

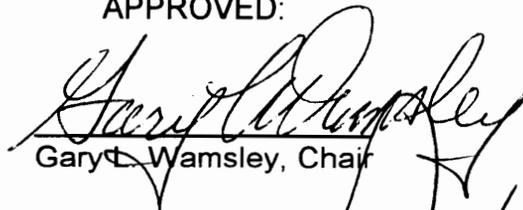
Effects of Politicization on the Regime, Policy Subsystem,  
and Agency Levels: A Case Study of the Commonwealth of Virginia

by

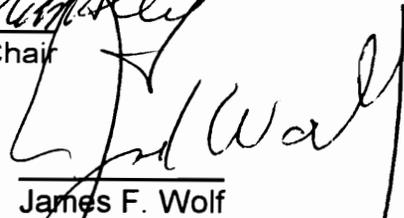
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THE EFFECT OF POLITICIZATION ON THE REGIME,  
POLICY SUBSYSTEM, AND AGENCY LEVELS:  
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(ABSTRACT)

This study examines the effect of politicization caused by executive aggrandizement on the regime, policy subsystem, and agency levels. The study finds that most public administration literature on executive supremacy concentrates on the federal government, with little attention paid to state government and the unique constitutional, political cultural, and institutional issues in the states.

This study examines the tools for and consequences of executive supremacy at the state level by reviewing the case of the Commonwealth of Virginia. The study finding that efforts to enhance executive control over administration through reorganization, civil service reform, and increased use of political appointees have politicized administration in the state. At the regime level, executive aggrandizement reduces the legislature's constitutional role in administration. This complicates the application of public administration theories that call upon career administrators to act as constitutional officers, responsive

to both the legislature and the executive as well as their own constitutional duties. Executive aggrandizement also invites legislative retaliation, potentially leaving career administrators caught between the chief executive and the legislature.

At the policy subsystem level, politicization upsets the equilibrium of policy subsystems by introducing partisan actors and the winner-take-all mentality of political campaigns into the traditionally low-level conflict of policy subsystems. At the agency level, politicization harms institutional capacity and negatively impacts agency morale and employee trust in agency management.

The study concludes by proposing public administration appeal to the enlightened self-interest of chief executives by demonstrating that politicization does not make chief executives more effective, in most instances. The tool of cost-benefit analysis is borrowed from policy analysis to offer a method for chief executives to determine when politicization is appropriate.

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My wife Jean and daughter Hallie continually put both state government and graduate school in perspective. Hallie is the joy of my life. Jean is my best friend, intellectual soul mate, and the person to whom I dedicate this dissertation.

“First things and final conform but seldom.”

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## I. Introduction

Like the British Constitution, most of the State of Virginia's civil service system is unwritten, based on political comity and custom, and dependent on executive restraint, not judicial review. As was long the case with constitutional liberties in Britain, civil service protections in Virginia were deemed all the stronger because they were unwritten. However, the tradition, political comity, and executive restraint underlying the Virginia civil service had been strained during the late 1980's and early 1990's. They were fractured altogether on December 19, 1993, a casualty of the Yuletide Massacre where the Governor-elect demanded the resignations of hundreds of Virginia's career administrators.

December 19, 1993 fell on the Friday before Christmas, a time when the activities of state government are usually at a low ebb. Late that afternoon, however, Governor-elect George Allen's transition team hand delivered a form letter to 453 career administrators, demanding their resignations. Among those receiving letters were executive secretaries, administrative assistants, senior budget analysts, medical examiners, prison wardens, mental health physicians, and hospital directors. With the rare exception of those who received a letter by mistake<sup>1</sup>, all of the public servants in question were exempted from the State's Personnel Act<sup>2</sup> by Senate Bill 643 (SB 643), a civil service reform adopted in 1985 at the request of Governor Charles Robb.

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<sup>1</sup> Two legislative agency heads received demands for their resignation from the Governor. Both agency heads were appointed by the General Assembly, not the Governor. The Secretary of Administration blamed the mistake on poor recordkeeping by the State's Department of Personnel and Training.

<sup>2</sup> As later chapters will demonstrate, being exempted from the Virginia Personnel Act is not as drastic a loss of employment rights as it might first appear, because the Personnel Act confers no specific employment rights.

Adopted in theory to encourage more responsiveness to the Governor by civil servants, SB 643 placed certain career administrators and confidential assistants in an employment at will category. The resulting statute (SB 643 was codified as Section 2.1-116 A 16 of the *Code of Virginia*) added to the already significant discretion that the Governor enjoyed in personnel matters. Unlike the federal civil service, which is based largely on regulation and statute, the civil service system in Virginia is legally<sup>3</sup> based on the sole statutory provision that selection and tenure in office will be based on merit. Implementing a merit-based civil service system is left to the Governor. As chief personnel officer, the Governor's discretion is particularly significant with regard to the tenure in office of career administrators,<sup>4</sup> because Virginia's personnel statute confers no presumption of continued employment based on good performance.

Despite the lack of meaningful statutory or regulatory protections, Virginia's civil service was virtually free of partisan considerations for almost fifty years, from the adoption of the Personnel Act in 1943 until the Wilder and Allen administrations in the 1990's. The only political appointees were agency heads,<sup>5</sup> who were routinely reappointed by incoming Governors without regard to partisan affiliation. The replacement of senior career administrators was unheard of. SB 643's purpose had been generally to make the civil service more

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<sup>3</sup> Section 2.1-116 of the *Code of Virginia*.

<sup>4</sup> The civil service procedures are developed in executive policy memos, not regulation. Policy remains subject to change at the sole discretion of the Governor, whereas the Virginia Administrative Process Act requires public notice and participation prior to adoption of or changes in regulations.

<sup>5</sup> A cabinet system was established in the early 1970's, adding two other layers of political appointees, cabinet secretaries and deputy secretaries.

responsive to the Governor.<sup>6</sup> Even after the adoption of Senate Bill 643, there are no documented cases prior to 1993 of the bill being used to dismiss a civil servant without cause until the Yuletide Massacre.<sup>7</sup>

The tension between political responsiveness to a chief executive and a merit based civil service is not unique to Virginia. This tension has been a significant issue for the federal civil service, particularly since the adoption of the Civil Service Reform Act of 1978. The same tension between political responsiveness and merit<sup>8</sup> has been an issue for state civil services as well. Indeed, the tension between politics and administration has long been at the center of public administration scholarship and practice for over a century. However, recent public administration literature has been slow to examine forthrightly the consequences of partisan politicization on the practice of administration, the task of this dissertation.

### **Statement of the Problem**

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<sup>6</sup> Allegedly, the bill was also intended to target one prison warden who was an outspoken critic of the Robb administration. The truth of the allegation that SB 643 targeted a single individual was difficult to assess; eleven years later the intransigent warden remains employed by the state. On the day this dissertation was completed, the *Richmond Times Dispatch* announced that the individual in question had been promoted to chief warden of the state's largest correctional center.

<sup>7</sup> Shortly after SB 643's passage, Governor Robb issued an executive memorandum (85-1) stating that employees were to be dismissed only for cause using SB 643. An executive memorandum, unless otherwise specified in the document itself by the Governor, remain in force until superseded or rescinded by another executive memorandum.

<sup>8</sup> It is acknowledged that both affirmative action and veterans preference, in addition to political responsiveness, can be viewed as factors that redefine merit. This dissertation will deal only with political responsiveness and its effects on the practice of administration in general and civil service systems in particular. While both affirmative action and veterans preference redefine or potentially weaken merit-based civil service systems, these systems were not originally established to prevent veteran status, race, or gender from being considered in hiring. Merit systems were originally established at the federal level by the Pendleton Act in 1883 and in most states between 1940 and 1980 to prevent political influences in government hiring.

Overhead democracy assumes that administration is only legitimate in a democracy if administrators are ultimately responsible to elected representatives of the people. In the United States this means accountability to both the executive and the legislative branches of government. Since the Nixon administration, overhead democracy has often been truncated into a belief that administrators need to be tightly controlled by and accountable only to elected chief executives and their retinue of political appointees (Moe, 1985; Lane, 1995). The result has been aggrandizement of the power of chief executives in administration, but not an increase in the effectiveness of chief executives in administration. In fact, this dissertation will argue that executive aggrandizement potentially weakens a chief executive. While it has not made chief executives more effective, executive aggrandizement has had one demonstrable outcome: increased politicization of administration.

Public administration has not, however, addressed the normative and practical implications of executive aggrandizement and its resulting politicization of administration. This reluctance to discuss the consequences of a politicization in administration can be explained by public administration in the United States having first defined itself as an alternative to partisan politics as manifested in Jacksonian democracy. As the practice of administration slowly turns full circle, the study of administration risks undermining its reason for being.

Moreover, public administration has addressed contextual issues related to politicization, such as merit system protections, separation of powers, and the constitutional role of career administrators, only at the federal level. The tacit assumption has been that the federal model would be applicable to state and

local administrators. However, significant contextual differences exist in state government when compared to the federal government.

In Virginia, the subject of this dissertation's case study, civil service protections are significantly weaker than is the case at the federal level. Therefore, the potential for partisan manipulation of career administrators is correspondingly higher and public administrations that call on career administrators to act as constitutional officers are correspondingly more difficult. Moreover, governors of many states, including Virginia, are significantly more powerful relative to the legislative branch than is the case at the federal level. Governors are full-time chief executives, 43 of 50 state legislatures are part-time. Governors generally have a constitutional line item veto and in some cases have legislative powers such as introducing amendments that are denied to the President. Further, the Governor's role as party leader and fund-raiser is often proportionally more important within a state is proportionally more important than the President's corresponding role at the federal level. Finally, as this dissertation will show, in Virginia the state legislature has been slow to avail itself of its constitutional powers, in marked contrast with Congress.

This dissertation broadens and enriches existing public administration literature on politicization by examining the politicization of state government in Virginia, particularly the politicization of the civil service system. First, the causes of politicization are examined. Then, the effects of politicization are analyzed at the regime, the policy subsystem, and the agency levels. Finally, a theoretical framework is developed to mitigate the consequences of politicization.

### **A Conceptual Framework for Analyzing Politicization in Administration**

The effect of increasing politicization of state government can be analyzed in terms of a three-level framework: the regime, policy subsystem, and agency level. At the regime level, the politicization of administration in the interest of aggrandizing the chief executive poses a significant threat to separation of powers by usurping the legislative branch's constitutional role in administration. Executive aggrandizement also invites retaliation by the legislative branch (Aberbach and Rockman, 1988). At the policy subsystem level, the increasing number of partisan actors contributes to what Wildavsky describes as "ideological dissensus" (Wildavsky, 1988: 753). At the organizational level, the increasing politicization of state government threatens to undermine the technical and administrative competence of agencies as well as their organizational capacity. In particular, politicization is potentially devastating to employee morale and employee trust in agency management. The effects of politicization on the agency level make it difficult if not impossible to operationalize normative theories that call on career administrators to act as constitutional officers or agential leaders (Rohr, 1989a; Rohr, 1990; Wamsley, 1990).

The regime level is best explained in Rohr's *Ethics for Bureaucrats: An Essay on Law and Values* (Rohr, 1989a). In explaining his concept of regime, Rohr notes the:

word 'regime' is not used in the journalistic sense of the 'Carter regime,' the 'Reagan regime,' and so on. Rather it is simply intended as the best English equivalent of what Aristotle meant by a 'polity.' More specifically by the American 'regime,' I mean the fundamental political order established by the Constitution of 1789" (Rohr, 1989a: p. 3).

With respect to this dissertation's discussion of Virginia state government, the meaning of regime is broadened to the fundamental political order established by the U.S. Constitution of 1789 and the Constitution of Virginia as revised in 1971.

It is acknowledged that applying the term "regime" to a state within the American federal system suggests two fundamental political orders, that of the state in question established by its constitution and the fundamental order established by the United States Constitution of 1789. Two recent United States Supreme Court decisions, *Seminole Tribe of Florida v. Florida* (1996) and *United States v. Lopez*, 115 S. Ct. 1624, (1995) have emphasized the notion that the state and federal governments are jointly delegated the sovereignty that ultimately rests in the people. Indeed, it is state government, not the federal government, that possess plenary legislative power (police power), while the federal government's powers are limited to those enumerated in the Constitution. While the Constitution established the federal government's role in the American polity, the role of state government is defined largely by state constitutions which serve to limit the otherwise general power of the states. Chief Justice Rehnquist's opinion for the Court in *U.S. v. Lopez* holds:

We start with first principles. The Constitution creates a Federal Government of enumerated powers. As James Madison wrote, - [t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. This constitutionally mandated division of authority was adopted by the Framers to ensure protection of our fundamental liberties. Just as

the separation and independence of the coordinate branches of the Federal Government serves to prevent the of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.

The policy subsystem level was first described by Wamsley (1969) with regard to the military manpower system and more generally by Wamsley and Zald (1973) as the political economy or network of organizations, institutions, and other actors that develop around a policy issue. Wamsley characterizes policy subsystems as being composed of “multifarious actors” (Wamsley, 1985: 2). Policy subsystems more accurately depicts policymaking than the traditional political science view of iron triangles between an agency, interest group, and oversight committee (Wamsley, 1985). Policy subsystems literature recognizes that the multifarious actors can include the press, the public, interest groups of varying degrees of organization, multiple legislative committees, non-profit organizations, legislative staff, a multitude of executive and independent agencies, professional associations, and the judiciary (Hecl, 1975).

In the context of this dissertation, the agency level is understood as the environment described by Wamsley (1990) in which agential leadership is practiced. In the state of Virginia, agencies are statutorily defined in the *Code of Virginia* (Section 2.1). In the federal government, the term agency can encompass cabinet departments and a wide variety of independent agencies.

### **Contributions of the Study**

This dissertation contributes to public administration literature in several ways. First, it has examined politicization in state government

administration, a neglected but increasingly important area of study in public administration. State government is neglected because of the methodological problems of generalizing about experiences in one state, but state government is increasingly important as federal programs are targeted for devolution to the states. This dissertation has addressed the methodological problems of doing research in state government by focusing on a case study of one state, Virginia, while bolstering findings from this case study with a survey of four other states. In so doing, the dissertation serves as a potential model for other research projects in state government.

The dissertation has enriched and broadened literature on separation of powers and politicization by examining the state level and illuminating differences, particularly constitutional differences, at the state level. In addition, the dissertation has contributed to literature on politicization by developing an analytical framework with which to examine the effects of politicization on administration. This framework involves analyzing the consequences of politicization in terms of the regime, policy subsystem, and organizational (agency) levels.

At the regime level, the dissertation has contributed to the literature on separation of powers, such as Rosenbloom (1983) and Rohr (1986) by analyzing the role of the chief executive and the legislative branch in administration in

terms of a state constitution.<sup>9</sup> The dissertation has contributed to literature on policy subsystems (Hecklo, 1978; Wamsley 1985) by arguing that partisan politics should be considered in describing the interaction within the policy subsystem. The increased politicization of state government by the chief executive contributes to what Wildavsky described as “ideological dissensus<sup>10</sup>,” because more partisan actors are introduced into policy subsystems (Wildavsky, 1988: 753). This insight on the interjection of partisan actors into policy subsystems also raises questions about the extent to which partisan actors may destabilize subsystems by escalating the low-level conflict that typifies subsystems into the all or nothing style of conflict that typifies political campaigns.

In terms of the agency level, the politicization of the civil service potentially harms the technical and administrative competence and capability of agencies. Politicization also makes it difficult for career administrators to respond to normative theories (Wamsley et. al. 1990) that call upon them to act as constitutional officers. Instead, career administrators are increasingly pressured to respond to partisan political pressures and to reserve their loyalty to the chief executive of the moment, even at the expense of their broader constitutional, statutory, or regulatory responsibilities. As Long (1993) noted,

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<sup>9</sup> The role of the judicial branch of government in administration is also important, but it will not be examined by this dissertation, which focuses on questions of politicization that are largely restricted to the two political branches, the executive and the legislative branch.

<sup>10</sup> Wildavsky used the term to refer to a general lack of agreement in American political life about the priorities and values underlying the activities of the government. Partisan actors such as political appointees now engage in an escalated form of political conflict within government because ideological dissensus makes it difficult for partisans to find the accommodation that had allowed policy subsystems to operate with a low-level of conflict and shared norms.

civil servants are left with few options other than resignation in protest when political pressures conflict with their policy judgments or their sense of constitutional responsibility.

Finally, the dissertation addresses a theoretical gap in discussions of politicization in administration by suggesting a conceptual framework, cost-benefit analysis, for determining the appropriateness of politicization in administrative settings.

### **Study Design**

This study is based on a case study of the Commonwealth of Virginia during the decade since adoption of SB 643 in 1985. It examines several threads in Virginia administration and politics. These threads include: civil service reform, the increased use of reorganization for political ends, aggrandizement of the Governor's powers at the expense of the General Assembly, and analysis of the General Assembly's constitutional role in administration.

Within the overall case study of Virginia, specific examples are presented at the regime, policy subsystem, and agency levels to illustrate the consequences of politicization. These examples are drawn from state government reports, interviews conducted by the author, and first hand observation of the events in question.

### **Limitations of the Study**

The case study is a common approach to public administration research (Yeager, 1989: 685). The approach does have limitations. Findings from a case study are not empirically generalizable. Indeed, findings from case studies run

the danger of being dismissed as "anecdotal," a criticism which bears enormous rhetorical weight in social science research.

However, the case study is useful, even necessary for research in state government, because the differences among states make meaningful comparisons difficult. A case study allows in-depth study of one state to identify research issues potentially relevant to other states.

This dissertation uses Virginia as a case study, both to answer research questions about Virginia state government and to frame research questions applicable to other states.

### **Research Questions**

The seven research questions that will initially be asked in this dissertation are:

To what extent, if any, have civil service reforms in Virginia state government increased either the actual level of politicization in the civil service or the perception of politicization?

What role, if any, have executive branch reorganizations in the past decade had on the politicization of Virginia state government?

To what extent, if any, have attempts to increase the control of the Virginia Governor over administration of the executive branch contributed to the politicization of Virginia state government?

What is the current role of the Governor and the General Assembly in administration and how do these roles compare with those envisioned by the framers of the Virginia Constitution?

How is Virginia similar to or different from other states in terms of executive control over and the politicization of state government?

What has been the effect of politicization on the regime, the policy subsystem, and the agency level in Virginia?

Are current normative theories in public administration adequate to address the consequences of politicization on the regime, policy subsystem, and agency levels?

### **Overview of the Dissertation**

This dissertation consists of nine chapters. This chapter has provided an introduction to the dissertation. Chapter II reviews public administration literature on overhead democracy. Chapter III reviews public administration literature on the principal tools of overhead democracy: reorganization, civil service reform, and political appointees. Chapter IV presents the methodology for the dissertation.

Chapters V through VIII present the case study of Virginia. Chapter V examines merits system reform in Virginia since 1985. Chapter VI discusses reorganization and aggrandizement of executive power in administration. Chapter VII outlines the General Assembly's constitutional role in administration. Chapter VIII concludes the case study by discussing the effect of politicization on the regime, policy subsystem, and agency levels in Virginia.

Chapter IX discusses findings from a limited survey of four other states and compares these findings with those from the case study. Chapter X concludes the dissertation by examining implications of the dissertation for public administration, proposing that public administration appeal to the self-interest of chief executives by demonstrating the negative consequences of politicization in many situations.

## **II. Literature Review Part I: The Theory of Politicization**

Politicization of administration is a long-standing issue in American political life. This discussion begins, as most discussions of politicization in American administration do, with Andrew Jackson<sup>1</sup>. The discussion then turns to one of public administration's oldest intellectual constructs, the politics-administration dichotomy, the equally venerable concept of overhead democracy, and the more recent notion that administrators owe unquestioning loyalty to the chief executive and his or her politically appointed lieutenants (executive supremacy). Executive supremacy has replaced both the politics-administration dichotomy and overhead democracy as the normative basis for public administration, despite the flawed constitutional logic of executive supremacy and the demonstrable consequences of partisan politicization.

However, public administration literature has addressed executive supremacy almost exclusively at the federal level. This chapter reviews secondary literature on executive supremacy at the federal level. The case study in chapters V to VIII demonstrates that executive supremacy is also an issue at the state level, though the constitutional and statutory provisions of a given state may make executive supremacy even more of an issue for public administration at the state level than it is in the federal government.

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<sup>1</sup> Jackson was by no means the first President distressed at the notion of a bureaucracy not of his own choosing. Van Riper quotes Thomas Jefferson as remarking, upon assuming control of an executive branch almost entirely staffed by Federalists, that "If due participation of office is a matter of right, how are vacancies to be obtained? Those by death are few; by resignation none. Can any other mode than that of removal be proposed?" (Van Riper, 1958: 22). Van Riper explains that Jefferson's solution was to propose "equal division of offices" between political parties (Van Riper, 1958: 22). This differed markedly from Jackson's notion that to the victor belonged the spoils, as did Jefferson's interest in ensuring merit on the part of appointees.

## Jackson

Arthur Schlesinger's *The Age of Jackson* (1945) argued that Jackson's election in 1828 signaled the triumph of the common man. In particular, Schlesinger saw Jackson's election as the triumph of common men from the west over the aristocratic easterners who had traditionally controlled American government. In terms of public administration, the Federalist concept of merit was replaced by the Jacksonian concept of spoils.

Leonard White (1954) suggested that rather than marking a clean break from the past, Jackson's election was part of a gradual evolution in American political and administrative institutions that made both more democratic, though only marginally so. Crenson (1975) draws heavily on Leonard White's work to explain how Jackson transformed American public administration from a system based on personal relationships to one based on bureaucratic organizations, structures, and rules. Jackson transformed public administration using tools familiar to twentieth century administrators: a gradual weakening of career civil servants' tenure in office, reorganization, and attempts at increased control of administration by the chief executive (Crenson, 1975).

Jackson replaced more of the civil service than his predecessors had, but only marginally more. Jackson "dismissed from office less than a thousand of the bureaucrats who had served under John Quincy Adams--about one-tenth or one-eleventh of the government's total personnel" (Schlesinger, 1945: 55). Despite this relatively mild turnover of the government's workforce,<sup>2</sup> Jackson

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<sup>2</sup> It is useful to remember, however, that a similar percentage turnover of the present non-postal civilian civil service at each change in administration would involve approximately 200,000 political firings and subsequent appointments.

strongly articulated a policy of rotation in government office, where to the victor would go the spoils, explaining that “the duties of all public office are, or at least admit to being made so plain and simple that men of intelligence may readily qualify themselves for their performance” (Schlesinger, 1945: 56-57).

In addition to his judicious use of the spoils system, Jackson also used reorganization to assert his control over the bureaucracy. According to Crenson, Jackson implemented the first comprehensive reorganization of the federal government in the republic’s history. This reorganization centered on the post office and the land office, which together accounted for nearly three fourths of the federal government’s civilian workforce (Crenson, 1975).

In addition to the use of the spoils system and reorganization, Jackson also asserted more personal control over the bureaucracy than had previously been the case. For example, Jackson instructed the Secretary of State:

That where any office under this Government, (clerk or others) contracted debts and failed to pay them, and has taken the benefit of the insolvent debtors act, then he should be forthwith removed--the debt being contracted under this administration. It is reported that a Mr. Ruggles in the Patent office, has been guilty of a violation of this rule. Please have inquiry made as it appertains to your department, and if truly reported, as to him, or any other, let them be removed (Schlesinger, 1945: 79).

Despite Jackson’s personal supervision of the bureaucracy and his concern for ethical administration, abuses surfaced regularly during his tenure in office. Most notably, Samuel Swartwout, the customs collector for the port of New York, departed his office for England in 1838 in possession of \$1,225,705.69 belonging to the United States Treasury. This sum, which had been embezzled during Swartwout’s eight-year career as collector in New York,

represented approximately five percent of the annual federal budget at that time (White, 1954: 424-429). This would be a recurring theme in efforts to exert executive control over administration: more attempts at control generally yield less effective control.

The Swartwout scandal was not enough to discredit the spoils system. Ethical abuses three and four decades later, however, did lead to its end. Most notorious in this regard were the two administrations of U.S. Grant (1872-1880). As Leonard White explains in *The Republicans*, ethical abuses on a colossal scale during America's "gilded age" led to the creation of merit-based civil service systems to isolate public offices from partisan politics and presumably from the potential for abuse (White, 1957).

The Pendleton Act, adopted by Congress in 1883, created the U.S. Civil Service Commission and implemented a merit-based civil service system for most federal hiring, based on civil service exams. According to Van Riper, "1883 marked the first great inroad into the spoils system of the mid-nineteenth century" (Van Riper, 1958: 110). Van Riper notes that the Pendleton Act established the norm of political neutrality in allocation of public offices, remedied the corruption of the spoils system, and "laid the foundation for the development of the technical expertise crucial to the operation of the modern state" (Van Riper, 1958: 112). The civil service system at the federal level was thus founded on the ideal of politically neutral technical competence. Neutral competence has always coexisted uneasily with partisan actors in government. The partisan perspective, rather than one of neutral competence, might be summarized as "that those who are not with us are against us." The partisan distrust of neutral competence explains the regular scene of partisan

appointees arriving in Washington or in state capitals to preside over what they view as a hostile bureaucracy (Hecló, 1977; Butler, Senara, and Weinrod, 1984: 449-452, 461-480; Hecló, 1984: 12-14; Lorentzen, 1985: 411-412; Ingraham, 1987: 425-426; Aberbach and Rockman, 1990: 40, Durant, 1990: 321; Colvard, 1995: 34; Ingraham, Thompson, and Eisenberg, 1995: 270; Light, 1995: 88-94).

At roughly the same time as the establishment of a merit-based civil service system at the federal level, public administration began as a self-aware field of scholarship. The first task set for itself by this nascent field was finding a way to remove the perceived evil of politics from administration. The desire to remove politics from administration gave rise to the field's first intellectual construct: the politics-administration dichotomy.

### **Politics and Administration**

To remove the corrupting influence of politics from administration, Woodrow Wilson's 1887 essay "The Study of Administration" proposes a politics-administration dichotomy. Wilson proposes a science of administration, viewing this science as "the latest fruit of the study of the science of politics which was begun some twenty-two hundred years ago" (Wilson, 1887: 11). For Wilson, the challenge for public administration in the United States is to achieve the administrative efficiencies he notes in Prussia and France while maintaining liberty.

To meet this challenge, Wilson casts administration in instrumental terms, viewing it as analogous to business and removed from politics:

The field of administration is a field of business. It is removed from the hurry and strife of politics; it at most points stands apart even from the debatable grounds of constitutional study. It is part of the

political life only as the methods of the counting-house are a part of the life of society; only as machinery is part of the manufactured product. But it is, at the same time, raised very far above the dull level of mere technical detail by the fact that through its greater principles it is directly connected with the lasting maxims of political wisdom, the permanent truths of political progress (Wilson, 1887: 18).

Wilson views civil service reforms such as the Pendleton Act as “but a moral preparation for what is to follow,” the development of lasting principles of administration “ (18). Wilson views administration as the instrument of politics but as removed from politics so as not to be corrupted from it: Wilson comments that “Administrative questions are not political questions. Although politics sets the tasks for administration, it should not be suffered to manipulate its offices” (18). For Wilson, the administrator was to be the apolitical servant of the political master. In addition to proposing the politics-administration dichotomy, Wilson also lays the intellectual groundwork for the theory of overhead democracy. Ironically overhead democracy would later be used to justify partisan interference in administration.

Early public administration scholarship generally accepted Wilson’s proposed dichotomy between politics and administration. Goodnow (1900), in the field’s first modern text book, *Politics and Administration: A Study in Government*, echoed Wilson’s call for a politics administration dichotomy:

Enough has been said, it is believed, to show that there are two distinct functions of government, and that their differentiation results in a differentiation, though less complete, of the organs of government provided by the formal governmental system. These two functions of government may for purposes of convenience be designated respectively as Politics and Administration. Politics has to do with the policies or expressions of the state will. Administration has to do with the execution of these policies (18).

Goodnow's call for separation between politics and administration is not the naive misunderstanding of political reality that it may seem to be nearly a century later. Goodnow was reacting directly to the spoils era in calling for administration to be divorced from politics. Goodnow comments:

The spoils system, however, had two great faults. In the first place, when applied to ministerial appointive officers, it seriously impaired administrative efficiency. In the second place, even where applied to elective officers, and much more so when applied to appointive officers, where it had no theoretical justification except that to be found in the necessity of keeping up the party organization, it tended to aid in the formation of political party machines, organized not so much for facilitating the expression of will of the state as for keeping the party in power (Goodnow, 1900: 113).

Goodnow accurately diagnosed the problems caused by politicization in administration, but the intellectual construct of the politics-administration dichotomy did nothing to prevent such politicization other than to assume it away.<sup>3</sup> A quarter century after Goodnow's text, public administration texts continued to espouse the politics-administration dichotomy, though the argument was presented in terms of principles of sound business management, not the political theory of Wilson or Goodnow (White, 1926). Leonard White called for lifting American public administration "out of the ruts in which it has been left by a century of neglect" by applying the lessons of scientific management to administration (64). White is insightful in noting that public administration involves legislative, judicial, and executive functions, but White grounds administration firmly in business management, rejecting law as a basis for

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<sup>3</sup> Classical public administration may be thought of as the field's deductive phase, where scholarship began with axiomatic assumptions about the social world, much like economics does today.

administration. White's argues that "Public administration is the management of men and materials in the accomplishment of the purposes of the state emphasizes the managerial phase of administration and minimizes its legal and formal aspect. It relates the conduct of government business to the conduct of the affairs of any other social organization" (58). In White's view, administration of public organizations is no different from the business management of any other enterprise.

By the 1930's the politics-administration dichotomy was beginning to lose sway over public administration. Luther Gulick challenged the traditional reading of Wilson as calling for a complete division between politics and administration. Instead, Gulick suggested that Wilson meant only that political corruption be removed from administration (Gulick, 1933). Gulick acknowledged that politics could not entirely be eliminated from administration, but provided no framework for how politics and administration could successfully coexist. Most importantly, Gulick did not address Goodnow's second complaint about the spoils system, that it became a means not for implementing the will of the state but for maintaining a party in political power.

In the 1940's, the politics-administration dichotomy was rejected. In *Big Democracy*, Paul Appleby memorably dismisses attempts by White and others to equate public administration with business (Appleby, 1945). Appleby remarks "the dissimilarity between government and all other forms of social action is greater than any dissimilarity among those other forms themselves" (144). Appleby is equally sweeping in his rejection of the politics-administration dichotomy. He states that "Government is different because it must take account

of all the desires, needs, actions, thoughts, and sentiments of 140,000,000 people. Government is different, because government is politics” (149).

Appleby’s work made it possible for public administration scholars to dismiss the politics administration dichotomy as naive. However, as a field, public administration has never addressed the consequences of partisan politics in administration. While admitting that organizational politics often come into play in the administrative world, public administration scholars have remained almost oblivious to the existence of partisan politics in administration (Vinzant, 1993). Most public administration scholars tacitly assume that lower and mid-level administrators are isolated from partisan politics by merit systems and restrictions on public employee involvement in politics such as the Hatch Act.<sup>4</sup> The influence of partisan politics on administration is assumed to be concentrated at the senior level of public agencies.

Public administration has traditionally acknowledged that administrators must be ultimately accountable to elected officials. This theory of overhead democracy views administrators as subordinate to both the legislative and executive branch. Redford (1969) explained the concept of overhead democracy as the traditional view of public administration and political science. According to Redford:

Traditional literature on administration and politics gave us a model of how the administrative state ought to operate--a model that acquired orthodoxy in both administrative and democratic theory. It was a simple model of overhead democracy. It asserted that

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<sup>4</sup> In reading the case study of Virginia in Chapters V to VIII, the reader should bear in mind that the Commonwealth of Virginia has no equivalent of the federal Hatch Act. Several prominent political activists in both parties are state employees. For example, the director of alumni affairs at the author’s own state university is the local chairman of the Republican Party.

democratic control should run through a single line from the representatives of the people to all those who exercised power in the name of the government. The line ran from the people to their representatives in the Presidency and Congress, and from there to the President as chief executive, then to lesser units, and so on to the fingertips of administration (Redford, 1969: 71).

Redford views overhead democracy as an important part of the American regime, but he criticizes the concept as overly simplistic, suggesting that the influences on bureaucratic action are more web-like than linear (72-80).

Notwithstanding Redford's attempt to sketch a more sophisticated model, overhead democracy's power as a normative theory remained potent enough so that two decades later Lane and Wolf (1990) could state:

[overhead democracy] is a powerful normative theory which satisfies the need for establishing political control over the bureaucratic administrative establishment. The fact that the theory takes an overly simplistic view does not diminish its significance as a powerful influence on public organizational cultures (Lane and Wolf, 1990: 100).

In the past three decades, the practice of overhead democracy has been truncated to encompass only accountability to the chief executive. The Nixon, Carter, and Reagan administrations each politicized the civil service so as to assert greater executive control over it. The Nixon administration's efforts, including the well-known Malek Manual<sup>5</sup>, are detailed in a congressional study (U.S. House of Representatives, 1976). The Carter administration's efforts to politicize the civil service were consummated in the Civil Service Reform Act of 1978, to be discussed at length in Chapter III. The theory and practice of the

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<sup>5</sup> The Malek manual was drafted by a Nixon administration attorney who gave frank advice on how to circumvent civil service protections to eliminate career administrators. The Malek Manual also demonstrates how layering of political appointees could be used to isolate career administrators and diminish or eliminate their influence. Malek later became deputy director of OMB during the second Nixon term.

Reagan administration's efforts at politicizing the civil service are forthrightly described and enthusiastically defended in Butler et. al. (1984). These efforts may be collectively described as executive aggrandizement or the theory of executive supremacy in the realm of administration.

Herbert Kaufman identified the conflict in public administration between the doctrines of executive leadership and neutral competence in a 1956 article (Kaufman, 1956: 1073). However, what Kaufman identified as the focus on executive leadership has been transformed into a quest for executive supremacy. In so doing, the earlier trend in public administration, Jacksonian representativeness, has resurfaced in the form of political appointees used to further executive supremacy in administration (Kaufman, 1956: 1057).

Terry Moe (1985) found that the President exercises significant influence via the political appointment power over the National Labor Relations Board. Moe argued that the President's ability to control an agency through politicization was one of the missing elements in political science's formal models of agency behavior (Terry Moe, 1985: 1115). A truncated notion of overhead democracy is the theoretical justification of what Moe observed empirically; chief executives must control agencies through politicization in order to preserve democracy. What Kaufman described as executive leadership has been transformed into executive supremacy over career administrators.

Executive supremacy assumes that partisan control of administration is linear and focused on the attainment of the policy objectives of the chief executive. Proponents of executive supremacy do not address Goodnow's insight that politicization in administration may be a means of keeping a party in power, not accomplishing policy objectives. Moreover, arguments for executive

supremacy do not address the consequences of politicization. Politicization, as later chapters will demonstrate, tends to be random, diffused, and difficult to control as it penetrates downward in public agencies, spawning partisan conflict throughout agencies, subsystems, and even the regime. Rather than the clear lines of authority portrayed in the organization chart metaphor, politicization of administration invites a balkanization of administration, with partisan brushfire wars cropping up throughout government.

The theory of executive supremacy is not without its critics. Rohr (1986) implicitly rejects the contention that the administrative (and regulatory) state can be legitimated only by tight political control exercised from the top by chief executives and their partisan appointees. Rohr finds considerable support for the administrative state in the Constitution, particularly in Publius' argument for the adoption of the Constitution in the *Federalist Papers*. Similarly, the authors of the Blacksburg Manifesto (1987) argue that public administration has a constitutionally legitimate role in governing. Rohr continues his argument for the constitutional legitimacy of public administration in Wamsley et. al. (1990), arguing that important aspects of the administrative state fulfill the political vision of the Constitution's framers as originally manifested in the U.S. Senate. In particular, Rohr argues that:

the image of a balance wheel best captures the distinctive contribution of the Public Administration. The Senate originally intended by the framers (as opposed to the Senate of history) is the constitutional model for public administration because the Senate, like the Public Administration, was intended to exercise all three powers of government. Unlike the Senate of the framers intent, however, the Public Administration exercises all three powers in a subordinate capacity and must make its peculiar contribution in conformity with that subordination. It does this by choosing which of its constitutional masters it will favor at a given

time on a given issue in the continual struggle between the three branches as they act out the script of *Federalist 51* (Rohr, 1990: 81).

Rohr's argument assumes, as does *Federalist 51*, that no one branch of government will be long predominate in any sphere (particularly control of administration). This assumption has been resisted by American Presidents and governors for most of this century as chief executives have sought to establish themselves as the sole masters of administration.<sup>6</sup> As later chapters of this dissertation illustrate, a career administrator, however senior, in a highly partisan environment chooses among constitutional masters at his or her peril.

Like Rohr, Wamsley (1990) argues that the role of the administrator in the American polity should not be limited to loyalty to the chief executive. Wamsley views the public administrator as an agent for mediating the public interest in the service of democracy (the agency perspective). Kaufman (1987) deplores bureaucrat bashing but sharply criticizes Wamsley et. al.'s vision of the public administrator playing a role in governing as a threat to democracy and largely endorses the theory of overhead democracy, though not executive supremacy. Long (1993) rejects Kaufman's criticism of Wamsley et. al., pointing out that political superiors are capable of illegal or immoral acts, such as the search of presidential candidate Bill Clinton's passport files by State Department political appointees, as well as acts that while legal greatly imperil the public interest.

Long adds his own criticism of Wamsley (1990), stating that the agency perspective does not address what administrators should do when their political

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<sup>6</sup> The assumption has proven largely accurate at the federal level. While presidential efforts at exerting more control over administration continue apace, the effectiveness of these efforts have been mixed. The situation at the state level is more problematic, due to the substantial institutional advantages most governors enjoy when compared to part-time legislatures with minimal staffs.

superiors act in a way contrary to the public interest. Long's own prescription, however, is resignation in protest. Unfortunately for the career minded administrator, resignation in protest has the same disadvantage as the Apollo rocket; it can only be used once.

As Long suggests, Wamsley et. al. and associated writings (Rohr 1990, Wamsley 1990, and Goodsell 1990 in particular) do not explicitly accept or reject overhead democracy, though they are critical of the notion of executive supremacy. Rohr concedes that public administration occupies a subordinate position but assumes administrators have the freedom to choose which of their constitutional masters to serve. Wamsley offers "homely examples" of administrators who have the discretion to act in a "subordinate, autonomous, agential, responsive, and responsible manner" (Wamsley, 1990: 118-119). These include a senior sergeant and a head secretary, but do not include senior career administrators in highly partisan environments where attempts to be agential would be viewed as disloyal to the chief executive and potential grounds for dismissal.

While Wamsley et. al. Rohr (1986 and 1990) and Wamsley (1990) offer partial critiques of executive supremacy, it continues to exert a powerful influence on the theory and practice of public administration. The appeal of executive supremacy has been demonstrated by the support public administration scholars have offered to efforts to provide chief executives more control over administration. Efforts to provide chief executives more control include the creation of the institutional chief executive, regular calls for government reorganization, civil service reform to make career administrators

more responsive, and a proliferation of political appointees to control career administrators.

A potential alternative to executive supremacy and, to some extent, overhead democracy is pointed out by Cook (1992). Cook does not reject overhead democracy, and he concedes that the eighteenth century Congress determined to make administration subordinate to the constitutional branches of government. However, Cook argues that there was substantial congressional sentiment for viewing “department heads to be constitutional officers” and “public administration [as] a distinctive constitutional entity” (Cook, 1992: 498). Cook also notes that some state and local officials enjoy a degree of autonomy similar to that expressed by the minority in the debate of 1789 (Cook, 1992: 501). In essence, Cook argues the same position as Rohr, that public administration can be viewed as constitutionally legitimate in its own right, without having to have legitimacy conferred on it by executive control. However, like Rohr, Cook does not address how the increased downward penetration of executive control is to be addressed. If anything, administrative agencies now have more political overhead to constrain their autonomy, not less (Light, 1995). The next chapter will discuss the tools of executive supremacy: reorganization, civil service reform, and political appointees.

### **III. Literature Review Part II: Tools of Executive Supremacy**

The literature review now turns to a discussion of the specific tools of executive supremacy and how each has contributed to the politicization of administration. The first tool discussed is reorganization. The second is civil service reform, particularly the Civil Service Reform Act of 1978 and similar reforms at the state level. The third tool of politicization discussed is the use of political appointees.<sup>1</sup>

The great majority of public administration literature on each of these issues is grounded in experiences in the federal government. For each issue, reorganization, civil service reform, and political appointees, this chapter first reviews the literature on the federal government and then relevant literature on state government. The limitations of existing literature for the study of state government is also discussed by way of introduction to this dissertation's project of broadening and enriching public administration literature on executive supremacy to include state government and its unique features.

As more federal responsibilities devolve from the federal government to the states, the study of state government will become an increasingly important part of public administration scholarship. Theories of public administration grounded only in the federal government will become increasingly impoverished as a means for describing the world that most public administrators know. In

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<sup>1</sup> The term political appointee is used rather than patronage, because as Roback and Vinzant (1994) point out, a political appointment is only one form of patronage.

examining one important aspect of state government, executive supremacy in administration, in comparison to existing secondary literature on the federal government, this dissertation attempts to lead the field by example in rethinking our existing assumptions and theories in light of the experience of the states.

### **Reorganization and the Elusive Quest for Control**

March and Olson (1983) observe that government reorganization is a "matter of restructuring political relationships within a policy subsystem." As noted in Chapter II, the first major federal government reorganizations took place during Andrew Jackson's first term (1829-1833). Since Jackson's time, reorganization has been a continual pattern in American administrative life, as chief executives seek to assert more control through executive branch reorganization. Wamsley (1994) argues that reorganization has, at least since the Brownlow Commission in the 1930's, been used to aggrandize the chief executive at the expense of the legislature<sup>2</sup>. Other notable reorganization projects that sought to enhance presidential control include the first and second Hoover Commissions, the Ash Council, and the National Performance Review.

