
HOLDING
GOVERNMENT
BUREAUCRACIES
ACCOUNTABLE

BERNARD ROSEN



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HOLDING GOVERNMENT BUREAUCRACIES ACCOUNTABLE,

Bernard Rosen

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PREFACE

The growth in power of government bureaucracies is one of the more profound developments of twentieth-century society. What we normally refer to as the bureaucracies have a daily impact on the quality of life of every person in this country and many millions outside our borders. The president, governors, mayors, legislators, judges, and many private citizens now find themselves increasingly concerned with how the bureaucracies are using this power — with what they are doing or not doing. The underlying question persists: are government bureaucracies out of control?

Accountability is at the heart of these concerns. For what and to whom are bureaucracies answerable? How are they held accountable? This book discusses these questions, primarily in the context of the federal bureaucracy. Also, while there are problems of accountability with regard to elected as well as appointed bureaucrats, the focus here is on accountability of nonelected bureaucrats.

In putting aside accountability for elected bureaucrats — congressmen, senators, state and local legislators, and elected chief executives at all levels — it is useful to recall a passage from James Madison's *Federalist* 57: "The House of Representatives is so constituted as to support in the members an habitual recollection of their dependence on the people. Before the sentiments impressed on their minds by the mode of their elevation can be effaced by the exercise of power, they will be compelled to anticipate the moment when their exercise of it is to be reviewed, and when they must descend to the level from which they were raised; there forever to remain unless a faithful discharge of their trust shall have established their title to a renewal of it."¹

Throughout this book, the terms "bureaucracy" and "bureaucrat" are used in a neutral, nonpejorative sense. "Bureaucrat" refers not only to career civil service employees, including many of extraordinary competence, but also to political appointees, many of whom are outstanding and come to government for relatively short periods after successful experiences in the private sector or academia. This book assumes that "politics" in a representative democracy is a necessary and honorable activity even though some politicians, just as is the case with some doctors, lawyers, engineers, and people in business, may not be a credit to their vocation.

The first two chapters deal with the substance of accountability: for what public administrators are accountable and to whom. The next five chapters are concerned with the processes of accountability, that is, how public administrators are held accountable — within the executive branch, by the legislative branch, through citizen participation and the news media, by the courts, and by some relatively new instruments. The last two chapters look to the future with

discussion of proposals for improving the policies and processes for holding government bureaucracies accountable.

The idea for this book was born after the author had served in the federal bureaucracy for more than 30 years and began teaching courses in public administration. Although the substance and processes of accountability grow large in importance for public administrators as their responsibilities increase, no single work focuses on the subject as a whole in terms of current policies and practices. I believe this book will help fill that need for students, teachers, and managers and other professionals in government. For courses in public management, politics of administration, public personnel administration, Congress, and the presidency, it would be a useful companion text to facilitate discussion and understanding of this overriding issue. Those studying business administration or in business and concerned with the relations between government and business will find that accountability policies and processes translate into opportunities for intervention in the decision-making processes of government.

With citizen expectations continuing to outrun funded governmental capacity, holding government bureaucracies accountable is a long-term, high-priority concern for the governed and the governors.

NOTE

1. James Madison, "The House of Representatives," in *Hamilton, Madison, and Jay on the Constitution*, ed. Ralph H. Gabriel (New York: The Liberal Arts Press, 1954), pp. 111-15.

ACKNOWLEDGMENTS

The experience and insights of many outstanding practitioners in the arts of politics and public management are reflected in this book. Especially helpful were 20 United States senators and 39 representatives who provided valuable judgments on the usefulness of various mechanisms and processes for legislative oversight. Equally helpful were 59 federal career executives from 15 agencies who shared their knowledge and perspectives by evaluating the effectiveness of a wide range of methods for holding administrators accountable. These legislators and administrators shall remain nameless — they are too numerous to list.