The irony that is common to the Brownlow, Hoover, and Ash projects is that the focus of each on enhanced presidential power may have been

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<sup>2</sup> While the Brownlow Report did not recommend politicizing the civil service (quite the contrary), it did seek to significantly strengthen the institutional presidency relative to Congress.

counterproductive. Nelson (1982) argues that the central irony of the history of American bureaucracy is that successive efforts to establish political control over the bureaucracy have actually enhanced bureaucratic power at critical junctures in American history. Wamsley, Schroeder, and Lane (1995) suggest that attempts by Presidents to control the Federal Emergency Management Agency (FEMA) through political appointees have degraded FEMA's organizational capacity and weakened the agency head and the President's ability to control the agency. Hill (1995) suggests that changes to control bureaucracy, which have been motivated by a fear of bureaucracy, have been ineffective in curtailing bureaucratic power. Like Wamsley, Schroeder, and Lane, Hill notes that political appointees in particular are not helpful and may actually be harmful in establishing control over bureaucracy. Karl (1987) argues that attempts to assert executive control are counterproductive both because they do not yield more effective control and because such attempts diminish the effectiveness of administration and reduce the accountability of political leaders.

Notwithstanding the counterproductive nature of attempting to assert executive control through reorganization, the tendency of an incoming administration to reorganize remains a constant. Seidman and Gilmour begin *Politics, Position, and Power* by observing that:

Reorganization has become almost a religion in Washington. It has its symbol in the organization charts, Old Testament in the Hoover Commission reports, high priesthood in the Office of Management and Budget, and society for the propagation of the

faith in sundry groups such as the Citizens Committee for Government Reorganization.(Seidman and Gilmour, 1986: 3).

Seidman and Gilmour chronicle a number of efforts over time to reorganize the federal government, chiefly in the service of attempting to create a more powerful chief executive.

Similarly, the results of reorganization efforts at the federal level have not been a more effective administrative presidency, but rather a more politicized administration. Newland observes that “American constitutional history since 1933 has been a record of national and presidential aggrandizement” (Newland, 1987: 46). Newland terms the image of the presidency cultivated by the mass media as “sacerdotal” and bemoans the displacement of career administrators by political appointees (Newland, 1987, 49-53). As Newland suggests, in examining the origins of the presidential aggrandizement in administration, a logical starting point is in the second term of Franklin Roosevelt, with the President’s Committee on Administrative Management.

### **The Brownlow Committee**

The Brownlow Committee’s report, “Report of the President’s Committee on Administrative Management,” (1937) contributed significantly to the flowering of the institutional presidency that continues even today<sup>3</sup>. The Brownlow Committee was assigned by President Franklin Roosevelt to study the organization and management of the executive branch. The committee members included Luther Gulick, Charles Merriam, and Louis Brownlow. In 1937, the Brownlow Report called for the creation of the Executive Office of the

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<sup>3</sup> As Light (1995: 155) finds, President Clinton’s promised cut in White House staff did not materialize, and the number of layers of management in the White House and the number of senior staff actually increased.

President, consolidation of executive agencies into cabinet departments, creation of an office of planning, and the relocation of the Bureau of the Budget in the newly created Executive Office of the Presidency.

The Brownlow Report was implemented to some degree by the Reorganization Act in 1939, but as Rohr (1986) notes, the report's real significance was in providing an intellectual justification for the growth of presidential executive power over the next six decades. The Brownlow Report focused on enhancing executive control over the executive branch, largely by increasing the power of the institutional presidency. The cornerstone of accomplishing this was the creation of the Executive Office of the Presidency (EOP). Rather than relying on the cabinet to manage the executive branch, the presidency now came into possession of a potential shadow government within the White House.<sup>4</sup> As part of the creation of EOP, the Bureau of the Budget was moved from the Treasury Department to EOP. This transfer stripped the Secretary of the Treasury of most budget responsibilities and placed them in EOP.

John Rohr's *To Run a Constitution* discusses the normative implications of Brownlow for the civil service, particularly Brownlow's sweeping assertion of executive prerogative in administration and the implications of this for separation of powers (Rohr, 1986: 135-153). By viewing the President as the sole master of the civil service, the Brownlow Commission ignored the constitutional structure that established separate institutions sharing power, including power in

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<sup>4</sup> This potential was largely realized during the Nixon Administration. H.R. Haldeman, assistant to the president, essentially functioned as vice-president for domestic affairs, eclipsing the relevant cabinet secretaries. Henry Kissinger, national security advisor, functioned as the shadow secretaries of state and defense, though he later assumed the position of secretary of state. See Schlesinger (1989: 220-223).

administration. As Rohr notes, the Brownlow Report was the first reexamination of the President's role in administration since the founding (Rohr, 1986: 142). It was only the first of many such reexaminations in this century, most of which have sought to increase presidential power in administration.

### **Hoover I and Hoover II**

Former President Herbert Hoover chaired two studies of the executive branch in 1947-1949 and 1953 to 1955. The first Hoover Commission Report begins with a strong statement of executive supremacy democracy that equates the need for effective presidential control of administration with no less than world peace:

The President, and under him his chief lieutenants, the department heads, must be held responsible and accountable to the people and the Congress for the conduct of the executive branch. Responsibility and accountability are impossible without authority--the power to direct. The exercise of authority is impossible without a clear line of command from the top to the bottom, and a return line of responsibility from the bottom to the top...Definite authority at the top, a clear line of authority from top to bottom, and adequate staff aids to the exercise of authority do not exist. Authority is diffused, lines of authority are confused, staff services are insufficient....The critical state of world affairs requires the Government of the United States to speak and act with unity of purpose, firmness, and restraint in dealing with other nations. It must act decisively to preserve its human and material resources. It must develop strong machinery for the national defense, while seeking to construct an enduring world peace. It cannot perform these tasks if its organization for development and execution of policy is confused and disorderly, or if the Chief Executive is handicapped in providing firm direction to the departments and agencies (Hoover Commission Report, 1949: 3-4).

To remedy the perceived lack of presidential authority and clear lines of accountability in the executive branch, the first Hoover Commission

recommended enhanced presidential authority over executive agencies, clear lines of control, greater use of generalist administrators, and an increased staff for EOP.

Among the proposed additions to the EOP staff was a director of a newly created Office of Personnel in the White House. The director of the Office of Personnel would also chair the Civil Service Commission, thereby cementing the institutional presidency's control over the career civil service. To enhance presidential control over agencies within EOP, the Hoover Commission recommended discontinuing the requirement for Senate confirmation of EOP agency heads and senior staff (for example the director of the Bureau of the Budget).

In its discussion of department management, the Hoover Commission includes an organization chart showing the proposed organization of each federal agency. This chart is a classic illustration of executive supremacy. The line of authority stretches from the President to the cabinet officer/agency head, to assistant secretaries, bureau chiefs, division chiefs, branch chiefs, section chiefs, and unit chiefs. This would give the federal government eight consistent lines of responsibility, ranging from the President to the first-line supervisor level (Hoover Commission, 1949: 22).

The Second Hoover Commission focused less on recommendations concerning the EOP and more on specific recommendations regarding the federal civil service. The first Hoover Commission's concept of a generalist administrator was expanded by the Second Hoover Commission, which recommended the creation of a senior executive service to form an elite corps of generalist administrators. In addition, the Second Hoover Commission

recommended the creation of additional political appointee positions, thereby removing career administrators from policymaking roles (Moe, 1982: 91). The Second Hoover Commission also gave significant attention to ensuring political neutrality among career administrators, which the Commission argued would be easier to accomplish as career administrators ceded policymaking roles to political appointees (Moe, 1982). The Commission hoped to create, in effect, a bright line between political and career positions, thereby increasing the President's political control over policy making while at the same time preserving a neutrally competent career civil service.

### **Ash Council**

The Ash Council was formed by President Richard Nixon to develop the plan for managing the executive branch during the Nixon administration. The Ash Council was chaired by Roy Ash, who became OMB director in Nixon's second term. Other members included the Dean of Harvard Business School, George Baker, former Texas Governor John Connally, and private sector executives Frederick Kappel, Walter Thayer, and Richard Paget (Nathan, 1983: 43). Nathan (1983) divides the work of the Ash Council into two parts, roughly corresponding with Nixon's two terms in office. During the first Nixon term, the Ash Council strengthened the institutional presidency, at the expense of the traditional prerogatives of cabinet secretaries. The Bureau of the Budget was reconstituted as the Office of Management and Budget (OMB). OMB was given more responsibility for executive branch oversight, interjecting the EOP into an area traditionally reserved for cabinet secretaries. Also at the recommendation of the Ash Council, the President formed a Domestic Policy Council, which Nathan describes as "analogous to the National Security Council" (Nathan,

1983: 43). Further, the Nixon White House more strongly controlled executive branch appointments through the White House Personnel Office, again usurping authority of cabinet secretaries. Finally, all major policy direction came from the White House, not cabinet officers (Nathan 1983; Schlesinger, 1989).

During the second Nixon term, before the administration foundered on the shoals of Watergate, the Ash Council proposed consolidating cabinet departments into the existing departments of State, Defense, Treasury, and Justice as well as four newly created super departments. The new departments would be organized around goals and included departments of Natural Resources, Community Development, Human Resources, and Economic Affairs. Nixon viewed the consolidation of cabinet departments as an important part of instituting more presidential control over the bureaucracy. In his address to Congress proposing the reorganization plan (1971), Nixon remarked:

Elections are the people's tool for keeping government responsive to their needs. This entire assumption rests on the assumption, however, that elected leaders can make the government respond to the people's mandate. Too often, this assumption is wrong... No wonder that bureaucracy has often been described as "the rule of no one." No wonder the public complains about programs which simply seem to drift. When elected officials cannot hold appointees accountable for the performance of government, then the voters' influence on government behavior is also weakened (Nixon, 1971: 124-125).

In this address, Nixon's references to elections are entirely within the framework of presidential elections. At the time, Nixon was addressing a Congress that had been controlled by Democrats for nearly two decades. However, Nixon viewed his election as President as a mandate to assert complete control over the civil

service, notwithstanding the voters' decision to retain Democratic control of Congress.

### **National Performance Review**

Gaebler and Osborne's *Reinventing Government* (1992) animates the latest effort at enhancing executive control: the National Performance Review of the Clinton Administration. Reinventing government argues that traditional models of government bureaucracy should be revised in favor of private sector, market-based models. This movement dovetailed nicely with the private sector's movement towards downsizing during the recession of the early 1990's.

The term reinventing government, if not all the concepts implicit in it, was embraced by the Clinton administration shortly after President Clinton's inauguration. Vice President Gore was tasked with leading a National Performance Review of all the agencies and operations of the federal government in order to bring the spirit of reinventing government to the Clinton administration (Moe, 1994: 111). In addition, the National Academy of Public Administration "aligned itself with the supporters of this new paradigm to the extent that it created an Alliance for Redesigning Government chaired by David Osborne within its own walls" (Moe, 1994: 112).

As Lane (1994) notes, the report of the National Performance Review was often sharply anti-bureaucratic in tone (Lane, 1994: 35). Carroll argues that the National Performance review "uses the dichotomy to reject one form of politics

(congressional action) to advance another (increased presidential and political executive control over administration) (Carroll, 1995: 304). Moe notes that the National Performance Review views Congress “largely as a nuisance that insisted on micro-managing the beleaguered agency manager and should accept the lesser role in management implicit in the entrepreneurial management paradigm” (Moe, 1994: 117).

In addition, Moe observes that the National Performance Review “implicitly argues that greater faith should be placed in the abilities and motivations of the politically appointed leadership in the departments and agencies” (Moe, 1994: 116). The management responsibilities of the career staff at OMB would be largely ceded to committees of senior political appointees such as a proposed President’s Management Council (Moe, 1994: 117). The Clinton administration suggests cutting the number of career administrators by 252,000 (Moe, 1994: 114). However, the Clinton administration has stoutly resisted efforts to reduce the number of political appointees<sup>5</sup>. Light faults the National Performance Review for failing to recommend cutting the number of political appointees, noting: “by not including even one political appointee in the 272,900 [positions] cut, the report implicitly accepted the ‘orthodoxy’ of

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<sup>5</sup> In September 1995, responding to a White House request, the Senate defeated a budget amendment that would have reduced the number of political appointees by 25 percent (Al Kamen, “Relief for Political Appointees,” *Washington Post*, A25).

thickening that sees more leaders as equal to stronger leadership” (Light, 1995: 36).

Reorganization is only one time-honored means of advancing executive supremacy in the name of managerial efficiency. Civil service reform is another means of advancing a chief executive’s control over administration. And just as it supported reorganization in the service of executive aggrandizement, so too did public administration initially support the watershed civil service reform of the last century, the Civil Service Reform Act of 1978.

### **Reorganization in the States**

The federal government has not been alone in undergoing a continual cycle of reorganization. State governments also have frequently undergone executive reorganizations. Just as Seidman and Gilmour found that reorganization was used at the federal level as a means to enhance executive control, so Conat (1988) observes the same phenomenon at the state level. Conat found that 22 states significantly reorganized their executive branches from 1965 to 1987. Conat argues that the Brownlow Committee report and Woodrow Wilson’s writings on the science of administration were the guiding spirits behind most state level reorganizations. One attribute of every reorganizations studied by Conat was an increased number of political appointees (Conat, 1988: 895). While the number of political appointees increased as a result of reorganization, Conat found that “the desired bottom line

benefits in 20 of the 22 state reorganization initiatives examined here remain undocumented or did not materialize” (Conat, 1988: 898).

Garnett and Levine (1980) found that the decade from 1965 to 1975 had witnessed “a flurry of efforts by American state governments to reorganize their executive branches” (227). Garnett and Levine conclude that one important motivating factor behind executive reorganization is political competition, including competition between the executive and legislative branches for control over administration (239).

One of the reorganizations in question was in Virginia, where Governor Linwood Holton’s 1970 *Governor’s Management Study* initiated the growth of Virginia’s cabinet system and an era of tighter gubernatorial control over administrative agencies by diminishing the power of citizen boards and agency heads and increasing the administrative power of the governor. Erlich (1975) noted that Virginia’s executive reorganization during Governor Holton’s term was part of an effort to strengthen the Governor’s role in administration.

One consequence of politically motivated reorganization in state government is turnover of senior administrators. Haas and Wright (1989) found that turnover among department or agency heads was relatively high for senior state administrators: approximately 50 percent of department or agency heads were replaced during the most recent two-year cycle they reviewed (269). Haas and Wright note that “state government is not a very stable organizational

leadership setting. The creation and spread of new responsibilities and the related lack of tenure among top administrators present formidable challenges to public administrators and public policy at the state level” (275).

One clear motivation for the proliferation of reorganizations at the state level is the desire to strengthen the powers of the Governor. In 1976, *Public Administration Review* published a mini-symposium on the strong governorship, examining whether post-Watergate concerns about the imperial presidency were also applicable to state governors. The symposium’s authors each found that the governor of the state they reviewed had started with extremely weak formal powers in the eighteenth and nineteenth centuries, reflecting lingering hostility felt towards royal governors during the colonial period. However, governors had gradually accrued strong formal powers in the twentieth century, particularly in the areas of appointment of state officials, budgeting, and reorganization (Lockard, 1976).

However, Sigman and Dometrius (1988) found that strong formal powers, such as reorganization powers, did not necessarily guarantee a strong role in administration. On the other hand, lack of formal powers (such as in Louisiana) did not prevent a Governor such as Huey Long from channeling the informal aspects of the governorship into a dominant role in administration and indeed the political culture of the state (158-159). Similarly, Abney and Lauth (1983)

found that strong formal powers did not necessarily translate into an active or effective gubernatorial role in administration

Research into reorganization in state government remains relatively sparse when compared to the voluminous literature on reorganization at the federal level. More research is needed with regard to the political aspects of reorganization in the states, particularly given the variations in political cultures among the states. For example, Graham and Whitby (1989) found that party affiliation is not a major determinant of legislative voting patterns in South Carolina. This would be consistent with the traditional view of Southern states having two conservative parties: the usually dominant Democrats and the minority Republicans.<sup>6</sup> Similarly, Erikson, McIver, and Wright (1987) found that state political culture is at least as important, perhaps more important, than party identification in determining political behavior in the states. The political uses of reorganization at the state level, therefore, are potentially less party-based than at the federal level and more driven by personality or political culture. However, partisan politics also continues to be an important potential motivation for executive reorganization.

Fiorina (1994) finds that divided government appears to be a major feature in state government just as it is in the federal government (304-305).

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<sup>6</sup> When the Republican Party took control of the North Carolina House in 1994, it was the first legislative chamber in a state of the Old Confederacy to be controlled by Republicans since the end of Reconstruction over a century earlier.

While Fiorina's rumors of the death of Republicans in state legislatures proved to be greatly exaggerated by the results of the 1994 elections, it is still the case that many states face the regular possibility of divided government. This is increasingly the case in the South, where the formerly one-party region becomes competitive in gubernatorial and state legislative races. As governors increasingly find themselves dealing with a state legislature dominated by the other party, the attractiveness of executive reorganization from a partisan political standpoint may appear great.

Reorganization also will probably continue to be an attractive tool for Governor's to enhance their institutional powers relative to the legislature. Public administration literature is sorely lacking in careful examination of separation of powers issues at the state level. It appears to be the field's tacit assumption that the constitutional rules of the game are the same in the states as at the federal level. As will be explained in more detail in the case study of Virginia, this is not necessarily the case. State governors often have formal powers denied the President (especially a constitutional line-item veto) and exercise significant informal powers as well (Siglman and Dometrius 1988). However, state legislatures are also in a different constitutional position than is the case with Congress. As Howard (1974) explains, state constitutions limit what are otherwise the plenary powers of the state legislature, while the U.S. Constitution serves as a specific grant of enumerated powers.

In addition, public administration needs to consider the role of other institutional structures in the states in examining separation of powers issues in general and reorganization in particular. As Browne (1987) observes: “Research on the ‘neglected world’ of state politics suffers from, among other things, a lack of attention to institutional relationships” (47). In the states, these relationships include those between the governor, legislature, and directly elected agency heads in the state (such as the Attorney General or state treasurer), supervisory citizen boards (such as Virginia’s Alcoholic Beverage Control Board which oversees the Virginia Department of Alcoholic Beverage Control), and independent regulatory commissions (such as the Virginia State Corporation Commission), which may have broad constitutional and statutory powers.

Additionally, it would be useful to examine legislative capacity in individual states in assessing the Governor’s reorganization powers. Legislative structures for oversight and other issues have dramatically improved in many states since the scathing critique of state legislatures issued in 1971 by the Citizens Conference on State Legislatures report *The Sometimes Governments*. In Virginia, this report led to the creation of an oversight arm of the General Assembly: the Joint Legislative Audit and Review Commission, full-time staff for legislative money committees, and a proliferation of legislative study and oversight commissions (interview). Likewise, Elling (1984) found that legislative

oversight and legislative influence increased in some states since the 1971 report (457-458). However, Elling also found that the relative influence of state legislatures on administration was highly variable and that as many as two-thirds of state legislatures lacked the institutional capacity for effective oversight (477-479). This is in marked contrast to the significant institutional capacities of Congress, where one legislative agency, the General Accounting Office, has ten times or more the staff of the entire legislative branch in many states.

In concluding that state legislators are becoming increasingly careerist, Fiorina (1994) ignores the pending impact of term limits in many states as well as significant Republican gains in the South that have toppled senior Democratic legislators<sup>7</sup> in arguing that there is a trend towards growing careerism among state legislators. Notwithstanding the accuracy of Fiorina's view, legislative capacity varies widely among the states, as do legislative folkways and practices such as the seniority system, the power of committee chairpeople, and the powers of legislative leaders (Rosenthal, 1981).

Finally, the case of Virginia, examined in this dissertation, suggests that Siglman and Dometrius' (1988) and Abney and Lauth's (1983) portrait of Governors as ineffectual in administration, notwithstanding their formal powers,

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<sup>7</sup> For example, Virginia's 1995 General Assembly elections witnessed the defeat of Senate Majority Leader and Senate Finance Committee Chairman Hunter B. Andrews, a thirty-two year Senate member who had been majority leader for 16 years and chairman of the powerful Finance Committee for 10. Similarly, the 1995 elections also toppled senior Senators in Mississippi, including the Senate President and a member whose service extended back to the Truman administration.

is incomplete. Strong formal and informal powers, in the hands of a highly partisan governor, can allow the governor to play a dominant role in the states political and administrative life. Whether the governor's dominant role is ultimately a constructive one for the agency, policy subsystem, or regime levels of governance is the focus of this dissertation's case study.

## **Civil Service Reform**

### **Civil Service Reform Act of 1978**

Civil service reform, starting with the Civil Service Reform Act of 1978 (CSRA) sought to graft the theory of executive supremacy onto the civil service system with the hopes of making the civil service more responsive to elected leadership. Aspects of the CSRA were copied in many states (Argyle, 1981). These civil service reforms have led to a more politicized civil service and to a civil service more responsive to political leadership at the expense of responsiveness to the legislative branch or the public. At the same time, chief executives, given more leverage over the civil service through civil service reforms, have used reorganization and the layering of political appointees to further enhance their leverage. The decline of merit-based civil service systems has also allowed control-oriented chief executives to gradually increase the scope of their partisan appointments, while the move to downsize and restructure government has provided a convenient cover for replacing career bureaucrats with either contractors or political appointees.

Public administration has tacitly countenanced the breakdown of merit-based civil service systems by embracing civil service reforms intended to make the bureaucracy more politically responsive and by worshipping at the altar of

executive power. The Civil Service Reform Act of 1978 (CSRA) was drafted by President Carter's Presidential Reorganization Process and widely embraced by public administration at the time. Indeed the reform's chief architect was the Dean of the Maxwell School at Syracuse University, Alan K. Campbell, who later became the founding director of the Office of Personnel Management (OPM) (Campbell, 1978).

The CSRA realized the vision of the second Hoover Commission in giving the President more control over the career service. According to a participant in the President's Reorganization Project, the CSRA was marketed to some audiences as a means of making bureaucrats more accountable to the President. To others, particularly public administration scholars, the CSRA was touted as moving the American civil service towards the British model (interview).

The claim to imitate the British civil service is particularly problematic. The year after the passage of the CSRA, Margaret Thatcher took office as Prime Minister in Britain determined to implement her own civil service reform. In her autobiography, Thatcher (1993) describes the British civil service system when she took office in scathing terms. Thatcher notes that her one of first objectives on taking office in Whitehall was to reduce civil service and to exercise more control over senior appointments (45-46). Thatcher reserves some of her most pointed language, however, for the Civil Service Department (CSD), which had functioned as the British equivalent of the U.S. Civil Service Commission.

Thatcher observed:

the CSD had always lacked credibility and power in Whitehall. Not without cause. When I arrived at the CSD, many of my worst fears about the civil service were confirmed. I met able and

conscientious people attempting to manage and monitor the activities of civil servants in departments of which they knew little, in policy areas of which they knew even less. Because the staff of other departments were aware of the disadvantages under which the CSD worked, they took scant notice of the recommendations that they received from it. After this visit, the only real question in my mind was whether responsibility for the CSD's work should be redistributed to the Treasury or the Cabinet Office (48).

Thatcher is equally dismissive of Britain's elite corps of senior administrators, the generalist higher civil service that many public administration scholars longed to see mirrored in the United States. Thatcher recounts the dinner with Britain's most senior civil servants that caused her to conclude that most of them would have to be replaced:

I invited the Permanent Secretaries to dinner at No. 10 on the evening of Tuesday 6 May 1980....This was one of the most dismal occasions of my entire time in government. I enjoy frank and open discussion, even a clash of temperaments and ideas, but the menu of complaints and negative attitudes as was served up that evening was enough to dull any appetite I may have had for this kind of occasion in the future. The dinner took place a few days before I announced the program of civil service cuts to the Commons, and that was presumably the basis for complaints that ministers had damaged civil service 'morale.' What lay still further behind this I felt, was a desire for no change. But the idea that the civil service could be isolated for a reforming zeal that would transform Britain's public and private institutions over the next decade was a pipe-dream....It became clear to me that it was only by encouraging or appointing individuals, rather than trying to change attitudes *en bloc*, that progress would be made. And that was to be the method I employed (48-49).

Thatcher's vow to remake the British civil service was not made in jest.

Christoph (1992) concludes that Mrs. Thatcher successfully remade the British civil service as a more responsive political tool.

The attempts of the CSRA to ground civil service reform on the British model are therefore problematic in at least two respects. First, the commitment to establishing a generalist class on the British model is questionable. Second, the British model itself underwent significant change at almost the same time as the CSRA. Supporters of the CSRA were therefore either disingenuous in claiming to adopt some aspects of the British model or were unaware of the discontents caused in the United Kingdom by the British civil service system.

Irrespective of how genuine the intent of the CSRA was to mirror the British model, public administration literature is consistent in finding that the CSRA is a failure in most regards. The notable exception is that the CSRA has increased politicization of the civil service (Levine and Kleeman, 1986; Ingraham and Rosenbloom, 1988; Lane, 1988; Volcker Commission, 1989; GAO, 1990; Ingraham and Reed, 1990; Ingraham and Rosenbloom, 1990; Ingraham, Romzek, and Associates, 1994).

The CSRA had several principal components. These included:

- the elimination of the Civil Service Commission and the creation of the Office of Personnel Management, the Federal Labor Relations Authority, and the Merit Systems Protection Board,
- establishment of merit pay for middle managers (GM 13-15),
- a revised performance evaluation system,
- authority for demonstration projects,
- a new commitment to civil service diversity, and
- the creation of the senior executive service.

In addition to its implications for performance evaluation, merit pay, workforce diversity and demonstration projects, which will not be reviewed here, the CSRA blurred the distinction between career and political executives with the creation of the senior executive service (SES) and the Office of Personnel Management. The effects of this legislation have been less to move the American civil service towards the British model than they have been to politicize both the upper reaches of the civil service and the administration of the civil service system.

Certainly, Hecló's (1977) distinction between political and career executives was complicated by the creation of the senior executive service. Hecló defined a political executive as a presidential appointee at the Assistant Secretary Level or higher in a cabinet department. Career bureaucrats were those on the general schedule, GS-1 to GS-18, with senior bureaucrats understood as the GS-16 to GS-18. The senior executive service incorporated what had formerly been grades 16 to 18 of the general schedule. However, a large number of technical experts remain at the GS 16 to GS 18 level. In addition, as Ingraham notes, there are still a small number of GS 16 to 18 positions established as presidential appointments subject to Senate confirmation. Ingraham put this number at 28 in 1985 (Ingraham, 1987: 427).

The SES was intended to make senior bureaucrats more responsive to political leadership, to encourage cross-fertilization of senior bureaucrats across agencies, and to create a elite corps of senior general managers modeled on the British higher civil service. Literature on the SES finds that it has not been successful in transplanting senior bureaucrats across agencies or in creating an

elite corps of civil servants (Marzotto 1993; Ingraham and Rosenbloom 1990; Volker Commission Report, 1989, Ingraham and Reed 1988). The same literature, however, notes that the SES has succeeded in making senior career administrators more politically responsive and in politicizing the bureaucracy itself.

The SES in particular was touted as adopting the British model of a senior, apolitical higher civil service. The SES has not worked like the British model, because the United States lacks four key elements of the British model that have survived Thatcher's reforms: a generalist administrative class (Punnett, 1988, p. 348-355) bureaucratic anonymity (Smith, 1988: 77-78; O'Toole, 1990: 345-349), ministerial responsibility (Birch, 1973: 211-217; Turpin, 1984; O'Toole, 1990: 340-341), and a parliamentary form of government (Birch, 1973: 217-223; Smith, 1988, 67-69). Unlike Britain, the United States does not have a generalist tradition in administration that leads to the development of an administrative class. Rather, senior career administrators in the United States tend to be technical experts who identify at least as much with a profession such as law, medicine, or science as they do with their role as an administrator. As Marzotto (1993) finds, generalist opportunities for SES members have been few and most SES members remain in the same department after appointment to the SES and many retain technical orientations.

In Britain civil servants, even at senior levels, can remain relatively anonymous in difficult political times for an agency (Smith, 1988), confident that the department's political leadership will take responsibility before Parliament for all of the department's actions and policies (O'Toole, 1990). Ministers demonstrate collective responsibility in that all ministers publicly support the

decisions of the government of the day, and the government will immediately resign in the face of a parliamentary vote of no confidence (Birch, 1973).

Ministers demonstrate individual responsibility by allowing themselves to be held individually accountable for the actions of the ministry (O'Toole, 1990).

In the United States, career administrators are not necessarily anonymous, nor do political appointees always take responsibility for the actions of their agencies (in fact, the American tradition sometimes appears to be one where a political appointee seeks out a convenient career administrator to offer as a sacrifice when it is deemed politically expedient). Moreover, Britain's tradition of collective ministerial responsibility, where all members of the government of the day support whatever decisions are reached by the cabinet, prevents much of the policy subsystem level politicking that enmeshes senior civil servants at the agency level, where agencies often act independently irrespective of the administration's stated position on an issue.<sup>8</sup>

The parliamentary form of government, where the government of the day wields sovereign legislative and executive power (McEldowney, 1994), is a major reason why Britain's traditions of ministerial responsibility and bureaucratic anonymity can survive (Marion, 1994). In the United States, the two political branches (the executive and the legislature) can be thought of as two opposite poles between which agencies must operate. Though executive agencies are

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<sup>8</sup> For example, during the budget stalemate taking place in Washington during the writing of this chapter, the Department of Defense's career leadership is actively collaborating with Congressional leaders to raise the defense budget seven billion dollars above the level proposed by the President. In Britain it would be unthinkable for career military officers or senior civil servants to lobby Parliament for more funds than is recommended in the government's budget. Similarly, Stockman (1987) recounts being reprimanded but not fired by Ronald Reagan for publicly criticizing the very administration fiscal policies of which Stockman was the chief architect.

nominally accountable to the President, agency survival requires maintenance of substantial, independent contacts with Congress. In Britain, the government of the day controls the House of Commons as well, so agencies do not have to serve two political masters (Turpin, 1984: 53-60). The CSRA and other calls for bureaucratic responsiveness at the senior levels are probably, to some extent, reactions against the incentives that our constitutional structure provides for senior career administrators to be responsive to both the President and Congress. The CSRA's failure to fully prevent agencies and senior career and political administrators from maintaining their own pipelines to Congress is testimony to the enduring power of our constitutional structures.<sup>9</sup>

Nevertheless, the SES worked to make senior career administrators more politically responsive to the President in two ways. The first means towards encouraging political responsiveness is the provision that ten percent of the total SES can be comprised of non-career appointees (no more than 25 percent of any one agency's SES positions could be non-career). While appointees in these positions were theoretically required to meet minimum qualifications for the positions they filled, the non-career SES has been viewed by every

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<sup>9</sup> It is interesting to note that the CSRA passed during one of the few periods during the last 27 years when Congress and the presidency were controlled by the same party. During the more typical situation where at least one house of Congress is controlled by a different party than the party of the president, it is possible that responsiveness to the president on the part of executive agencies will be seen as less of a virtue and more of an infringement on Congress' constitutional role in administration. For example, it is doubtful if the current congressional majority elected in 1994 would have much sympathy to efforts to enhance the administrative power of the Clinton administration. However, in 1995 Congress did reject a budget amendments sponsored by Senators McCain and Feingold that would have reduced the number of executive branch political appointees from about 2,900 to 2,000 (*Washington Post*, September 25, 1995, p. A19). A column by the head of the Heritage Foundation, Edwin Feulner, had argued that reducing the number of political appointees would handicap the next Republican administration (Edwin Feulner, "One Veto the GOP Ought to Support," *Washington Post*, September 13, 1995, p. A19).

administration since 1978 as another tier of political appointments.<sup>10</sup> Some agencies have made sweeping use of the authority for non-career SES appointments (in keeping with the unwritten law that "a political appointment available is a political appointment filled"), so much so that some agencies have had to add additional career SES slots in order to accommodate more political appointees.<sup>11</sup> Like other political appointees, non-career senior executives serve at the pleasure of the appointing authority, typically the agency head. This tends to increase turnover and overtly politicize what had once been career positions.<sup>12</sup>

At the same time the CSRA introduced a cadre of senior executives with no civil service protection into positions once held by career bureaucrats, the CSRA provided agency leadership with increased flexibility regarding assignment of career members of the SES. There were several provisions that weakened SES members' career protections, but the most important of these provisions was unrestricted transfer authority. By virtue of joining the SES, senior bureaucrats agreed to accept transfer anywhere within the first 90 days of an administration. In 1981, the newly formed Reagan administration made broad use of this authority to transfer allegedly recalcitrant bureaucrats to what one senior executive dubbed "administrative Elbas." While typical stories

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<sup>10</sup> This perception was so widely held, that throughout January 1993 the *Washington Post* repeatedly listed all SES slots in each cabinet department as presidential appointments to be filled by the incoming administration.

<sup>11</sup> An example of this is the Federal Emergency Management Agency during the Reagan and Bush administrations.

<sup>12</sup> To again use FEMA as an example, the position of general counsel was once a career position at the agency. Since becoming a political appointment six years ago, it has been filled by three different incumbents.

involve district offices in Anchorage, the one that remains in this author's mind is the career FEMA executive who found himself detailed to run the agency's United Way campaign. Marzotto (1993: 6) notes that 19 percent of the members of the senior executive service were transferred during the first year of the Reagan administration.

This authority did not need to be used with any great frequency for it to have a chilling effect on the bureaucracy. Reagan's sweeping reassignments of the upper reaches of the civil service was sufficient to send a message to bureaucrats that political considerations were now more important than had previously been the case. The combination of outright political appointees being allowed into the SES and relaxation of civil service protections for career members is a potent one for ensuring the politicization of the SES. However, another provision of the CSRA that has also contributed to the perception of politicization of the SES was not necessarily intended to do so. This is the provision that encourages hiring career executives from outside of the federal civil service.

Historically, few private or non-profit sector executives entered government laterally as career senior executives. Virtually all senior executives had worked their way up the GS scale from a GS 5, 7, or 9 (Marzotto, 1993). The CSRA relaxed restrictions on hiring qualified executives from outside the government, with the expectation that the government would thereby be able to attract qualified executives from the business world, non-profits, and other levels of government. However, of the relatively few number of career senior executives who have come from outside the career federal service (Marzotto places this number at approximately six percent), there are a number of

anecdotal reports about former members of Congress, lobbyists, and others whose qualifications are more partisan than professional. In fact, the end of the Bush administration gave rise to reports of "burrowing in," the practice of political executives being placed in career SES positions at a change of administration.

In 1995, the U.S. General Accounting Office (GAO) reviewed the burrowing in phenomena (GAO, 1995). GAO examined three types of employees who converted to career civil service appointments: legislative and judicial employees, White House employees, and political appointees. GAO found that from 1984 to 1994 there were 552 career civil service appointments made under the Ramspeck Act<sup>13</sup> (only 20 of which were in 1994). During the same period, 1984 to 1994, there were 502 instances of a non-career SES political appointee or schedule C political appointee converting into a career position. Thirty-six individuals converted from the White House staff to career positions during this time period.<sup>14</sup>

Most of these conversions from political appointments to career positions were converted to relatively low level positions. GAO found that the median grade for White House and Ramspeck appointments was GS-12. For conversions from schedule C or noncareer SES ranks, the median grade of the

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<sup>13</sup> According to GAO, "The Ramspeck Act of 1940 (5 U.S.C. 2204(c)) authorizes noncompetitive appointments based on service in the legislative and judicial branches for anyone who has served at least 3 years as a congressional employee or 4 years as a secretary or law clerk in the judicial branch, who was separated involuntarily and without prejudice, who is appointed within 1 year from the date of separation, and who meets the applicable qualification requirements for the career position."

<sup>14</sup> According to GAO, "individuals who serve in the Office of the President or Vice President, on the White House staff . . . are permitted to apply for noncompetitive appointment to career positions in the competitive service. Under 5 C.F.R. section 315.602, such appointments are authorized on the basis of White House service for employees who have served at least 2 years, who are appointed without a break in service, and who meet applicable qualification requirements for the career positions."

career position was GS-13. Of the total of 1,090 appointments to career positions examined, 42 (approximately 4 percent) were at the SES level.<sup>15</sup>

Notwithstanding the relative infrequency of political appointees converting into the senior executive service, anecdotal accounts of politically motivated SES hires potentially increase perceptions of politicization. However, perceptions of increased career vulnerability, which can only be heightened by the current drive to reduce the number of government employees, is a more significant factor. This is because the perception of career vulnerability, unlike the perception of widespread burrowing in, is an accurate perception.

Perceptions of politicization and career vulnerability help to create a self-fulfilling prophecy in the SES. Because career executives perceive the senior civil service as becoming more politicized, they may become more vulnerable to partisan pressure, out of a desire for career survival. Career survival is very important to career federal executives in an age of downsizing throughout the public and private sectors. Contrary to widely publicized fears by the National Academy of Public Administration (NAPA, 1992) and the Office of Personnel Management (OPM, 1992), the expected wave of retirements three years after the large SES pay raise granted in federal fiscal year 1991 has not materialized. Federal retirement benefits are calculated based on the three highest years of salary, so a large increase in FY 1991 created an apparent incentive for retirement eligible SES members to retire in FY 1994 (OPM, 1992; NAPA, 1992). The flood of retirees has not occurred (except in cases where separation

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<sup>15</sup> One limitation of the 1995 GAO review is that it did not examine the number of conversions of presidentially appointed, Senate confirmed appointees into career positions.

bonuses or buyouts were offered), probably due to uncertain job prospects for middle-aged career government executives in the private sector workforce.

Besides the SES, another aspect of the CSRA that contributed to the politicization of the federal civil service was the creation of the Office of Personnel Management (OPM) to replace the Civil Service Commission (Lane, 1987; Levine, 1986). The director of OPM was appointed by the President (and confirmed by the Senate), and the creation of OPM was meant to enhance the President's control of the federal civil service. As Lane (1988) notes, OPM has been an institutional failure in terms of its impact on the quality and effectiveness of the civil service. Lane also notes, however, that OPM has been successful in politicizing the civil service. The Volker Commission and Levine (Volcker Commission Report, 1989; Levine, 1986) also criticized OPM for its overly political focus. The General Accounting Office found that OPM has not been effective in workforce planning, staffing, performance management, oversight, nor in its internal operations, but OPM does appear to be motivated by political considerations (GAO, 1990).

Rohr captures the normative implications of the CSRA by observing that public administration implicitly rejected neutral competence as a normative framework when it embraced the CSRA (Rohr, 1993). As Lane notes, public administration has also long embraced the idea of a strong chief executive. The discipline has yet to fully acknowledge the consequences of the politicization that accompanies efforts to strengthen chief executive control over the civil service.

In reaction to the failure of OPM, much of the current discussion of civil service reform centers around the need for decentralization of personnel

management to the agency level and minimizing central control of personnel. For example, the National Performance Review recommended significantly reducing OPM's role in personnel transactions (NPR, 1993). At a 1995 Congressional hearing, the Director of Federal Management and Workforce Issues at the U.S. General Accounting Office testified that a more decentralized personnel system was needed (GAO, 1995). Ingraham and Romzek blame the centralized personnel system for much of the public discontent with the public service, stating:

The 1980's were a time of serious government-bashing that revealed how tenuous the link has become between citizens and the public institutions created to serve them. At the center of this dissatisfaction, and often its target, was the public service. In the United States and elsewhere, civil service systems created to perform limited and relatively routine tasks struggled to adapt to new functions, more complex problems, and increasingly turbulent political and economic environments. The bureaucratic structures that civil service systems reinforced were slow and sometimes unwilling to change; the employees within those structures faced a new set of rules and expectations regarding stability, performance, and productivity" (Ingraham and Romzek, 1994: 1-2).

### **Civil Service Reform in the States**

In 1993, the National Commission on the State and Local Public Service reached the same general conclusions about state and local civil service systems as the Volcker Commission had reached about the federal civil service. The National Commission on the State and Local Public Service (Winter Commission) called for significant reforms in state and local civil service systems, identifying these systems as in crisis (National Commission on State and Local Public Service, 1993). Despite the efforts of many states to adopt aspects of the CSRA, state civil services were viewed as largely inadequate for

the challenges facing the public sector: building organizational capacity, increasing workforce vitality, and addressing a more complex environment (Ingraham and Romzek, 1994: 322-333). The Winter Commission's recommendations for meeting these challenges, however, focus on increasing executive power and making civil services more flexible. As Cox (1994) notes, the Winter Commission Report was heavily influenced by experiences in Mississippi, Florida, and Texas, states characterized by the limited formal powers of the governor.

With the adoption of the CSRA, state governments (as well as local governments) began examining the potential advantages of civil service reform. Allan and Rosenberg (1978) pointed to New York City's civil service reform during its financial crisis in the 1970's as one model for state and local governments to pursue. Allan and Rosenberg found that state and local civil service reform efforts, like the CSRA, involved four core elements. These were: decentralization of personnel authority, separation of the central personnel and merit system functions, pay for performance, and creation of a service or specific class for senior administrators (579-580). Allan and Rosenberg conclude that the best model for states and localities to pursue is gradual, incremental reform.

Notwithstanding this caution, Argyle (1981) found that states and localities had actively pursued civil service reform since the CSRA's passage in 1978, with state governments more likely to pursue reform than local governments. Finkle, Hall, and Min (1981) note that creation of senior executive services was a typical state civil service reform. However, Caneavle (1989), using the example of Florida, suggests that such reforms were not always successful. Similarly, Sherwood and Breyer (1987) suggest that state-level

executive personnel systems have done little to meet the challenges of state civil services in recruitment, resource management, or leadership development.

Public administration literature has not examined the long-term impacts of state civil service reform in any depth. In contrast to the voluminous literature (only a fraction of which is cited here) on the CSRA, state civil service reform efforts have gone relatively unexamined. With regard to the strengthening of chief executives through civil service reform, some state civil service reforms have gone far beyond the provisions of the CSRA, which have caused so much consternation in public administration literature.

For example, as later chapters will demonstrate, in Virginia civil service reform removed all civil service protections from a large percentage of the state's senior career administrators. In contrast, the CSRA simply allowed for the transfer, under certain circumstances, of senior executives. As Roberts (1987) notes, several states such as Virginia classified their senior career administrators as will and pleasure employees, serving at the discretion of executive branch political superiors. The full implications of will and pleasure service for public administration will be discussed at length in Chapter V, which seeks to fill a significant void in the literature on civil service reform. Briefly put, removing all civil service protections from senior career administrators potentially transforms the senior career service to another layer of political appointees, encouraging affected administrators to offer fealty only to the chief executive, and discouraging them from acting in the role of constitutional officer that Wamsley et. al. (1990) urge them to.

Public administration literature has also been slow in addressing the link between state civil service reform and the growth of the strong governor in state

government. The governor's administrative powers are typically examined (when they are examined at all) in terms of budget power and appointment power. Enhanced personnel authority over the career civil service, however, potentially enhances the governor's role in administration, with attendant consequences for the role of the legislature in administration as well as institutional relationships at the policy subsystem and even agency level. However, civil service reform has not only added a power to the administrative arsenal of governors in the form of greater personnel policymaking authority and more control over career administrators. Civil service reform also, in many cases, has increased the governor's already significant appointment authority.

Indeed, one of the most significant outcomes of state civil service reforms is to increase political appointees. This increase is, in some cases, significantly more proportionately than occurred with the CSRA's provision that 10 percent of the SES could be political appointees. Layering of political appointees has been a problematic trend in both federal and state government. The next section discusses the political appointee issue at both the federal and state level.

### **Political Appointees**

Despite Neustadt's finding that the President's power can largely be summarized as "the power to persuade" (1960), public administration has often endorsed political science's near-worship of the President in arguing that many problems of governance could be ameliorated by giving greater power to the President (Lane, 1994). Indeed, one of the central selling points for the CSRA was the enhancement of the President's ability to control "unelected bureaucrats," partially through having more political appointments available in the non-career portion of the Senior Executive Service. Edward Corwin

succinctly sums up the development of the presidency in American political thought by stating "Taken by and large, the history of the presidency has been a history of aggrandizement" (Corwin, 1956: 57). Corwin wrote these words before the two most arguably imperial presidencies of this half-century, those of Johnson (1963-1969) and Nixon (1969-1974). However, Corwin adds the admonition that the presidency's history of aggrandizement has not made it a more effective institution.<sup>16</sup>

Notwithstanding the decidedly mixed legacy of efforts to expand presidential control, Presidents have continued in the last two decades to attempt to assert more political control over the bureaucracy. A preferred method of doing this is increased use of political appointees, particularly the phenomenon of "layering" political appointees more deeply into the ranks of executive agencies. Unfortunately, the presidency has also become substantially weakened in its ability to lead during the past twenty years, though the President's leadership capacity was always more theoretical than actual (Schlesinger, 1989: 420-499). This means that a more politicized, yet weakened presidency has attempted to assert more control over the bureaucracy even as its ability to lead the bureaucracy diminished.

As Lane (1994) argues, the President's attempt to control the bureaucracy has manifested itself by substituting political responsiveness as a qualification for the civil service for the more traditional qualification of neutral competence first established in 1883. As noted previously, reorganization and civil service

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<sup>16</sup> As will be discussed in Chapter IX, much of the aggrandizement of the president Corwin identifies is tied to national security issues, though expansion of presidential power to address these issues also leads to expansion of the powers of the domestic and managerial president.

reform have both been tools for enhancing the power of the presidency, in particular the power of the institutional presidency over the bureaucracy. Lane observes, however, that attempts by the President to assert more control over the bureaucracy have not resulted in more effective management of the bureaucracy, because "size, scope, and complexity of government organizations" mitigate against effective presidential control (Lane, 1994: 20).

Like civil service reform and reorganization, political appointees have been of limited utility in bringing about a more effective managerial presidency. Nevertheless, as Ingraham, Thompson, and Eisenberg (1995) note, "for much of this century, but most notably for the past 25 years, political/career relationships in Washington have been marked by presidential efforts to direct and control the permanent bureaucracy better. The key players in this relationship are the political executives appointed by the President . . . and the top career management cadre" (Ingraham, Thompson, and Eisenberg, 1995: 263). Ingraham, Thompson, and Eisenberg found that, while the number of political appointees remained relatively stable during the Bush and Clinton administrations, the overall number of political appointees had grown dramatically in the last quarter century.<sup>17</sup> A similar phenomenon exists at the state level, with increased layering of political appointees but uncertain results from this layering.

In addition to being ineffective as an instrument of political control, increased use of political appointees causes other problems. The proliferation

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<sup>17</sup> Ingraham, Thompson, and Eisenberg also argue that, whereas Nixon and Reagan used political appointees to politicize and control agencies, Bush and Clinton appear to be more oriented towards political patronage, in other words rewarding campaign workers and other loyalists with government jobs.

of political appointees has led to considerable conflict between career and political executives (Lorentzen, 1985; Durant, 1990; Colvard, 1995). Colvard succinctly captures the problem of career-appointee relations even in the best of times in stating:

Political officials come into an agency without detailed knowledge of the discipline of the agency and are suspicious of the career civil servants who have the knowledge they need. The career civil servants have been developed as experts in their field, do not have a full appreciation of the legitimate role of the political official . . . Eventually they gain respect for each other, trust develops, and they understand their respective roles. With the average tenure of political appointees being roughly two years, this process often takes a good deal of the time they have to work together (Colvard, 1995: 34).

In addition to problems caused by the inexperience, short tenure in office, and hostility towards career bureaucrats found in political appointees, Aberbach and Rockman (1988) suggest that politicization of the federal executive branch may lead to congressional retaliation. They speculate that congressional retaliation could take the form of more statutory restrictions on presidential personnel authority. As the constitutional logic of *Federalist 51* suggests, none of the three branches of government will forever tolerate efforts by another branch of government to usurp constitutional prerogatives. It is certainly reasonable to expect an eventual congressional reaction to presidential usurpation of control over administration.<sup>18</sup> The 104th Congress has been mixed in this regard, attempting to assert more control over some aspects of administration but also approving an enhanced rescission authority that shifts

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<sup>18</sup> This would be analogous to congressional limitations on presidential budget authority in the Budget and Impoundment Control Act of 1974 and the congressional limitations on presidential warmaking in the War Powers Resolution of 1973.

power in budgetmaking, the lifeblood of administration, more towards the President.

In addition to these general problems caused by a proliferation of political appointees, there are problems that are unique to each of the three types of political appointees at the federal level: presidential appointees, non-career SES appointees, and Schedule C appointees. Each of these will be discussed in greater detail, as will issues related to political appointees at the state level.

### **Presidential Appointed, Senate Confirmed Appointees**

The highest ranking political appointees in the federal government are presidentially appointed, Senate confirmed (PAS) appointees. These PAS appointees are compensated on levels I to IV of the federal executive schedule. In addition to cabinet secretaries and heads of independent agencies, the traditional titles carried by PAS appointees include: secretary, deputy secretary, undersecretary, assistant secretary, and administrator. Heclo's 1977 study of federal political appointees assumed an organizational structure consisting of a cabinet secretary, a deputy secretary, one or more undersecretaries, and several assistant secretaries. Even with this structure, Heclo commented on the growth of organizational complexity, remarking that a nineteenth century clerk would scarcely recognize his department (though growth from the nineteenth century to the time of Heclo's writing in the size and complexity of government could explain much of this increase in organizational complexity).

Light's 1995 study reveals a federal government significantly more bloated with political appointees at the upper echelon of the organization. Light found that, while the absolute size of the civilian federal workforce remained relatively constant from 1960 to 1992, "the total number of senior executives and

political appointees grew from 451 in 1960 to 2,393 in 1992, a 430 percent increase<sup>19</sup> The four principal layers of political leadership identified by Heclo had mushroomed to thirty-two in some cases (Light, 1995: 7). One manifestation of this increased layering of political appointees is the bewildering array of titles now carried by PAS employees. These include deputy assistant undersecretaries, principal assistant secretaries, and other deputy assistant secretaries. Light found that the growth of PAS appointees in absolute numbers was particularly pronounced at the lower echelons of upper management, at the deputy assistant secretary level. According to Light, the number of deputy assistant secretaries has increased from 77 to 507 from 1960 to 1992, meaning that in 1992 the federal government had more deputy assistant secretaries than it had political appointees in 1960 (Light, 1995: p. 8). While the growth in absolute numbers of political appointees is most pronounced at the deputy assistant secretary level, Light found that in terms of percentage increase, growth has occurred at all ranks of political appointees.

The growth in the number of PAS appointees has several consequences for public administration outside of the broader problem of the growth in total number of political appointees of all types (at the federal level this would include non-career SES and Schedule C positions in addition to PAS positions). The first consequence of the growth in numbers of PAS positions is that incoming administrations are having increasing difficulty filling all of their political appointments. This leaves agency leadership positions vacant for much of an administration's term. The Clinton administration did not begin filling many of its

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<sup>19</sup> Light is not referring to members of the Senior Executive Service; rather he is referring to employees compensated on the Executive Schedule (Levels I to V).

assistant secretary level positions until the second year of the administration. For several months of the administration, in several departments the cabinet secretary was the only administration appointee who has successfully been confirmed by the Senate.

Heclo points out that presidential appointees may develop their own power bases and network of influence independent of the chief executive or the nominal agency head (Heclo, 1977). The National Academy of Public Administration (NAPA) team that reviewed the Federal Emergency Management Agency (FEMA) noted this phenomenon with the eight PAS appointees at FEMA (NAPA 1993). Of the eight appointees, the agency head (director) was the last to have been appointed and had been given no say in the appointment of the agency's senior managers. It was well known in the agency that the director did not have the discretion to insist on the removal of any of the appointees in the agency, as all had their own political sponsors within the administration. Ironically, because political appointees, particularly PAS appointees, often have their own network of supporters, this makes them more difficult for other political executives to manage, not less.

A final consequence of the growth in PAS positions is that there are now many more layers of management between the President and the career administrators that the political appointees are nominally supposed to help the President manage. The National Commission on the Public Service (Volcker Commission) noted that "Presidents today are further away from the top career layers of government with 3,000 appointees...than was Franklin Roosevelt 50 years ago with barely 200" (National Commission on Public Service, 1989, p. 17). The Volcker Commission also notes that "From 1933 to 1965, during a

period of profound expansion in government responsibilities, the number of cabinet and sub-cabinet officers appointed by the President and confirmed by the Senate doubled from 73 to 152. From 1965 to the present, a span when total employment and programs were more stable, the number more than tripled to 573" (Volcker, 1989: p. 17).

Ingraham notes that the short average tenure of presidential appointees makes them an imperfect instrument of presidential control (Ingraham, 1987). Similarly, Pfiffner argues that presidential mistrust of career bureaucrats is misplaced and that increasing use of political executives is counterproductive because of the inexperience and short tenure of political appointees (Pfiffner, 1987). Heclo found an average tenure for political appointees of 2.5 years (Hecl, 1977). Eight years later, another study found that the average tenure of a political appointee had shrunk to less than two years (National Academy of Public Administration, 1985).

The Volcker Commission also notes that "the more positions are opened up to political appointees at lower levels, the harder it is to recruit high-quality people to fill them" (Volcker, 1989: p. 224). In addition, the Volcker Commission notes that the downward penetration of political appointees limits the career potential of federal employees and hence the attractiveness of a federal career by reserving ever more senior positions for political appointees. Many of these positions, particularly at the deputy assistant secretary level, were once largely filled by career personnel.

### **Non-Career SES**

The creation of the non-career SES authority has already been discussed in the context of the Civil Service Reform Act of 1978. The number of non-

career SES positions varies with the overall size of the SES, as the number of SES appointees is statutorily limited to 10 percent of the total SES. The non-career SES is the most recent type of political appointment, and it is the only type of political appointment authority that has not grown demonstrably since its inception. Ingraham notes that, from 1979 to 1985, the number of non-career SES positions ranged from 828 in 1979 to 688 in 1985. Light estimates that the SES had expanded to 8,130 by the end of the Bush administration, allowing for 813 non-career SES appointments, approximately the same number as were available at the adoption of the Civil Service Reform Act in 1978 (Light, 1995: p. 58).

### **Schedule C Appointments**

Schedule C appointments are appointments on the general schedule without career tenure (grade 15 and below). Schedule C appointees have a wide range of potential assignments including staff assistant to a political executive, chauffeur, and secretary. These duties generally involve a personal and confidential relationship with an appointed official. Schedule C employees are routinely replaced with each change in administration.

The Schedule C appointment authority was initiated by the Eisenhower administration. According to Light, this appointment authority vested in cabinet secretaries authority to appoint "positions of a confidential or policy determining nature" without regard to merit (Light, 1995: 45). The number of Schedule C appointees in the Eisenhower administration ranged from 868 to 1,128. By the end of the 1980's, according to Light, there were over 1,700 Schedule C appointees in the federal government (Light, 1995: 46). Ingraham found that in 1986 "there were more Reagan appointments at the GS 13-15 levels only (946)

than there were in total Ford Schedule C appointments at all grade levels (911)” (Ingraham, 1987).

Schedule C appointments had traditionally been the prerogative of agency heads and cabinet secretaries. However, starting in the Reagan Administration, these appointments became the province of the White House Personnel Office (though the secretary or agency head remains the formal appointing authority for the positions). According to Light, the Reagan White House established a policy that all political appointments, including Schedule C appointments, would be subject to White House approval (Light, 1995: 56).

In addition to contributing to the overall politicization of the federal government, Schedule C appointees cause specific problems. The first is a tendency to isolate political executives, by allowing them to surround themselves with a phalanx of Schedule C aides. Schedule C appointees tend to act as gatekeepers for more senior political appointees, and as such can screen political executives from needed interaction with career staff.

Schedule C appointments are also problematic because they magnify the problems noted previously with lower ranking presidential appointees. The lower ranking a political position is, the more difficult it is to find a quality individual to fill the position and to justify why the position needs to be a partisan rather than career appointee. With regard to politicization, Schedule C appointees have a tendency to “out Herod Herod.” This is because many Schedule C appointees tend to be younger, zealous campaign aides eager to win their partisan stripes. Thus, these low ranking positions can contribute significantly to the politicization of government and to partisan conflict in government.

### **Political Appointees at the State Level.**

All fifty states allow the governor some executive branch political appointments (Roberts 1987), and there are varying arrangements for legislative confirmation of gubernatorial appointees. In Virginia, for example, appointees are confirmed by both houses of the General Assembly. In many other states only the upper chamber confirms appointees.

One factor that complicates discussion of gubernatorial appointment power and comparisons with the federal government is the existence of constitutional officers at the state level, offices whose manner of selection (generally statewide election by voters) is prescribed by the state constitution. For example, the President appoints the U.S. Attorney General and U.S. Attorneys, but in most states the Attorney General is an elected official as are local district attorneys.

Moreover, other state offices at the agency head level, such as state treasurer, state auditor, state controller, and superintendent of public instruction are elected rather than appointed positions in many states. In some cases one or more of these positions are appointed by the state legislature<sup>20</sup>. The federal equivalents of these state constitutional officer positions would be appointed by the President. At the state level, the independently elected nature of these positions makes it difficult if not impossible for the Governor to exercise any meaningful control over the incumbents. The Winter Commission estimated that there are 300 elected officials nationwide at the state level who could be made

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<sup>20</sup> For example, in Virginia the state auditor is nominated by the General Assembly's Joint Legislative Audit and Review Commission and is confirmed by both houses of the General Assembly. Commissioners of the State Corporation Commission are also chosen by the General Assembly with no formal input from the Governor. In Maryland the State Treasurer is elected by a vote of both houses of the General Assembly (and is, by custom, usually a former legislator).

gubernatorial appointments (National Commission on the State and Local Public Service, 1993).

The Winter Commission identified constitutional officers as one of the significant factors preventing governors from functioning as effective administrators. However, Lauth (1984) found that the method of agency head selection (appointment by the governor, election by voters, appointment by a board or commission) did not significantly influence the governor's ability to dictate the budget of the agency in question. Lauth emphasized that the governor's other formal and informal powers, especially legislative and budget powers, potentially compensated for the inability to directly appoint certain agency heads.

Notwithstanding the presence of constitutional officers, most governors enjoy fairly broad political appointment powers. For example, the Governor of Texas names over 200 agency heads and hundreds more lower level officials (Texas has no cabinet structure, so agency heads are the highest level of appointee). Political science and public administration literature has been mixed in its view of the significance of the governor's appointment authority. Blair (1984) found that, in Arkansas, the Governor's appointment authority was seldom channeled into effective legislative influence. However, using the Ranney index that measures party competitiveness in the states (expressed in terms of relative influence of the Democratic Party), Holbrook and Van Dunk (1993) found that Arkansas ranked 49th of the 50 states in terms of political competitiveness during the 1980's. Only in Louisiana did the Republican Party have less electoral success than in Arkansas. The paucity of Republican elected officials in the legislature, Congress, or the executive branch

correspondingly might tend to limit the importance of political appointments in asserting gubernatorial influence.

In a functioning two-party state, the governor's appointment authority is potentially very significant. In North Carolina, in addition to the Governor's ability to appoint agency heads, there are over 1,000 civil servants exempt from the state personnel system and subject to replacement by political appointees. Unlike the apparent case in Arkansas, North Carolina has witnessed several gubernatorial transitions involving wholesale replacement of political and career appointees. As Roberts (1987) finds, many states have a significant number of positions exempted from the state civil service statute and therefore many of these positions are at least potential political appointments. For example, in Virginia there are 17 exemptions to the State Personnel Act, encompassing more than a quarter of the state workforce (JLARC, 1993). Therefore, a partisan turnover in the governor's mansion can translate into a widespread purge of senior administrators. For example, Haas and Wright (1989) found that nearly half of state department and agency heads were replaced during every two year period examined from 1970 to 1983 (269).

In addition to high turnover among department or agency heads, who are generally political appointees, state executive personnel systems potentially increase turnover among senior career administrators by rendering many career positions *de facto* political appointments. Sherwood and Breyer (1987) found that twelve states have adopted a formal executive personnel system as a way of bringing coherence to what had previously been a patchwork of exemptions to the state civil service system. Eight of these states adopted executive personnel systems after the passage of the Civil Service Reform Act of 1978 and appear to

have patterned their systems to some degree on the federal Senior Executive Service (Sherwood and Breyer, 1987). The size of these state executive personnel systems range from 11 in Connecticut to nearly 700 in Oregon (Sherwood and Breyer, 1987: p. 411). State executive personnel systems have attempted to improve the responsiveness of senior career administrators to political leaders. Sherwood and Breyer note that:

such responsiveness is to be attained through a shift in personnel controls from the traditional civil service unit to the operating agencies. At both the entrance and exit points, discretion is provided to appointing officials. They are accorded much more freedom in deciding who to appoint, and they may retain a person only so long as they choose. Through this type of "hire-fire" arrangement, it is assumed that executives will recognize the importance of performing in ways that are congruent with the demands of a particular party in power (Sherwood and Breyer, 1987: 412).

In increasing political responsiveness of career administrators, executive personnel systems seek to address the concerns about the "powerlessness" of public executives noted by Pak (1984). Pak, who later became Virginia's state personnel director, argues that public executives are relatively powerless because of the constraints that are placed on them (including the perceived lack of responsiveness on the part of career administrators). Pak also argues that, in comparison to private sector executives, public executives receive little or no development to prepare them for senior management roles.

Sherwood and Breyer criticize state executive personnel systems for focusing on potential political punishments for senior executives and correspondingly neglecting to develop appropriate reward structures. Like the familiar criticism of the federal SES, Sherwood and Breyer find that state

executive personnel systems are “all stick and no carrot.” Among the neglected reward structures for senior executives is the lack of a meaningful system for executive development that would help address Pak’s concern about the poor preparation and development of public executives.

The National Academy of Public Administration (NAPA) also suggests that state governments may have even greater challenges than the federal government with regard to political appointees (NAPA, 1983). One NAPA panel participant commented that states have an even more restricted pool of talent to draw from, since most recruitment for senior positions is aimed at in-state candidates. In addition, state salaries generally lag federal salaries, and the status of state government in the public eye is even lower than that of the federal government (NAPA, 1983: 13-14). In the author’s experience, the third of these points is debatable, but it is demonstrably true that state salaries lag federal salaries in many cases<sup>21</sup> and that, in many states, most senior appointees came from within the state.

Significant literature exists documenting the layering of political appointees in the federal government, most notably Light (1995). However, no such systematic examination of the methods and consequences of political thickening has yet taken place in state government. Quite to the contrary, the Winter Commission has called for increased gubernatorial appointment authority and, by implication, an increase in the number and layer of political appointees. While political appointees have been identified as a challenge for administration in the federal government, no examination has been made of how state

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<sup>21</sup> The State of Virginia’s *Compensation Manual* advises personnel officers that since federal pay is known to be inflated, it should not be used as a basis for comparison for state jobs.

constitutional structures, political culture, and institutional relationships are impacted by the growth in political appointees. This dissertation examines these questions in the case of Virginia. In so doing, the dissertation broadens and enriches existing public administration literature on political appointees, which focuses almost exclusively on the federal government. In addition, by using Virginia as a case study and by surveying four other states, the dissertation identifies comparative issues regarding political appointees (as well as reorganization and civil service reform) to address in a more comprehensive study of the consequences of executive supremacy for state government.

## **IV. Methodology**

This chapter discusses the research methods used in the dissertation. This discussion begins by expanding on Chapter I's treatment of the overall methodological approach of this dissertation, the case study method. Specific research methods used during the study are then reviewed. These research techniques included structured interviews, document review, review of state legal statutes, and a review of constitutional debates and commentaries.

### **The Case Study Method**

The case study method itself is described by Silverman as one in which "the main question . . . is the quality of the analysis rather than the recruitment of the sample, or, say, the format of the interview (Silverman, 1993: 22). Yin defines a case study as:

an empirical inquiry that investigates a contemporary phenomenon within its real life context; when the boundaries between phenomenon and context are not clearly evident; and in which multiple sources of evidence are used (Yin, 1989: 23).

The use of a case study is particularly attractive, and at the same time somewhat problematic, when applied to state government. In many respects, each of the fifty states is a universe of one, and aspects of one state's government or political culture are often difficult to apply to another's.

Virginia has traditionally been particularly independent in its structures and relationships in government. It was the last state to allow elected school boards, is the only state with independent cities, and is the only state that forbids its governor from succeeding him or herself. The Virginia attitude towards approaches in other states often reflects the comment of Claude W. Anderson, the former chairman of the Virginia House of Delegates Privileges and Elections

Committee, "just because forty-nine other states do something doesn't mean that it's right." The multiplicity of approaches among states in general and Virginia's tradition of independence in particular make generalizing about experiences within Virginia particularly troublesome.

At the same time, the case study approach does offer a workable way to examine a level of government that is often neglected in public administration research. The case study approach allows for a level of detail in analysis that is not possible in comparisons of all fifty states or even several states.

Comparative analysis of state governments is plagued by the level of analysis problems that are more commonly associated with research in comparative government. Because of the different institutions and political cultures in the fifty states, it is hard to compare, for example, Virginia to Massachusetts without also comparing the proverbial apples to oranges. The case study approach offers a workable way for research to be conducted at the state level. Comparisons can be made with other states, using the state that the case study focuses on as a frame of reference. The case study can thus be used to frame questions to test in other states.

In order to address the research questions for this study, and in order to frame other questions, the case study was developed using the following research methods:

- structured interviews,
- document reviews,
- review of state legal statutes and state constitutions.

## **Research Tools and Techniques**

### **Structured Interviews**

In the case study approach used by this dissertation, interviews were conducted with a sample of fifteen individuals: one legislator, three legislative staff members, one representative of a state employee group, and ten current or former executive branch employees. These interview subjects included:

- one senior legislator,
- three senior legislative staff members
- one former cabinet secretary,
- three former agency heads (one of whom was also a former deputy secretary of administration),
- one former agency deputy directors,
- one current agency heads,
- one current agency deputy director,
- four current middle managers.

Interview subjects were selected using a networking strategy. The author's experience in using qualitative methods has suggested that a networking strategy is potentially more effective for identifying interview subjects than the more traditional random sampling technique. This is because the associational approach used in the networking strategy more closely mirrors the social world in which we live. A random sample can select potential interview subjects; it cannot assure that those selected will be willing or able to help the interviewer. A networking strategy, on the other hand, takes a more collegial approach to identifying helpful interview subjects and thereby improves the chances of producing meaningful information.

The interviews consisted of two parts. The first part comprised a structured questionnaire, which was substantially the same for each interview. In designing this questionnaire, the author consulted a standard text on the subject. This standardized questionnaire allowed for some comparisons of responses. The second part of each interview consisted of a more conversational interaction between the interviewer and the interview subject, with the interviewer serving to facilitate rather than direct the discussion. This approach allowed for a more open exchange and encouraged the interview subject to be as expansive as possible in their remarks.

Interview subjects were contacted by telephone and told the general aims of the dissertation. An interview time and location was then arranged; a telephone interview was conducted in several cases to suit the convenience of the interview subject. Interview subjects were told to expect a total interview time of between sixty and ninety minutes. Detailed interview notes were taken, but the interviews were not tape recorded.

The decision not to tape record interviews was made for several reasons. The author has extensive professional experience in qualitative interviewing and has found that the use of a tape recorder inhibits interview subjects, introduces a technological "third party" into what should be one on one interaction, and focuses interview analysis on minor issues of transcription rather than the major conceptual points of the interview.

In addition, the nature of the interview questions in this particular study were unusually sensitive in nature and were asked in an unusually sensitive time in Virginia state government. Several interview subjects noted fear retaliation by superiors in the executive branch for any comments that they made which might

be interpreted as criticism of the current administration. Therefore, the normally observed disadvantages in using a tape recorder in conducting interviews were greatly magnified.

In addition, all interview subjects were promised confidentiality. It was agreed that interview subjects would only be described by level of responsibility (a former agency head), not by agency, exact title, or name. The author agreed to promise confidentiality in the interest of promoting frank discussion with interview subjects.

The prepared (structured) questions for each interview varied somewhat, depending on the background of the individual being interviewed. Questions for each interview subject were customized by the author, dependent on the interview subject's career background. However, the bulk of interview questions were the same for each interview, allowing generalizations to be made across interviews. These questions included:

Could you describe your career background in state government?

What was your view, if you had one at the time, regarding SB 643? HB 776?  
Why?

What effect, if any, did SB 643 have on you professionally? What effect, if any did HB 776 have on you professionally?

Did you ever feel that your job was in jeopardy as a result of SB 643 or HB 776?

(For agency heads) Did you ever feel that the jobs of your subordinates were in danger as a result of SB 643 or HB 776? How did you determine which of your subordinates should fall under the purview of HB 776 or SB 643? Did you reorganize your agency to affect the number or type of employees covered by HB 776/SB 643? Did you ever remove an employee using SB 643/HB 776? (If yes) please describe these changes.

What were the advantages for managers of SB 643 and HB 776?  
What were the disadvantages?

Did the implementation of SB 643 or HB 776 change your behavior in the workplace? (If yes) Please describe these changes.

What is your understanding of the Governor's reorganization powers? Position abolishment powers? Do you view these powers as sufficient? Insufficient? Too sweeping?

In your career in state government, were you ever involved in a reorganization? (If yes) Please describe the reorganization(s) in which you were involved? Was your job affected by the reorganization? (If yes) How? Did you have any input into the reorganization? (If yes) What form did this input take?

(If involved in a state government reorganization) Did the experience of undergoing the reorganization change any of your workplace behaviors? If so, please describe these changes.

How secure would you describe a civil service job in state government? How secure do you feel in your job? How has this changed, if at all, since the beginning of your career in state government? (If change is indicated) What do you think accounts for the changes that you have noticed in the perceived job security of state employees?

How much, if at all, do partisan politics affect state employees in their day-to-day job responsibilities? Has this changed during your career in state government? If you have perceived changes, what has changed and what do you think accounts for these changes?

How conscious are you (were you) of partisan politics in your present (last) position in state government? Were you more or less conscious of partisan politics than earlier in your career? Why?

(For current middle managers) What effect, if any, did the change in 1994 regarding bumping rights have on your feelings of security in your job? What do you think the intent was in eliminating bumping rights?

Overall, do you feel that the politicization of state government has increased, decreased, or stayed about the same between the beginning of your career and now? (If an increase or decrease in politicization is indicated) To what do you attribute this change that you have noticed in the degree of politicization in state government?

The one exception where most of these questions were not used was the interview with a senior legislator. In this interview, questions focused on the legislative intent of the statutes discussed during this dissertation.

Analysis of interviews focused both on comparisons across the entire set of interviews (such as on perceptions regarding the level of politicization in state government) and on issues unique to the interview subject (such as the origin of SB 643, in the case of the interview subject who was deputy secretary of administration at the time). Analysis of interview results was more conceptually based than content-analysis based, as transcripts were not taken for interviews. Selected results from the interviews are reported in Chapter VIII. It should be emphasized that, unlike some qualitative dissertations, this dissertation does not rely on interviews as a primary research method. Rather, interviews were used to supplement findings and analysis developed from review of documents, statutes, and the Virginia constitution.

### **Document and Data Reviews**

Document review consisted of a review of legislative hearings and reports, committee minutes, internal correspondence, working papers from the Governor's Commission on Government Reform as well as its final report, and publications from state agencies, principally the Joint Legislative Audit and Review Commission (JLARC). Document reviews included:

- *Acts of Assembly* (session laws) for relevant sessions of the General Assembly (principally the 1985, 1994, and 1995 sessions of the General Assembly),
- Internal working papers and the final report from the Governor's Commission on Government Reform,

- JLARC's reviews of the Reorganization of the Department of Education, the Department of Personnel and Training, the Implementation of HB 776, and the Reorganization of the Department of Environmental Quality,
- Lists of all employees excluded from the Personnel Act by SB 643 and by HB 776 that the Department of Personnel and Training is statutorily required to maintain,
- *Proceedings and Debates of the Senate of Virginia Pertaining to Amendment of the Constitution and Proceedings and Debates of the House of Delegates Pertaining to the Amendment of the Constitution*, and
- Professor Howard's *Commentaries on the Constitution of Virginia*.

*Acts of Assembly*. For each session (regular and special sessions) of the Virginia General Assembly, the statutes and resolutions adopted during that session are compiled in *Acts of Assembly (Acts)*. These are often referred to as session laws. Session laws differ from the state code in several ways. These differences include:

- session laws reflect only one session's lawmaking, rather than being a collection of all active statutes,
- session laws include resolutions and other non-statutory actions, and
- session laws may include statutes that do not take effect as law (either because of a reenactment clause, a judicial finding that the statute is unconstitutional, or because of a conflicting statute with a later effective date)<sup>1</sup>.

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<sup>1</sup> In the case of two statutes which are mutually exclusive or conflicting adopted during the same session (an all too frequent occurrence), the statute with the most recent enactment becomes law.

For research purposes, session laws are useful because they reflect the new and former language for a given statute. This allows for a straightforward examination of changes in a statute. Each statute in Virginia is assigned an Acts chapter. For this dissertation, the statutes reviewed included SB 643, HB 776, HB 2194, the Virginia Personnel Act, the reorganization statute, and the state's employee grievance statute.<sup>2</sup> Appendix A shows HB 776 as adopted. The language lined out in this document reflects the text of SB 643. Therefore, this document is useful for comparing the provisions of the two statutes.

*Committee Reports of the Governor's Commission on Government Reform.* The Governor's Commission on Government Reform was created by Executive Order 94-1, shortly after George Allen took the oath of office as Virginia's governor in January 1993. The Commission was made up of politicians and business leaders, with a staff of employees detailed from state agencies. Governor Allen charged the Commission on Government Reform with examining all areas of state government for improved efficiency and potential streamlining. The committee reports from this effort are valuable to this dissertation for two reasons. First, they provide useful secondary information on the state workforce and other issues. Second, and more importantly, the Commission on

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<sup>2</sup> Senate Bill 643, Chapter 596, 1985 Virginia Acts of Assembly. House Bill 776, Chapter 653, 1994 Virginia Acts of Assembly. House Bill 2194, Chapter 757, 1995 Virginia Acts of Assembly. The Personnel Act is Section § 2.1-116 of the *Code of Virginia*. The grievance statute is § 2.1-114.5:1 of the *Code of Virginia*. The reorganization statute is § 2.1-8.1 of the *Code of Virginia*.

Government Reform provides a useful window into the thinking of the Allen administration regarding workforce issues.

The reports of the Commission on Government Reform are also important for study of separation of powers in Virginia. The reports, taken as a whole, are a sweeping call for significantly enhancing the already formidable administrative powers of the Virginia Governor at the expense of the General Assembly. As later chapters will demonstrate, several of the important recommendations of the Commission on Government Reform have already been implemented through executive action. Moreover, with legislative approval, the Commission on Government Reform has been institutionalized as the Commonwealth Competition Council.

*JLARC Reports.* The Joint Legislative Audit and Review Commission (JLARC) is an oversight agency of the General Assembly, charged with insuring that state agencies and programs are managed and implemented in the most efficient, effective manner. JLARC is a bipartisan commission of the legislature, with nine members of the House of Delegates, appointed by the Speaker of the House and five members of the Senate, appointed by the Senate Committee on Privileges and Elections. The commission has a nonpartisan staff of 33 employees, including 24 research staff. The staff director is appointed for a six-year term by both houses of the General Assembly.

Several JLARC reports that are relevant to this study. JLARC's 1983 *An Assessment of the Secretarial System in Virginia* provides useful context for understanding Virginia "policy coordinator" model for cabinet secretaries. The 1991 JLARC report *The Reorganization of the Department of Education* raised concerns about the state's civil service protections in the case of reorganizations. JLARC's 1993 *Review of the Department of Personnel and Training* examines the state agency charged with overseeing the merit system and provides useful background on the development of the state merit system. JLARC's 1994 staff memorandum to the Senate Finance Subcommittee on Compensation and General Government on the implementation of House Bill 776 provides a detailed analysis of the effect of the implementation of that statute. JLARC found that the statute's criterion for excluding employees from the Personnel Act was overly broad and led to treating similarly situated employees differently among agencies, cabinet secretariats, and even with the same agency. Finally, JLARC's 1995 *Review of the Reorganization of the Department of Environmental Quality* raised continuing concerns about merit system protections in state agencies in the case of reorganization, and pointed out the changing role of cabinet secretaries in the day-to-day management of agencies (particularly regarding personnel matters). The report also raised concerns about the politicization of the Department of Environmental Quality.

*Lists of Excluded Employees.* Senate Bill 643 and House Bill 776 both required the Department of Personnel and Training to maintain “ongoing and up-to-date” lists of positions excluded from the Personnel Act. The author obtained a list of employees excluded from the Personnel Act by SB 643 as of June 30, 1994 (the last effective date for the statute) and a list of employees excluded from the Personnel Act by HB 776 as of December 1, 1994. These lists allow a comparison to be made of the types of employees excluded by the two statutes, to determine differences among them. In addition, the lists of excluded employees for both SB 643 and HB 776 allows for analysis of the scope and breadth of the penetration of the excluded category of employees in the state workforce.

*Documents Related to the Adoption of the State Constitution.* Virginia has a modern constitution, adopted in 1971. Debates in both the House of Delegates and the Virginia Senate regarding the adoption of the new State Constitution have been published as, respectively, *Proceedings and Debates of the House of Delegates Pertaining to the Amendment of the Constitution*, and *Proceedings and Debates of the Senate of Virginia Pertaining to Amendment of the Constitution*. Both of these documents are the best available primary sources in determining the *Constitution of Virginia's* intent regarding the role of the Governor and the General Assembly relating to the civil service. Unfortunately, there are no transcripts available of the committee discussions

that preceded these floor debates. Nevertheless, the floor debates provide important insight into the intent of the framers of the current Virginia constitution on administrative matters, particularly the constitutional role of the governor and the General Assembly in administration.

In addition, Professor Howard's *Commentaries on the Constitution of Virginia* is generally viewed as the authoritative secondary interpretation of the *Constitution of Virginia*. Professor Howard served as the executive director of the Commission on the Revision of the Constitution that drafted the proposed language for the 1971 Constitution. He is widely viewed as the foremost expert on constitutional issues in Virginia.

### **Review of Other States Legal Statutes**

To place findings from the case study on Virginia in context, legal statutes were reviewed from four nearby states. These states were Tennessee, North Carolina, West Virginia, and Pennsylvania. These states were selected, because they are the benchmarks against which Virginia state government often measures itself. In the author's experience, in considering a change to a state agency or program, a legislator's first question is often "What does North Carolina do?" In addition, these states provide a good range in terms of size, degree of civil service unionization, and political culture.

Using the law library at the Supreme Court of Virginia, the author reviewed the relevant personnel statutes and grievance statutes for each of the

four states. The author then made a telephone call to the central personnel agency in each case, to speak with staff in the personnel policy section in order to confirm his understanding of the statutes. As part of this interview, the author also attempted to determine the number of employees excluded from the state personnel statute by various exemptions. This was compared with JLARC's 1994 findings on the same issue. The number of employees excluded from personnel protections by various statutory exemptions was then compared to the total number of executive branch employees reported in the *Book of the States*, a standard reference work on state government.

The author also reviewed the statutes of the four neighboring states to determine the reorganization powers of the Governor as well as the employment rights of state employees during executive reorganizations. Specifically, the author examined:

- whether legislative approval was required of intraagency reorganizations,
- whether legislative approval was required of inter-agency reorganizations,
- the position abolishment power of the governor and/or agency heads (including whether position abolishment was a grievable matter), and
- whether employees were given a statutory right to seniority-based layoffs (bumping rights).

## **V. Civil Service Reforms in Virginia**

“Personnel is policy”

--Rebecca Norton Dunlop, Deputy Director, White House Personnel, 1981-1983;  
Secretary of Natural Resources, Commonwealth of Virginia (1994-present)

Virginia was relatively late in adopting a merit system and did not devise a system with particularly strong safeguards. Nevertheless, political partisanship had not been an issue in civil service hiring in Virginia until the 1970's, because Virginia did not have a viable two-party system until that time. Similarly, there was little perceived need to have bureaucrats be politically responsive, because electoral politics in Virginia essentially stopped with the Democratic primary, the winner of which was generally guaranteed success in the general election.<sup>1</sup> As Virginia developed a viable two-party system, pressure increased to reform the civil service system to provide for a bureaucracy that was more responsive and accountable to the Governor. This chapter briefly traces the development of a merit system in Virginia, and then discusses attempts since 1985 to modify the merit system to increase the responsiveness of senior career administrators to the Governor.

### **History of Merit System Protections in Virginia**

Rosenbloom (1982) describes the federal merit system established by the Pendleton Act as centered on merit-based selection via competitive examination, personnel rules developed to enforce the act through a Civil Service Commission, and “restrictions on the dismissal of federal employees” (4).

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<sup>1</sup> Prior to the 1970's, the standard joke about the Republican convention in Virginia was that it could be held in a phone booth. In 1964 there was one Republican state senator out of forty total members. From 1900 to 1970, Republicans captured only five percent of state legislative seats. As recently as 1991, Republicans held only 9 of 40 seats in the Virginia Senate.

Virginia first established a merit-based civil service in 1942, with the adoption of the Virginia Personnel Act (JLARC, 1993). As Greene (1982) notes, most states adopted a merit-based civil service system during the period 1939 to 1980, because of a variety of federal statutes requiring or encouraging merit based civil services as a condition of federal funds for particular programs.<sup>2</sup> Merit requirements for participating states were first appended to the Social Security Act at the request of President Roosevelt in 1939 (Greene, 1982: 39).

In the first 40 years of its existence, Virginia's civil service remained relatively apolitical and free of significant partisan duress. That all changed with the emergency of a two-party system in the state and with the drive to make the civil service more responsive to the Governor.

### **Creation and Development of Virginia's Merit System**

The merit-based civil service system in Virginia was slow in coming (though not as slow as in many other states). Virginia's civil service system was created more than fifty years after the Pendleton Civil Service Act established the competitive civil service at the federal level in 1883. The 1938 General Assembly directed the Virginia Advisory Legislative Council to study adopting a merit system for state employees. The 1942 General Assembly approved the Virginia Personnel Act, which established a merit system for selection and promotion of State employees.

The Personnel Act sharply limited the Governor's appointment powers. The Governor was designated the State's chief personnel officer, but agency

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<sup>2</sup> Curiously, Greene does not list Virginia as one of the states that adopted a merit system between 1939 and 1980. Greene's figure of 36 such states must therefore be revised upward by at least one.

heads were made the appointing authority for all positions in their agency. The Governor was allowed to appoint only certain agency heads and members of state boards.<sup>3</sup> The Virginia Constitution of that time did not contain a provision empowering the Governor to appoint heads of agencies; the Governor's appointment powers were limited to those granted by statute (Howard, 1974: 633).

According to the Personnel Act, selection for state positions was to be on the basis of merit, not political considerations. The first paragraph of the Personnel Act states that "the purpose of this chapter is to ensure for the Commonwealth a system of personnel administration based on merit principles and objective methods of appointment, promotion, transfer, layoff, removal, discipline, and other incidents of state employment." Specifically regarding appointment to state positions, the Personnel Act states that "In accordance with the provisions of this chapter all appointments and promotions to and tenure in positions in the service of the Commonwealth shall be based upon merit and fitness, to be ascertained, as far as possible, by the competitive rating of qualifications by the respective appointing authorities" (*Code of Virginia* § 2.1-111).

The implementation of this general statutory charge to develop a merit system was left entirely to the executive. Moreover, the state's grievance procedure specifically notes that "Management reserves the exclusive right to manage the affairs and operations of state government . . . Complaints related solely to the following issues are not grievable and shall not proceed to a

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<sup>3</sup> Virginia did not have cabinet secretaries until the 1970's. Cabinet secretaries and deputy secretaries are now appointed by the Governor, as are agency heads.

hearing: . . . termination, layoff, demotion, or suspension from duties because of lack of work, reduction in work force, or job abolition" (*Code of Virginia*, § 2.1-110). This provision was originally contained in the Personnel Act; it was moved to the grievance statute in the 1970's (interview). In formal terms, this provision was enough to render the Virginia merit system meaningless in terms of ensuring that tenure in office was based on merit. An employee could be dismissed for any of the three stated causes (lack of work, reduction in work force, or job abolition) with no grievance rights; Virginia also has no seniority rights for employees facing a reduction in force or job abolition. An employee terminated for other reasons (such as conduct) could file a grievance.

Pak's (1984) concern about the inability of public executives to hold employees accountable is not applicable to Virginia state government. In fact, as a senior human resource administrator observed in an interview, management has almost complete power over state employees in terms of tenure in office, discipline, and other matters. The grievance system provides limited recourse to employees with regard to grieving retaliation for protected acts or misapplication of policy. However, because personnel policy gives so much discretion to agency management, it is possible to comply with personnel policy and still exercise enormous discretion over an employee's tenure in office provided management makes a claim that dismissal is for lack for work, reduction in job force, or position abolition. Dismissal for other cause would be grievable, however, as later chapters will show, position abolition, rather than dismissal for cause, is an increasingly popular means of targeting employees.

Another factor in the weakness of Virginia's formal merit system was the complete absence of public employee unions in the State. Public employees in

Virginia are forbidden to collectively bargain. Section 40.1-57.2 of the *Code of Virginia* states:

No state, county, municipal, or like governmental officer, agent, or governing body is vested with or possesses any authority to recognize any labor union or other employee association as a bargaining agent of any public officers or employees, or to collectively bargain or enter into any collective bargaining contract with any such union or association or its agents with respect to any matter relating to them or their employment or service.