An enormous contribution in research, editing, and typing was made by my wife Adele, a fellow student of the late Roscoe C. Martin. He is in good part responsible for our love affair — with each other and with public administration. His role must be acknowledged because writing this book was a labor of love.

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PART I

The Substance of Accountability

*In a democracy the object is to keep
the government subordinated to the people.*

1

PUBLIC ADMINISTRATORS: ACCOUNTABLE FOR WHAT?

“And now, if you will raise your right hand and repeat after me, I will administer the oath of office,” said the chief clerk. The oath of office! The words were clear — deceptively simple.

I, Bernard Rosen, do solemnly swear that I will support and defend the Constitution of the United States against all enemies foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

Participation in a nation-wide competitive examination, interviews, forms filled out, the oath, and now I was an employee of the United States government — the executive branch!

During more than 30 years in the federal civil service, the duties to be “well and faithfully” discharged spanned a series of necessary and often exciting assignments that ranged from recruiting workers for Pearl Harbor in order to help rebuild the fleet that was destroyed by Japan’s surprise attack, to White House meetings on issues related to improving the effectiveness of government, meetings that on some occasions included even the president. Along the way, I wrestled with management policies and practices of federal agencies as they operated in all 50 states and in many other countries. This involved discussing problems and possible solutions — testifying before congressional committees, listening to and talking with congressmen, senators, governors, agency officials, newspaper and magazine reporters, union leaders, veterans’ organization officials, civil rights leaders, and representatives of numerous other interest

groups, as well as individual citizens, all of whom had views on the duties that I was charged to perform "well and faithfully." They all had a claim on me. In one respect or another, they felt I was accountable to them. I shared that feeling, although not always with joy.

Accountability in the executive branch of the federal government starts with the president. The president's oath of office, specified in the Constitution, is even briefer than that taken by all other officers and employees:

I, _____, do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my ability, preserve, protect, and defend the Constitution of the United States.¹

With an oath of similar intent, if not identical words, elected and appointed officials at all levels of government in the United States officially undertake their duties and thereby become accountable. Accountable for what?

In our national government overall executive responsibility is vested in the president, whose specific powers and duties are rooted in the Constitution. The clause "he shall take care that the Laws be faithfully executed"² establishes the need for a bureaucracy and the president's role as the head of it. Similar provisions in many state constitutions and charters for local governments give legitimacy to executive-branch bureaucracies.

The substance of accountability places at least four requirements on elected chief executives and public administrators throughout the bureaucracy:

1. Make laws work as intended with a minimum of waste and delay.
2. Exercise lawful and sensible administrative discretion.
3. Recommend new policies and propose changes in existing policies and programs as needed.
4. Enhance citizen confidence in the administrative institutions of government.

Each of these merits separate discussion.

MAKE LAWS WORK AS INTENDED

This appears perfectly clear, and one might assume it can lead to prompt and decisive action. However, many laws are the product of compromises in ideas and language. Often the crucial agreements are achieved through deliberate ambiguity, and the conflicting forces then merely shift the field of battle from the legislative halls to the administrators' offices. Rowland Egger's essay on "Responsibility in Administration" describes the reality this way:

A public servant who is really convinced that his every official action is fully informed by incontrovertible legal sanctions, instructed by clear

policy directives, and supported by objectively demonstrable fact is a dangerous person. He requires to be confined in a straitjacket.³

On the issue of determining the intent of laws and dealing with deliberate or accidental ambiguity, the architects of the Constitution offer little guidance for public administrators, whose roles have changed enormously in two centuries. A grand total of less than 800 employees constituted the executive branch of the United States government in 1789. The laws to be "faithfully executed" were few in number, quite specific in content, and related almost entirely to collecting revenues, moving the mail, providing for a minuscule military force, and carrying on relations with a small number of countries. The president, and department heads appointed by him, made virtually all significant decisions involving administrative policy. There were few doubts about who was accountable for what.