This prohibition on collective bargaining for public employees is not unusual in the South, which has traditionally been hostile to labor unions. The lack of public employee unions means that state employees in Virginia do not have rights enumerated in union contracts, as is the case in states with collective bargaining for public employees.

One demonstrable outcome of the adoption of a merit system in Virginia was the establishment of a central personnel function for the State. From 1942 to 1948 the State's budget director also served as director of personnel. The central personnel function was created in 1948, with the appointment of the State's first full-time personnel director and the establishment of the Division of Personnel. The Governor remained chief personnel officer, but a 1952 revision of the Personnel Act delegated most day-to-day personnel responsibilities such as compensation and classification and benefits administration to the Division of Personnel.

Despite the weakness of Virginia's formal merit system, Virginia had a strong unwritten merit system. Partisan affiliation was not generally an issue in State hiring at any level from the creation of the merit system in the 1940's until the 1970's. This is partially because, like most States of the old Confederacy,

Virginia had only one functional political party, the Democratic Party, controlled from the 1920's until 1968 in Virginia by the Byrd Machine of former Governor and U.S. Senator Harry Flood Byrd. The lack of a two-party system was not the only factor that promoted lack of partisanship in hiring however, as this easily could have provided the opportunity for state positions to be filled through political patronage. This did not occur, largely because Virginia's political leaders, most prominently Harry Flood Byrd, believed in the ideal of a neutrally competent civil service (interview).

Byrd's belief in a neutrally competent civil service obviated the need for stronger civil service protections as the political order that Byrd's Democratic machine established dominated the state for much of this century. To illustrate how complete Democratic control of Virginia has been, the Democrats have controlled both houses of the Virginia General Assembly since the end of Reconstruction in the 1870's.<sup>4</sup> Linwood Holton, elected in 1969, was the first Republican elected Governor of Virginia since Reconstruction. Holton's election was largely due to a split in the Byrd Machine.

However, by the 1970's Virginia had a functioning two-party system, with the Republican Party winning every gubernatorial election held during the 1970's. As of this writing, the two parties have reached near political parity in the General Assembly, with the Senate split 20-20 between the parties and the Democrats holding a 52-47 edge in the House of Delegates (with one

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<sup>4</sup> As a result of the 1995 legislative elections, Republicans achieved a share of power in the State Senate, which is deadlocked 20-20. However, the Lieutenant Governor is a Democrat, giving his party a theoretical majority on most matters.

independent). This condition of near parity has significantly heightened partisan tensions in state government (interviews).

Moreover, the size and scope of state government expanded significantly. In 1942, when the Personnel Act was first adopted, there were approximately 20,000 state employees. In 1970 there were 63,895 (*Governor's Management Study*, 1970). By 1985, there were 91,428. By 1995 this number had grown to 108,863 (1985 Appropriation Act; 1990 Appropriation Act). As the state workforce has grown, Virginia Governors have increasingly felt the need for greater flexibility in the State's personnel system and for more authority over the state bureaucracy.

Governor Linwood Holton drew upon private sector executives and professionals to conduct the 1970 Governor's Management Study, intended to infuse the State's management with private sector wisdom. This study made a number of recommendations regarding the personnel function. The most important of these was the recommendation that the Division of Personnel be realigned as a central personnel staff focused on developing policies and procedures rather than performing line personnel functions. The Governor's Management Study recommended that most day-to-day personnel activities be decentralized to state agencies.

After several years of failed attempts to implement this decentralized approach to personnel administration, the 1976 General Assembly created the Department of Personnel and Training (DPT), replacing the Division of Personnel (*Chapter 761, 1976 Acts of Assembly*). This act decentralized most hiring decisions to State agencies, leaving DPT only to set policy with regard to hiring and to approve deviations from policy (such as offering a new hire a salary

higher than that allowed by policy). As part of its decentralization effort, the State largely discontinued the practice of administering competitive exams for employee selection. Competitive testing was replaced by an interview panel of at least three employees who then rated applicants who had been selected for an interview from a screening of employee applications.

With the elimination of the Division of Personnel and the creation of DPT, Virginia no longer had a strong central entity overseeing the merit system. Indeed, JLARC's 1993 review of DPT found that Virginia's personnel system is very decentralized when compared with other states. The lack of a strong central entity to oversee the State's merit system, combined with the absence of public employee unions and the sparse formal protections in the Personnel Act created significant potential for abuse of the merit system. This potential for abuse would be greatly increased by merit system reforms during the 1980's and 1990's.

### **The Beginning of Virginia's Two Party Era**

John Dalton's election in 1977, the third straight victory for the Republican Party in the Governor's race, combined with the election of J. Marshall Coleman as the State's first Republican Attorney General signaled the beginning of Virginia's two party era.<sup>5</sup> The previous two state-wide losses had been explained by Virginia Democrats as the result of a divided party and the breakup of the Byrd Machine (1969) and the popularity of former Democratic Governor Mills Godwin as the Republican candidate in 1973.<sup>6</sup> In 1977, there were no such

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<sup>5</sup> No Republican has ever been elected Lieutenant Governor of Virginia since Reconstruction (the only other statewide office). James Gilmore was elected Virginia's second Republican Attorney General in 1993.

excuses to explain Republican victories in two of the three statewide elections. Coleman's victory in the Attorney General's race was particular shock, because no Republican had been elected Attorney General of the Commonwealth since Reconstruction.<sup>7</sup> The Republican Party had become a viable force in statewide elections.

The Dalton Administration began using partisanship as a criterion for appointment to some state positions. The two previous Republican administrations had appointed even senior appointees such as agency heads and cabinet secretaries without regard to party. Governor Dalton's chief of staff, on the other hand, attempted to place partisan allies of the Governor in state classified positions. This was accomplished through the simple expedient of attaching the chief of staff's business card to the state application of favored candidates. An agency head who served at the time reports that this was a persuasive approach (interview).

However, the Dalton administration had no delusions of taking control of the Virginia General Assembly. In 1981, at the end of Dalton's term, there were eight Republican members of the 40 member State Senate, and 25 members of the 100 member House of Delegates (Secretary of the Commonwealth, 1981). The overwhelming Democratic majority tempered many of the administration's partisan impulses. For example, Governor Dalton was widely criticized by fellow Republicans for allowing Lieutenant Governor Charles Robb to attend and

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<sup>6</sup> The *Constitution of Virginia* forbids Governors from succeeding themselves. An individual may serve as Governor more than once if the terms are not successive. Mills Godwin was Governor of Virginia as a Democrat from 1966-1969 and as a Republican from 1973-1977. This is the only case in modern Virginia history of a Governor serving more than one term.

<sup>7</sup> Democratic candidate Charles Robb was elected Lieutenant Governor, the third statewide office.

sometimes to chair cabinet meetings. Dalton explained this practice as a necessary concession to the General Assembly's Democratic majority. The prominence Robb achieved as Lieutenant Governor, however, helped him to win election as Governor in 1981, breaking the cycle of Republican victories.

Democratic candidates were to win all three races in all three statewide elections during the 1980's. Meanwhile, during this time the Democratic majority in the General Assembly steadily shrank to a margin of only three seats in both the Senate and House of Delegates in 1995. As a measure of the rapid decline of the Democratic majority in the General Assembly, in the 1995 Virginia Senate elections, the Democrats fielded fewer candidates (28) than they had state Senate seats (31) in 1991.

### **SB 643 and the Further Weakening of Virginia's Merit System**

Despite the structural weaknesses of Virginia's merit system, Governors periodically complained of their inability to remove intransigent civil servants and of the requirement to fill even senior management positions in agencies with merit system employees. Over time, the General Assembly exempted large segments of the State workforce from the Personnel Act. By 1985 these exemptions included:

- law enforcement officers,
- legislative and judicial employees,
- the presidents, teaching, and research staff of State educational institutions,
- employees of the Department of Workers' Compensation, Industrial Commission of Virginia,
- investment staff of the Virginia Retirement System, and
- curatorial and conservatorial staff of the Virginia Museum of Fine Arts.

The Governor retained the power to appoint most agency heads<sup>8</sup> and members of the cabinet and their deputies. However, most state employees outside of higher education and law enforcement were covered by the Personnel Act. This included senior agency managers such as deputy directors, mental hospital directors, and prison wardens. Concern over the management of the Department of Corrections would spark a significant change to Virginia's Personnel Act.

In 1984, six death row inmates escaped from Virginia's maximum security prison in Mecklenburg. An angry Governor Robb promised sweeping reform of the state Department of Corrections as a result of this and other, less publicized escapes. In particular, Governor Robb wanted to exert more control over the department's wardens at major correctional institutions and the superintendents of correctional work camps (correctional field units). Governor Robb was especially angry at the warden at Nottoway Correctional Center, who had been quoted in the media criticizing the Robb administration's reaction to the Mecklenburg escapes.

Governor Robb's desire to overhaul the Department of Corrections intersected with his frustration that mid-level and senior level bureaucrats in State government were not sufficiently responsive to his administration. Chong M. Pak, who later became the State's Director of Personnel and Training during

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<sup>8</sup> Within the executive branch, the Governor does not appoint the director of the State Council of Higher Education for Virginia, State museums, the Department of Game and Inland Fisheries, and the chancellor of the Virginia Community College System. All are appointed by their respective governing boards. In addition, the Governor does not appoint university presidents, who are appointed by Boards of Visitors. The Governor does appoint the governing boards of all of these entities, however appointments to these boards are staggered so that the Governor does not get to appoint a majority of board members until the third year of the administration.

the administration of Gerald Baililes, expressed this frustration in a 1984 article. Pak stated that “public executives have far less control over their environments that do their counterparts in the business world” (Pak, 1984). In Virginia, this was more perception than reality, as removal of civil servants for cause was straightforward and involved only minimal appeals. Removal of civil servants during reductions in force required no appeals at all.

However, signaling his desire to gain more control over the state bureaucracy, Governor Robb submitted Senate Bill 643 to the 1985 General Assembly<sup>9</sup>. This bill exempted several categories of bureaucrats from the Virginia Personnel Act. These included:

- all civil servants reporting directly to an agency head,
- all civil servants grade 16<sup>10</sup> and above reporting to an official one level below the agency head (typically a deputy director),
- all prison wardens,
- all correctional field unit superintendents.

The bill also stated that, in the case of agencies with fifty or fewer employees, only the “immediate advisory or deputy or advisors or deputies” of the agency head could be excluded from the Personnel Act by SB 643. This provision was put in the bill in recognition that, in small agencies, significant

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<sup>9</sup> The bill's chief patron was Senator Elliot Schewel from Lynchburg, who introduced the bill at the request of the Governor. Senator Schewel later was instrumental in attempts to repeal SB 643.

<sup>10</sup> The State of Virginia's pay system has 23 pay grades. As of August 1995, the compensation for a grade 16 ranges from approximately \$41,500 to \$63,000.

portions of the agency's staff might report to the agency head. In addition, the bill stated that internal audit and employee relations positions were not to be subject to serving at the pleasure and will of the agency head, notwithstanding reporting relationship to the agency head or pay grade. This concession was made by the Robb administration to ensure that these functions would continue to be free from political pressure.

Each of the approximately 500 employees covered by Senate bill 643 served at "pleasure and will" of the appointing authority (the agency head). The positions affected continued to be filled using merit procedures and affected employees received the same employee benefits as other state employees, but the newly designated "pleasure and will" employees no longer had any recourse to appeal summary dismissal. While dismissals for reasons of race, sex, color, national origin, religion, age, handicap, or political affiliation were forbidden, but management was not required to give any cause for dismissing "pleasure and will" employees. In a 1985 Legislative Impact Statement, the Department of Personnel and Training (DPT) estimated that 508 State positions were affected by SB 643. These positions included:

- 73 clerical positions (generally secretaries to agency heads),
- 174 positions reporting to the agency head,
- 33 deputy directors or advisors to the agency head in agencies of fewer than 50 positions,
- 186 positions reporting to an official who reports directly to the agency head and are classified as a grade 16 or above, and

- 42 prison wardens and field unit superintendents<sup>11</sup>.

Despite the fears of the bill's critics, who predicted that the bill would create a spoils system in the Commonwealth, the passage of SB 643 did not result in significant turnover of senior employees during the next two changes of administration in 1986 and 1990. This is probably because the same party retained control of the Governor's mansion for two more terms.<sup>12</sup>

It is important to emphasize that SB 643 positions could not be directly filled by the Governor's office. These positions were filled in the same way as classified positions. The agency head remained the appointing authority for all positions within a given agency, and the Governor's office has traditionally lacked both the staff and the inclination to meddle in most agency hiring. However, SB 643 did allow the Governor's office to selectively target senior bureaucrats who had proven troublesome.<sup>13</sup> In this respect, the bill was analogous to Voltaire's description of Britain's use of the Articles of War to punish unsuccessful admirals: "from time to time the British shoot an admiral in order to encourage the others."<sup>14</sup> The SB 643 did not have to be invoked very often to dismiss a bureaucrat in order for it to affect the behavior of bureaucrats subject to the bill's provisions for summary dismissal.

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<sup>11</sup> Field unit superintendents were generally grade 14 positions. A correctional warden was a grade 16, and a warden senior was a grade 17.

<sup>12</sup> Governor Gerald Baililes (1986-1990) and Governor Lawrence Douglas Wilder (1990-1994).

<sup>13</sup> Executive Memorandum 1-85 required agency heads to obtain the approval of their cabinet secretary before removing a SB 643 employee. This provided a check against arbitrary action by the agency head, but also involved the Governor's office more directly in the tenure in office of senior career administrators (cabinet secretaries are considered part of the Governor's office).

<sup>14</sup> Voltaire's remark was prompted by the execution of Admiral Byng in 1756 for his failure to successfully seize the island of Minorca.

Ironically, the warden of Nottoway Correctional Center was transferred and demoted but not fired. According to press accounts at the time and the recollection of senior Robb administration officials and senior legislative staff, the bill was so obviously aimed at this individual that it became too politically embarrassing to actually use it against him<sup>15</sup>. The individual is still employed in the Department of Corrections research unit as of this writing.

Senate Bill 643 created the excluded class of state employees, employees who were excluded from using the grievance procedure but who otherwise were treated like classified employees. Roberts compared these employees to Norton Long's description of city managers, "managerial mercenaries . . . the most striking case of the public administrator whose role has outrun his profession's self-rationalization (Roberts, 1987: 42)" However, excluded employees formed only a small percentage of the total number of employees exempted from the State's merit system, through one exemption or another. JLARC's 1993 study of the state personnel system estimated that, of the approximately 113,000 state employees at that time, approximately 77,800 were classified employees. In other words, over a quarter of the state workforce or 35,000 employees now existed outside of the merit system. Table 1 shows the breakdown of these employees, by type of exemption from the Personnel Act.<sup>16</sup> However, only employees covered by SB 643 (and later HB 776) were "pleasure and will" employees. Employees who were otherwise exempted from

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<sup>15</sup> The bill's intended target and the legislation itself were the subject of a series of articles in the Richmond newspapers during the 1985 legislative session.

<sup>16</sup> A review of bills filed for the 1996 session of the General Assembly shows that the move to exempt more employees continues apace. After exempting employees of the State lottery in 1995, the General Assembly now has before it a bill to exempt employees of the Department of Correctional Education.

the Personnel Act were still required by statute to be covered by a grievance system, which would include the ability to grieve dismissal.

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**Table 1**  
**Categories of Virginia State Government Employees as of 1993**

<u>Category of Employee</u>	<u>FTE Number as of June 30, 1993</u>
Classified	77,800
Excluded (by SB 643)	551
Excepted: College President	41
Excepted: Agency Head*	82
Excepted: Faculty	14,390
Excepted: Non-Executive Branch	3,926
Wage	13,124
Adjunct Faculty	3,269
Total:	113,183

\*Appointed by the Governor to serve at "the pleasure of the Governor."

Source: JLARC, *Review of the Department of Personnel and Training*, 1993.

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Despite the anxieties it provoked in employees excluded by the statute, SB 643 received little public attention until George Allen was elected Governor in 1993. Governor Allen ran his campaign in part against what he characterized as an unresponsive, bloated state bureaucracy. On December 9, 1993, one month before he was to assume office, Allen's transition team delivered "Dear Public Servant" letters to approximately 450 state employees covered by Senate

Bill 643 demanding their resignations.<sup>17</sup> Quickly dubbed the "Yuletide massacre," this unprecedented demand for resignations included clerical employees, medical examiners, and other seemingly non-partisan officials in addition to agency deputy directors, division chiefs, and other senior managers. Most of these officials were subsequently retained in their positions, but the demand for so many resignations at the change of administration caused considerable concern within the state bureaucracy.<sup>18</sup> Allen's critics promptly accused him of attempting to politicize the state bureaucracy. The Allen administration's representatives responded by noting that the bill in question had been put in place by a Democratic Governor and General Assembly and suggesting that the Governor would offer his own reform to the legislation.

In retrospect, the potential for SB 643 to politicize the state civil service was clear. Indeed, at the time editorial writers had warned of making Richmond "another Raleigh," alluding to the widespread changes in state personnel that accompany every change in administration in North Carolina. The act specifically stated that "in implementing this exemption, personnel action shall be taken without regard to race, sex, color, national origin, religion, age, handicap, or political affiliation." However, the sweeping nature of the language that "such officers or employees shall thereafter serve at the pleasure and will of their appointing authority" effectively negated the stricture against taking personnel actions based on political affiliation. Since agency heads were not

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<sup>17</sup> Ironically, George Allen had voted against Senate Bill 643 as a member of the House of Delegates.

<sup>18</sup> Fears of a partisan purge of state employees after every election are particularly strong in Virginia, since Virginia, unlike every other state, is guaranteed to have a new Governor every four years.

required to offer any justification for dismissal of "pleasure and will" employees, and because this dismissal was not grievable, there was little recourse available to employees dismissed under the statute other than a federal suit raising a claim that federal constitutional rights have been violated<sup>19</sup>.

Pursuing a federal claim would require asserting that a dismissal action violated the Supreme Court's decisions in *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980). These decisions held that, as Justice Brennan's opinion in *Rutan v. Republican Party of Illinois* states,

To the victor belong only those spoils that may be constitutionally obtained. *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980) decided that the First Amendment forbids government officials to discharge or threaten to discharge public employees solely for not being supporters of the political party in power, unless party affiliation is an appropriate requirement for the position involved.

The burden of proof that the dismissal is solely for reasons of political affiliation would be placed on the dismissed employee. This would be difficult to establish for administrators in Virginia state government, as dismissals of will and pleasure employees in Virginia are generally accomplished in a more subtle way than Sheriff Elrod's dismissal of staff members (including Burns) for failing to join or obtain the support of the local Democratic Party. Instead of demanding that employees join a political party as a condition of continued employment (which in addition to being unconstitutional would clearly violate the statutory prohibition on dismissal based on political affiliation), agency heads could replace a will and pleasure employee arguing a personality conflict, a desire to have an incumbent

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<sup>19</sup> The Virginia Governmental Employees Association filed such a claim with regard to House Bill 776 on the behalf of several dismissed employees. This suit was rejected in U.S. District Court in Richmond and an appeal to the Fourth Circuit Court of Appeals is pending.

of their own choosing, or differences in management style. Governor Allen's request for resignations did demand employees join the local Republican Party, only that the employees fill out an application and send it to his transition team. As a result, Allen could reasonably argue that the removal of a particular individual was not motivated solely by political affiliation but also by skills, education, background, or other issues such as personality or management style.

Indeed, political relationships in Virginia have tended to be as much personality based as party based. Many of the SB 643 employees whose resignation Governor Allen demanded were Republicans, however, they did not have personal ties to the incoming administration. The *Elrod* and *Branti* decisions are not clearly applicable to dismissals based partly on the absence of personal association.<sup>20</sup> Moreover, some of the positions encompassed by SB 643 could be viewed as meeting the test announced in the *Branti* decision for dismissals based on political affiliation, which is whether political affiliation is an appropriate requirement for the position in question.

The potential of SB 643 to politicize the civil service had not become clear earlier because the Robb administration was followed by two other Democratic administrations. Given that the Virginia Governor is limited by the *Constitution of Virginia* to one term, SB 643 codified the potential for sweeping changes in state government personnel every four years. After the Allen administration's demand

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<sup>20</sup> When the Bush White House was reviewing applicants for political appointments, the application form included a blank for Republican experience and a blank for Bush experience. The later was viewed as the more significant of the two.

for mass resignations, legislators began to worry that every four years would lead to a purge of senior bureaucrats by the incoming administration.

As a result of the Allen administration's unprecedented use of SB 643, a previously ignored legal question arose whether state employees excluded from the Personnel Act by SB 643 retained vested employment rights if they had been classified employees prior to the adoption of the statute. The State's Director of Employee Relations consistently ruled that employees who had formerly been in a classified position retained the grievance rights of that position with regard to dismissal even after their position was administratively reclassified as a SB 643 position (JLARC 1994; interview). While dismissals for three reasons (lack of work, reduction in force, and job abolishment) are nongrievable for classified employees, classified employees can file a grievance if they are dismissed for any other reason. The Employee Relations director ruled that dismissals of SB 643 employees who had previously been classified employees should be grievable unless the dismissals were for one of the three reasons explicitly exempted from the grievance process. This ruling was based on a local government case originating in the City of Norfolk.

In the City of Norfolk case, *Kohler v. City of Norfolk*, 234 Va. 341 (1987), the State Supreme Court ruled that employees who had been civil service employees could not have this protection stripped from them by a change in the city charter<sup>21</sup>. The specifics of the case involved a deputy librarian, Kohler, who

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<sup>21</sup> Virginia is a "Dillon's Rule" state, meaning that localities have only those powers granted to them by the General Assembly. While localities are governed by the Personnel Act in terms of minimum standards for public employees, they are empowered to grant employees additional civil service protections. In some cases, such as in the City of Norfolk, local employees have substantially more civil service protections than is the case for state classified employees. The Virginia Supreme Court did not hold that Norfolk had to offer civil service protection to Kohler in the first place, only that once these rights were granted they could not be unilaterally revoked.

had been acting city librarian. After Kohler was not selected for the permanent position of city librarian, she was perceived to be an obstacle for the new appointee. Therefore, the City Council changed the city charter to reclassify her position from a civil service position to an "at-will" position. She was subsequently dismissed.

Kohler sued, claiming that she had vested rights in her civil service position that could not be taken away by retroactive action. The Virginia Supreme Court agreed, ruling that once given, civil service protections such as grievance rights could not be unilaterally revoked by the City. In effect, the ruling gave municipal employees a property interest in their civil service employment, to the extent that this employment was protected by the local charter.

There was never a court ruling on whether the *Kohler* precedent was applicable to SB 643. In the one legal challenge to the Allen administration's use of SB 643 to remove employees that went to court, *Pignato v. DEQ*, a Richmond circuit court judge ruled that because Pignato had moved from the excluded position he had occupied as a classified employee (at the time of the SB 643's passage) to another excluded position, he voluntarily surrendered his grievance rights.<sup>22</sup> The court's ruling in *Pignato* did, however, leave open the possibility that the Kohler precedent could apply to state employees.

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<sup>22</sup> Pignato's case is somewhat complicated because of circumstances surrounding his transfer of position. In 1993, Pignato's agency the State Water Control Board was merged into the newly created Department of Environmental Quality. Pignato assumed a new position because his former position ceased to exist.

## **House Bill 776**

Responding to criticism of the Yuletide Massacre, the Allen administration agreed to support legislative changes to SB 643. Delegate Robert Ball of Henrico, the Chairman of the House Appropriations Committee and representative of a district with a high concentration of state employees, submitted HB 776, which would have essentially repealed SB 643.<sup>23</sup> The Allen administration objected to the outright repeal of SB 643 and instead submitted amendments to HB 776. The Allen administration's amendments to HB 776 stated that employees reporting to the agency head would serve at the "pleasure and will" of the agency head. The bill contained no special provisions to protect employees of small agencies, employee relations staff, internal audit staff, or employees below grade 16 (JLARC, 1994).

This administration's amendments to the bill ostensibly was designed to remove "non-political" employees who were not senior managers such as medical examiners from political control and restore merit system protections to them. However, the Secretary of Administration noted that some non-managerial positions such as public information officers and policy analysts would remain subject to the "pleasure and will" of the agency head (JLARC, 1994: 9). This amended bill was approved as House Bill 776 by the 1994 General Assembly (Appendix A).

The executive memorandum implementing House Bill 776 (9-94) explained the rationale behind the statute:

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<sup>23</sup> The 1991 General Assembly had passed a bill repealing Senate Bill 643, but at the request of the Wilder administration had placed a three year reenactment clause on the bill so that it would not become effective unless reenacted by the 1994 General Assembly, effectively continuing the provisions of SB 643 for the life of the Wilder administration (1991-1994).

Under the provisions of House Bill 776, which becomes effective July 1, 1994, state employees occupying designated positions will serve at the pleasure and will of their appointing authority. Agency heads and supervisory boards are thereby provided with an additional management tool to help ensure accountability and effective performance by employees in key policy, communications, and/or managerial role, thus advancing the accomplishment of the agency's mission and the effective implementation of official policies.<sup>24</sup>

The comment about "official policies" is particularly instructive in the context of the Allen administration. The administration was criticized in its early days for issuing a "gag order" to all state employees in the executive branch, forbidding them from communicating with the legislature or with the media without approval from the Governor. A spokesperson explained on the Governor's behalf that the order was not a gag order, but was meant to ensure that only the Governor's "true policy" would be communicated to the legislature or to the media (interview). Even agency heads have limited authority to speak to the media and to legislators (interview). State employee groups viewed HB 776 as an effort to muzzle state employees (interview).<sup>25</sup>

HB 776 seemingly restored merit system protections to a number of employees by removing correctional wardens and third tier employees (reporting to those who report to an agency head) from the exemption from merit system.

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<sup>24</sup> Executive memorandum 9-94, issued June 16, 1994 by Governor George F. Allen.

<sup>25</sup> In Virginia the General Assembly's standing committees do not have subpoena power, unlike congressional committees. The General Assembly can require information through an Act of Assembly (generally the Appropriation Act), but Acts of Assembly can only be approved while the General Assembly is in session (60 days in even numbered years; 30 to 45 days in odd numbered years).

However, as part of the administration's restructuring of Virginia government, the number of employees reporting to agency heads greatly increased as layers of management were reduced and organizations flattened. All public affairs, policy, and planning staffs were realigned to report to the agency head or to their relevant cabinet secretaries. JLARC's analysis of HB 776 found that the number of excluded positions decreased only slightly, from 560 positions as of June 30, 1995 (the last effective day of SB 643) to 520 as of December 1, 1994 (JLARC, 1994, p. 11).

Table 2 compares the provisions of SB 643 and HB 776.

<b>Table 2</b>		
<b>Comparison of Senate Bill 643 and House Bill 776</b>		
	<b>Senate Bill 643</b>	<b>House Bill 776</b>
Types of Positions Excluded From the Personnel Act	direct reports to agency heads; employees grade 16 and above reporting to a direct report to an agency head; correctional wardens and field unit superintendents	direct reports to agency heads
Positions not to be Excluded From the Personnel Act	employee relations and internal audit positions; any position in an agency with fewer than 50 employees other than the agency head's immediate deputy or deputies or advisor or advisors	NA

Source: JLARC staff memorandum on House Bill 776, December 1994, p. 3.

The sole criterion under HB 776 for being excluded from the Personnel Act was reporting to the agency head. Therefore, any employee, no matter the grade level, could become an at will employee if he or she reported to an agency

head or had their position moved organizationally to report to an agency head. The Secretary of Administration explained the sole criterion for excluding employees by stating that it made the statute easier to administer (JLARC, 1994: 9).

The application of this statute, in practice, led to some striking incongruities. For example, the Department for the Rights of Virginians with Disabilities (DRVD), with 22 employees, had 11 employees excluded from the Personnel Act by HB 776. The Virginia Department of Transportation (VDOT), on the other hand, with 11,570 employees only had 10 employees excluded by the Personnel Act. As JLARC pointed out, It is difficult to argue that DRVD, with a budget of less than two million dollars, has more senior level positions requiring at will appointments than VDOT has with a budget greater than two billion dollars (JLARC, 1994: 15).

In general HB 776 had a disproportionate effect on small agencies. In fact, of the 520 employees excluded from the Personnel Act by HB 776, 111 worked for agencies with fewer than 25 employees. These agencies, with 441 total employees, represented less than 1/2 of one percent of total executive branch employment. There were actually two small agencies, the Council on Information Management and the Council on Human Rights where 100 percent of the agencies employees (not including the agency head) were excluded from the Personnel Act by HB 776 (JLARC, 1994: 16).

Ironically, given the origin of the excluded category of employees in problems concerning the correctional system, HB 776 no longer excluded correctional wardens from the Personnel Act, because wardens did not report directly to the agency head. However, HB 776 had a potentially chilling effect on most state employees, because the statute did not impose any time limitations on an employee being converted from a classified position to an excluded position and then dismissed. In fact, it was theoretically possible for an employee to be a classified employee and then reclassified to an at will employee and dismissed all in the same day. This scenario actually occurred at the Department of Rehabilitative Services, where four employees were dismissed by the newly appointed agency head, on the same day that these employees were reclassified as HB 776 positions (interview).

Besides disproportionately affecting small agencies, HB 776 also excluded from the personnel act a number of employees who could not reasonably be considered managerial employees. These included clerical positions (though typically these were assistants to senior managers), a legal assistant, a public health nurse, museum exhibits staff, a Building and Grounds Supervisor at the Museum of Natural History, and a Boiler Chief Inspector at the Department of Labor and Industry (JLARC, 1994: 17).

JLARC found that HB 776 also had the effect of treating differently similar types of positions in different agencies or, in one instance, within the same

agency. For example, regional administrators in some agencies were excluded by HB 776 while regional administrators in other agencies were not (and thereby remained classified employees). In fact, in larger agencies such as the Department of Transportation and the Department of Corrections, regional administrators (who tended to have more responsibility and staff) remained classified employees, while regional administrators in smaller agencies, such as the Department of Rehabilitative Services and the Department of Environmental Quality became excluded employees (JLARC, 1994: 18). JLARC found that, in the case of the Department of Planning and Budget, employees within the same layer of management were treated differently in the implementation of HB 776. The agency had been traditionally organized into three layers of management, with a director, deputy directors for budgeting and for management/evaluation, and six section managers. The agency reorganized after the passage of HB 776 to have three of the section managers report directly to the agency head, thereby placing them under the auspices of HB 776. Three section managers continued to report to one of the deputy directors, thereby retaining their status as classified employees (JLARC, 1994: 19).

HB 776 had three potential effects that raise normative issues for public administrators. The first was a question of equity. Employees with similar types of job responsibilities and policy making roles were treated very differently under HB 776. For example, regional administrators in the Department of Corrections

continued to enjoy the job security of being a classified employee, while regional directors in the Department of Environmental Quality were subject to dismissal at the pleasure and will of the agency head. Similarly, some section managers in the Department of Planning and Budget retained the job protections of classified employees, while others became “pleasure and will” employees.

The second concern for public administrators raised by HB 776 was the potentially chilling effect that HB 776 could have on employees. Some normative theories of public administration call for public administrators to view themselves as constitutional officers, imbued with constitutional grounding, the public interest, and an agency perspective (Rohr, 1986; Rohr, 1989a; Rohr, 1990, Wamsley, 1990; Wamsley, et. al., 1990). However, serving as an at will employee or facing the potential to be reclassified as an at will employee had the potential effect of focusing public administrators' attention on one issue, protecting their jobs. Since the threat to one's job would come, under HB 776, from the appointing authority for whom one served at the pleasure and will, this creates a strong incentive for bureaucrats to be responsive to the agency head and only to the agency head (and by implication the Governor). This would have the effect of vitiating the legislative and the public's role in civil service, whereby the civil service is posited to be responsive to the public interest and to the people's representatives in the legislative branch.

The third normative issue raised by HB 776 was that of patronage. Because excluded employees were easy to replace, it became easier for an administration to target positions to fill with its supporters. While HB 776 required these positions, once vacated, to be filled using competitive processes, these could be circumvented. For example, the State Department of Environmental Quality filled several vacated HB 776 positions with individuals who were active in Republican Party circles (JLARC, 1995).

Responding to concerns raised by state employees and their representatives, as well as by the JLARC review of HB 776, the 1995 General Assembly took two separate approaches to revising the State's approach to excluded employees. The first approach, HB 2194, would essentially return the Personnel Act to the time before the adoption of SB 643. Once again, "managerial employees who are engaged in agency-wide determinations, or directors of major state facilities or geographic units as defined by regulation" would be excluded from the Personnel Act, but they would retain the right to grieve their dismissal, unless the dismissal was for lack of work, reduction in job force, or job abolition<sup>26</sup>. Therefore, there would be no at will employees beyond those appointed directly by the Governor.

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<sup>26</sup> As the next chapter will demonstrate, these three exceptions to an employee's ability to grieve dismissal have been used to great advantage by the past two administrations, to the point where they undercut the effectiveness of the remainder of the Personnel Act.

SB 896 was the other approach to revising HB 776. SB 896 sought to limit the Governor's previously unfettered power to reclassify state employees as excluded employees. This was to be accomplished originally by specifying in statute the positions to be excluded. When the administration objected that this would limit their flexibility and require frequent amendments to the statute, a compromise was agreed to whereby the excluded positions would be enumerated each year in the Appropriation Act. Moreover, SB 896 specified reasons for which excluded employees could be dismissed and gave them standing to appeal their dismissals to a circuit court. Excluded employees therefore would no longer be at will employees but instead would have to be removed for one of the causes specified in the statute.

However, the administration continued to have reservations about both HB 2194 and SB 896. Both bills passed with significant margins of victory in the General Assembly. HB 2194 was approved 90-10 by the House of Delegates and 39-0 by the Senate. SB 896 was approved 40-0 by the Senate and 87-11 by the House of Delegates. The Governor exercised his prerogative to submit amendments to both bills. The amendments, which were identical, added the following to the Personnel Act's list of exemptions:

In executive branch agencies the employee who has accepted serving in the capacity of chief deputy, or equivalent, and the employee who has accepted serving in the capacity of a confidential assistant for policy or administration. An employee serving in either one of these two positions, shall be deemed to serve on an employment at will basis. An agency may not exceed two employees who serve in this exempt capacity.

Language requiring that at will employees be competitively hired and receive the same benefits as other employees was removed. Absent a statutory provision regarding the means of filling the positions, they are assumed to be political appointments. Essentially, these amendments expanded the scope of the Governor's appointment powers in each agency from only the agency head to the agency head, deputy director, and one other position (either the director of policy or the director of administration).

The General Assembly narrowly agreed to the Governor's amendments to HB 2194 and the bill was enacted (the vote was 20-19 in the Senate). However, the Senate rejected the Governor's amendments to SB 896 and an attempt to pass the legislation notwithstanding the Governor's amendments failed by three votes to obtain the necessary two-thirds majority. The Governor subsequently vetoed SB 896. HB 2194, as amended by the Governor, is now in effect.

In reviewing the history of Virginia's merit system reforms to make the bureaucracy more responsive to the Governor, it is important to emphasize that these reforms passed by significant margins with support from both parties in the General Assembly. While the implications of the merit system reforms seem to be more partisan influence on administration, the reforms themselves were not seen as partisan. Rather, the reforms were seen as the General Assembly's traditional deference to the Governor and to agency heads in matters of personnel administration. Virginia's decade-long experiment with excluded

employees, a hybrid between a political appointee and a merit system employee appears to have ended. Ultimately, the excluded class of employees represented an unsatisfactory compromise in addressing the dilemma of maintaining a merit-based civil servant while providing for politically responsive bureaucrats. Instead, Virginia's General Assembly and Governor have chosen to increase threefold the number of political appointees in state government.

### **Increased Number of Political Appointees in Virginia**

HB 2194, as adopted, represented a compromise that substantially expanded the Governor's appointment powers (though the agency head would nominally continue to be the appointing authority) while reducing the number of state employees in serving at the will and pleasure of the agency head. HB 2194 also limited the potential for arbitrary designation of an employee as a will and pleasure employee. However, the administration's willingness to compromise on this issue may be explained by the broad nature of another of the Virginia Governor's powers, the reorganization power. This will be the subject of Chapter VI.

Light (1995) indicates, at the federal level the growth of political appointees has been exponential. The same has been true during the last three decades in Virginia. In 1969, as the Byrd Machine breathed its last, Virginia state government had one layer of political appointees: agency heads. The creation of the cabinet system in 1972 led to the establishment of another layer

of political appointees (JLARC, 1983). A third layer of political appointees was created in the early 1980's, when cabinet secretaries began to routinely have deputy secretaries (interview). A fourth layer of political appointees emerged in the late 1980's and early 1990's, as cabinet secretaries began to routinely have special assistants and other policy-related staff who performed liaison roles with agencies.

With the passage of HB 2194, Virginia now has five layers of political appointees between the Governor and career administrators where less than three decades ago there was only one layer. These five layers of political appointees now include: the cabinet secretary, the deputy secretary or secretaries, cabinet staff below the deputy secretary level, the agency head, and the two positions per agency designated by House Bill 2194.

One fear of career state employees is that, in due time, it will be decided that the political appointees created by HB 2194 need "their own team" of political appointees. This, alas, seems to be the inexorable logic of downward penetration of political appointees. No political appointee is comfortable on the layer immediately adjacent the career staff; it is always desirable to supervise other political appointees and to thereby minimize the policy making autonomy of career administrators. Light outlines this logic in his discussion of the Malek Manual (Light, 1995: 51-53). Layering of political appointees is a time honored

method of political executives to both control the career service and to render it impotent.

Merit system reforms and the growth in the number of political appointees are not the sum total of the politicization of administration in Virginia. The expansion of the Governor's reorganization power and the institutional governor also have had a significant effect on the politicization of state government. Chapter VI will discuss both of these issues. As can be seen from the next chapter, even classified employees are not protected from arbitrary dismissal. As part of the expansion of the Governor's reorganization powers job abolishment is increasingly used as a means to dismiss employees. As job abolishment is non-grievable, employees are left with little recourse when their positions are eliminated as part a reorganization.

## **Chapter VI. Executive Aggrandizement in Virginia**

Merit system reform is not the only factor that has increased the Governor's power of administration generally and the civil service in particular. Informal expansion of the Governor's reorganization powers and growth of the institutional Governor also served to expand the role of the chief executive in administration. The combination of civil service reform, expansion of the Governor's reorganization powers, and growth of the institutional Governor have combined to increase the Governor's already significant administrative powers. The aggrandizement of the Governor's administrative powers is animated by the belief that the Governor must have unfettered administrative power and discretion. This belief is not consistent with the view of the framers of the present *Constitution of Virginia*. The Virginia constitution confers significant powers on the Governor, but the Virginia constitution's framers consciously acted to prevent the Governor's power in administrative matters from being complete.

### **Constitutional Powers of the Governor in Administration**

Just as the history of the presidency can be viewed as one of aggrandizement, so too have the powers of the Virginia Governor have grown steadily since during this century. The Virginia founders' distrust of executive power was so great that, until 1851, the Governor was appointed by the General Assembly, not directly elected (Howard, 1974: 577). This was typical of early

state constitutions, which Howard notes were characterized by legislative supremacy (Howard, 1974: 571).

The Governor's constitutional powers were significantly enhanced in 1851, where the Governor received veto power over legislation. The Governor received a line item veto for appropriation bills as a result of the constitutional convention of 1901-1902 (Howard, 1974: 577; 580). The same convention granted the Governor the power to "suspend executive officers for misbehavior or incapacity" (Howard, 1974: 579). As a result of a constitutional amendment proposed by Governor Byrd, the Governor received the power to appoint agency heads in 1928.

The 1970 Governor's Management Study recommended creation of a cabinet in Virginia, consisting of Deputy Governors for Finance, Education, Human Affairs, Commerce and Resources, and Transportation and Public Safety (Commonwealth of Virginia, 1970: 170). The cabinet system began operation in 1972, though the term cabinet secretary was used rather than the term Deputy Governor (JLARC, 1983: 21).

The 1971 Virginia constitution enhanced the Governor's constitutional powers further by granting the Governor the right to remove agency heads (Article V, Section 10). The Governor's current powers under the 1971 *Constitution of Virginia* are outlined in Article V of the Virginia constitution. Article V, Section 1 confers general executive power on the Governor, stating

that “the chief executive power of the Commonwealth shall be vested in a Governor.” Article V, Section 7 directs the Governor to “take care the laws be faithfully executed.”

In addition to general executive powers, the Governor also has substantial legislative powers that bolster the Governor’s role in administration, particularly in budget matters. Article V, Section 5 grants the Governor authority to convene the General Assembly as well as to recommend bills to the General Assembly. Article V, Section 6 outlines the Governor’s veto power. Like the President, the Governor has the power to veto legislation. However, Article V, Section 6 (c) (iv) gives the Governor the power to veto individual items in an appropriation bill (the line item veto). In addition, Article V, Section 6 (b) (ii) gives the Governor the right to submit amendments to a bill rather than vetoing the bill. The General Assembly then votes on whether to accept the Governor’s amendments. The Governor’s amendment power gives the Virginia chief executive a substantially larger legislative role than is the case with the President of the United States, who can suggest changes to a vetoed bill that might make the bill acceptable, but cannot formally propose amendments.

The line item veto gives the Governor more latitude in budget negotiation with the General Assembly than the President has in similar negotiations with Congress<sup>1</sup>. The President’s only options, when confronted by unacceptable

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<sup>1</sup> As this document was finalized, the Congress had just approved an enhanced rescission statute that is intended to function in a manner similar to the line item veto given to most Governors.

items in an appropriation bill, are to veto the entire bill or to sign the entire bill. This often means that the President must accept disagreeable parts of an appropriation bill in order to fund necessary programs. The Governor, on the other hand, can simply veto certain items in the appropriation act while signing the act as whole. The possibility of a line item veto often causes the General Assembly to alter spending provisions prior to submitting them to the Governor (interview).

Rohr (1989) observes that Article II of the U.S. Constitution is silent on the President's removal power (Rohr, 1989b: 110) According to Rohr, the general removal power for executive branch officers now enjoyed by the President stems from an overly generous interpretation of the President's removal powers by the Supreme Court in *Myers v. United States* 272 U.S. 252 (1926) (Rohr, 1989b: 110-112). The Virginia constitution, on the other hand, granted the Governor a general removal power for the first time in the 1971 revision to the Constitution (Howard, 1974: 634-638).

Article V, Section 10 of the Virginia constitution both grants the Governor authority to appoint the heads of executive agencies and states that "each officer appointed by the Governor pursuant to this section . . . shall serve at the pleasure of the Governor." In addition to the appointment and removal power for

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However, this statute contains an eight-year sunset provision and faces a probable constitutional challenge. The Virginia Governor's line item veto power is constitutionally established in Article V, Section 5 (d).

agency heads conferred by Article V, Section 10, Article V, Section 7 states “the Governor shall have power to fill vacancies in all offices of the Commonwealth for the filling of which the constitution and law make no other provision.

Article V, Section 7 also establishes the Governor power as “commander-in-chief of the armed forces of the Commonwealth” and directs that the Governor to conduct “all intercourse with other and foreign states.” Article VII, Section 8 allows the Governor to “require information in writing, under oath” from officers of the Commonwealth and allows the Governor to “ascertain the conditions of the public funds in their charge.”

In terms of informal powers, the Governor's information gathering ability, fund raising capacity, and role as a party leader are substantially more important in Virginia than the President's role in these areas are in the national arena.<sup>2</sup> This is because Virginia, like most states, has a part-time legislature with very little institutional staff. The Governor's full-time status, staff, and fund raising ability are more effective vis-à-vis the legislature than the presidency is in confronting a full-time congress with more than 10,000 full-time staff. To give an example of the Governor's fundraising prowess, during the 1995 legislative elections, Governor Allen's political action committee, the Campaign for Honest

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<sup>2</sup> It occurs to the author that many Governors also have an incentive to behave in a more partisan fashion that is not applicable to Presidents: desire for higher office. The path from the Governor's mansion to the Senate or the White House is a well-traveled one and desire for higher office can animate both more partisan behavior (building loyalty) and more bureaucrat bashing (always popular with the mass electorate) on the part of Governors.

Change, was the single largest fund-raiser receiving more than \$1,200,000 in donations. This was more than the combined total raised by the Democratic Party, the Republican Party, and both legislative caucuses for the 1995 elections<sup>3</sup>.

The Virginia Governor's formidable powers and the corresponding part-time status of the legislature are not unique. Relevant statistics in the 1994-1995 *Book of the States* are instructive. All states grant the Governor significant appointment powers. Forty-four states have some form of the line item veto for appropriation bills. Forty-three states (including Virginia) give the Governor full authority to develop the executive budget. Twenty-four states allow the Governor to authorize a reorganization of state government through executive order. Conversely, only nine states have full-time legislatures, meaning that in four-fifths of the states the executive branch is, in effect, the only full-time political branch of government.

The General Assembly's concern about the Governor's array of formal and informal powers are one of the principal reasons that the Virginia constitution continues to restrict the Governor to one term. Article V, Section 1 state the Governor "shall be ineligible to the same office for the term next succeeding that for which he was elected." Both houses of the General Assembly considered allowing the Governor to serve two terms, but both

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<sup>3</sup> *Richmond Times Dispatch*, January 28, 1996, page A1.

rejected the proposal by wide margins (House of Delegates Proceedings, 1973: 35; Senate Proceedings, 1971: 132).

During the House of Delegates debate on Article V of the 1971 Virginia constitution, Delegate Dudley argued against allowing the Governor more than one term, arguing that doing so would further eclipse the General Assembly's role in state government:

the Governor of Virginia has enjoyed sweeping powers of a nature not granted governors of other states. One argument generally overlooked is that the office of the Governor under the present Constitution has tended to overshadow the legislative branch to the extent that the powers of the executive are increased, the powers of the legislative branch will be diminished . . . to sum up, the Governor of Virginia has the broadest possible powers any person with a decent respect for democratic institutions could desire. To further extend such powers would be to diminish the legislative branch (House of Delegates Proceedings, 1973: 34).

Delegate Harrell stated his opposition to allowing the Governor to run for reelection in terms of potentially politicizing the office:

I believe that if the Governor is permitted to succeed himself his legislative actions would most likely be interpreted as having some implications for his future election... This is a strong Governor State, and this makes it possible that considerations other than concern for the public good might at times be given. There would be those who would accuse a Governor with acting in furtherance of his own benefit for his reelection to a second term (House of Delegates Proceedings, 1973: 31-32).

Similarly, in the Virginia Senate, Senator Aldhizer, Chairman of the General Laws Committee, commented:

One of the reasons assigned for retaining the existing limit was that the affairs of the Commonwealth are better managed if a Governor is not facing the prospect of a reelection campaign. Not being able to succeed himself, a Governor can deal with public matters relatively free of political considerations. Moreover, the greater the powers of the Governor's office, the more reason to want some safeguard against self-perpetuation in office of one who would seek to serve his own interests at the expense of the citizens of the Commonwealth (Senate Proceedings, 1971: 128-129).

As the debate on limits on the Governor's term of office shows, the General Assembly that adopted the 1971 Constitution of Virginia was well aware of the formidable powers of the Governor and the need for effective checks against these powers. The Governor's powers have been further enhanced in recent years by expansion of the statutory executive reorganization power and by growth of the institutional governor.

### **Growth of the Governor's Reorganization Powers**

Article III of the Virginia constitution reserves the power to create, and by implication to reorganize, administrative agencies to the General Assembly. However, the General Assembly has delegated to state agency heads (and by implication to the Governor) almost total authority to conduct internal reorganizations. No legislative approval is required for internal agency reorganizations, irrespective of the scope of the reorganization.

According to the § 2.1-8.1 of the *Code of Virginia*, the Governor must transmit a reorganization plan for the approval of the General Assembly only in the following instances:

- the transfer of the whole or part of an agency or the functions thereof, to the jurisdiction and control of another agency;

- the abolition of all or a part of the functions of an agency;
- the transfer or abolition of the whole or a part of the responsibilities of a board;
- the abolition of a board;
- the consolidation or coordination of the whole or a part of an agency, or the whole or a part of the functions thereof, with the whole or a part of another agency or the functions thereof;
- the consolidation or coordination of a part of an agency or the functions thereof;
- the abolition of the whole or part of an agency;
- the authorization for the exercise of functions or responsibilities by an agency, board, or officer to whom such functions or responsibilities have been transferred.

A recent example of a reorganization requiring notification and approval of the General Assembly was the creation of the Department of Environmental Quality (DEQ) in 1993. DEQ was created by merging four agencies: the Council on the Environment, the Department of Waste Management, the Department of Air Pollution Control, and the State Water Control Board. The reorganization therefore involved the elimination of existing agencies, the creation of a new agency, and the elimination of a board (the former Council on the Environment). The Governor transmitted a reorganization plan to the General Assembly and enabling legislation to create the agency in 1992. The reorganization plan was approved after considerable debate and the agency began operation in 1993 (JLARC, 1995).

Internal agency reorganizations, however, are far more typical than reorganizations requiring legislative approval (interview). The Governor's agency heads have broad statutory discretion to conduct internal reorganizations. This discretion extends to personnel actions that may take place during a reorganization. Several categories of management action related to reorganizations are exempted from the grievance procedure. These include:

- methods, means, and personnel by which ... work activities are carried out;
- termination, layoff, demotion, or suspension from duties because of lack of work, reductions in work force, or job abolition;
- the hiring, promotion, transfer, assignment and retention of employees within the agency.

In addition, the grievance statute states that "in any grievance brought under [these exceptions], the action shall be upheld upon a showing by the agency that: (i) there was a valid business reason for the action, and (ii) the employee was notified of the reason in writing prior to the effective date of the action." In other words, transfer, demotion, and assignment of employees in a state agency, as well as employees' continued tenure with the agency are exclusively at the discretion of the agency head.

The federal senior executive service was criticized for weakening civil service protections by allowing unrestricted transfers of senior executives. In state government, an employee at any level can be obliged to transfer or can be demoted with no recourse. The most sweeping power of agency heads, however, is the authority to abolish positions. This power is complete and unchecked provided that the agency head states a valid business reason for

abolishing the position and notifies the employee in writing prior to the effective date of the position abolishment. After the employee's position is abolished, his or her continued employment with the agency is at the discretion of the agency head. The agency head's power to abolish positions extends to all agency employees at all levels in the agency. The only recourse for employees whose positions are abolished is the state's layoff policy which, as a subsequent section will discuss, has been significantly weakened by the elimination of bumping rights. The reorganization of the Department of Education in 1990 showed the lengths to which the power to abolish positions could be used to reshape a state agency and to dismiss career administrators selectively under the guise of reorganization.

### **Reorganization of the Department of Education**

In September 1990, Governor Wilder's newly appointed Superintendent of Public Instruction, Joseph Spagnola, began a sweeping reorganization of the Virginia Department of Education (DOE). The JLARC review of the department's reorganization noted that "Of the department's 453 classified positions, 288 (64 percent) were abolished. There were 228 new positions created, for which department employees had to apply and compete in an open recruitment process" (JLARC, 1991: 35).

Of the 288 employees whose positions were eliminated as a result of this action, 58 permanently lost their jobs. Several of these employees sued the state, citing the protections of the Virginia Personnel Act, but the dismissal of the employees was upheld by the State's Department of Personnel and Training (DPT) (whose director was appointed by the Governor) and by a state circuit court in *Anderson v. Wilder*. Both DPT and the state court held that since the

employees lost their jobs in an internal reorganization, not a layoff, the state's layoff procedure did not apply. Moreover, since reorganizations are a non-grievable matter according to the Personnel Act, the state's grievance procedure did not apply (JLARC, 1991: 39).

The JLARC report raised the concern that many of the new positions created in the department did not vary significantly from the old positions they replaced, implicitly questioning whether the reorganization was a genuine reorganization or an end run around the state's civil service system. As the JLARC report pointed out, the DOE reorganization set a disturbing precedent where merit system protections could be circumvented by reorganizations (JLARC, 1991: 38).

The reorganization of the Department of Education, while sweeping, was arguably an internal reorganization.<sup>4</sup> The Wilder administration also managed to eliminate a state agency without legislative approval. This is discussed in the following section on the reorganization of the Department of Economic Development.

### **Reorganization of the Department of Economic Development**

In 1990, the Wilder administration eliminated the Virginia Department of World Trade, absorbing its functions into the Department of Economic Development (interview). As this reorganization involved more than one agency, it seemed on its face to trigger legislative review under the State's reorganization statute, which requires the Governor to obtain legislative

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<sup>4</sup> The 1991 JLARC report found that some aspects of the reorganization such as reallocating certain programs from other agencies and changing the name of the department to the "Center for Educational Leadership" would have required legislative approval.

approval for reorganizations of more than one agency. In addition, the action appeared to usurp the General Assembly's prerogative granted in Article III of the Virginia constitution to create administrative agencies by statute.

Governor Wilder justified his actions with language from the general conditions of the Appropriation Act. Section 4-1.02 of the Appropriation Act grants the Governor the authority to withhold a portion of the appropriation to State agencies. Section 4-1.03 of the Appropriation Act allows the Director of the Department of Planning and Budget to transfer appropriations among agencies under certain circumstances. While the Governor's abolition of the Department of World Trade was of questionable legality, notwithstanding the language in the Appropriation Act, the General Assembly took no action to reverse the Governor's decision.<sup>5</sup>

The Wilder Administration's successful elimination of the Department of World Trade without statutory authority set a precedent for executive action to eliminate programs or agencies across state government without triggering the reorganization statute. The combination of the reorganization of the Department of Education and the elimination of the Department of World Trade effectively established the Virginia Governor's reorganization powers as nearly total. This meant that state employees, in the case of executive reorganizations, were bereft of any meaningful merit system protections. While this had always been true in a legal sense, no Governor had ever exploited the weaknesses of the state's merit system to accomplish targeted elimination of career state

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<sup>5</sup> The General Assembly's Division of Legislative Services issued an opinion that the elimination of the Department of World Trade was not supported by adequate statutory authority or by the authority to withhold funds in the Appropriation Act. Nevertheless, the General Assembly took no affirmative action to stop the administration's action.

employees. However, the already weak merit system protections in the Commonwealth were about to get even weaker.

### **Elimination of Bumping Rights**

The Governor's reorganization powers over the career civil service were further enhanced in December 1994 with the Allen administration's modification of the state's layoff policy. As discussed in Chapter III, layoff rights, including "bumping rights," whereby a more senior worker who was laid off could displace a less senior worker, were rights granted by policy not by statute. Rights granted by policy can be modified at the discretion of the Governor. In Executive Order 94-38, the Governor eliminated bumping rights for state employees in the event of layoffs.

The elimination of bumping rights allowed a reorganization to target individual employees more precisely. Previously, layoffs initiated as part of a reorganization would not necessarily effect the employees occupying positions targeted for elimination, because these employees could bump less senior employees from any position for which they were minimally qualified. Bumping rights therefore had the effect of limiting an agency head's ability to target individual employees, particularly employees with significant career seniority.

The elimination of bumping rights meant that when a position was targeted for elimination, the incumbent would be laid off (unless he or she was able to occupy a vacant position somewhere in the organization)<sup>6</sup>. While layoffs had formerly tended to affect less senior employees (the last hired, first fired

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<sup>6</sup> According to an interview with a senior state human resources official, the possibility of a targeted employee occupying a vacant position was eliminated by abolishing all vacant positions in the agency prior to initiating the layoffs.

phenomenon), layoffs now became a threat to even the most senior career workers.<sup>7</sup> This threat compounded the effect of the Governor's reorganization powers in cowing the state workforce, as individual employees now could be targeted for layoffs irrespective of their seniority.

### **Growth of the Institutional Governor**

Within five minutes of being sworn in as Governor of Virginia on January 13, 1994, George Allen created the Governor's Commission on Government Reform (Strike Force) in Executive Order 94-1.<sup>8</sup> The stated purpose of the Strike Force was to reinvent Virginia government, which in Allen's view had grown too large and wasteful during twelve years of Democratic administrations. In practice, this provided a convenient mechanism with which to reorganize state government to serve ideological and partisan, as well as management ends.

As stated in Executive Order 94-1, the Commission on Government Reform was to:

1. Challenge and question the basic assumptions underlying all state agencies and services offered by the state and to identify those that are vital to the best interests of the people of the Commonwealth and those that no longer meet that goal;

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<sup>7</sup> Seniority-based layoffs are often criticized for their effect on an agency's diversity. Reasoning that minority and female employees tend to be more recently hired than white males, some have expressed concern that layoff rules be modified to take diversity into account. For example, in 1995 the U.S. General Accounting Office requested that Congress grant it a waiver from federal layoff rules (which favor seniority and veterans preference, both factors favorable to white males) in order to preserve the diversity of GAO's workforce. Preserving diversity of the workforce was not one of the Allen administration's stated objectives in eliminating bumping rights. The elimination of bumping rights was justified as a way to enhance the management discretion of agency heads.

<sup>8</sup> Executive Order No. 1, January 13, 1994, issued by Governor George F. Allen.

2. Evaluate the effectiveness with which state agencies operate their programs, and identify and recommend ways to eliminate waste and duplication;
3. Identify any program or service now offered by an agency that can be eliminated or transferred to the private sector without injury to the public good and well-being; and
4. Recommend ways to eliminate unnecessary, costly, or burdensome regulations.

The Strike Force was also directed to "review every aspect of the executive branch of state government, and to hold public hearings to identify citizen and private sector concerns" (Executive Order 94-1). The Strike Force itself consisted of 60 members, comprised primarily of business leaders with a sprinkling of Republican legislators and members of the Allen administration. Staff support was provided by detailees from executive branch agencies, many of whom had partisan connections with the Republican Party (interview).

The rhetoric of the executive order is instructive. The first area for the Strike Force to examine (number one above) echoes the "sunset" movement from the 1970's as well as the rhetoric of zero-based budgeting where agencies are periodically required to justify their existence. The second item echoes the traditional 3 E's of government evaluation: efficiency, effectiveness and economy. The third item echoes the 1980's debate on privatization, implicitly assuming that whenever government services can be privatized they should be. The fourth item echoes conservative academic and political criticism of regulation as burdensome and impeding economic growth.

The Strike Force report resulted in two recommendations with significant implications for the growth of the institutional Governor. These were recommendations for an enhanced role for cabinet secretaries, and creation of

the Governor's competition council. Both of these recommendations have been implemented by the Allen administration. The enhanced role for cabinet secretaries has been accomplished by administrative action without seeking a change in statute. The Commonwealth Competition Council was created with the approval of the 1995 General Assembly.

### **Enhanced Role of Cabinet Secretaries**

Since the creation of the cabinet system in 1972, Virginia's cabinet secretaries<sup>9</sup> have traditionally played the roles of coordinating policy and facilitating communication from state agency heads under the secretariat to the Governor. The term "secretariat" in Virginia state government refers to the agencies with the realm of responsibility for a particular cabinet secretary. For example, the Transportation secretariat consists of the Department of Transportation, the Department of Motor Vehicles, the Department of Rail and Public Transport, and the Department of Aviation, all of which report to the Secretary of Transportation. However, cabinet secretaries do not head individual state agencies. For example the Secretary of Transportation does not head the Department of Transportation (the Commonwealth Transportation Commissioner does). Individual agency heads, particularly the heads of large agencies have traditionally enjoyed broad autonomy in the management of their agencies<sup>10</sup>.

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<sup>9</sup> Administration, Commerce and Trade, Education, Finance, Health and Human Resources, Natural Resources, Public Safety, and Transportation.

<sup>10</sup> In Virginia state government "agency" and "department" are often used interchangeably. Agency is the more generic term; all departments are agencies, though not all agencies are departments (the term agency also encompasses certain boards, commissions, museums, universities, community colleges, and councils). Section 2.1-1.2 of the *Code of Virginia* defines the standard nomenclature for state agencies.

The Secretary acts as the Governor's liaison to and policy coordinator for a given secretariat but does not traditionally exercise line authority or play a role in the internal management of an agency. Nor does a cabinet secretary have authority to hire or fire agency heads. Agency heads are appointed by the Governor and confirmed by both houses of the General Assembly. Agency heads can be removed only by the Governor, as provided for in Article V, Section 10 of the Virginia Constitution.

Most administrative powers are statutorily given to agency heads, not to cabinet secretaries. For example, Section 2.1-20.01:1 of the *Code of Virginia* grants agency heads broad (some have complained almost unchecked) authority to "supervise and manage the department or agency." As noted above, Section 2.1-114 grants agency heads the right to abolish positions at will. Section 2.114.7 of the *Code of Virginia* makes the agency head the appointing authority for state agencies and specifically enjoins the Governor (and by extension cabinet secretaries) from involvement in the selection or tenure in office of classified employees.

The statutory authority of cabinet secretaries, on the other hand, is limited to:

- resolving jurisdictional conflicts between agencies,
- coordinating budget development,
- holding agency heads accountable for administrative, fiscal, and program actions, and
- signing documents on behalf of the Governor.

In recommending stronger powers for cabinet secretaries, the Strike Force's Education Report observes:

The Secretary of Education and, for that matter, none of the Secretaries have "hire and fire" authority over the agencies

organizationally grouped in their Secretariat. This is not a coincidence. The reorganization of the executive branch of the Commonwealth in the mid 1970's created secretariats wherein the Secretaries had no appointive powers over agencies, being strictly extensions of the Governor with no service functions assigned directly to the office of the Secretary.

The legislature understands this clearly. Essentially all legislatively created functions of, and directives to, the state government have been assigned, not to the Secretaries but directly to the agencies within the secretariat (Governor's Commission on Government Reform, Education Committee Report, 1994: 42).

The Governor's Strike Force envisioned dramatically expanding the power of the cabinet secretaries. The Health and Human Resources Committee Report recommends:

Require the Secretary of Health and Human Resources to function as the Chief Executive Officer of health and human services, and provide appropriate staff resources to consolidate policy and administrative functions . . . the consolidated function should include planning, policy development, budget, regulatory, and legislative liaison. The Secretary should also be responsible for oversight of appeals, internal audit, information management, and systems development (Governor's Commission on Government Reform, Health and Human Resources Committee Report, 1994: 5).

Under this recommendation all policy, regulatory, legislative liaison, internal audit, management information systems, and budget functions would be removed from state agencies and concentrated in the Secretaries' offices, which are considered a part of the Governor's Office. Executive Order 94-19 has indicated that all staff in the Governor's office and in the offices of cabinet secretaries will serve at the pleasure of the Governor and are thus exempt from the personnel act. Therefore, if the Strike Force's recommendation were adopted, all policy, budget, legislative liaison, management information systems,

internal audit, and regulatory development positions in State government would become political appointments of the Governor.

The Strike Force's Public Safety Report issued a similar call for consolidating authority in the Office of the Secretary of Public Safety:

More than any other one issue (sic) identified, the Public Safety Committee contends that the role of the Secretary should be analogous to that of a Chief Executive Officer in the private sector. The Secretary should establish the vision and mission of the organization and should have at his or her disposal the resources and tools to accomplish this. Under the current structure, individual agencies may be doing an excellent job, but the resources available to the Secretary are not being directed in a concentrated manner (Governor's Commission on Government Reform, Public Safety Committee Report, 1994: 5).

The Governor's proposed budget for the 1995-1996 fiscal year reflected significant increases in staffing and dollars for the cabinet secretaries, with the size of some cabinet offices doubling. The General Assembly rejected the proposed increases for the cabinet secretaries' offices, but the administration partially compensated by filling positions with detailees from executive agencies or by funding political appointments in the cabinet secretaries offices with funds from executive agencies (interview). Cabinet secretaries in Virginia are now surrounded by a retinue of staff assistants (interview). As recently as eight years ago, the Secretary of Education's Office had one employee and a part-time receptionist (interview). In 1994-95, the Office of the Secretary of Education expanded to over twenty staff, including staff assigned to the Governor's Commission on Champion Schools (interview).

Cabinet secretaries now play a much larger role in the management of their agencies. For the first time, the Secretary of Transportation has moved his office to the Department of Transportation headquarters, rather than being

housed several blocks away with the rest of cabinet offices (interview). The Secretary of Transportation now, according to several interview subjects, now is the *de facto* chief executive of the Department of Transportation (interview). Similarly, JLARC's 1995 review of DEQ found that the Secretary of Natural Resources exercises significant authority in agency hiring, including approving all hires at the first-line supervisory level and above (JLARC, 1995: 37-44). Interview subjects indicated that no significant decisions in Natural Resources agencies are reached without the active participation and concurrence of the Secretary of Natural Resources (interview).

In particular, cabinet secretaries appear to be involved in regulatory matters (interview). The Strike Force's Regulatory Review Committee had recommended that cabinet secretaries have all regulatory authority now residing in state agencies, commenting that "this would allow for continuity of principles among agencies and facilitate communication. Under this concept the agency would have to convince a third party in the secretary's office of the need to issue regulations" (Governor's Commission on Government Reform, Regulatory Review Committee, 1994: 8). Similarly, the Regulatory Review Committee endorsed giving the Governor absolute power to veto regulations without the legislative approval that is presently required:<sup>11</sup> "the committee found it incredible that a Governor acting alone cannot prevent a regulation from going into effect" (Governor's Commission on Government Reform, Regulatory Review Committee, 1994: 9).

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<sup>11</sup> The Governor can delay a regulation for 30 days. With the approval of the chairmen of the relevant House of Delegates and Senate committee, the Governor can delay issuance of a regulation until after the next session of the General Assembly, thereby giving the administration an opportunity to submit legislation to the General Assembly reversing the proposed regulation.

The General Assembly has not approved legislation enhancing either the Governor's or the Secretary's power over regulation. However, Executive Order 38-94 requires that all regulations be cleared by the responsible cabinet secretary before being issued. In addition, the executive order requires that all regulations be reviewed by the Department of Planning and Budget in terms of the costs and benefits of regulations. The effect of these two requirements has been to more tightly centralize power over regulations in the Governor's office than had previously been the case (interview). Increased authority and staff for cabinet secretaries and increased executive control over regulations have not been the only factors in the growth of the institutional Governor. Privatization has provided an additional opportunity for the expansion of the institutional Governor.

Growth in the power of the cabinet secretaries has been accomplished without legislative approval. During the 1996 session of the General Assembly, several legislators raised concerns about the enhanced role of cabinet secretaries. As a result, Item 14 of the 1996 Appropriation Act directs the Joint Legislative Audit and Review Commission to:

conduct a follow-up review of its 1984 assessment of the secretarial system in the Commonwealth. The follow-up study shall include, but not be limited to, issues identified in the 1995 JLARC interim report on the Department of Environmental Quality on the role of cabinet secretaries in internal agency management and the structure and staffing of the current secretarial system.

### **Commonwealth Competition Council**

The Competition Council, created in 1995, essentially institutionalized the Governor's Commission on Government Reform. The newly created Commonwealth Competition Council was set up to guide privatization efforts of

state agencies. Privatization, together with layoffs and early retirements, is expected to contribute to the fulfillment of the Governor's objective of eliminating 16,000 state jobs (interview).

The Commonwealth Competition Council was informally established prior to the 1995 legislative session, but its enabling legislation was approved by the 1995 General Assembly. The statute creating the Commonwealth Competition Council, the Virginia Government Competition Act of 1995, described the following duties for the council:

1. Examine and promote methods of providing a portion or all of select government-provided or government produced programs and services through the private sector by a competitive contracting program;
2. Develop an institutional framework for a statewide competition program to encourage innovation and competition within state government;
3. Establish a system to encourage the use of feasibility studies and innovation to determine where competition could reduce government costs without harming the public;
4. Monitor the products and services of state agencies to bring the element of competition and to ensure a spirit of innovation and entrepreneurship to compete with the private sector;
5. Advocate, develop, and accelerate implementation of a competitive program for state entities to ensure competition for the provision or production of government services, or both from both public and private sector entities;
6. Establish approval, planning, and reporting processes required to carry out the functions of the Council;
7. Determine the privatization potential of a program or activity; perform cost/benefit analyses; and conduct public and private performance analyses;

8. Devise, in consultation with the Secretary of Finance, evaluation criteria to be used in conducting performance reviews of any program or activity which is subject to a privatization recommendation;
9. To the extent practicable and to the extent that resources are available, make its services available for a fair compensation to any political subdivision of the Commonwealth.

The Competition Council is located organizationally in the Office of the Governor and is to be composed of ten members, six of whom will be appointed by the Governor. The Council's most sweeping power is its ability to recommend that the Department of Planning and Budget rescind funds for a state activity or program that can be privatized. This statute's marriage of privatization and the Governor's hitherto controversial rescission power gives the Governor a formidable weapon to wield over state agencies and programs. Not only can individual employees now have their positions abolished, even programs that have been appropriated sufficient funds can now potentially be privatized, without legislative approval.

The Governor's reorganization powers have always been significant in Virginia government. However, recent precedents at the Department of Education and Department of Economic Development and the elimination of bumping rights have increased these powers significantly. In addition, the institutional governor has been strengthened by the enhanced role of cabinet secretaries and the creation of the Commonwealth Competition Council. The combination of the merit system reforms described in Chapter III with the

Governor's enhanced reorganization powers and strengthened institutional Governor has made the Governor's power over administration formidable indeed. The current trend towards gubernatorial aggrandizement in matters of administration threatens to diminish the General Assembly's constitutional role administration. The next chapter discusses this, which remains significant despite the growth in the Governor's administrative powers. Continued attempts at executive aggrandizement threaten to provoke the General Assembly to exercise its partially dormant administrative powers more fully.

## VII. Administrative Role of the General Assembly

Despite the Governor's formidable array of formal and informal powers, the General Assembly still is given a significant role in administration by the *Constitution of Virginia*. It is this legislative role in administration that recent efforts at gubernatorial aggrandizement have attempted to usurp. The General Assembly's administrative powers can be generally categorized as confirming appointees, impeachment, appointment of certain officers, oversight of the state employee retirement system, and legislative oversight.

However, more generally it is important to keep in mind that the Virginia General Assembly is not limited to enumerated constitutional powers, as is the case with Congress.<sup>1</sup> In his *Commentaries on the Constitution of Virginia*, Howard explains:

In constitutional theory, a state's government is a government of plenary powers, except as limited by the state and federal constitutions. Unlike the Federal Constitution, which is a grant of power, a state constitution is a restraint on power. Accordingly, unlike Congress, whose legislative powers ultimately trace to the grants of Article I of the federal Constitution, a state's legislature has all legislative powers not prohibited to it by the federal or state constitutions. Virginia's cases, like those in other states, accept these propositions as fundamental. A typical Virginia case carries the reminder that "the State Constitution is not a grant of power, but only the restriction of powers otherwise practically unlimited,

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<sup>1</sup> To be sure, the concept of the federal legislative power as limited to enumerated powers has been expanded by generous judicial readings of the commerce, general welfare, and necessary and proper clauses of Article I, Section 8 of the U.S. Constitution. As noted in chapter 1, however, of late the Supreme Court has taken steps to draw place some limits on federal power. In *United States v. Lopez*, 115 S. Ct. 1624 (1995), the Court struck down a statute making possession of a firearm within a school zone a federal crime. The Court ruled that Congress had no power to regulate possession of firearms in a school zone under the Commerce Clause (the supposed basis for the statute's constitutionality). In *Seminole Tribe of Florida v. Florida* (1996), the Court ruled that Eleventh Amendment prevented Congress from granting the right to sue a state in federal court (thereby abrogating the state's sovereign immunity) to argue that a federal statute had been violated.

that is except so far as restrained by the Constitution, the legislature has plenary powers” (Howard, 1974: 537-538).

The General Assembly’s plenary powers are explicitly acknowledged in the *Constitution of Virginia*. Article IV, Section 14 states:

The authority of the General Assembly shall extend to all subjects of legislation not herein forbidden or restricted; and a specific grant of authority in this Constitution upon a subject shall not work a restriction of its authority upon the same or other subject. The omission in this Constitution of specific grants of authority heretofore conferred shall not be construed to deprive the General Assembly of such authority, or to indicate a change of policy in reference thereto, unless such purpose plainly appear.

During the debate in the House of Delegates on the adoption of the present *Constitution of Virginia*, Delegate Mann succinctly captured the importance of Article IV, Section 14, stating: “the fundamental point is that any power which is not specifically denied to the General Assembly, the General Assembly has” (House of Delegates Proceedings, 1973: 712). In comparison, Article I, Section 8 of the U.S. Constitution enumerates the powers of Congress, implicitly limiting the federal legislative power to those enumerated in Article I, Section 8.

### **Separation of Powers**

The *Constitution of Virginia* also differs from the U.S. Constitution in that the Virginia constitution contains an explicit acknowledgment of separation of powers. In fact, as Delegate Gray, chairman of the House Commerce Committee, noted during the House of Delegates debate on the Constitution, “separation of powers is regarded as so important that it is included not once but

twice in the existing Constitution of this state” (House of Delegates Proceedings, 1973, p. 18). Howard notes that the U.S. Constitution contains no explicit mention of separation of powers; the presumption of separation of powers flows from the structure of the United States government as established in the Constitution (Howard, 1974, 81-85).

The importance of separation of powers in preserving liberty is reflected in the Virginia constitution by incorporating separation of powers into the Bill of Rights. Article I, Section 5 of the Virginia constitution states in part “the legislative, executive, and judicial departments of the Commonwealth should be separate and distinct.” Article III of the Virginia constitution reiterates the doctrine of separation of powers and carves out a special exemption from the doctrine for administrative agencies, stating:

The legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others, nor any person exercise the power of more than one of them at the same time; provided, however, administrative agencies may be created by the General Assembly with such authority and duties as the General Assembly may prescribe. Provisions may be made for judicial review of any finding, order, or judgment of such administrative agencies.

The importance of Article III for students of public administration in Virginia is difficult to overstate. Article III explicitly recognizes as constitutional the combination of executive, legislative, and judicial powers found in regulatory agencies. This constitutional provision addresses what Rohr terms “one of the earliest criticisms of the government institution that is considered by many as the harbinger of the administrative state--the independent regulatory commission ...

that it violates the principle of separation of powers” (Rohr, 1986: 15). In adopting the language of Article III of the Virginia constitution, the General Assembly in essence formalized what Rohr terms “the framers’ relaxed standards on separation of powers” (Rohr, 1986: 16). Senator Fitzgerald enunciated the relaxed standard of the General Assembly towards separation of powers, stating: “I do say, though, that the pure separation of the three branches of government is certainly impossible. You can not separate all the branches of our government and still adhere to a system of checks and balances” (Senate Proceedings, 1971: 41).

Delegate Moore, chairman of the House Courts of Justice Committee, explained the need for language on administrative agencies in Article III as acknowledging existing administrative reality:

The Commission on Constitutional Revision added to the section; they acknowledged the existence of certain regulatory agencies which are not solely legislative or executive or judicial but in most instances have powers that deal with each of these three functions. This added language would simply recognize an accomplished fact. These agencies that we have in Virginia, and all of you are aware of the several that exist, have been functioning and the courts have passed upon their constitutionality (House of Delegates Proceedings, 1973: 17).

The Senate debates emphasized that the view of administrative agencies as not violating separation of powers rested on the assumption that such agencies would not exercise full legislative, executive or judicial powers:

*Senator Bateman:* Do you feel that a broadly based Commission on Local Government, if created in the future, exercising judicial or quasi-judicial along with the administrative function, might violate the Division of Power article?

*Senator Parkerson:* I think it could be so constituted as to do so, yes. If you made it a full court and a full administrative branch, a full legislative branch.

*Senator Bateman:* Suppose it were constituted in a manner somewhat analogous to the State Corporation Commission which has a quasi-judicial along with the administrative function, might it violate the Division of Powers Article?

*Senator Parkerson:* I think that could remove most of the doubts, yes. I think something parallel with the Corporation Commission would probably be what we envision in the Division of Powers Article that we have adopted (Senate Proceedings, 1971: 433).

### **Executive Reorganization**

The 1968-69 Commission on Constitutional Revision recommended language for Article V, Section 9 of the Virginia Constitution that would have provided the Governor sweeping reorganization powers even beyond those described in Chapter VI. As proposed by the Commission on Constitutional Revision, the executive reorganization clause would have read:

Except as may be otherwise prescribed by this Constitution, the functions, powers, and duties of the administrative departments and divisions and of the agencies of the Commonwealth within the legislative and executive branches shall be prescribed by law. The Governor may reallocate the functions, powers, and duties of the departments and divisions and of agencies within the executive branch for efficient administration. Proposed changes in the allocations prescribed by law shall be set forth in executive orders which shall be submitted to each member of the General Assembly at least forty-five days prior to the commencement of a regular or special session of the General Assembly. A proposed change shall become effective on a date designated by the Governor following the adjournment of the General Assembly and thereafter shall have the force of law unless either the Senate or the House of Delegates, prior to the adjournment of the General Assembly, by resolution of a majority of the members elected thereto, shall have disapproved the change (Senate Proceedings, 1971, p. 716).

As Howard notes, the effect of Article V, Section 9 as proposed would have been to give the Governor near autonomy in matters of executive reorganization, however sweeping the proposed changes were. The General Assembly's only role would be a negative one, to disapprove the change as proposed. The General Assembly would not have constitutional power to institute its own executive branch reorganizations or to modify the Governor's proposals.

Article IV, Section 9 as proposed was approved by the Senate, but it was rejected outright by the House of Delegates (House of Delegates Proceedings, 1973: 839). The House Select Committee on Constitutional Revision eliminated all but the first sentence of the article. On the floor of the House of Delegates, Article IV, Section 9 was further modified to change the prescriptive phrase "shall be described by law," to the more permissive "may be prescribed by law." The purpose of this change was to preserve legislative flexibility with regard to the establishment and role of legislative agencies (House of Delegates Proceedings, 1973: 35-37).

Delegate Farley, chairman of the House Labor Committee, explained his opposition to the proposed Article IV, Section 9 in terms of an already strong executive usurping legislative power:

it has been pointed out that we have a strong, executive type government in Virginia anyhow, and [Article IV, Section 9] is taking some power away from the General Assembly that it now has which should remain in the legislative branch. If we are put in the position where a plan by the Governor has to be vetoed rather than taking a positive approach, this is one more power transferred to the executive that should, at least in part, remain in the legislative branch (House Proceedings, 1973: 36).

Immediately after Delegate Farley's speech, the House Committee amendment removing most of Article IV, Section 9 was agreed to by a voice vote. As Howard notes, "the General Assembly, however, rejected *in toto* the executive reorganization proposal. The tenor of the House debate suggests that the legislators believed the proposal would give additional power to the Governor and diminish that of the Assembly proportionally" (Howard, 1973: 631).

### **Confirmation Powers of the General Assembly**

Regarding confirmation of the Governor's appointments, Article V (Sections 10 and 11) grants the General Assembly the power to confirm gubernatorial appointees to boards, commissions, and executive agencies. It is left to the General Assembly to determine whether or not an appointee is subject to confirmation:

Except as may be otherwise provided in this Constitution, the Governor shall appoint each officer serving as the head of an administrative department or division of the executive branch of government as the General Assembly may prescribe. Each officer appointed by the Governor pursuant to this section shall have such professional qualifications as may be prescribed by law and shall serve at the pleasure of the Governor" (*Constitution of Virginia*, Article V, Section 10).

Gubernatorial nominees are confirmed by both houses of the General Assembly. Theoretically, the General Assembly could, by statute, assign the confirmation power to only one chamber. Given the tendency of each chamber to jealously guard its prerogatives, this is unlikely to occur. To show the breadth of the General Assembly's confirmation powers, even the Governor's chief of staff is required by statute to be confirmed by the General Assembly.<sup>2</sup> The President's

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<sup>2</sup> *Code of Virginia*, § 2.1-41.2.

chief of staff, on the other hand, is not subject to Senate confirmation. However, since the adoption of the current Virginia constitution, there has never been a case of a gubernatorial nominee being denied confirmation.

In addition to the confirmation power of the General Assembly, Article V, Section 10 gives the General Assembly statutory power to establish professional qualifications for executive officers. This power enables the General Assembly to guard against professionally unqualified political appointees assuming crucial state positions. The power to set qualifications for gubernatorial appointments, in addition to the power to confirm the appointments themselves, represents another important potential administrative power of the General Assembly.

Article V, Section 11 is carefully written to prevent a Governor from finding a way around the General Assembly's refusal to confirm an appointee (such as naming that person to a recess appointment). Article V, Section 11 states:

No person appointed to any office by the Governor, whose appointment is subject to confirmation by the General Assembly, under the provisions of this Constitution or any statute, shall enter upon, or continue in, office after the General Assembly shall have refused to confirm his appointment, nor shall such person be eligible for reappointment during the recess of the General Assembly to fill the vacancy caused by such refusal to confirm (*Constitution of Virginia*, Article V, Section 11).

As discussed in Chapter V, House Bill 2194 (HB 2194), approved by the 1995 General Assembly and signed by the Governor (now § 2.1-116 of the *Code of Virginia*), indirectly gives the Governor two appointments to each state agency that will not require confirmation by the General Assembly. This will mean that only the agency head and cabinet secretaries, among executive branch officials,

are subject to confirmation. The approximately 200 appointments conferred on the Governor by HB 2194 will be the first appointees not subject to General Assembly confirmation. However, these positions will be nominally appointed by agency heads, not the Governor directly. In addition, the General Assembly retains the right to modify the statute to require that each of the two appointments given agency heads under House Bill 2194 be confirmed by the General Assembly.

While the outcome of the confirmation process is generally a foregone conclusion, the nomination process acts as a check against the Governor appointing officials who are completely unqualified for their positions. The process of confirmation hearing allows legislators to extract commitments from nominees. Typically, this is the case for cabinet secretaries and heads of major state agencies, who face more extensive confirmation hearing than the heads of smaller agencies. By approving the Governor's amendments to HB 2194 that granted the Governor political appointments without legislative confirmation, the General Assembly partially surrendered one of its important administrative powers. However, the confirmation process remains an important part of the General Assembly's role in administration.

During the Allen administration, the General Assembly has been more assertive in scrutinizing the appointees that come before it for confirmation. Three of Governor Allen's seven cabinet appointments had at least one General Assembly member vote against confirmation. While no nominee has yet been rejected, it appears that the General Assembly is beginning to take its long-dormant confirmation powers somewhat more seriously.

### **Appointment Powers of the General Assembly**

In addition to having the confirmation power to partially counterbalance the Governor's appointment powers, the General Assembly itself has appointment powers with administrative implications. Article IV, Section 18 gives the General Assembly sole power to appoint the State Auditor of Public Accounts, an elected position in many states and a gubernatorial appointment in others. The Auditor of Public Accounts' status as a legislative appointee gives the General Assembly, rather than the Governor, control over the financial auditing and oversight activities of the State. As of 1995, the legislative Auditor of Public Accounts had 200 staff, while the executive branch Department of the State Internal Auditor had only 11 staff (1995 Appropriation Act). Article X of the Virginia Constitution (Section 8 and Section 9) confers on the Auditor of Public Accounts, not the Governor, the power to certify the tax revenues of the State, the revenue base from which each biennial budget is developed.

The Auditor of Public Accounts had been established in the executive article of the Virginia Constitution from the creation of the office in 1851 until the adoption of the current Virginia Constitution in 1971. As Howard notes, "This section was moved, with no change whatever, from the Executive article to the Legislative article in the revision of 1969, on the theory that the Auditor is properly a legislative officer" (Howard, 1974: 558).

Article IX, Section 1 gives the General Assembly the power to appoint the commissioners of the State Corporation Commission (SCC). One consequence of this appointment power is that the SCC's three commissioners currently include two former members of the House of Delegates. The SCC is often referred to as the fourth branch of government in Virginia, because it is constitutionally established and has sweeping regulatory powers over banking,

utilities, insurance, and other industries (JLARC, 1983). The General Assembly, rather than the Governor, is in a position to influence state regulatory power through the appointment process, as the Governor has no role in appointing SCC commissioners.

Presidents generally view their judicial appointment powers as one of the chief prerogatives of the office. In Virginia, the General Assembly, not the Governor, enjoys the President's prerogative of shaping the composition of the judiciary. Article VI, Section 7 grants the General Assembly the power to appoint Supreme Court justices and Article VI, Section 8 gives the General Assembly authority to appoint all other judges. Virginia is the only State where the legislature selects judges with no involvement by the executive or the voters. This power, a jealously guarded prerogative of the General Assembly, has not been threatened by the Governor's enhanced power over administration.<sup>3</sup> However, the deadlock in the State Senate produced by the 1995 General Assembly elections means that the Democratic caucus will not longer be able to unilaterally pick judges. Prior to 1996, the Democratic caucus of each house would meet in secret to select a slate of judges, and an equally secretive informal conference committee would resolve differences between the houses. The Democrat majority would then vote as a block to appoint the judges selected by the joint caucus. Republican members of the General Assembly had no role whatsoever in the selection process.