In this, the ninth decade of the twentieth century, the federal government's executive branch has over 2.5 million employees engaged in executing tens of thousands of laws by doing almost every conceivable type of work. Federal employees propose laws, and develop the implementing policies and programs for those that are enacted, on subjects that were not even thought about when the nation was founded: laws dealing with environmental pollution, space exploration, abortion, unemployment compensation, neutron weapons systems, occupational health and safety, cancer research, control of pesticides, minimum wage, subsidized housing, deregulation of regulated areas, and hundreds of others. As for accountability, in our twentieth decade as a nation the president found it impossible to fulfill a campaign commitment that heads of agencies would personally review and approve their regulations — regulations that have the effect of law. The Carter administration quickly learned that agency heads do not have the time to consider personally the numerous issues and conflicting interests that constitute the essential background.

Several examples will illustrate the complex and difficult problems that confront public administrators as they seek to fulfill the first requirement of accountability: make laws work as intended with a minimum of waste and delay.

The secretaries and staffs of the Department of Health and Human Services (HHS)* in the Ford and Carter administrations worked for almost six years to develop policies for implementing a law designed to strengthen the civil rights of handicapped people. The unfinished task then became the responsibility of the Reagan administration. The long delay reflects the many controversial provisions of the law. For example, it calls for public transportation to be accessible to handicapped people. Does this mean that all buses in interstate commerce, and all other bus transportation that is financed in part with federal

*The Department of Health, Education, and Welfare (HEW) was renamed in 1979 when a separate agency was created for education. This name will be used throughout the book.

funds, must be accessible to people in wheel chairs? Powerful forces with primary concern for the handicapped argued "yes." Other powerful forces, which estimated the costs of such a conversion in the billions of dollars, argued that this was not the intent of the law, and that alternate forms of transportation could assure equal or greater mobility at significantly less cost. Then there was the matter of timing. Regardless of the approach, enormous expenditures would be required. Over what period were these to be made? The adversaries included those who believe that, because civil rights are the foundation of our democratic society, as soon as a major shortcoming is identified it should be corrected; those at the other end of the spectrum hold that additional expenditures for such purposes should be made at a speed and level that will not adversely affect the economy; and there were many in between. To reach a consensus to enact legislation it was necessary to avoid being specific in these matters, even though this presented a serious problem for the administrator charged with carrying out the law as intended. The intent was not clear.

Another example relates to action taken by Congress in recent years to attach riders to appropriation bills for the Department of Health and Human Services that restrict the use of federal funds for abortions. The language finally adopted after major struggles within the House and the Senate and between the two was subject to a range of interpretations, any one of which would be contrary to the position of some individuals who found the language in the law acceptable. It is in fact doubtful that agreement would have been reached on some appropriation bills if Congress had insisted on eliminating all ambiguity. Yet an administrator is charged with carrying out the law as intended with regard to the use of funds for abortions.

Across the board it is certainly the intent of Congress and the president that laws be carried out in the most efficient and economical manner. Some policies and programs are particularly vulnerable to inefficiency and corruption during their implementation. New programs that involve spending large sums of money in relatively short periods of time to achieve goals that are quite general provide fertile ground for poor productivity, inefficiency, and even dishonesty.

The strongest signals sent to administrators by the president and Congress at the beginning of such programs call for moving ahead quickly. Often in the first year a key question is whether the money is being spent at the anticipated rate. There is little or nothing in most legislation authorizing and funding new multibillion dollar social and defense programs to evidence a clear concern on the part of either the president or Congress that the need for speed should be balanced against the need for integrity, efficiency, and high productivity. Rarely are there specific provisions for early, continuing, and systematic review by legislative bodies or within the executive branch. Yet administrators of civil and military programs can testify from first-hand experience that years after the programs were launched, they were held accountable on these grounds.