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<sup>3</sup> The Governor, however, does have the power to appoint judges for vacancies that occur when the General Assembly is not in session. The General Assembly typically confirms the Governor's nominee during the next session.

Even with power sharing among political parties in the 1996 Virginia Senate, the legislative branch of government continues to have the sole power to appoint members of the judiciary. The legislative branch also retains power to investigate wrong doing by judges, through the Judicial Inquiry and Review Commission established by Article VI, Section 10.

### **Impeachment Power of the General Assembly**

Article IV, Section 17 grants the General Assembly the power to impeach executive officers and judges. The impeachment power has not been exercised in modern Virginia history, but it gives the General Assembly a formidable tool with which to combat executive malfeasance or misfeasance. Article IV, Section 17 states in part:

The Governor, Lieutenant Governor<sup>4</sup>, Attorney General, judges, members of the State Corporation Commission, and all officers appointed by the Governor or elected by the General Assembly, offending against the Commonwealth by malfeasance in office, corruption, neglect of duty or other high crime or misdemeanor may be impeached by the House of Delegates and prosecuted before the Senate, which shall have the sole power to try impeachments .....Judgment in case of impeachment shall not extend further than removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the Commonwealth (*Constitution of Virginia*, Article IV, Section 17).

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<sup>4</sup> In the case of the Lieutenant Governor being removed from office or when the Lieutenant Governor is temporarily absent, the President *pro tempore* of the Senate presides over the chamber. The position of President *pro tempore* is established in the Rules of the Senate, Section 1-2(a). The President *pro tempore* is elected for a four-year term on the first day of the legislative session following the election of the Senate and is to be a senior member of the majority party. The current President *pro tempore* of the Virginia Senate is Senator Stanley Walker (D-Norfolk), who was first elected to the post in 1986.

The legislative impeachment and removal power is the ultimate constitutional check given to the legislative branch against executive excess. Lest the impeachment power be considered simply an abstract one, it is useful to remember that three years after the adoption of the Virginia Constitution, the nation witnessed the U.S. House of Representatives drawing up articles of impeachment against the sitting President, who resigned rather than face near-certain conviction in the Senate.

The 1996 General Assembly has added an additional aspect to the removal power by using the general legislative and appropriation powers granted the General Assembly by the Constitution. House Bill 1524 would abolish the position and office of the Secretary of Natural Resources, but only for two years. The bill's patron, Delegate George Grayson, helpfully explained to a reporter that the two year provision was so the bill would be effective only until current Secretary of Natural Resources Rebecca Norton Dunlop leaves office.<sup>5</sup> While House Bill 1524 was not acted upon by the House General Laws Committee, the success the bill, which had twelve co-patrons, reflects a renewed assertiveness of the General Assembly towards gubernatorial appointees.

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<sup>5</sup> Article I, Section 9 of the *Constitution of Virginia* forbids bills of attainder. As House Bill 1524 was not enacted (and had no realistic chance of being enacted), the question of its constitutionality never arose.

Notwithstanding House Bill 1524, the Commonwealth has not yet had a case similar to the impeachment and trial of President Andrew Johnson, where a sitting President was nearly removed largely over policy disagreements.<sup>6</sup> The impeachment and removal power has occasionally tempted American leaders. According to Schlesinger (1989), Jefferson wanted to use the Republican majority in Congress to remove federalist judges through impeachment. However, the impeachment power has remained (albeit narrowly) as an important check against executive excess, not a tool of legislative government or political revenge.

### **Appropriation Powers of the General Assembly**

Perhaps the most formidable constitutional administrative power of the General Assembly is the appropriation power. Article X, Section 7 of the *Constitution of Virginia* states in part that “All taxes, licenses, and other revenues of the Commonwealth shall be collected by its proper officers and paid into the State treasury. No money shall be paid out of the State treasury except in pursuance of appropriations made by law” (*Constitution of Virginia*, Article X, Section 7). All revenues of the Commonwealth and its agencies are subject to appropriation by the General Assembly in the biennial budget bill (Appropriation Act). This includes non-tax revenue such as tuition paid to state-supported

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<sup>6</sup> Johnson, who succeeded Lincoln as president, was tried and nearly convicted by the Senate in 1868 after the House of Representatives impeached him for violating the Tenure of Office Act, a statute of dubious constitutionality that prevented the president from removing Senate-confirmed appointees without Senate approval. Johnson removed the Secretary of War in February 1868. The House of Representatives quickly impeached him. The Senate failed to convict Johnson by only one vote. (See Kelly, Harbison and Belz, 1983: 350; 352-354 for a discussion of this case).

colleges and universities, medical center revenue<sup>7</sup>, and federal funds granted to state agencies.

The General Assembly's appropriation power is somewhat countered by the Governor's line item veto power, where the Governor can veto specific spending items in the Appropriation Act. Traditionally, the Virginia Governor has made less use of the line item veto than is the case in other states. For example, in 1995, despite a contentious budget debate with the General Assembly, Governor Allen did not exercise the line item veto on the Appropriation Act. The reason for this gubernatorial restraint with regard to the line item veto is not simply deference to the General Assembly's appropriation power. It is also a recognition of political reality.

The budget bill in Virginia routinely passes both houses of the General Assembly with little or no opposition. The only "no" votes on the budget bill generally come from maverick members of the General Assembly, who wish to make a symbolic point. While partisan bickering can be intense during the development of the budget, a bipartisan consensus on the budget bill inevitably emerges that the Governor confronts at his or her peril. A successful override of a Governor's line item veto would render the threat of a line item veto meaningless for the remainder of an administration. Therefore, actual use of the line item veto is reserved for items where the Governor can obtain support from

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<sup>7</sup> All state senior institutions of higher education (and some community colleges and other state agencies) have private foundations to which donations can be given. These foundations sometimes engage in other revenue generating activities such as selling merchandise and sponsoring credit cards. Foundations are considered private entities, not state entities, and therefore foundation funds are not subject to appropriation. Similarly, professional services fees paid to physicians at state-supported medical schools are funneled through private associations and therefore are not subject to appropriation. However, revenue for hospital charges at the Medical College of Virginia or the University of Virginia Medical Center is subject to legislative appropriation.

members of his or her party. In general, the line item veto is more useful as a negotiating tool prior to a vote on the Appropriation Act than it is as a means of altering the Appropriation Act once it is adopted by the General Assembly.

In contrast with the limited (though significant) usefulness of the line item veto to the Governor, the appropriation power is broadly useful to the General Assembly in asserting itself in administration. The Appropriation Act has evolved into more than just a collection of spending items. The general conditions of the Appropriation Act touch on a wide range of administrative matters. These include: guidelines on employee travel, compensation, capital outlay procedures, and executive branch budget and accounting procedures. In addition, specific items in the Appropriation Act often contain legislative direction to the agency or institution whose funds are appropriated by the given item.

An example of how the appropriation power is used to give administrative policy direction is found in the 1995 Appropriation Act. The Governor, at the suggest of the Governor's Commission on Government Reform, had been contemplating privatizing some or all of the state's mental hospitals and training centers. The administration viewed this privatization decision as a matter of executive discretion. However, for each mental hospital or training center item in the Appropriation Act, the 1995 General Assembly inserted a direction that "this facility shall not be sold, privatized, or converted to other use without the approval of the 1995 General Assembly."

The Appropriation Act has the force of law. Indeed, when the Appropriation Act conflicts with statute, the Appropriation Act language prevails during the effective life of the Appropriation Act. Therefore, there is a wide range of quasi-legislation that can be accomplished through the appropriation.

The Governor also does not have the authority to veto language in the Appropriation Act without also vetoing the applicable spending item. Therefore, in order to remove disagreeable language, the Governor must also veto the spending authority for the program in question.

In addition to its use in providing administrative direction, the appropriation power is significant in that it allows the General Assembly to fund administrative programs it approves and to reduce or eliminate funds for administrative programs it does not approve. For example, in 1995 the Governor requested that the staff of each cabinet secretary be approximately doubled. Previous to that year, the maximum employment levels for cabinet secretaries given in the Appropriation Act had been advisory only and the Governor had been free to transfer funds to the offices of cabinet secretaries to support additional staff. Most cabinet secretaries had already significantly increased their staff before the Governor submitted his request for increased cabinet staffing. This request was expected by the administration to receive routine approval as it was considered a gubernatorial prerogative (interview).

A strong, bipartisan majority of the 1995 General Assembly not only rejected the Governor's request for additional funds and staff for cabinet secretaries, it also reduced the funding for cabinet secretaries to a level below the previous year's authorized level. In addition, the maximum employment levels for offices of cabinet secretaries were made mandatory, meaning that the Governor no longer had flexibility to transfer funds and staff to cabinet offices. To prevent the Governor from simply detailing staff from agencies, the General Assembly also added a general condition of the Appropriation Act limiting such

details to 180 days, requiring legislative notification, and forbidding permanent transfers.

### **Constitutional Oversight Powers of the General Assembly**

Related to its appropriation powers, the General Assembly also has general oversight powers to ensure that state funds are spent and managed responsibly. Virginia is unique in that the General Assembly is also given a constitutional responsibility for the State's retirement system (Article VI, Section 9 for the judicial retirement system and Article X, Section 11 for the Virginia Retirement System). This responsibility is not taken lightly. After the perceived politicization of the Virginia Retirement System during the Wilder Administration, the General Assembly adopted legislation and a companion constitutional amendment making the Virginia Retirement System independent of the Executive Branch.

The General Assembly is further given an explicit constitutional oversight role for education. Article VIII, Section 1 of the Virginia Constitution provides that "the General Assembly shall provide for a system of free public elementary and secondary schools for all children of school age throughout the Commonwealth and shall seek to ensure that an educational program of high quality is established and continually maintained" (*Constitution of Virginia*, Article VIII, Section 1). This constitutional provision provides the basis for considerable legislative involvement in the administration of education. The General Assembly is given authority even to alter the means of selection for the Superintendent of Public Instruction, whose office is established in Article VIII, Section 6. The Superintendent of Public Instruction is to be appointed by the Governor, but Article VIII, Section 6 adds that "the General Assembly may alter

by statute this method of selection and term of office.” Conceivably, were the General Assembly to be unhappy with gubernatorial policies in education, the Superintendent of Public Instruction, who heads the State Department of Education, could be made a legislative appointee.

Regarding matters outside of education and the retirement system, the General Assembly has general oversight authority extending from its overall legislative powers and from its specific appropriation powers. Each session of the General Assembly dozens of joint resolutions are approved establishing joint study commissions of the General Assembly or directing a legislative agency to conduct an oversight study. The legislative agencies that are most active in conducting legislative oversight include JLARC, which does a variety of performance and program reviews as well as policy analysis studies. In addition, several legislative commissions have professional staffs (albeit small ones) to conduct studies. These commissions include the Crime Commission, the Commission on Youth, and the Joint Commission on Healthcare.

Legislative oversight studies can have significant policy outcomes. JLARC’s study of the state budget process lead to the adoption of a constitutional amendment creating a revenue stabilization fund (Article X, Section 8). JLARC’s series of studies on transportation and education funding in the 1980’s lead to the creation of funding formulas for allocating resources in these areas. In addition, legislative oversight studies can identify wrongdoing by executive branch officials or cases where the executive branch is not complying with legislative intent.

In addition to oversight studies, the General Assembly has the power to hold hearings on any subject of its choosing. The General Assembly frequently

summons executive officers to testify before standing committees, subcommittees, or commissions. While the General Assembly does not have subpoena power, a legislative summons is seldom ignored. Legislative hearings are generally open to the public and to the media, giving the General Assembly a public forum in which to exercise oversight (an on occasion in which to embarrass executive branch officials who have offended legislative sensibilities).

**Concluding Thoughts on the General Assembly's Role in Administration**

As shown in Chapter V and particularly in Chapter VI, aggrandizement of executive power in recent years has diminished the role of the General Assembly in administration. In particular, the expansion of the executive powers to appoint and to reorganize, as well as the growth of the institutional governor, have served to aggrandize executive power in administration. Notwithstanding this growth of executive powers, the General Assembly has significant administrative powers that it can bring to bear when it chooses to do so. These powers include general legislative power, confirmation power, impeachment and removal power, appointment power, appropriation power, and oversight power.

During the 1994 and 1995 sessions of the General Assembly, it appeared that the General Assembly was starting to reassert its constitutional prerogatives in administration. The long-dormant confirmation power is being taken more seriously. The always important appropriation power is being used more broadly than ever by the General Assembly to control administrative actions. As Chapter VIII will argue, one of the consequences of executive overreach in administration may well be a corresponding legislative reaction that leads to increased friction between the two political branches and potential legislative micromanagement of

administration. In particular, executive aggrandizement has promoted a growth in the institutional legislature.

## VIII. Conclusions on the Case Study

The conclusion reached in Chapters V and VI that Virginia state government in general and the civil service in particular are becoming more politicized and more dominated by the chief executive was supported by interviews conducted as part of this study. These interviews, together with document review, suggest that administration in the Commonwealth of Virginia has gone in a fairly short time from being highly professionalized to a more politicized, less professionalized state. Executive aggrandizement through civil service reforms, expansion of the Governor's reorganization authority, and growth of the institutional Governor have contributed to the politicization of state government. This politicization has profound implications for the regime, policy subsystem, and organizational levels in state government.

At the regime level, the increased leverage of the Governor over the civil service and the increased power of the Governor in administration potentially diminish the General Assembly's role in administration. As such, the gubernatorial aggrandizement is not so much a violation of separation of powers, which Publius in *Federalist 47* understood to occur only when one branch of government entirely usurps the function of another branch. The diminution of the General Assembly's role in administration is significant for public administrators in two respects. First it truncates the theory of overhead democracy into mere executive supremacy, thereby diminishing the ability of

public administrators to fulfill their constitutional role. Second, executive aggrandizement invites legislative retaliation and corresponding conflict between the political branches, leaving administrators caught between two warring political superiors. Indeed, the General Assembly has attempted to counteract the threat posed by executive aggrandizement by enhancing its own institutional structures. The result is an increasing role in state government for both the institutional governor and the institutional legislature and a correspondingly increased level of politicization and diminished role for the professional civil service. Existing public administration literature on constitutional issues in administration (Rohr 1986; 1989a; 1989b; 1990; Cook, 1989; Spicer and Terry, 1993) has concentrated almost exclusively on the federal level. This dissertation has contributed to public administration literature by analyzing the constitutional role of administration at the state level, and the role played in administration by the Governor and General Assembly in Virginia.

Ironically, the Governor's increased leverage over the civil service has not made the Governor a more effective policy actor in the policy subsystem level. Nelson (1983) argues that attempts by executives at exerting more control generally yield less control. In fact, increased politicization has increased partisan discord and lessened opportunities for the Governor to achieve policy objectives. The policy subsystems in which policy outcomes are negotiated are now complicated by a partisan political subplot that previously was the exception

rather than the rule in state government. Discussion of the implications of partisan politicization on policy subsystems extends and enriches the existing literature on the political economy of policy subsystems (Wamsley and Zald, 1973; Milward and Francisco, 1983; Wamsley 1985; Milward and Wamsley, 1986).

At the organizational (agency) level, the Governor's increased leverage has made for more partisan, not more effective agencies. In fact, increased levels of partisanship have the potential to undermine employee morale, trust in agency management, and confidence in the agency's effectiveness. The recent cases of the Virginia Department of Education and the Virginia Department of Environmental Quality are examples of the pathologies that can result from politicizing a state agency.

### **Interview Findings**

Recent JLARC reports, including *The Reorganization of the Department of Education* (1991), *Review of the Virginia Retirement System* (1993), and *Review of the Implementation of HB 776* (1994) and *Interim Report: Review of the Department of Environmental Quality* (1995) demonstrate a trend towards politicization of state agencies, with the attendant negative consequences. The reports of the Governor's Commission on Government Reform issued an explicit call for more politicization of state government through growth of the institutional Governor. Review of merit system reforms in Virginia suggests a similar trend.

To supplement review of state government documents and merit system reforms, the author pursued an interviewing strategy.

As discussed in Chapter IV, the author conducted interviews with current and former state government officials. The interview subjects were in general agreement on several points. These included:

- state government is becoming more politicized,
- Governor-elect Allen's call for resignations of SB 643 employees at the start of the administration was a defining moment in the politicization of state government, and
- the role of cabinet secretaries has not traditionally been to serve as chief executives for their agencies but this role has evolved during the present administration.

Politicization also appears to have personally affected some of the career administrators interviewed, particularly those below the agency head level. In some cases perceived politicization of state government was a decisive factor in the decision to leave state government.

### **State Government is Becoming More Politicized**

Of the interview subjects who expressed an opinion on this subject, all agreed that state government is becoming more politicized. One interview subject, a former agency head with over twenty years of state service, observed that increased politicization was, to some extent, the logical end result of the development of a two party system in the state. Another interview subject, a former career administrator who rose to the level of deputy director of a state

agency, noted that the personalities of individuals involved in state government now affected the level of politicization. As individuals with partisan political backgrounds assume posts traditionally held by career administrators, the results are a more political outlook. This belief was echoed by a current agency head, who commented that the number of professionals at the senior level in state government had decreased, while the number of individuals with political backgrounds had increased.

Another current agency head, who has served for more than one administration, observed that politicization has been slowly evolving in the state and cannot be attributed to any one administration. The agency head also commented that the state's Department of Personnel and Training (DPT) has not functioned effectively in protecting the state's merit system. A former DPT director also expressed concern about the politicization of the agency. Two former agency heads with long state service, however, commented that during their time in office DPT had been effective. Both wondered aloud whether this would still be the case given the background of recent appointees to the agency. The past two DPT directors have been, respectively, the goddaughter of Governor Wilder and the husband of Governor Allen's Secretary of Health and Human Resources. Neither appointee had a significant human resources management background prior to being appointed.

## **Resignation Demand was a Watershed in the Politicization of State Government**

Interview subjects who held senior positions in December 1993 were asked to comment on the effect of the Governor-elect's demand for the resignations of all SB 643 employees in December 1993. Though this demand by the Governor-elect was made without legal authority (he had not yet assumed office) and was overturned by the sitting Governor<sup>1</sup>, without exception interview subjects described this event as severely damaging to the morale of career administrators. Over half of the interview subjects, without prompting from the interviewer, used the term "devastating" in referring to the Governor-elect's demand for resignations.

A current agency head interviewed commented that this demand for resignations was meant to provide senior employees with ample warning that changes were expected and that job security for senior career administrators was not guaranteed. However, three former agency heads interviewed, as well as a former deputy director described their reaction to the resignation demand as one of "shock." Indeed, it appears that this resignation demand was a watershed, bringing into sharp relief the trend towards politicization of state government and accelerating the trend towards politicization.

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<sup>1</sup> Governor Wilder, then in his last month in office, issued an executive order to all SB 643 employees ordering them not to comply with Governor Allen's request for recommendations.

## **Effect of Politicization on Individual Bureaucrats**

JLARC's *The Reorganization of the Department of Education and Interim Report: Review of the Department of Environmental Quality*, discussed in detail later in this chapter, suggested that perceived politicization of a state agency could have a significant effect on employee morale and trust in agency management. Politicization can also have a negative effect on individual career administrators in terms of their sense of physical well-being and willingness to continue a government career.

Two career middle managers interviewed indicated that the politicization in their agency has caused them to suffer negative health effects and to sometimes dread going to work. One middle manager commented that politicization affects "everything that I do." In this manager's department, everything from contracting to grant applications to replies to public requests for information was given a "political spin" or was considered from a political point of view.

Politicization also has a direct effect on the careers of administrators. Each of the former agency heads interviewed as part of this review lost his or her job in the transition from one administration to another. While replacement of agency heads in the transition from one administration to another may be routine at the federal level, it is not routine in Virginia, even when there is a change of parties. The last time that the Governor's office changed parties in

Virginia, prior to the 1993 election, was in 1981, when Democrat Charles Robb was elected to Replace Republican John Dalton. Governor Robb reappointed 42 of the 54 agency heads appointed by Governor Dalton, a total of 78 percent<sup>2</sup>. When Governor Allen replaced Governor Wilder, on the other hand, he reappointed only 11 of 56 agency heads appointed by Governor Wilder, or 20 percent. The former agency heads interviewed as part of this study had an average tenure of over 20 years in state government and of more than 10 years at the agency head level.

Politicization also affects the careers of senior managers below the agency head level. One of the former deputy directors interviewed was removed using Senate Bill 643. Another former deputy director chose to retire early, commenting that the politicization of state government was a decisive factor in making the choice to retire. Even in cases where a senior manager was not replaced as a result of the change in administrations, the potential to be replaced every four years has a negative effect on the ability of a professional to plan for a career in state government. Several interview subjects commented that the lack of security in senior level state posts might make qualified individuals reluctant to assume such posts.

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<sup>2</sup> This does not include agency heads, such as the Director of the State Council of Higher Education for Virginia, who were appointed by supervisory boards.

As noted in Chapter IV, interviews were not the major research technique of this project. Nevertheless, interview findings confirm the findings of earlier chapters that the politicization of state government has accelerated. The implications of this politicization will be the subject of the remainder of this chapter.

### **Effect of Politicization at the Regime Level**

Chapter VII discussed the constitutional role of the General Assembly in administration and suggested that continued aggrandizement of the chief executive could provoke a legislative reaction to assert more of a role in administration. There are some indicators that this may already be occurring. These indicators include the growth of the institutional legislature and nascent use by the General Assembly of its long dormant confirmation powers.

The administrative role of the Governor and General Assembly in Virginia have long-term implications for public administration in the state in terms of what Rosenbloom (1983) termed the political approach to public administration, which views public administration in terms of the relative responsiveness of administrative agencies to elected leaders (220-221). As the case study of Virginia demonstrates, the political view of public administration can easily be truncated into the executive view of public administration, where the General Assembly's constitutional role in administration is minimized and the governor's

is enhanced through reorganization, civil service reform, and proliferation of political appointees.

Virginia does not currently have either a full-time legislature or a large number of legislative staff. The establishment of a full-time legislature is not considered even a remote possibility in Virginia (interview). However, the number of legislative staff has been increasing. While the number of executive branch staff continues to dwarf the number of legislative staff, the number of legislative staff in the state has been increasing significantly faster than executive branch staff. Legislative staff increased from 445 positions in 1982 to 595 in 1995. While the number of legislative staff increased 34 percent during this thirteen year period,<sup>3</sup> the number of executive staff has increased only 14 percent during the same time period, increasing from 90,807 in 1982 to 103,673 in 1995 (1995 Appropriation Act and 1996 Appropriation Act).

The growth in absolute number of legislative staff is one manifestation of the General Assembly's institutional response to the threat to separation of powers posed by the increased strength of the Governor and the institutional governor. Another manifestation of the General Assembly's response is the increased breadth of activities in which legislative staff are now involved. In the late 1970's the General Assembly created full-time staffs to assist the two

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<sup>3</sup> This period is chosen for comparative purposes, because FY 1992 is the first year that Virginia began listing maximum employment levels by agency and by branch of government in the appropriation act.

legislative budget committees (House Appropriations and Senate Finance) in their responsibilities. During the past decade these staffs have played an increasingly prominent role in state budgeting (interview). During the past decade, General Assembly has created full-time staffs to oversee the state's efforts in healthcare, crime prevention, and juvenile justice<sup>4</sup>.

It should be noted that officers and employees of the General Assembly are exempt from the Virginia Personnel Act, serving at the pleasure of their appointing authority. Prior to the 1995 legislative elections, when the first change in party control of the General Assembly in over 100 years seemed a possibility, there was considerable concern among legislative staff about a wholesale replacement of legislative staff. As the anticipated change in party control did not occur, the job security of legislative staff after a change in parties remains an open question.

The General Assembly has also broadened the scope of responsibility for its existing staff and proposed the creation of new legislative agencies. In 1994, the General Assembly gave JLARC continuous oversight authority over the Virginia Retirement System (VRS). In 1995, JLARC was given responsibility for reviewing and commenting on the cost-benefit methodology used in the executive branch. Finally, beginning in 1994 the General Assembly began

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<sup>4</sup> These are, respectively, the Joint Commission on Healthcare, the Crime Commission, and the Commission on Youth.

discussing the creation of a legislative budget office, modeled on the Congressional Budget Office (CBO). Each of these efforts was bipartisan and grounded in concern that the General Assembly could no longer get the objective information that it needed from the executive branch.

The General Assembly's institutional involvement in the Virginia Retirement System and in budget development and analysis are both instructive in the General Assembly's response to perceived attempts at executive aggrandizement and politicization by the executive branch. In both cases, executive overreach prompted a legislative reaction that both decreased the Governor's effective control and increased the General Assembly's involvement. In the long-term, a concern is that increased involvement by both political branches in administration will have negative consequences for the practice of administration. These consequences will be most apparent at the policy subsystem level, where increased numbers of partisan actors will further complicate and may actually rupture the political economies of the given policy subsystem.

As discussed in Chapter VII, the General Assembly has a constitutional responsibility to ensure responsible management of the Virginia Retirement System. During the administration of Democratic Governor L. Douglas Wilder, the General Assembly became concerned about perceived politicization of VRS by the Governor. There were several causes for this concern. First, the

Governor appointed two executive branch agency heads, the director of the Department of Planning and Budget and the State Controller, to the Virginia Retirement System Board. These agency heads were appointed in slots reserved for “state employees.” Members of the General Assembly expressed considerable concern about the propriety of having political appointees of the Governor filling positions meant to represent the interests of future beneficiaries of VRS (interview).

Legislative concern about VRS was heightened when VRS completed a hostile takeover of a private corporation, the RF&P Corporation. Legislators expressed concerns about the propriety of a public employee retirement system taking over a private company, the secrecy involved in the takeover<sup>5</sup>, and the soundness of the investment. Once the private company became a wholly-owned VRS subsidiary, legislative concern was further heightened when two prominent legislators appointed to the subsidiary’s board were removed from the board at the direction of the Governor (interview).

Concern about politicization of the VRS was further heightened when the Governor announced in a press conference that land owned by the retirement system at Potomac Yards in Northern Virginia had been designated as the new site for a stadium for the Washington Redskins. When the Virginia Attorney

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<sup>5</sup> The takeover was the subject of a federal grand jury inquiry that resulted in a guilty plea by a VRS staff attorney and allegations made by the U.S. Attorney for the Eastern District of Virginia against the VRS director, chairwoman, and chair of the investment advisory committee. However, none of these three were ever indicted.

General raised questions about the propriety of VRS's dealings with the RF&P Corporation in general and the stadium agreement in particular, the Governor removed the Attorney General as counsel to VRS, claiming that she had a conflict of interest.<sup>6</sup> This led to the unprecedented spectacle of a Virginia Governor and Attorney General (of the same party) suing one another in state court.

In response to the perceived politicization of VRS by the Governor, the General Assembly took several steps. First, JLARC was instructed to study VRS in general, with particular attention given to the RF&P Corporation acquisition and the governance of the retirement system. After the JLARC study was completed, the General Assembly removed VRS from the executive branch, making it an independent agency. The VRS board was restructured by statute. The General Assembly gave itself the right to appoint four of the nine board members. More stringent requirements were placed on the qualifications of the Governor's appointees to the board, including a prohibition against the Governor's secretaries or agency heads serving on the board. JLARC was given continuing oversight responsibility for VRS, and was instructed to have at least two commission meeting per year devoted to the subject. JLARC's staff

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<sup>6</sup> Contrary to the crime busting image cultivated by some Attorneys General (and by some aspirants to the office) the Office of the Attorney General in Virginia serves primarily as counsel to state agencies (almost exclusively in civil matters). VRS, as a state agency, was represented by the Attorney General's office as a matter of course. After the Attorney General was dismissed as counsel to VRS, the agency retained private counsel to provide legal advice.

was also increased by one member, to allow for a full-time analyst to oversee VRS. Finally, the General Assembly passed a constitutional amendment, to be submitted to the voters, enhancing the General Assembly's oversight responsibilities for VRS.

At the federal level, it has become a cliché for senior members of Congress to declare the executive budget "dead on arrival." However, in Virginia, legislators of both parties have traditionally given substantial deference to the Governor in budget matters. Only the Governor was thought to have the resources and staff needed to conduct sound budget formulation and analysis. Unlike the post-Stockman Office of Management and Budget, which is generally viewed as the political creature of the presidency, the Virginia Department of Planning and Budget (DPB) and the Department of Taxation<sup>7</sup> were viewed as an impartial source of budget analysis.

Beginning in 1990, when Virginia faced a significant revenue shortfall, members of the General Assembly expressed substantial concern about the reliability of the executive branch agencies in revenue forecasting and budget formulation (interview). During the Allen administration, concern about DPB's objectivity surfaced. The budget documents produced by DPB became notably more political in tone, complete with photographs of citizens demanding passage

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<sup>7</sup> DPB is responsible for budget formulation. The Department of Taxation is responsible for revenue forecasting.

of the Governor's policy objectives (such as abolishing parole) and snapshots of the Governor touring factories.

DPB also began involving itself in functions viewed by some General Assembly members as political such as review of regulations promulgated by state agencies.<sup>8</sup> In addition, the new director of DPB, traditionally a position reserved for a career administrator, was a former Republican party official from Fairfax who did not have state government experience. For the first time in recent memory, members of the General Assembly (from both parties) began questioning the accuracy and the motives behind DPB's analysis (interview). During the 1995 session of the General Assembly, a senior Republican member of the House of Delegates sponsored a resolution calling for the creation of a legislative budget office, to be modeled on the Congressional Budget Office. By way of expressing its displeasure with DPB, the 1995 General Assembly significantly reduced DPB's staff.

In 1995, the outgoing chairman of the Senate Finance Committee called for creation of a legislative forecasting function, arguing that the General Assembly could no longer trust the executive branch to provide sound budget analysis. Regardless of whether a legislative budget office, forecasting function, or both are created, the legislative money committee staffs are now more heavily

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<sup>8</sup> Despite the word "Planning" in the agency name, DPB has traditionally devoted the vast majority of its resources to the budget function. In fact, the 1991 JLARC review of DPB criticized the agency for not devoting more resources to management and program evaluation reviews.

involved than ever in budget preparation, as opposed to simply reviewing and modification of the executive budget (interview).

In addition to the growth of the institutional legislature, the General Assembly has also begun to make halting use of its confirmation powers. As mentioned in Chapter VII, the 1994 General Assembly witnessed the first negative votes cast on the confirmation of cabinet nominees since the adoption of the 1971 Virginia constitution (both nominees in question were easily confirmed notwithstanding a handful of negative votes). On January 30, 1996, the General Assembly nearly rejected gubernatorial nominees for the first time when the Senate Privileges and Elections Committee initially rejected three of the Governor's appointments to the George Mason University Board. Ironically, the committee that rejected these nominees was controlled by members of the Governor's own party. The nominees were rejected because of fears that these nominees (who had been serving on an interim basis) were politicizing the process for selecting a new university president. However, the committee reversed its decision on February 2, 1996, after extracting promises of good behavior from the applicants in question.

One committee member commented to the media that, in good conscience, he could reject nominees such as these already in office (via recess appointments) only for malfeasance or misfeasance<sup>9</sup>. This attitude, which

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<sup>9</sup> *Richmond Times Dispatch*, February 3, 1996, page A1.

appears to be widely shared, confuses the confirmation power with the impeachment power, since recess appointees have never faced confirmation to begin with. The General Assembly is under no constitutional obligation to reject nominees only for improper conduct, but the tradition of deferring to the Governor on executive appointments appears to be strong.

Nevertheless, given the recent halting steps to assert the confirmation power, it would not be surprising if, in the immediate future, gubernatorial nominees to sensitive posts face considerably more searching scrutiny than has been the case in the past. The result would be that the Governor's previously unchecked appointment power would once again be shared with the General Assembly.

### **Effect of Politicization on the Policy Subsystem Level**

Policy subsystems have been recognized for at least two decades to be complex social and political networks, rather than the more simplistic metaphor of "iron triangles" (subcommittee/agency/interest group) that the political science literature once described (and that journalists continue to fixate on). Policy subsystems were defined by Wamsley as networks of the "multifarious actors" in a given policy area configured in a manner akin to "complex molecular models used in teaching chemistry" (Wamsley, 1985: 6). These multifarious actors include a myriad of interest groups, legislators and legislative staff, executive agency staff, and professionals interested in the policy question at issue.

Wamsley argues that policy subsystems can be understood in terms of a political economy framework applied to the internal and external political economies of the policy subsystem. According to Wamsley, policy subsystems have internal norms, imbedded incentive structures, and an internal equilibrium. Conflict is restricted to “lower level” or “routine” marginal disputes as all parties in the subsystem accept the tacit norms and incentive structure of the subsystem (Wamsley, 1985).

Hecló (1978) found that subsystem norms varied so widely among subsystems that he reframed the issue of policy subsystems as issue networks. According to Hecló, issue networks developed among the constituent actors in a given issue area, with the issue itself serving as an organizing force. In Hecló’s view, issue networks are shorter in lifespan than Wamsley’s policy subsystems, because the issue network is a temporary interaction among a variety of actors, not an institutionalized relationship. While Hecló examined executive branch political appointees as issue network actors, he did not view them as dominant actors.

Browne (1987) examined institutional variables at the state level in attempting to explain policy outcomes in the area of aging. Browne’s variables focused almost exclusively on the legislative process, viewing approved legislation as a successful policy outcome. In so doing, Browne does not examine the impact of partisan actors in the administrative world.

Bickers and Stein (1994) examine domestic policy subsystems at the federal level from the point of view of agency survival in difficult budget years. They argue that the agency's success in building subsystem relationships, especially with legislators, influences the agency's success in attaining its funding goals. Bickers and Stein do not examine the state level and do not address the role of executive branch political appointees hostile to an agency's purpose (for example Ann Buford at the Environmental Protection Agency during the first Reagan term) in preventing agencies from making their case to Congress

The existing literature on policy subsystems does not consider what effect the introduction of partisan political actors has on the policy subsystem, particularly the internal economy of the policy subsystem. Partisan political actors tend to come from a background outside the subsystem. Rather than accepting the tacit norms of a subsystem, partisan actors may be actively hostile to them. Partisan actors also tend to have short-term involvement in policy subsystems, leaving limited opportunity for them to be acclimated to the subsystem. Partisan actors are motivated by a reward structure centered on partisan contacts and the election cycle, not the incentives available through adhering to the norms of the subsystem. Therefore partisan actors are less likely to be co-opted by the subsystems' incentive structure into accepting the

norms of the subsystem or acquiescing to the tacit power and authority of the dominant coalition of actors in the policy subsystem.

Perhaps most importantly, partisan actors potentially escalate the low-level conflict described in the policy subsystem literature. Partisan actors have a world view informed by the stylized, exaggerated conflicts of the political campaign. The political campaign is an all or nothing affair. With rare exceptions<sup>10</sup>, a political race is a “winner-take-all” exercise. The winner-take-all model of a political campaign contrasts markedly with the policy subsystem literature’s description of low-level conflict aimed at marginal adjustments in policy (Wamsley, 1985: 42), passage of relatively limited legislative initiatives (Browne, 1987: 55-56) or agency’s attempting to protect a certain percentage of their base funding (Bickers and Stein, 1994: 175-179).

In Virginia state government partisan political actors have permeated the already complicated organizational and interpersonal politics of policy subsystems. The result has been what Wildavsky (1988) termed “ideological dissensus” where the previously low-level conflict of policy subsystems escalated into the winner-take-all conflict of the political campaign.

Partisan politics actors are increasingly injected into various policy subsystems in the Commonwealth because of: (1) the increasingly political

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<sup>10</sup> The exceptions to the winner-take-all model of a contested election would be elections in multi-member districts, where the top two or even three candidates are elected, and at large elections to local governing boards or school boards, where the number of top finishers equal to the number of available seats are all “winners.”

nature of appointees to head state agencies, (2) the increasing involvement of the Governor's office and the General Assembly in policy discussions once largely handled by professionals, and (3) the increasingly political nature of senior level and even middle and technical level staff within state agencies.

Examples of ideological discord can be found in several policy subsystems in the State. Two examples include the juvenile justice subsystem, and the surplus property subsystem. While juvenile justice is an intuitively controversial issue, disposition of surplus property appears, on its face, to be largely apolitical. However, both policy subsystems, facing already difficult issues, are now further complicated by the ideological discord injected by partisan politics resulting from the politicization of state government.

### **The Juvenile Justice Subsystem**

Governor Allen was elected promising, among other things, to eliminate parole. In his inaugural address, Governor Allen stated "our commonwealth has experienced an epidemic of violent crime, much of it the result of offenses committed by career criminals out on parole."<sup>11</sup> The Governor therefore convened a special session of the 1994 General Assembly to eliminate parole for inmates sentenced after July 1, 1994. The General Assembly concurred with the Governor's recommendation, and Virginia felons now are legally obligated to

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<sup>11</sup> Inaugural address of Governor George Allen, January 8, 1994, Richmond, Virginia.

serve 100 percent of their sentences with no allowances for good behavior or early release except in the case of executive clemency.

Once parole was eliminated for adults, the rhetorical war on crime quickly turned to juvenile justice. The Governor's Strike Force Public Safety Committee recommended that the Governor "establish a task force to reinvent the juvenile justice system for Virginia" (Governor's Commission on Government Reform, Public Safety Committee Report, 1994: 8). The Governor formed a Commission on Juvenile Justice Reform, headed by the Attorney-General, to make recommendations on the issue (Executive Order 95-44, issued by Governor George F. Allen).

The General Assembly, in the early 1990's, had established a Commission on Youth, with small professional staff, to study juvenile justice issues. This commission, in response to Governor's commission, began drafting its own proposals on juvenile justice. The Governor's commission started from the a priori assumption that the juvenile justice system needed to be more punitive. The Commission on Youth started from the presumption that the system needed to be reformed in ways other than simply increasing punishment (interview). With the Governor's office in the hands of the Republican Party and the General Assembly in the hands of the Democratic Party, the stage was set for a partisan conflict within the juvenile justice policy subsystem.

Previously, the juvenile justice policy subsystem consisted of a variety of professional, largely non-partisan actors. These actors included social workers, probation and parole offices, staff of the State Department of Youth and Family Services (DYFS), the Department of Corrections, local law enforcement agencies, juvenile court judges, youth advocacy groups, victims rights groups, church groups, parents, local prosecutors, and the defense bar. While previous debates on juvenile justice may well have involved a good deal of low-level conflict seeking marginal adjustments, the policy subsystem did not typically break down along partisan fault lines.

However, the prominence of the issue in 1995 led to high level political involvement. As mentioned previously, the Governor's Commission on juvenile justice reform was chaired by Attorney General James Gilmore, the presumptive 1997 Republican gubernatorial nominee. The Youth Commission was chaired by Delegate Jerrauld Jones (D-Norfolk), chairman of the General Assembly's Black Caucus. The Department of Youth and Family Services was headed by Patricia West, a former Republican activist and assistant Commonwealth's Attorney from Chesapeake (who has the distinction of being one of the youngest heads of a major state agency ever appointed). As a result of the involvement of these partisan actors, a serious policy question, how to administer juvenile justice in the face of increasing juvenile crime, has been almost exclusively framed in partisan political terms.

## **The Surplus Property Subsystem**

The State's Department of General Services (DGS) is responsible for disposing of surplus state assets, including both real and tangible property. During the period 1994-1995, the surplus property subsystem became infiltrated with partisan actors. As if to demonstrate that partisan politics can thrive in even the most prosaic of settings, the surplus property subsystem became the setting for repeated partisan conflict.

The state's surplus property subsystem is a relatively uncomplicated one, consisting of the Department of General Services (DGS), which oversees the state's physical assets, state agencies that own surplus assets, legislative fiscal staff and committees, local governments who potentially can receive surplus assets of the state, environmental groups, and citizens interested in acquiring state surplus assets.

In 1994 the JLARC identified significant excess real property held by state agencies<sup>12</sup>. The report had been prepared as a follow-up to a 1977 JLARC study at the request of the House Appropriations Committee, which was interested in identifying one-time revenue. However, as the report was under preparation the Governor's drive to abolish parole was complicated by a shortage of funds with which to construct additional prison space. The week

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<sup>12</sup> Joint Legislative Audit and Review Commission, October 1994, *Review of State-Owned Real Property*, Richmond, VA: Joint Legislative Audit and Review Commission.

before the JLARC report was released, the Governor announced that surplus real property assets of the State would be used by the administration as a major source of funding for the new correctional facilities necessitated by the abolition of parole. Surplus assets had been brought to the Governor's attention by the Strike Force Committee on Privatization and Procurement, which recommended an executive branch study of surplus real property (Governor's Commission on Government Reform, Privatization and Procurement Committee Report, 1994: 29). In response to the JLARC report, which identified as much as \$36 million in surplus state assets, the Governor created a Commission on the Conversion of State-Owned Real Property,<sup>13</sup> headed by his former campaign manager (the Secretary of Administration) and a Republican state senator. The executive order creating the Governor's commission emphasized that proceeds of surplus property sales would be used to fund correctional facilities.

However, many of the properties identified as surplus by JLARC were in higher education or mental health. Existing state law dictated that half the proceeds from the sale of such property would be retained by the agency that held the property, with the other half credited to a fund to support conservation activities. Therefore, the Governor's proposal to use the proceeds for surplus assets to fund prisons ran afoul of advocates for natural resources, higher education, and mental health. The 1995 General Assembly waged a heated

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<sup>13</sup> Executive Order 94-30, issued by Governor George F. Allen, September 13, 1994.

debate about how to spend money that, until the surplus assets were offered for sale and purchased, did not exist. The normally sedate surplus property subsystem had become infused with and a microcosm for partisan conflict about state spending priorities in general.

During the 1995 election season, the Director of DGS, Donald Williams, found another way to introduce surplus state property into the 1995 General Assembly campaign. Mr. Williams, a former Republican Party official in Chesapeake, spent much of the week before the General Assembly elections driving a truck around the state to deliver surplus state computers (rendered surplus when their former users had their positions eliminated). These deliveries came to the attention of the General Assembly and the state media after the election when it was revealed that all of the surplus computers were delivered to schools within the districts of Republican members of the General Assembly facing difficult reelection campaigns (interview). The administration indicated that the computers were simply delivered to districts that had requested them. The State Department of Education indicated that it had been developing procedures to allocate the computers to schools that needed them most and had no role in DGS's allocation of computers to school districts (Auditor of Public Accounts, 1996). An angry General Assembly sharply criticized the DGS director's actions and began considering enhanced legislative oversight of the disposition of state surplus property (interview).

Meanwhile, the 1995 legislative elections had centered on higher education, not correctional issues as had been the case in the 1993 gubernatorial election. The Governor's 1996-98 budget addressed the issue of surplus property once again. This time, however, the proceeds from surplus property was earmarked for higher education capital outlay (1996-98 Budget Bill). The General Assembly sharply criticized the Governor's proposal, stating that it was based on an unstable source of revenue (interview).

The intrusion of partisan politics into so routine a matter as surplus property disposition brings into sharp relief how pervasive the politicization of state government has become. It appears that, at the policy subsystem level, that even the most mundane activities of state government now potentially involve partisan conflict and partisan actors. The comfortable assumption that policy subsystem conflict is low-level and nonpartisan is challenged by the pervasiveness of partisanship in administration.

The surplus property example also is instructive in considering the weaknesses of the notion of executive supremacy. It is difficult to argue in any serious way that democratic government in the Commonwealth is dependent on the chief executive exercising partisan control over the disposition of state surplus property. The logic of executive supremacy is not only an invitation to executive aggrandizement, it is also an invitation to partisan infiltration of the most routine activities of government. As Chapter IX will argue, partisanship has

no place in these prosaic activities of government, which together account for the majority of government activities at all levels of government. NAPA's 1993 study of FEMA observed that "there is no Republican or Democratic way to respond to a disaster" (NAPA, 1993: 49). Similarly, there is no Republican or Democratic way to conduct many of the activities of government. Party platforms are generally silent on surplus property. For most of the activities of government, executive supremacy and the downward penetration of political appointees and other political actors infuses a needless partisan level of meaning into the already complex political economy of policy subsystems. Chapter IX will discuss this theme in more detail, emphasizing that much of the presidential aggrandizement since President Lincoln has flowed from the application of the commander-in-chief clause (Article II, Section 2) of the U.S. Constitution in national security issues that are not at all relevant to state government

### **Effect of Politicization on the Agency Level**

JLARC 's reviews of the Department of Education (DOE) and Department of Environmental Quality (DEQ) demonstrate the consequences of politicization at the agency level. As chapter VI outlined, politicization at DOE was manifested in a sweeping reorganization of the agency that required most career administrators in the agency to reapply for their positions (JLARC, 1991). Politicization at DEQ was reflected in a variety of questionable personnel

practices identified by the JLARC review. In addition DEQ employees indicated fears of retaliation from political superiors if they angered members of the regulated community (JLARC, 1996) .

In both agencies, the consequences of politicization were low employee morale, a low level of trust in agency management, and employee unwillingness to make difficult decisions for fear of retaliation. In general, politicization diminished organizational capacity and the ability of the agency to fulfill its statutory mandate.

At DOE, JLARC's survey of agency employees found that the agency had "very low morale" (JLARC, 1991: 44). Only 10 percent of DOE employees responding to the survey agreed that agency morale was good. Thirty-eight percent of employees disagreed with the statement agency morale was good and 46 percent of the employees responding to the survey strongly disagreed with the statement. A total of 84 percent of DOE employees responding to the JLARC survey either disagreed or strongly disagreed with the statement employee morale is good (JLARC, 1991: 45)..

JLARC also concluded that DOE employee trust in agency management was low. Seventy-five percent of DOE employees disagreed with the statement that "employee trust in agency management is good." Only 12 percent of employees agreed with the statement (JLARC, 1991: 46).

JLARC conducted a similar employee survey of DEQ employees. A number of DEQ employees commented in their survey responses on their concerns about politicization. For example:

“nepotism is the most blatant I’ve seen”

“jobs have been awarded on political affiliation rather than merit”

“DEQ has been infiltrated with over a dozen political appointees; special positions are created and advertised and the temporary (wage employees) . . . just so happened to be ‘the most qualified for the jobs’”

“politicization of the workforce is inexcusable, destroys feelings of professionalism.” (JLARC, 1996: 54 ).

As was the case with DOE employees, JLARC found that morale among DEQ employees was very low. Only four percent of DEQ employees responding to the JLARC survey agreed with the statement “employee morale is good.” Thirty-four percent of DEQ employees strongly disagreed with the statement, and 55 percent DEQ employees strongly disagreed with the statement. A total of 89 percent of DEQ employees either disagreed or strongly disagreed with the statement “employee morale is good” (JLARC, 1996: 56).

Similarly, the JLARC DEQ employee survey found that employee trust in agency management was low. Nine percent of DEQ employees responding to the JLARC employee survey agreed with the statement “employee trust in agency management is good.” Eighty-three percent of DEQ employees responding to the JLARC survey either disagreed or strongly disagreed with the

statement (JLARC, 1996: 58). JLARC also found that a majority of DEQ technical staff feared retaliation (at least to some extent) for making a decision consistent with law and regulation but which upset a member of the regulated community enough to provoke a complaint (JLARC, 1996: 62).

At both DOE and DEQ, politicization of the agency appeared to have created a number of organizational pathologies such as low morale and a low level of trust in management. In the long-term, politicization has the potential to diminish organizational capacity. Interviews conducted by the author with DOE staff as part of this study suggest that DOE continues to be a heavily politicized agency, and that DOE organizational capacity has suffered as a result of politicization. JLARC's DEQ report expressed concern that politicization would have long-term consequences for DEQ's organizational capacity as well (JLARC, 1996: 68).

Politicization at the agency level also makes it difficult to operationalize normative theories that call upon career administrators to act as constitutional officers or agential leaders (Rohr, 1989a; Rohr, 1990; Wamsley, 1990). These theories assume a certain degree of administrative discretion that may not exist in a highly politicized environment. In particular, these theories assume that career administrators will have freedom to mediate amongst their political, constitutional masters in the executive and legislative branches. It might be more accurate, in the case of a highly politicized agency, to state that

career administrators are caught between the mutually incompatible desire of the chief executive to exercise total control in administration and the desire of the legislature to exercise its constitutional role in administration. At the policy subsystem level, career administrators are potentially victims of partisan conflict between the political branches rather than long-term keepers of subsystem norms. Rather than serving as a balance wheel, public administrators may instead find themselves in the unhappy position of the Alsace and Lorraine provinces of France. These provinces spent seventy years caught between hostile French and German armies and were regularly exchanged as war booty at the end of each conflict.

Career administrators who find themselves in highly politicized agencies with low morale, low trust in agency management, and fear of retaliation for carrying out their legal or regulatory responsibilities are not optimal candidates for being persuaded that they should view themselves as constitutional officers. Long's prescription of resignation in protest (1992) is an option of last resort for career administrators who are asked to break the law or the dictates of their own conscience in the service of some political end. However, resignation in protest is certainly a difficult route to pursue in personal terms. As government downsizes at all levels, resignation in protest is an increasingly difficult choice to make for career administrators who are not eligible for retirement or independently wealthy.

In conducting interviews with career administrators in highly politicized environments, the author was struck by the feeling of helplessness expressed by interview subjects when describing politicization. Politicization was described in terms reminiscent of a force of nature: random, boundless, and irresistible. Politicization can become the dominant reality for career administrators in agencies captured by politicization. When this occurs, as it did in FEMA during the early 1990's (NAPA, 1993), at DOE, and at DEQ, most of public administration's normative advice to administrators is either inadequate or simply irrelevant.

## **IX. Survey of Other States**

The previous four chapters have presented a case study of the politicization of administration in the Commonwealth of Virginia. As discussed in Chapter III, one of the criticisms of a case study method is that it is difficult to draw generalizations from a case study. To address this criticism with respect to this study, the author conducted a survey of four other states to determine the extent to which those states had civil service issues similar to those identified in Virginia. Findings from this survey of other states, while much less detailed than the findings from the study of Virginia, allow some generalizations to be made about the normative implications of the case study.

The comparison finds that politicization is an issue for all five states. The discussion of secondary literature in Chapter III also indicates that politicization is a significant issue at the federal level. Indeed, politicization has become a layer of meaning in our social construction of the administrative world. At present, public administration lacks an adequate normative theory to address politicization. Overhead democracy quickly devolves into a justification for executive aggrandizement in administration with the attendant consequences.

The survey of other states targeted four states. Two of the states, Tennessee and North Carolina are neighboring southeastern states of similar size and political culture to Virginia. West Virginia was chosen as an example of a smaller state in terms of population. Pennsylvania was surveyed as an

example of a heavily unionized northeastern state as well as a state significantly larger in population than Virginia.

### **North Carolina**

North Carolina is probably the state against which Virginia most frequently measures itself due to geographic proximity, equivalent size, similar political cultures, and economic competition. North Carolina's civil service has traditionally been more politicized than Virginia's civil service. One of the concerns expressed regarding Senate Bill 643 in Virginia was that it might make Richmond into "another Raleigh" (interview). Transitions from one gubernatorial administration to another in North Carolina typically involve the resignations or dismissals of hundreds of senior administrators below the agency head level (interview).

North Carolina's personnel statute establishes a "policy making exempt" category of employees. These employees are managers involved in setting agency policy and are exempted from most civil service protections, serving at the will of the agency head.<sup>1</sup> The number of these employees is limited to no more than 30 per agency or 1.2 percent of an agency's total workforce, whichever is greater. For example, the Department of Commerce, a relatively large department, is estimated to have 85 policy-making exempt

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<sup>1</sup> Employees with more than 10 years of service have recall rights. When removed for reasons other than cause, these employees must be reassigned to an equivalent graded position within a 35 mile radius of their duty station.

positions. Personnel staff in North Carolina estimated that the policy making exempt class encompasses approximately 1,000 employees (interview).

Policy-making exempt employees are not entirely treated as at will employees. Once a policy-making exempt employee has reached the minimum service requirement (one year), the employee has recall rights in the event of being dismissed for reasons other than cause. In the case of policy-making exempt employees with ten or more years of service, if the employee is dismissed for reasons other than cause, then the employee must be reassigned to a position for which they are qualified either within the same agency or within a 35 mile radius of their duty station at the time of dismissal. The reassigned position must be the same pay grade and salary as the previous position. The purpose of this requirement is to protect long-term state employees from being dismissed for reasons other than cause (interview).

The reemployment rights that are gained after one year and after ten years in North Carolina's policy-making exempt class render that employment class different from a purely political appointment. These reemployment rights also make the position of North Carolina's policy-making exempt employees less precarious than was the case for excluded employees in Virginia under Senate Bill 643 or House Bill 776. This is particularly true given that it generally takes a career employee ten or more years to reach the level of seniority necessary to be included in the policy-making exempt class. These career administrators

therefore are likely to enjoy the right of reassignment to an equivalent position if dismissed. On the other hand, employees who are appointed into the policy-making exempt class as a first job in North Carolina state government can be presumed to have less of an expectation of long-term tenure than career administrators who have worked their way up into a senior position encompassed by the policy-making exempt category of employees.

Even with regard to employees appointed directly into a senior position, one important difference between Virginia and North Carolina is that the North Carolina governor can stand for reelection, potentially allowing the governor eight years of consecutive service. This means that North Carolina does not have the automatic turnover of administrations every four years that is the case in Virginia. However, as already noted, North Carolina has a longer tradition than Virginia of sweeping personnel changes at the beginning of an administration.

One factor that probably influences the degree of senior employee turnover at the beginning of an administration in North Carolina is that North Carolina also has the strong secretary model of government. Cabinet secretaries are responsible for large departments that encompass the responsibilities of several separate agencies in Virginia (interview). One consequence of the strong secretary model is that cabinet secretaries appoint some agency heads as well as members of the policy-making exempt category

in North Carolina. In Virginia, with the exception of agency heads appointed by governing boards<sup>2</sup>, executive branch agency heads are appointed by the Governor. The involvement of cabinet secretaries in hiring increases the number of partisan actors in the state seeking to “appoint their own team.”

While the number of senior career administrators exempted from merit system protections is higher in North Carolina than it is in Virginia, reorganization appears to be less useful as a tool of politicization in North Carolina than is the case in Virginia. With regard to internal agency reorganizations, legislative approval is not required. However, a reorganization plan must be prepared and employee performance must be considered in making layoff decisions (interview). Both of these requirements limit management discretion in reorganizations to a greater degree than is the case in Virginia, where no reorganization plan is required and employee performance need not be considered in making layoff decisions (management is free to use whatever criteria it chooses).

## **Pennsylvania**

Pennsylvania’s civil service system is substantially different from Virginia’s, particularly with regard to unionization. Virginia state law does not allow collective bargaining for public employees (interview). In Pennsylvania, on

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<sup>2</sup> Agencies where governing boards appoint the agency head include the State Council of Higher Education for Virginia, the Virginia Community College System, the Virginia Retirement System, the Department of Game and Inland Fisheries, and all institutions of higher education.

the other hand, most state agencies have collective bargaining agreements, and most state employees are covered by a collective bargaining agreement (interview). Thus it appears that the balance of power in Pennsylvania state government between labor and management is somewhat more equal than is the case in Virginia, where virtually all power is vested in agency management (interview).

Pennsylvania's civil service system, like Virginia's, has provisions for senior career administrators to be exempted from civil service protections. However, in Pennsylvania, this exemption is achieved in two ways. The first way of exempting senior career administrators is through the establishment of a formal senior management service (as opposed to the ad hoc senior management corps created in Virginia by Senate Bill 643). The second way of exempting senior career administrators in Pennsylvania is through exempting certain categories of jobs (such as administrative officers in state agencies). Personnel staff in Pennsylvania estimated that there are approximately 1,400 management positions exempt from civil service protections. These include 300 members of the senior management service and an additional 1,100 management jobs (many of which are middle management positions). Both members of the senior management service and managers who are exempted from the civil service act serve at the will and pleasure of the agency head (Chapter 32, Commonwealth of Pennsylvania Personnel Rules).

Pennsylvania also has adopted the “super secretary” model, where cabinet secretaries exercise direct, line authority over agencies in their cabinet area. The cabinet in Pennsylvania is much larger than is the case in Virginia; there are 19 cabinet secretaries in Pennsylvania as opposed to eight cabinet secretaries in Virginia. This larger number of partisan actors in state government, however, is constrained by the provisions of civil service regulations and union contracts (interview).

For example, political managers have markedly less flexibility with regard to reorganization in Pennsylvania than is the case in Virginia. It is not possible in Pennsylvania to abolish an employee’s position and then recreate a similar position while requiring the displaced employee to apply competitively for the newly created position (interview). Employees who are laid off in Pennsylvania have extensive recall rights and layoffs are generally conducted in accordance with seniority (interview). These reemployment rights complicate efforts to use layoffs as a tool to silence employees who have become troublesome from a political standpoint. Conducting seniority-based layoffs is required by the Civil Service Act and by most of the collective bargaining agreements in the state.

### **Tennessee**

Like North Carolina, Tennessee is a southern state that borders Virginia and is one of the states against which Virginia often measures itself.

Tennessee has approximately 40,000 state employees outside of higher education and does not have cabinet secretaries. There are 22 executive agencies in the state; the Governor appoints these agency heads and the agency heads in turn appoint deputy agency heads (interview).

The civil service statute in Tennessee provides that “the state service shall be divided into an executive and a career service” (*Code of Tennessee*, Section 8-30-208). Members of the executive service serve at the will of the appointing authority. The types of positions to be included in the executive service are specified in statute. The positions are:

- the commissioner of each department,
- the deputy commissioner or equivalent in each agency,
- any assistant commissioner or equivalent authority in each agency,
- any division director or equivalent with statewide responsibility,
- any position serving in a confidential administrative or program management capacity to any of the above positions,
- all positions in the Governor’s office, and
- correctional wardens and superintendents of mental health/mental retardation facilities (*Code of Tennessee*, Section 8-30-208).

Tennessee’s personnel statute is noteworthy because it makes a clean distinction between career and non-career appointments in state government. Unlike Virginia or North Carolina, which both attempt to create a class in-between an outright political appointment and a career position,

Tennessee has only two categories of appointments, executive service (political appointments) and civil service appointments (career positions). In Tennessee, no distinction is made between overtly political positions (staff in the Governor's office) and seemingly professional positions (correctional wardens). This is one difficult with attempts to make senior civil servants more responsive; the line quickly blurs between traditionally partisan jobs and traditionally professional jobs.

With respect to reorganization, as is the case in Pennsylvania, Tennessee's civil service statute requires that layoffs be based on seniority. Veterans receive an additional five years credit for military service when calculating seniority. Employees must be provided with notice of the layoff and an explanation of the reasons for it at least ninety days before the effective date of the layoff notice (*Code of Tennessee*, Section 8-30-320 (b)). Tennessee's civil service statute also specifically states that "A position in the career service shall not be considered to have been abolished as provided in subsection (a) if the same or essentially similar duties are incorporated in a new position in the same agency within two years of the data a career service employee is required to transfer, bump, retreat, or be placed in layoff status because of the position abolishment" (*Code of Tennessee*, Section 8-30-320 (c)). This provision prevents the practice used in Virginia of abolishing a career administrator's position and then recreating a slightly different position which can be advertised

to the public at large. Tennessee's civil service statute also provides for significantly stronger recall rights than is the case in Virginia, where such recall rights are both limited and granted only as a matter of policy, not statute (*Code of Tennessee*, Section 8-30-322 and Section 8-30-323). In short, reorganization appears to be less useful for politicization than is the case in Virginia.

### **West Virginia**

West Virginia's state government structure was significantly revised in 1989 as part of a large-scale reorganization initiated by the Governor. West Virginia now has a strong secretary model of government, with seven cabinet secretaries appointed by the Governor overseeing operations of the executive branch (interview). The civil service statute exempts several categories of positions from the classified service of the state. Within the executive branch<sup>3</sup> of West Virginia state government, these exempted positions include:

- cabinet secretaries and employees within the office of a secretary,
- heads of departments,
- all policymaking positions,
- one principal assistant and one confidential assistant for each department head,
- employees of the governor's office,

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<sup>3</sup> As is the case in most, though not all states, employees of the legislative and judicial branches are exempted from the classified service.

- county road supervisors, and
- uniformed personnel of the department of public safety (*Code of West Virginia*, Section 29-6-4 (c)).

The West Virginia civil service statute makes a forthright statement of the importance of political patronage. The statute states:

The Legislature finds that the holding of political beliefs and party commitments consistent or compatible with those of the governor contribute in an essential way to the effective performance of and is an appropriate requirement for occupying certain offices or positions in state government, such as the secretaries of departments and the employees within their offices, the heads of agencies appointed by the governor and, for each such head of agency, a private secretary and one principal assistant or deputy, all employees of the office of the governor including all employees assigned to the executive mansion, as well as any persons appointed by the governor to fill policymaking positions and county road supervisors or their successors, in that such offices or positions are confidential in character and/or require their holders to act as advisors to the governor or his appointees, to formulate and implement the policies and goals of the governor or his appointees, communicate with and explain their policies to the public, the Legislature, and the press (*Code of West Virginia*, Section 29-6-4 (d)).

This sweeping statement of the need for political patronage in essentially all senior state positions (as all policymaking positions are included) appears to be worded to meet the test established by the Supreme Court in *Rutan et al. v. Republican Party of Illinois et al.*<sup>4</sup> for patronage appointments.

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<sup>4</sup> *Rutan et al. v. Republican Party of Illinois et al.*, 1990, U.S. Supreme Court Reports 111 L ed. 2d.

The Supreme Court held that patronage was acceptable only for positions where the state can demonstrate that patronage serves a vital government interest (Hamilton, 1993: 383).

Of the states surveyed in this review, West Virginia is notable for having the broadest statement in defense of partisanship in hiring for senior positions and the broadest scope of positions potentially subject to partisan appointment. West Virginia also has the strongest tradition of patronage in government hiring of the states reviewed (interview). However, reclassification of a position as a policymaking position must be approved by the State Personnel Board (interview). This occurs infrequently, as opposed to the case in Virginia under SB 643 and HB 776 where positions could be reclassified as exempt from the personnel act at the discretion of the agency head

With regard to reorganization, layoffs of employees in West Virginia state government are required by statute to be conducted in accordance with seniority. Recall of employees to vacant positions is also done in accordance with seniority. Laidoff employees receive preference for twelve months for other jobs that they qualify for in state government that may become vacant (*Code of West Virginia*, Section 29-6-10). As with the other three states examined, West Virginia's provisions for layoffs give management less flexibility in targeting individual employees than is the case in Virginia.

## **Conclusions on the Survey of Other States**

The balance between holding senior career administrators accountable to political leadership and maintaining a merit based civil service is a difficult one to achieve for all states reviewed. However, this balance appeared to be most tenuous in Virginia, during the effective dates of SB 643 and HB 776.<sup>5</sup> This is because these two statutes placed relatively fewer limits on the types and numbers of employees that could be exempted from merit system protections. In particular, HB 776 provided political appointees with the most sweeping power found in any state surveyed to reclassify career administrators at any level as pleasure and will employees.

Virginia's political appointees also have relatively more freedom in terms of internal agency reorganizations, and employees have relatively fewer reemployment rights, than is the case in other states. All four other states offer employees displaced by a layoff caused by a reorganization a greater degree of reemployment rights than is the case in Virginia. This makes reorganization easier to use in Virginia as a tool to target certain employees. Therefore, it appears that reorganization is more of a potential political tool in Virginia than in the other states surveyed.

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<sup>5</sup> Senate Bill 643 was effective from July 1, 1985 to June 30, 1994. House Bill 776 was effective from July 1, 1994 to June 30, 1995.

Nevertheless, representatives of all of the states contacted indicated that politicization of the workforce is, at times, an issue for their states. As already noted, in West Virginia there is an explicit statutory defense of the importance of politicization and a strong state tradition of patronage. North Carolina, Tennessee, and Pennsylvania all have extensive exemptions from their civil service statutes, allowing governors in those states ample opportunity for political appointees or politically inspired hiring. All five states reviewed during this study developed exemptions to their merit or civil service system as a means of empowering the governor in administration. This reflects the logic of overhead democracy that the chief executive must have political appointees as an instrument of control over career administrators in order to implement his or her policies. However, the proliferation of political appointees also leads to the consequences discussed in Chapter VIII, increased partisan conflict, potential conflict with the legislative branch, and problems with employee morale and trust in agency management.

In acknowledging that partisan politics are one layer of meaning in the social world of administration, it is necessary to discuss ways to mitigate the negative consequences (not eliminate) the role for partisan politics in administration. In particular, it seems helpful to bring some structure to the surfacing of partisan politics in the administrative world by developing an analytical framework for determining when the interjection of partisan politics into

administration is appropriate or reasonable. This will be the task of the final section of this dissertation.

## **X. Conclusion**

Critiques of overhead democracy and executive supremacy (Rohr, 1986; Wamsley 1990; Wamsley et. al. 1990) argue that the legitimacy of public administration can be grounded in the founding argument, as opposed to the legitimacy of public administration being dependent on overhead democracy in the truncated form of control of administration by the elected chief executive. However, these critiques fail to address the consequences of the continued politicization in administration that flows from overhead democracy's devolution into executive supremacy. Establishing the constitutional legitimacy of public administration does little to ameliorate the consequences of executive supremacy. Indeed, the continued appeal of executive supremacy assures that politicization will continue to be one of the dominant realities of administrative life.

This dissertation concludes by proposing a theoretical approach with which to temper the influence of politicization on administration. It suggests appealing to the enlightened self-interest of elected chief executives by suggesting the tool of cost-benefit to determine situations where the use of politicization is appropriate. Application of cost-benefit analysis by self-interested chief executives would sharply limit politicization in administration, because the costs of politicization so often outweigh the advantages.

## **THE ROLE OF PARTISAN POLITICS IN ADMINISTRATION**

Although it discarded the politics/administration dichotomy, public administration did not address the appropriate role for partisan politics in administration, assuming politics to be largely the servant of the chief executive in carrying out an election mandate in administration. Public administration did not address the appropriate setting for partisan politics in administration or the consequences of partisan politics in administration. Furthermore, public administration has been notably parsimonious in offering advice to either elected officials or bureaucrats in effectively melding politics and administration. The result, as can be seen in the case of Virginia, is a kind of boundless, random politicization of state government without careful consideration of the consequences versus the advantages of politicization in a given policy arena.

At first glance it would seem that the potential for partisan politicization in the federal government is much greater than in Virginia government, as there are significantly more political appointees in the federal government. GAO (1993) estimated 2,400 non-career SES and Schedule C political appointees at the federal level. In addition to these political appointees, Light estimates the number appointees on the executive schedule at 2,393 (Light, 1995: 9). This total of nearly 5,000 political appointees at the federal level dwarfs the total of less than 200 political appointees in Virginia state government. The scope for partisan politicization would presumably be correspondingly greater in the

federal government, because the number of partisan actors is much greater. However, in considering the scope of politicization at the state versus federal level, it is important to distinguish between reasons for the growth of gubernatorial power and growth of presidential power.

Much of the growth in presidential power occurred in the relatively nonpartisan context of national security (Kelly, Harbison, and Belz, 1983; Schlesinger, 1989). Lincoln's assertion of presidential emergency powers<sup>1</sup> took place when the nation's very survival was threatened by the civil war. The challenge of global war led Wilson and Roosevelt to reassert presidential power after a long congressional ascendancy. Truman expanded presidential power by fighting an undeclared war in Korea, and attempted unsuccessfully to expand the national security imperative into domestic affairs by seizing the nation's steel mills in the face of a threatened industry-wide strike.<sup>2</sup> Presidents from Eisenhower through Nixon further expanded or attempted to expand presidential power in the name of anticommunism, as the Cold War brought the nation its first sustained peacetime national security crisis.<sup>3</sup>

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<sup>1</sup> These included initiating hostilities against the rebel states without a congressional declaration of war, raising troops without congressional approval, expending funds without congressional appropriation, suspending the writ of *habeus corpus*, and arresting perceived rebel sympathizers.

<sup>2</sup> In a 6-3 vote the Supreme Court ruled Truman's action unconstitutional, *Youngstown Sheet and Tube Co. v. Sawyer*, 334 U.S. 579 (1952).

<sup>3</sup> Neustadt's assertion, cited in Chapter III, that presidential power is principally "the power to persuade" is largely confined to the domestic president. In national security emergencies, presidents have exercised sweeping, from some perspectives almost dictatorial powers.

Presidential assertions of authority in national security issues generally hinged on the commander in chief clause of the Constitution. Article II, Section 2 states "The President shall be Commander in Chief of the Army and Navy of the United States and of the Militia of the several States, when called into the actual Service of the United States."<sup>4</sup> With regard to gubernatorial power, the Constitution of Virginia contains its own commander in chief clause (Article V, Section 7), but the overwhelming federal primacy in matters of national security render this authority more ceremonial than meaningful.<sup>5</sup> Absent a meaningful commander in chief power and the argument of national security to support aggrandizement of executive power, expansion of gubernatorial power is on much weaker ground than expansion of presidential power (itself constitutionally dubious in some circumstances<sup>6</sup>).

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<sup>4</sup> One of Schlesinger's principal points in the *Imperial Presidency* is that the commander in chief clause has been so expanded as to usurp the power of Congress granted in Article I Section 8 "To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." Schlesinger notes that this clause encompasses the power to declare full scale war (perfect war) and other, more limited acts of hostility (imperfect war). Schlesinger states, the Constitution itself, by adding the authority, in that long-forgotten clause to 'grant letters of Marque and Reprisal' to the authority to 'declare' war was plainly giving Congress the power to authorize limited as well as general war" (Schlesinger, 1989, p. 21).

<sup>5</sup> At least in Virginia, most of the Governor's use of the National Guard involves natural disasters. Potentially, the Governor could also utilize the National Guard to suppress civil unrest. However, the Governor's use of the National Guard is always subject to federal primacy and the possibility of the president federalizing the National Guard.

<sup>6</sup> In addition to Truman's seizure of the steel mills, some other questionable presidential actions taken in the twentieth century in the name of national security include President Nixon's invasion of Cambodia, President Johnson's use of the Gulf of Tonkin Resolution to fight a major, undeclared war in Southeast Asia, and President Roosevelt's establishment of a military government and military courts to try civilians in Hawaii during World War II.

While national security is the most powerful presidential claim for increased power, it is also the sphere of government where professionalism, rather than politicization has been the rule at the federal level. In the federal government, some of the most egregious examples of politicization have occurred in areas viewed by presidents as less than critical. This includes the politicization of the Federal Emergency Management Agency (FEMA) in the Carter through Bush Administrations (NAPA, 1993; Wamsley, 1994) and the politicization of the Department of Housing and Urban Development during the tenure of Secretary Pierce (Moe, 1991).

### **Settings for Partisan Politics**

Overhead democracy assumes that political leadership is needed in important policy questions (such as foreign policy) and in issues defined as important by elected leaders during a campaign (for example President Clinton's campaign focus on health care policy or Governor Allen's campaign focus on parole policy). Partisan politics in administration is by no means limited to important policy questions or to issues raised in an elected chief executive's campaign for office<sup>7</sup>. For example, as this section is under preparation, the

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<sup>7</sup> One issue to consider regarding politicization in state government that is not applicable to Virginia but is to many states is that a variety of agency heads are elected officials in some states. In Virginia, the only three statewide elected officials in state government are the Governor, Lt. Governor, and Attorney General. However, in addition to these three offices, many states elect heads of state agencies such as State Treasurer, Secretary of State, State Auditor, State Controller, or Superintendent of Public Instruction. This introduces more high level elected officials into state government and correspondingly the number of partisan political actors. At the same time, elected agency heads (particularly when they are of a different party

nation's newsmagazines and network news programs are all headlining the role of the current first lady in the 1993 White House travel office firings the media was pleased to dub "travelgate." Whatever the outcome of this affair, the travelgate incident, like the discussion of the surplus property subsystem in Chapter VII, is a useful reminder that politicization does not confine itself to important policy questions or issues addressed in an election campaign (both 1992 candidates were silent on the question of travel arrangements for the White House press corps). The White House's decision (at whatever level it actually was made) to replace the career travel staff with political associates (and in one case a distant relative) of the first family has exposed the president to substantial criticism while accomplishing little or nothing in terms of political gain (other than rewarding political supporters with government jobs).

The theory of overhead democracy is largely appropriate with respect to important policy functions of government, the most straightforward example of which is the conduct of foreign affairs, which is largely (though not entirely) the constitutional prerogative of the president.<sup>8</sup> The president's conduct of foreign affairs necessitates the appointment of a Secretary of State, various political

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from the Governor) may complicate the governor's efforts to consolidate executive branch power.

<sup>8</sup> Congress retains the power to appropriate money for the conduct of foreign affairs and to declare war (though conflicts without a congressional declaration of war have become the rule rather than the exception since World War II). The Senate retains the right to confirm ambassadors (and other presidential appointees for the conduct of foreign affairs) and to approve treaties.

assistants, and ambassadors. In order to function effectively as a foreign policy team, it is appropriate that the president be able to appoint political leadership for the foreign policy apparatus that shares his or her philosophies and goals for the conduct of foreign affairs.<sup>9</sup>

Overhead democracy is a less compelling argument with regard to the more prosaic activities of government that often become the province of political appointees. For example, what presidential prerogative or democratic imperative requires that the Federal Emergency Management (FEMA) be managed by eight (the agency is actually authorized nine but has never filled the ninth position) presidential appointees and upwards of thirty total political appointees? (NAPA, 1993). As Wamsley, argues in a 1994 paper, the attempts to control FEMA with a large number of political appointees have been, at best, counterproductive for agency leadership and the presidents FEMA has served (Wamsley, 1994).

The first theoretical limit that needs to be addressed in public administration literature on politicization in general and political appointees in particular is a way to limit the use of politicization in general and political appointees in particular. The test for making the decision on when the use of

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<sup>9</sup> Less defensible in terms of the theory of overhead democracy is the time honored practice of awarding ambassadorships to large campaign contributors. Political appointees should offer more than simply agreement with the philosophies and goals of the chief executive. At a minimum, political appointees should also have the professional qualifications to successfully carry out their job responsibilities.

political appointees or some other manifestation of politicization is appropriate is described in the next section, which advocates a cost-benefit analysis for use of politicization of administration.

### **Cost Benefit Analysis for Politicization**

The politics-administration dichotomy addressed politicization in administration by assuming it away. By the 1940's public administration scholarship recognized that announcing a politics-administration dichotomy did not make it so. Rohr (1986; 1989a; 1990), Wamsley (1990), and Wamsley et. al. (1990) suggest that public administration can be constitutionally legitimate outside of tight political control by the chief executive. However, this insight, while correct, does not eliminate the politicization of administration that has increased so markedly in the last three decades (Light, 1995).

One theoretical contribution that public administration scholarship can make to the practice of administration is to develop an analytical framework for politicization that appeals to the enlightened self-interest of chief executives by demonstrating that politicization can often be counterproductive. Politicization is sometimes viewed by career administrators as akin to a force of nature, uncontrollable and unpredictable. However, partisan politics can be reframed as a purposive tool of effective administration, rather than a random, destructive force that thwarts or complicates administration. The way to accomplish this is to develop a framework for analyzing when politicization accomplishes important

political and policy objectives and when politicization needlessly exposes a chief executive to significant costs without attendant benefits.

Cost benefit analysis is a commonly used, albeit controversial tool in policy analysis. Cost-benefit analysis (also described as benefit-cost analysis) compares the expected costs and benefits of a proposed action to develop a ratio between costs and benefits. This technique is often criticized as lending itself to false quantification of subjective, nonquantifiable values, or phenomena (Hoos, 1983).

Notwithstanding these criticisms, the analytical framework underlying cost-benefit analysis is a potentially useful one for chief executives in considering the merits of political appointees or other partisan behavior within an agency or policy subsystem. Too often, politicization is only considered in terms of the benefit side of the equation (achieving a desired policy outcome, rewarding a supporter, enhancing comfort level with an agency by having friendly individuals managing the agency). The cost side of the equation is not considered.

The potential costs of politicization are steep. For example, ill-considered political appointments in the environmental areas, most prominently that of Ann Buford at the Environmental Protection Agency, probably did more to dismantle the Reagan environmental agenda than to advance it (Butler, Sanera, and Weinrod, 1984: 85-86). This is because the abrasive manner of some

appointees, their perceived zealotry, and lack of political (as well as managerial skills) served to rally opposition to Reagan's environmental policies, caused significant negative publicity, and damaged the capacity of the Environmental Protection Agency.

At the state level, the politicization of civil service has had demonstrable consequences for the Allen Administration. State employees were widely perceived to have voted overwhelmingly for Governor Allen's election in 1993. However, in at least two state<sup>10</sup> Senate races in 1995, Republican candidates (one an incumbent, one a challenger) were defeated in close raises where the state employee vote against candidates supported by the Governor may have been decisive (interview). State employees, alienated by perceptions that Allen has politicized the state's civil service, were perceived by both parties as a key Democratic constituency in the 1995 General Assembly elections. The Governor's party failed to gain control of the State Senate by one seat, dealing the Governor a potentially fatal setback in his efforts to advance his third and fourth year agenda in the face of determined opposition from the General Assembly<sup>11</sup>.

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<sup>10</sup> In Virginia's 25th Senate District, incumbent Republican Senator Edward Robb was defeated by Democrat Emily Couric. Employees at the University of Virginia are thought to have contributed to Robb's defeat by voting heavily for Couric. In Virginia's 39th Senate District, incumbent Democratic Senator Madison Marye was narrowly reelected in a Republican-leaning district. State employees at Radford University and Virginia Tech were widely perceived as having provided Marye's margin of victory.

<sup>11</sup> Despite the Governor's visible campaigning for Republican General Assembly candidates and the Governor having raised over \$1.2 million for legislative races, Democrat's retained

In addition, as reflected in the case of the Department of Environmental Quality discussed in Chapter V, perceived politicization of the state civil service has caused morale and credibility problems in Virginia's executive branch for the Governor and his agency heads. The payoff for this politicization has been minimal. Some of the Governor's supporters have been given state classified jobs. The costs have included considerable press criticism, galvanizing environmental groups against the administration's objectives, General Assembly action to restrict the department's hiring, regulatory, and privatization efforts, and the General Assembly's bipartisan rejection of virtually all of the administration's natural resources initiatives during the 1996 General Assembly.

Politicization is least defensible from a practical standpoint in circumstances where the potential payoff from the politicization is low and the potential costs are high. For example, Chapter V gives the example of the Director of the Virginia Department of General Services personally delivering surplus state computers to schools in districts represented by Republican General Assembly members in tight races immediately before the 1995 legislative elections. In this situation, the potential payoff was relatively low: a

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control of the House of Delegates with 52 of 100 seats. The state Senate deadlocked at 20 seats for the Democrats and 20 seats for the Republicans, but Lt. Governor Don Beyer provides a tie-breaking vote to the Democrats in most matters.

few potential votes in seven legislative races (none of which was ultimately decided by a margin of less than 2,000 votes).

The costs of the computer distribution, the other hand, were high. Costs of the computer episode included negative press attention that reflected poorly on the Governor, particularly the Governor's stated mission of bringing "honest change" to state government. In addition, this episode further enflamed already hostile Democratic legislators who will return for the 1996 session with control of the General Assembly. The computer distribution potentially undermines the morale of the state agency involved by portraying it as simply a political instrument of the Governor. Finally, this episode damages the credibility of the state's surplus property distribution process in particular and the Department of General Services in general with the public, the press, and legislators.

Even in areas where the potential payoff is much higher, politicization has not always been successful. A good example of this is the politicization of the Office of Management and Budget (OMB) that began during the Reagan Administration (Stockman, 1987). While OMB had previously been thought of as a relatively reliable source of budget analysis by both Republicans and Democrats, it is today widely derided as a political creature of the President. There can be little doubt that OMB has been of great use to the presidency as an instrument of political control. However, the price for using OMB as a

political instrument is the loss of OMB's credibility and the corresponding diminution of the agency as a policy tool and as a major actor in the federal budget process. It is no accident that the current Congress insists on using Congressional Budget Office (CBO) analysis for determining spending targets in crafting a budget agreement with the president. To some extent, CBO has established the same bipartisan reputation for impartial analysis OMB once enjoyed.

Lane's analysis of the Office of Personnel Management (OPM) gives another example of where politicization has caused significant harm without offering clear benefits. Lane argues that OPM has failed in building the capacity of the federal civil service but has succeeded in enhancing political control over the civil service. Again, the relative merits of achieving more control over a diminished institution are not altogether clear. In fact, Lane argues that OPM, as a result of politicization under Director Devine during the Reagan Administration, became increasingly irrelevant to the development of federal human resource policy. In addition, Lane notes that the politicization of the agency led to the agency's research products being disregarded as unreliable in the human resources field (Lane, 1988).

As noted in Chapter VIII, the Virginia Departments of Planning and Budget and Personnel and Training have experienced a similar loss of credibility as they have become increasingly politicized. While both are now more political

in nature, they are not necessarily more effective in accomplishing policy objectives. The General Assembly no longer accepts DPB's budget analysis as reliable, and DPT is now a marginal actor at best in state human resource management (interview).

With respect to foreign policy, Lyndon Johnson and Robert McNamara, as president and Secretary of Defense, unquestionably exercised an enormous amount of direct control over the Vietnam War (McNamara, 1995). The president purportedly went so far as to personally select bombing targets. The Secretary of Defense consolidated an unprecedented degree of authority over the armed services in the Office of the Secretary of Defense. However, neither the personal involvement of the president in tactical decisionmaking nor the authority over the previously ungovernable military services consolidated by Secretary McNamara brought about a successful policy outcome in Southeast Asia. If anything, the personal involvement of the president and the Secretary may have militated against U.S. efforts to disentangle from the Vietnam conflict.

These examples demonstrate that politicization in administration need not be criticized by appealing to the moral convictions of chief executives in telling them that politicization leads to bad government or a potential corruption. Public administration can demonstrate that politicization is also bad politics in many cases. By appealing to the enlightened self-interest of Presidents and

Governors, public administration can demonstrate that politicization leads, in many cases, to bad government and bad politics.

In looking for an example of successful politicization, it is necessary to seek out an example of politicization that yielded significant benefits (in both political and administrative terms) with relatively low costs. One example of at the state level might be the case of Virginia State University in 1992. In the third year of the administration of Governor Douglas Wilder, it became apparent that major financial and managerial problems had developed at Virginia State University. These problems included a significant lack of financial and accounting control and an unauthorized budget deficit. Governor Wilder fired the entire Board of Visitors for the College and hand-picked the State Treasurer as acting president; he was later appointed as permanent president (interview). The Governor's actions were an unprecedented assertion of political control over a state college. However, as the end of this political control was managerial competence, not partisan advantage, Wilder's actions were generally applauded as decisive and necessary (interview).

The cost benefit ratio for politicization needs to be considered with regard to the strengths and limitations of the principal tool of politicization, political appointees. The weaknesses should be considered first.

## **Weaknesses of Political Appointees**

Political appointees on the whole have two principal weaknesses, though individual political appointees, like individual career administrators, can have a wide range of flaws. These two weaknesses are: the short average tenure in office of political appointees and, ironically, frequent lack of political astuteness.

At the organizational level, political appointees tend to lack institutional memory, knowledge of the organization's institutional culture and folkways, and will (almost always rightly) be viewed by career staff as a transitory figure to be waited out. Career administrators who view a political superior as transitory are generally on solid ground. Hecló's 1971 figure of 2.5 years as the average tenure for a political appointee continues to be roughly correct, though some recent literature suggests that this estimate is actually on the high side (Ingraham, 1987: 428-430; Light, 1995: 69). The short tenure of political appointees make it difficult to count on them for long-term initiatives and invites career administrators to be guarded at best in extending loyalty, as they are likely to soon have their current political master replaced with a new political appointee. The transitory nature of political appointees also makes it difficult, though not impossible, for them to have significant institutional influence on the public organization to which they are appointed.

The assertion that political executives are more politically skilled has been largely accepted in an uncritical way by public administration scholars. It is probably true that political appointees will tend towards having more partisan political associations than is the case with career bureaucrats.<sup>12</sup> In terms of organizational and policy subsystem level politics, however, political appointees can often show themselves to have the proverbial hands of stone and feet of clay (the reader is again referred to Chapter VII for examples of this at the state level).

The folkways of partisan politics center on the political campaign. These translate poorly into the administrative world of the public organization or a policy subsystem. In fact, the overheated rhetoric, exaggerated political spin, and stylized confrontations that are staples of contemporary campaigns can undercut the credibility of the political appointee who employs them in the administrative world. For example, a political appointee who responds to a legislative oversight report in the same way he or she would respond to a

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<sup>12</sup> This is, of course, by no means an unmitigated blessing for the political superior(s) of a political appointee. A political appointee may well have his or her own network of supporters that make it difficult or impossible for a superior to effectively manage him or her. At the federal level this is particularly true of presidentially appointed, Senate confirmed appointees (generally at the Assistant Secretary or higher level in cabinet departments). The fact of being appointed by the president often makes appointees feel accountable only to the president, not to a department or agency head. In fact, it is not at all uncommon for an agency head to manage a department or agency staffed with political appointees put in place at the behest of the White House Personnel Office, not the department or agency head. The author is reminded of a story told by a career bureaucrat at the Federal Emergency Management Agency about the swearing in of a political appointee at FEMA. At the completion of the swearing in, when the appointee received his presidential commission, he turned to the then FEMA director and stated "this means you can't fire me now."

negative advertisement during a political campaign is unlikely to garner much good will with the legislative branch.

### **Strengths of Political Appointees**

Political appointees are not without inherent strengths. The first is the ability to communicate credibly with other political appointees. Another inherent strength is the potential for a political appointee to provide political cover to the career administrators in his or her organization.

“Our people” is a term used by all incoming administrations at all levels. A relatively low-ranking political appointee who suffered through a campaign with a chief executive can sometimes enjoy access to an elected chief executive that is denied to the most senior career administrators. In discussing this phenomenon, one senior legislative staff member in Virginia explained the relative lack of trust the Governor had for very senior career administrator by noting that the administrator in question was not “one of the long marchers.” The term “long marcher” referring to the favored position in Communist China enjoyed by veterans of Chairman Mao’s literal “long-march” across China to escape the Nationalist armies in the 1930’s. Political campaigns are the civilian equivalent of combat, building strong personal and professional bonds between fellow survivors. Therefore, it is a natural temptation of chief executives to surround themselves with veterans of the last campaign.

As the long marcher phenomenon is perhaps inevitable, it is necessary to have a minimum of political appointees in a large government organization to provide access to the chief executive and his or her partisan appointees. In explaining why FEMA needed at least a few politically appointed positions, a legislative staff member noted to NAPA staff that you need to be a political appointee to talk to an Assistant Secretary of the Army, who will presumably also be a political appointee (NAPA, 1993). Use of political appointees as ambassadors to other political appointees can be taken to excess, to the point where the political leadership of an agency becomes a virtual organization unto itself. However, a limited number of political appointees, in carefully defined functions such as legislative liaison or public affairs, are potentially valuable to public agencies, assuming that the political appointees have the network of political connections to interact successfully with key figures in an administration.<sup>13</sup>

Political appointees can also empower career administrators within their agency by providing political cover. Career administrators are not often associated with risk taking behaviors, and this inherent caution can limit the ability of an agency to act creatively. A political appointee can usefully take the

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<sup>13</sup> Given the weak nature of American political parties, one potential problem with political appointees is that the appointee may have made enemies within his or her party (and hence within segments of the administration) as a result of some intraparty squabble. As the current Republican primary race in Virginia for the Senate seat held by John Warner demonstrates, intraparty feuds can be every bit as vitriolic as general elections.

lead on a creative but risky initiative undertaken by an agency, both opening political doors that may otherwise remain closed to the initiative and providing political cover in the event the initiative either fails or becomes politically untenable. Thus a principal weakness of a political appointee, short tenure in office, can be harnessed as a positive factor in certain circumstances.

These limited uses of political appointees do not justify thickening government or the proverb of overhead democracy run amok to the point where partisan considerations must inform the distribution of surplus computers by a state agency. Political appointees and politicization are inevitable parts of administration, but it is incumbent on public administration to resist and, indeed, to try to roll back the politicization of administration that has flourished in the last three decades. This argument can be made but not by simply bemoaning the politicization of administration. Public administration must appeal to the enlightened self-interest of political leaders by systematically demonstrating the consequences of politicization on the regime, policy subsystem, and agency level. At each of these levels, politicization has the potential to make a chief executive less effective, not more.

### **CONTRIBUTIONS TO THE LITERATURE**

This dissertation has contributed to public administration literature in several ways. First, it has examined politicization in state government administration, a neglected but increasingly important area of study in public

administration. State government is neglected because of the methodological problems of generalizing about experiences in one state, but state government is increasingly important as federal programs are targeted for devolution to the states. This dissertation has addressed the methodological problems of doing research in state government by focusing on a case study of one state, Virginia, while bolstering findings from this case study with a survey of four other states.

This dissertation has contributed an analytical framework with which to examine the effects of politicization on administration. This framework involves analyzing the consequences of politicization in terms of the regime, policy subsystem, and organizational (agency) levels. At the regime level, the dissertation has contributed to the literature by analyzing the role of the chief executive and the legislative branch in administration in terms of a state constitution. With regard to policy subsystems, the dissertation has argued that partisan politics should be considered in describing the interaction within the policy subsystem. This insight on the interjection of partisan actors into policy subsystems also raises questions about the extent to which partisan actors may destabilize subsystems by escalating the low-level conflict that typifies subsystems into the all or nothing style of conflict that typifies political campaigns.

Finally, the dissertation has contributed to public administration theory by developing an analytical framework for examining the use of politicization.

This framework borrows the tool of cost benefit analysis from policy studies literature and suggests that use of partisan politics be considered in terms of the costs and benefits associated with interjecting partisan politics into a policy subsystem or an organization. This decision should be made in view of the inherent strengths and weakness of the principal tool of politicization, political appointees.

Further research in the area of politicization is needed in several areas. At the federal level, the impact of the National Performance Review as well as the Republican takeover of Congress on politicization need to be examined. At the state level, an ambitious but useful project would be an analysis of politicization in all fifty states. Given the significant differences among the states, this project would be analogous to an ambitious comparative government study. One useful way of making the study manageable would be to ground the study in the constitutional roles of the executive and the legislature in the fifty states with an eye towards developing some general categories of state constitutions with respect to the administrative powers they confer (strong governor, weak governor, etc.).

A final research project that is needed is a systematic examination of the costs and benefits of politicization in administration. This dissertation has argued that, in many cases, the costs of politicization outweigh the benefits. Continued research in this area would allow public administration to make a

strong case against politicization by appealing to the enlightened self-interest of chief executives.

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## Appendix A

### HOUSE BILL NO. 776 Virginia Personnel Act 1994 Session

**An Act to amend and reenact § 2.1-114.5:1 as it currently is effective and as it may become effective, and § 2.1-116 as it currently is effective and as it may become effective, of the Code of Virginia and to repeal the second enactment of Chapter 937 of the 1990 Acts of Assembly, relating to the grievance procedure and exemptions from the Virginia Personnel Act.**

Be it enacted by the General Assembly of Virginia:

1. That § 2.1-114.5:1 as it currently is effective and as it may become effective, and § 2.1-116 as it currently is effective and as it may become effective, of the Code of Virginia are amended and reenacted as follows:

§ 2.1-114.5:1. Grievance procedure.

The Department of Employee Relations Counselors shall establish a grievance procedure as part of the ~~state's~~ Commonwealth's program of employee-management relations. It shall be the policy of the Commonwealth to encourage resolution of employee problems and complaints wherein employees can freely discuss their concerns with immediate supervisors and upper management levels. However, to the extent such concerns cannot be resolved, the grievance procedure shall afford an immediate and fair method for the resolution of disputes which may arise between an agency and its employees. The grievance procedure shall include:

A. Definition of grievance. - A grievance shall be a complaint or dispute by an employee relating to his employment, including but not necessarily limited to (i) disciplinary actions, including dismissals, demotions and suspensions, provided that dismissals shall be grievable whenever resulting from formal discipline or unsatisfactory job performance; (ii) the application of personnel policies, procedures, rules and regulations, including the application of policies involving matters referred to in subdivision B (iii) below; (iii) acts of retaliation as the result of utilization of the grievance procedure or of participation in the grievance of another state employee; (iv) complaints of discrimination on the basis of race, color, creed, political affiliation, age, disability, national origin or

sex; and (v) acts of retaliation because the employee has complied with any law of the United States or of the Commonwealth, has reported any violation of such law to a governmental authority, or has sought any change in law before the Congress of the United States or the General Assembly.

B. Management responsibilities. - Management reserves the exclusive right to manage the affairs and operations of state government. Accordingly, the following complaints are nongrievable: (i) establishment and revision of wages or salaries, position classifications or general benefits; (ii) work activity accepted by the employee as a condition of employment or work activity which may reasonably be expected to be a part of the job content; (iii) the contents of ordinances, statutes or established personnel policies, procedures, rules and regulations; (iv) failure to promote except where the employee can show that established promotional policies or procedures were not followed or applied fairly; (v) the methods, means and personnel by which such work activities are to be carried on; (vi) except where such action affects an employee who has been reinstated within the previous six months as the result of the final determination of a grievance, termination, layoff, demotion or suspension from duties because of lack of work, reduction in work force, or job abolition; (vii) the hiring, promotion, transfer, assignment and retention of employees within the agency; and (viii) the relief of employees from duties of the agency in emergencies. In any grievance brought under the exception to (vi) of this subsection, the action shall be upheld upon a showing by the agency that: (i) there was a valid business reason for the action, and (ii) the employee was notified of the reason in writing prior to the effective date of the action.

C. Coverage of personnel. - 1. All classified state employees, excluding probationary employees, are eligible to file grievances as provided in this chapter with the following exceptions:

a. Appointees of elected groups or individuals;

b. Agency heads or chief executive officers of government operations and institutions of higher education appointed by boards and commissions;

c. Law-enforcement officers as defined in Chapter 10.1 (§ 2.1-116.1 et seq.) of this title whose grievance is subject to the provisions of Chapter 10.1 of this title and who have elected to proceed pursuant to Chapter 10.1 of this title in the resolution of their grievance or any other employee electing to proceed pursuant to any other existing procedure in the resolution of his grievance; and

d. Employees in positions designated in subdivision 16 of § 2.1-116.

2. Employees of the entities listed below shall be subject to the following provisions:

a. Employees of local social service departments and local social service boards, including local superintendents and directors of the local boards and departments, shall be included within the coverage of a grievance procedure. These employees may be accepted in a local governing body's grievance procedure if agreed to by the local governing body and the department or board but shall be excluded from the locality's personnel system, or they shall be covered by the state grievance procedure. The Director of the Department of Employee Relations Counselors may allow modifications to the management steps of the state grievance procedure for local social service departments and local social service boards.

b. Employees of community services boards shall be included within the coverage of a grievance procedure. These employees may be accepted in the grievance procedure of the local governing body that established the community services board or in the grievance procedure of any participating locality in the case of joint community services boards, if agreed to by the local governing body and the community services board, or they shall be covered by the state grievance procedure. The Director of the Department of Employee Relations Counselors may allow modifications to the management steps of the state grievance procedure for community services boards.

c. Constitutional officers' employees shall not be required to be covered by a grievance procedure; however, these employees may be accepted in a local governing body's grievance procedure if agreed to by both the constitutional officer and the local governing body but shall be excluded from the locality's personnel system unless their inclusion in the local personnel system is agreed to by both the constitutional officer and the locality.

d. Redevelopment and housing authorities created pursuant to § 36-4 and regional housing authorities created pursuant to § 36-40 shall promulgate and administer a grievance procedure which is consistent with the provisions of the state grievance procedure, including the definition of a grievance. Employees of authorities created pursuant to § 36-4 may be accepted in a local governing body's grievance procedure if agreed to by both the authority and the locality. Employees of authorities created pursuant to § 36-40 may be accepted in the grievance procedure of a local governing body that contributes financially to the operation of the authority if agreed to by both the authority and the locality. The state grievance procedure shall apply if a housing authority does not promulgate an approved grievance procedure or if its employees are not

accepted in a local governing body's grievance procedure; the housing authority shall provide its employees copies of the state grievance procedure upon request.

e. A housing authority that promulgates its own grievance procedure shall submit the procedure to the Director of the Department of Employee Relations Counselors for approval. The Director may allow modifications to the management steps of the procedure. The grievance procedure shall provide for a panel hearing. A housing authority shall not be required to have an administrative hearing officer in employee termination cases, as provided in the state grievance procedure, but may do so at its option. When a housing authority elects to use an administrative hearing officer as the third panel member in employee termination cases, the administrative hearing officer shall be appointed by the Executive Secretary of the Supreme Court. The appointment shall be made from the list of administrative hearing officers maintained by the Executive Secretary pursuant to § 9-6.14:14.1 and shall be made from the appropriate geographical region on a rotating basis. The housing authority shall bear the per diem expenses and other costs of the administrative hearing officer. Panel decisions shall be final and binding.

f. Employees of local social service departments and local social service boards, community services boards, housing authorities and local governing bodies who are covered by the state grievance procedure shall have issues of grievability, including questions of access to the procedure, determined by the Director of the Department of Employee Relations Counselors; those employees who have been accepted into a local governing body's grievance procedure shall have such determinations made pursuant to the locality's procedure. For a housing authority that promulgates its own grievance procedure, the commissioners of the housing authority or their designee shall determine issues of qualification for a panel hearing, subject to judicial review pursuant to subsection E of this section.

g. Notwithstanding those exempt from this chapter, every legislative and judicial agency shall promulgate and administer a grievance procedure.

D. Grievance procedure steps. - The Department of Employee Relations Counselors shall develop a grievance procedure in compliance with the foregoing which shall include not more than four steps for airing complaints at successively higher levels of management and a final step providing for a panel hearing.

1. The first step shall provide for an informal, initial processing of employee complaints by the immediate supervisor through a nonwritten, discussion format.
2. Management steps shall provide for a review with higher levels of management following the employee's reduction to writing of the grievance and the relief requested on forms supplied by the agency or the Department of Employee Relations Counselors. Personal face-to-face meetings are required at these steps.
3. With the exception of the final management step, the only persons who may be present in the management step meetings are the grievant, the appropriate manager at the level at which the grievance is being heard, and appropriate witnesses for each side. At the final management step, the grievant, at his option, may have present a representative of his choice. If the grievant is represented by legal counsel, management likewise has the option of being represented by counsel.
4. Qualifying grievances shall advance to the final step as described below:

a. Employees of the Department of Mental Health, Mental Retardation and Substance Abuse Services who are terminated on the grounds of patient abuse, and employees of the Department of Corrections who work in institutions or have client or inmate contact, and employees of the Department of Youth and Family Services who work in learning centers or have client or resident contact and who are terminated on the grounds of client or inmate abuse, or a criminal conviction, or are terminated as a result of being placed on probation under the provisions of § 18.2-251, may appeal their termination through the grievance procedure only through the management steps. If resolution is not forthcoming by the conclusion of the last management step, the employee may advance the grievance to the circuit court of the jurisdiction in which the grievance occurred for a de novo hearing on the merits in lieu of a panel hearing. In its discretion, the court may refer the matter to a commissioner in chancery to take such evidence as may be proper and to make a report to the court. Both the grievant and the respondent may call upon appropriate witnesses and be represented by legal counsel or other representatives before the court or the commissioner in chancery. Such representatives may examine, cross-examine, question and present evidence on behalf of the grievant or respondent before the court or commissioner in chancery without being in violation of the provisions of § 54.1-3904. A termination shall be upheld unless shown to have been unwarranted by the facts or contrary to law or written policy. The decision of the court shall be final and binding.

b. For employees who are not grieving termination or retaliation under subdivision A (v) of this section, the final step shall provide for a hearing before an impartial panel, consisting of one member appointed by the grievant, one member appointed by the agency head and a third member selected by the first two. In the event that agreement cannot be reached as to the final panel member, the chief judge of the circuit court of the jurisdiction wherein the dispute arose shall select the third panel member. The panel shall not be composed of any persons having direct involvement with the grievance being heard by the panel, or with the complaint or dispute giving rise to the grievance. Managers who are in a direct line of supervision of a grievant, persons residing in the same household as the grievant and the following relatives of a participant in the grievance process or a participant's spouse are prohibited from serving as panel members: spouse, parent, child, descendants of a child, sibling, niece, nephew and first cousin. No attorney having direct involvement with the subject matter of the grievance, nor a partner, associate, employee or co-employee of the attorney shall serve as a panel member.

c. For employees grieving termination or retaliation under subdivision A (v) of this section, the third panel member shall not be selected in the manner described above, but shall be appointed by the Director of the Department of Employee Relations Counselors. The appointment shall be made from the list of administrative hearing officers maintained by the Supreme Court of Virginia pursuant to § 9-6.14:14.1 and shall be made from the appropriate geographical region on a rotating basis, as established by the Director of the Department of Employee Relations Counselors. In cases of termination of employees of local social service departments and local social service boards, community services boards, redevelopment and housing authorities and regional housing authorities who are covered by the state grievance procedure, the third panel member shall be appointed by the Executive Secretary of the Supreme Court. The appointment shall be made from the list of administrative hearing officers maintained by the Executive Secretary pursuant to § 9-6.14:14.1 and shall be made from the appropriate geographical region on a rotating basis. The employing agency of the grievant shall bear the per diem expenses and other costs of the administrative hearing officer. Local governments that have their own grievance procedure shall not be required to have an administrative hearing officer in employee termination cases, but may do so at their option.

d. In all cases the third panel member shall be chairperson of the panel. The decision of the panel shall be final and binding and shall be consistent with provisions of law and written policy. In grievances filed by classified state employees, the question of whether the relief granted by a panel is consistent with written policy shall be determined by the Director of the Department of Personnel and Training. In the case of other employees covered by the state

grievance procedure or employees covered by local government grievance procedures, the question of whether the relief granted by a panel is consistent with written policy shall be determined by the chief administrative officer of the governmental agency which promulgated the policy or his designee unless such person has a direct involvement with the grievance, in which case the decision shall be made by the attorney for the Commonwealth of the jurisdiction in which the grievance is pending. Both the grievant and the respondent may call upon appropriate witnesses and be represented by legal counsel or other representatives at the panel hearing. Such representatives may examine, cross-examine, question and present evidence on behalf of the grievant or respondent before the panel without being in violation of the provisions of § 54.1-3904.

5. The grievance procedure shall prescribe reasonable and specific time limitations for the grievant to submit an initial complaint and to appeal each decision through the steps of the grievance procedure. Such limits shall be equivalent to the time which is allowed the response in each comparable situation.
6. After the initial filing of a written grievance, failure of either party to comply with all substantial procedural requirements of the grievance procedure without just cause shall result in a decision in favor of the other party on any grievable issue, provided the party not in compliance fails to correct the noncompliance within five work days of receipt of written notification by the other party of the compliance violation. Such written notification by the grievant shall be made to the agency head or chief administrative officer. Failure of either party without just cause to comply with all substantial procedural requirements at the panel hearing shall result in a decision in favor of the other party. For employees covered by the state grievance procedure, compliance determinations shall be made by the Director of the Department of Employee Relations Counselors. The commissioners of the housing authority shall make compliance determinations for employees of housing authorities that have their own procedures. Compliance determinations made by the commissioners of the housing authority shall be subject to judicial review.

E. Determining issues qualifying for a panel hearing. - Decisions regarding whether a matter qualifies for a panel hearing shall be made by the agency head or chief administrative officer at the request of the agency or grievant within five work days of the request. A copy of the ruling shall be sent to the grievant. Decisions of the agency head or chief administrative officer may be appealed to the circuit court having jurisdiction in the locality in which the grievant is employed for a hearing on the issue of whether the grievance

qualifies for a panel hearing. Proceedings for review of the decision of the agency head or chief administrative officer shall be instituted by filing a notice of appeal with the agency head or chief administrative officer within five work days from the date of receipt of the decision and giving a copy thereof to all other parties. Within five work days thereafter, the agency head or chief administrative officer shall transmit to the clerk of the court to which the appeal is taken: a copy of the decision of the agency head or chief administrative officer, a copy of the notice of appeal, and the exhibits. A list of the evidence furnished to the court shall also be furnished to the grievant. The failure of the agency head or chief administrative officer to transmit the record within the time allowed shall not prejudice the rights of the grievant. The court, on motion of the grievant, may issue a writ of certiorari requiring the agency head or chief administrative officer to transmit the record on or before a certain date. Within thirty days of receipt of such records by the clerk, the court, sitting without a jury, shall hear the appeal on the record transmitted by the agency head or chief administrative officer and such additional evidence as may be necessary to resolve any controversy as to the correctness of the record. The court, in its discretion, may receive such other evidence as the ends of justice require. The court may affirm the decisions of the agency head or chief administrative officer or may reverse or modify the decision. The decision of the court shall be rendered no later than the fifteenth day from the date of the conclusion of the hearing. The decision of the court is final and is not appealable.

F. Either party may petition the circuit court having jurisdiction in the locality in which the grievant is employed for an order requiring implementation of the panel decision.

§ 2.1-114.5:1. (Delayed effective date) Grievance procedure.

The Department of Employee Relations Counselors shall establish a grievance procedure as part of the Commonwealth's program of employee-management relations. It shall be the policy of the Commonwealth to encourage resolution of employee problems and complaints wherein employees can freely discuss their concerns with immediate supervisors and upper management levels. However, to the extent such concerns cannot be resolved, the grievance procedure shall afford an immediate and fair method for the resolution of disputes which may arise between an agency and its employees. The grievance procedure shall include:

A. Definition of grievance. - A grievance shall be a complaint or dispute by an employee relating to his employment, including but not necessarily limited to (i) disciplinary actions, including dismissals, demotions and suspensions, provided that dismissals shall be grievable whenever resulting from formal discipline or

unsatisfactory job performance; (ii) the application of personnel policies, procedures, rules and regulations, including the application of policies involving matters referred to in subdivision B (iii) below; (iii) acts of retaliation as the result of utilization of the grievance procedure or of participation in the grievance of another state employee; (iv) complaints of discrimination on the basis of race, color, creed, political affiliation, age, disability, national origin or sex; and (v) acts of retaliation because the employee has complied with any law of the United States or of the Commonwealth, has reported any violation of such law to a governmental authority, or has sought any change in law before the Congress of the United States or the General Assembly.

B. Management responsibilities. - Management reserves the exclusive right to manage the affairs and operations of state government. Accordingly, the following complaints are nongrievable: (i) establishment and revision of wages or salaries, position classifications or general benefits; (ii) work activity accepted by the employee as a condition of employment or work activity which may reasonably be expected to be a part of the job content; (iii) the contents of ordinances, statutes or established personnel policies, procedures, rules and regulations; (iv) failure to promote except where the employee can show that established promotional policies or procedures were not followed or applied fairly; (v) the methods, means and personnel by which such work activities are to be carried on; (vi) except where such action affects an employee who has been reinstated within the previous six months as the result of the final determination of a grievance, termination, layoff, demotion or suspension from duties because of lack of work, reduction in work force, or job abolition; (vii) the hiring, promotion, transfer, assignment and retention of employees within the agency; and (viii) the relief of employees from duties of the agency in emergencies. In any grievance brought under the exception to (vi) of this subsection, the action shall be upheld upon a showing by the agency that: (i) there was a valid business reason for the action, and (ii) the employee was notified of the reason in writing prior to the effective date of the action.

C. Coverage of personnel. - 1. All classified state employees, excluding probationary employees, are eligible to file grievances as provided in this chapter with the following exceptions:

a. Appointees of elected groups or individuals;

b. Agency heads or chief executive officers of government operations and institutions of higher education appointed by boards and commissions;

c. Law-enforcement officers as defined in Chapter 10.1 (§ 2.1-116.1 et seq.) of this title whose grievance is subject to the provisions of Chapter 10.1 of

this title and who have elected to proceed pursuant to Chapter 10.1 of this title in the resolution of their grievance or any other employee electing to proceed pursuant to any other existing procedure in the resolution of his grievance; and

~~d. Managerial employees who are engaged in agency-wide policy determinations, or directors of major state facilities or geographic units as defined by regulation, except that such managerial employees below the agency head level may file grievances regarding disciplinary actions limited to dismissals. Employees in positions designated in subdivision 16 of § 2.1-116.~~

2. Employees of the entities listed below shall be subject to the following provisions:

a. Employees of local social service departments and local social service boards, including local superintendents and directors of the local boards and departments, shall be included within the coverage of a grievance procedure. These employees may be accepted in a local governing body's grievance procedure if agreed to by the local governing body and the department or board but shall be excluded from the locality's personnel system, or they shall be covered by the state grievance procedure. The Director of the Department of Employee Relations Counselors may allow modifications to the management steps of the state grievance procedure for local social service departments and local social service boards.

b. Employees of community services boards shall be included within the coverage of a grievance procedure. These employees may be accepted in the grievance procedure of the local governing body that established the community services board or in the grievance procedure of any participating locality in the case of joint community services boards, if agreed to by the local governing body and the community services board, or they shall be covered by the state grievance procedure. The Director of the Department of Employee Relations Counselors may allow modifications to the management steps of the state grievance procedure for community services boards.

c. Constitutional officers' employees shall not be required to be covered by a grievance procedure; however, these employees may be accepted in a local governing body's grievance procedure if agreed to by both the constitutional officer and the local governing body but shall be excluded from the locality's personnel system unless their inclusion in the local personnel system is agreed to by both the constitutional officer and the locality.

d. Redevelopment and housing authorities created pursuant to § 36-4 and regional housing authorities created pursuant to § 36-40 shall promulgate

and administer a grievance procedure which is consistent with the provisions of the state grievance procedure, including the definition of a grievance. Employees of authorities created pursuant to § 36-4 may be accepted in a local governing body's grievance procedure if agreed to by both the authority and the locality. Employees of authorities created pursuant to § 36-40 may be accepted in the grievance procedure of a local governing body that contributes financially to the operation of the authority if agreed to by both the authority and the locality. The state grievance procedure shall apply if a housing authority does not promulgate an approved grievance procedure or if its employees are not accepted in a local governing body's grievance procedure; the housing authority shall provide its employees copies of the state grievance procedure upon request.

e. A housing authority that promulgates its own grievance procedure shall submit the procedure to the Director of the Department of Employee Relations Counselors for approval. The Director may allow modifications to the management steps of the procedure. The grievance procedure shall provide for a panel hearing. A housing authority shall not be required to have an administrative hearing officer in employee termination cases, as provided in the state grievance procedure, but may do so at its option. When a housing authority elects to use an administrative hearing officer as the third panel member in employee termination cases, the administrative hearing officer shall be appointed by the Executive Secretary of the Supreme Court. The appointment shall be made from the list of administrative hearing officers maintained by the Executive Secretary pursuant to § 9-6.14:14.1 and shall be made from the appropriate geographical region on a rotating basis. The housing authority shall bear the per diem expenses and other costs of the administrative hearing officer. Panel decisions shall be final and binding.

f. Employees of local social service departments and local social service boards, community services boards, housing authorities and local governing bodies who are covered by the state grievance procedure shall have issues of grievability, including questions of access to the procedure, determined by the Director of the Department of Employee Relations Counselors; those employees who have been accepted into a local governing body's grievance procedure shall have such determinations made pursuant to the locality's procedure. For a housing authority that promulgates its own grievance procedure, the commissioners of the housing authority or their designee shall determine issues of qualification for a panel hearing, subject to judicial review pursuant to subsection E of this section.

g. Notwithstanding those exempt from this chapter, every legislative and judicial agency shall promulgate and administer a grievance procedure.

D. Grievance procedure steps. - The Department of Employee Relations Counselors shall develop a grievance procedure in compliance with the foregoing which shall include not more than four steps for airing complaints at successively higher levels of management and a final step providing for a panel hearing.

1. The first step shall provide for an informal, initial processing of employee complaints by the immediate supervisor through a nonwritten, discussion format.

2. Management steps shall provide for a review with higher levels of management following the employee's reduction to writing of the grievance and the relief requested on forms supplied by the agency or the Department of Employee Relations Counselors. Personal face-to-face meetings are required at these steps.

3. With the exception of the final management step, the only persons who may be present in the management step meetings are the grievant, the appropriate manager at the level at which the grievance is being heard, and appropriate witnesses for each side. At the final management step, the grievant, at his option, may have present a representative of his choice. If the grievant is represented by legal counsel, management likewise has the option of being represented by counsel.

4. Qualifying grievances shall advance to the final step as described below:

a. Employees of the Department of Mental Health, Mental Retardation and Substance Abuse Services who are terminated on the grounds of patient abuse, and employees of the Department of Corrections who work in institutions or have client or inmate contact, and employees of the Department of Youth and Family Services who work in learning centers or have client or resident contact and who are terminated on the grounds of client or inmate abuse, or a criminal conviction, or are terminated as a result of being placed on probation under the provisions of § 18.2-251, may appeal their termination through the grievance procedure only through the management steps. If resolution is not forthcoming by the conclusion of the last management step, the employee may advance the grievance to the circuit court of the jurisdiction in which the grievance occurred for a de novo hearing on the merits in lieu of a panel hearing. In its discretion, the court may refer the matter to a commissioner in chancery to take such evidence as may be proper and to make a report to the court. Both the grievant and the respondent may call upon appropriate witnesses and be represented by

legal counsel or other representatives before the court or the commissioner in chancery. Such representatives may examine, cross-examine, question and present evidence on behalf of the grievant or respondent before the court or commissioner in chancery without being in violation of the provisions of § 54.1-3904. A termination shall be upheld unless shown to have been unwarranted by the facts or contrary to law or written policy. The decision of the court shall be final and binding.

b. For employees who are not grieving termination or retaliation under subdivision A (v) of this section, the final step shall provide for a hearing before an impartial panel, consisting of one member appointed by the grievant, one member appointed by the agency head and a third member selected by the first two. In the event that agreement cannot be reached as to the final panel member, the chief judge of the circuit court of the jurisdiction wherein the dispute arose shall select the third panel member. The panel shall not be composed of any persons having direct involvement with the grievance being heard by the panel, or with the complaint or dispute giving rise to the grievance. Managers who are in a direct line of supervision of a grievant, persons residing in the same household as the grievant and the following relatives of a participant in the grievance process or a participant's spouse are prohibited from serving as panel members: spouse, parent, child, descendants of a child, sibling, niece, nephew and first cousin. No attorney having direct involvement with the subject matter of the grievance, nor a partner, associate, employee or co-employee of the attorney shall serve as a panel member.

c. For employees grieving termination or retaliation under subdivision A (v) of this section, the third panel member shall not be selected in the manner described above, but shall be appointed by the Director of the Department of Employee Relations Counselors. The appointment shall be made from the list of administrative hearing officers maintained by the Supreme Court of Virginia pursuant to § 9-6.14:14.1 and shall be made from the appropriate geographical region on a rotating basis, as established by the Director of the Department of Employee Relations Counselors. In cases of termination of employees of local social service departments and local social service boards, community services boards, redevelopment and housing authorities and regional housing authorities who are covered by the state grievance procedure, the third panel member shall be appointed by the Executive Secretary of the Supreme Court. The appointment shall be made from the list of administrative hearing officers maintained by the Executive Secretary pursuant to § 9-6.14:14.1 and shall be made from the appropriate geographical region on a rotating basis. The employing agency of the grievant shall bear the per diem expenses and other costs of the administrative hearing officer. Local governments that have their

own grievance procedure shall not be required to have an administrative hearing officer in employee termination cases, but may do so at their option.

d. In all cases the third panel member shall be chairperson of the panel. The decision of the panel shall be final and binding and shall be consistent with provisions of law and written policy. In grievances filed by classified state employees, the question of whether the relief granted by a panel is consistent with written policy shall be determined by the Director of the Department of Personnel and Training. In the case of other employees covered by the state grievance procedure or employees covered by local government grievance procedures, the question of whether the relief granted by a panel is consistent with written policy shall be determined by the chief administrative officer of the governmental agency which promulgated the policy or his designee unless such person has a direct involvement with the grievance, in which case the decision shall be made by the attorney for the Commonwealth of the jurisdiction in which the grievance is pending. Both the grievant and the respondent may call upon appropriate witnesses and be represented by legal counsel or other representatives at the panel hearing. Such representatives may examine, cross-examine, question and present evidence on behalf of the grievant or respondent before the panel without being in violation of the provisions of § 54.1-3904.

5. The grievance procedure shall prescribe reasonable and specific time limitations for the grievant to submit an initial complaint and to appeal each decision through the steps of the grievance procedure. Such limits shall be equivalent to the time which is allowed the response in each comparable situation.

6. After the initial filing of a written grievance, failure of either party to comply with all substantial procedural requirements of the grievance procedure without just cause shall result in a decision in favor of the other party on any grievable issue, provided the party not in compliance fails to correct the noncompliance within five work days of receipt of written notification by the other party of the compliance violation. Such written notification by the grievant shall be made to the agency head or chief administrative officer. Failure of either party without just cause to comply with all substantial procedural requirements at the panel hearing shall result in a decision in favor of the other party. For employees covered by the state grievance procedure, compliance determinations shall be made by the Director of the Department of Employee Relations Counselors. The commissioners of the housing authority shall make compliance determinations for employees of housing authorities that have their own procedures. Compliance determinations made by the commissioners of the housing authority shall be subject to judicial review.

E. Determining issues qualifying for a panel hearing. - Decisions regarding whether a matter qualifies for a panel hearing shall be made by the agency head or chief administrative officer at the request of the agency or grievant within five work days of the request. A copy of the ruling shall be sent to the grievant. Decisions of the agency head or chief administrative officer may be appealed to the circuit court having jurisdiction in the locality in which the grievant is employed for a hearing on the issue of whether the grievance qualifies for a panel hearing. Proceedings for review of the decision of the agency head or chief administrative officer shall be instituted by filing a notice of appeal with the agency head or chief administrative officer within five work days from the date of receipt of the decision and giving a copy thereof to all other parties. Within five work days thereafter, the agency head or chief administrative officer shall transmit to the clerk of the court to which the appeal is taken: a copy of the decision of the agency head or chief administrative officer, a copy of the notice of appeal, and the exhibits. A list of the evidence furnished to the court shall also be furnished to the grievant. The failure of the agency head or chief administrative officer to transmit the record within the time allowed shall not prejudice the rights of the grievant. The court, on motion of the grievant, may issue a writ of certiorari requiring the agency head or chief administrative officer to transmit the record on or before a certain date. Within thirty days of receipt of such records by the clerk, the court, sitting without a jury, shall hear the appeal on the record transmitted by the agency head or chief administrative officer and such additional evidence as may be necessary to resolve any controversy as to the correctness of the record. The court, in its discretion, may receive such other evidence as the ends of justice require. The court may affirm the decisions of the agency head or chief administrative officer or may reverse or modify the decision. The decision of the court shall be rendered no later than the fifteenth day from the date of the conclusion of the hearing. The decision of the court is final and is not appealable.

F. Either party may petition the circuit court having jurisdiction in the locality in which the grievant is employed for an order requiring implementation of the panel decision.

§ 2.1-116. Certain officers and employees exempt from chapter.

A. The provisions of this chapter shall not apply to:

1. Officers and employees for whom the Constitution specifically directs the manner of selection;

2. Officers and employees of the Supreme Court and the Court of Appeals;

3. Officers appointed by the Governor, whether confirmation by the General Assembly or by either house thereof is required or not;

4. Officers elected by popular vote or by the General Assembly or either house thereof;

5. Members of boards and commissions however selected;

6. Judges, referees, receivers, arbiters, masters and commissioners in chancery, commissioners of accounts, and any other persons appointed by any court to exercise judicial functions, and jurors and notaries public;

7. Officers and employees of the General Assembly and persons employed to conduct temporary or special inquiries, investigations, or examinations on its behalf;

8. The presidents, and teaching and research staffs of state educational institutions;

9. Commissioned officers and enlisted personnel of the national guard and the naval militia;

10. Student employees in institutions of learning, and patient or inmate help in other state institutions;

11. Upon general or special authorization of the Governor, laborers, temporary employees and employees compensated on an hourly or daily basis;

12. County, city, town and district officers, deputies, assistants and employees;

13. The employees of the Virginia Workers' Compensation Commission;

14. The following officers and employees of the Virginia Retirement System: retirement system chief investment officer, retirement system investment officer, retirement system assistant investment officer and investment financial analyst;

15. Employees whose positions are identified by the State Council of Higher Education and the boards of the Virginia Museum of Fine Arts, the

Science Museum of Virginia, the Jamestown-Yorktown Foundation, the Frontier Culture Museum of Virginia, the Virginia Museum of Natural History and the Virginia State Library and Archives, and approved by the Director of the Department of Personnel and Training as requiring specialized and professional training;

16. The following officers and employees of executive branch agencies: those who report directly to the agency head; ~~additionally, those at the level immediately below those who report directly to the agency head and are at a salary grade of sixteen or higher. However, in agencies with fewer than fifty employees, only the immediate advisor or advisors or deputy or deputies of the agency head shall be exempt.~~ In implementing this exemption, personnel actions shall be taken without regard to race, sex, color, national origin, religion, age, handicap or political affiliation. Recruitment and selection of individuals covered by this exemption shall be handled in a manner consistent with policies applicable to classified positions. ~~Notwithstanding the above, all superintendents and wardens in the Department of Corrections shall be exempt from this chapter. Additionally, all persons responsible for the internal audit and personnel and employee relations functions for each agency shall be included in this chapter.~~ Each Governor's Secretary shall have a final authority in determining on an ongoing basis the officers and employees exempted by this subdivision and pursuant to its provisions. Such officers or employees shall thereafter serve at the pleasure and will of their appointing authority. The Department of Personnel and Training shall advise and assist each Governor's Secretary in making these determinations and shall be responsible for maintaining an ongoing and up-to-date list of the affected positions;

17. The sales and marketing employees of the State Lottery Department;

18. Production workers for the Virginia Industries for the Blind Sheltered Workshop programs; and

19. Employees of the Medical College of Virginia Hospitals and the University of Virginia Medical Center who are determined by the Department of Personnel and Training to be health care providers; however, any changes in compensation plans for such employees shall be subject to the review and approval of the Secretary of Education. Such employees shall remain subject to the provisions of § 2.1-114.5:1.

B. The dismissal of any employee referred to in subdivision A 16 of this section pursuant to this chapter shall not affect the retirement benefits, and annual and sick leave benefits accrued to such employee at the time of his

dismissal, nor shall any such employee be subject to any diminution of any other employee benefits by virtue of the provisions of this chapter.

§ 2.1-116. (Delayed effective date) Certain officers and employees exempt from chapter.

A. The provisions of this chapter shall not apply to:

1. Officers and employees for whom the Constitution specifically directs the manner of selection;

2. Officers and employees of the Supreme Court and the Court of Appeals;

3. Officers appointed by the Governor, whether confirmation by the General Assembly or by either house thereof is required or not;

4. Officers elected by popular vote or by the General Assembly or either house thereof;

5. Members of boards and commissions however selected;

6. Judges, referees, receivers, arbiters, masters and commissioners in chancery, commissioners of accounts, and any other persons appointed by any court to exercise judicial functions, and jurors and notaries public;

7. Officers and employees of the General Assembly and persons employed to conduct temporary or special inquiries, investigations, or examinations on its behalf;

8. The presidents, and teaching and research staffs of state educational institutions;

9. Commissioned officers and enlisted personnel of the national guard and the naval militia;

10. Student employees in institutions of learning, and patient or inmate help in other state institutions;

11. Upon general or special authorization of the Governor, laborers, temporary employees and employees compensated on an hourly or daily basis;

12. County, city, town and district officers, deputies, assistants and employees;

13. The employees of the Virginia Workers' Compensation Commission;

14. The following officers and employees of the Virginia Retirement System: retirement system chief investment officer, retirement system investment officer, retirement system assistant investment officer and investment financial analyst;

15. Employees whose positions are identified by the State Council of Higher Education and the boards of the Virginia Museum of Fine Arts, the Science Museum of Virginia, the Jamestown-Yorktown Foundation, the Frontier Culture Museum of Virginia, the Virginia Museum of Natural History and the Virginia State Library and Archives, and approved by the Director of the Department of Personnel and Training as requiring specialized and professional training;

16. The following officers and employees of executive branch agencies: those who report directly to the agency head. In implementing this exemption, personnel actions shall be taken without regard to race, sex, color, national origin, religion, age, handicap or political affiliation. Recruitment and selection of individuals covered by this exemption shall be handled in a manner consistent with policies applicable to classified positions. Each Governor's Secretary shall have final authority in determining on an ongoing basis the officers and employees exempted by this subdivision and pursuant to its provisions. Such officers or employees shall thereafter serve at the pleasure and will of their appointing authority. The Department of Personnel and Training shall advise and assist each Governor's Secretary in making these determinations and shall be responsible for maintaining an ongoing and up-to-date list of the affected positions;

17. The sales and marketing employees of the State Lottery Department; and

~~47.~~ 18. Production workers for the Virginia Industries for the Blind Sheltered Workshop programs.

19. Employees of the Medical College of Virginia Hospitals and the University of Virginia Medical Center who are determined by the Department of Personnel and Training to be health care providers; however, any changes in compensation plans for such employees shall be subject to the review and

approval of the Secretary of Education. Such employees shall remain subject to the provisions of § 2.1-114.5:1.

B. The dismissal of any employee referred to in subdivision A 16 of this section pursuant to this chapter shall not affect the retirement benefits, and annual and sick leave benefits accrued to such employees at the time of his dismissal, nor shall any such employee be subject to any diminution of any other employee benefits by virtue of the provisions of this chapter.

2. That the second enactment of Chapter 937 of the 1990 Acts of Assembly is repealed.

William L. Murray  
1921 Kings Rd.  
Glen Allen, Virginia 23060

**EDUCATION:**

**Ph.D. Candidate**, Center for Public Administration and Policy, Virginia Tech. Completed all requirements but dissertation. Degree Expected May, 1996.

**M.P.A.**, Center for Public Administration and Policy, Virginia Tech, 1991. Concentration: Budgeting and Public Law.

**B.A.**, University of Virginia, 1985, Major: History.

**PROFESSIONAL EXPERIENCE:**

**Principal Legislative Analyst**, Joint Legislative Audit and Review Commission (JLARC) of the Virginia General Assembly. Served as project leader in oversight reviews of operations of state government. Managed reviews of state real property, capital outlay in higher education, exemptions to the Personnel Act, and the Department of Environmental Quality. Supervised a professional staff of 2-5 analysts, conducted oral briefings to standing committees of the General Assembly as well as to JLARC, and drafted legislation and budget amendments. 1993-Present.

**Management Analyst**, U.S. Department of Veterans Affairs, Salem, Virginia. Served as executive assistant to medical center top management (chief of staff and associate director). Conducted management and financial reviews of hospital operations. Assisted in quality improvement efforts and provided internal training in computer systems and unit budget preparation. 1991-1993.

**Evaluator Intern**, U.S. General Accounting Office, Norfolk, Virginia Regional Office. Worked as junior evaluator on review of logistics issues in the Department of Defense. Conducted interviews and other fieldwork and helped develop study methodology and scope. Summer 1991.

**Graduate Teaching Assistant**, Virginia Tech. Taught three sections freshman composition (1990 academic year) and co-taught public budgeting (1992-1993).

*William L. Murray*