EXERCISE LAWFUL AND SENSIBLE DISCRETION

In his excellent book *Discretionary Justice*, Kenneth Culp Davis recognizes that administrative discretion is indispensable to effective government, but he argues that public officials now have too much discretion, and that a great deal needs to be done to confine, structure, and check this discretion to assure a more just society. Davis holds that some of this excess discretion should be restricted by legislators but that most needs to be defined and limited by higher-level administrators. In general, he favors administrative discretion when it is not practicable to lay down a rule that will permit fair consideration of unique situations.⁴ Of course, to the degree that public administrators have unnecessary discretion, accountability is diminished.

One of the virtues of bureaucracy is that its very nature contributes to a *lawful* exercise of administrative discretion. Max Weber discussed three characteristics of bureaucracy that help in this regard:

- 1 – Fixed and official jurisdictional areas, which are generally ordered by rules, that is, by laws or administrative regulations.
- 2 – The regular activities required for the purposes of the bureaucratically governed structure are distributed in a fixed way as official duties.
- 3 – Methodical provision is made for the regular and continuous fulfillment of these duties and for the execution of the corresponding rights; only persons with the generally regulated qualifications to serve are employed.⁵

These elements may, however, also work against the *sensible* use of administrative discretion. They have a tendency to encourage a narrow rather than broad responsiveness to problems; there are obvious risks for administrators who deal responsively with situations that do not fit the established rules.

“Responsiveness” is a complicated idea in the context of administrative discretion. It may involve action, or even inaction if today’s decision reduces tomorrow’s options. Public administrators are urged to be flexible; but they must also keep in mind the precedential power of each decision. They can become so responsive that they are not responsible. The basic question is always present: responsive to whom and with what consequences for the broader public interest? To illustrate:

1. The Federal Trade Commission may or may not choose to regulate in a particular area. This decision may be made for reasons of policy, priority, or resources. In any event, its decision is likely to be applauded by some as a sensible use of its discretion, and it is also likely to be condemned by others as being unresponsive to the problems. As expected, in recent years the chairman of the commission has come in for lavish praise and sharp criticism on his

proposal to prohibit advertising so-called junk food on television programs that cater to small children.

2. President Jimmy Carter's secretary of HHS and many governors and mayors were given high marks by some and denounced by others for conducting antismoking campaigns.

3. Several secretaries of transportation have been buffeted by conflicting forces on the issue of requiring all new automobiles to have airbags or seat belts that automatically lock into place.

In these and many other examples, the central issue relates to whether the administrator used discretion lawfully and sensibly in carrying out the government's responsibility.

How administrators exercise their discretion within the framework of law is subject to many forces. Higher-level supervisors have a powerful influence on the exercise of discretion by subordinates. President Gerald Ford caused HHS to reverse quickly the decision of one of its civil rights officials who cast doubt on the tax-exemption status of a nonprofit organization because it allegedly discriminated based on sex by sponsoring a mother-daughter luncheon. Although the decision of the HHS official was probably a correct literal application of the civil rights law, it was not politically feasible. Subsequently, there was no difficulty using administrative discretion "sensibly" in responding to a query from a school administrator about whether federal funding would be jeopardized if father-son breakfasts for the football team were continued.

There are almost unlimited numbers of conditions and circumstances where laws and rules do not fit the situation and where discretion must be used. Many of the most controversial proposals for applying significant administrative discretion are debated and decided at the point where political and career officials come into contact. Political appointees often consider the use of discretion in terms of action that will produce results *soon*, recognizing that on the average their tenure is about two years — accountability in the short term. On the other hand, senior career officials are likely to weigh the use of discretion in longer terms, including history of the policy or program, and the need for continuing relations with interest groups, legislators and staff, central management agencies, and the news media.

Decisions of the courts also guide the exercise of administrative discretion on a wide range of issues such as the granting or revocation of licenses, the immigration or deportation of aliens, denial of claims for social security or disability pensions, and the interpretation of the Constitution and laws in thousands of other situations where the executive-branch agencies provide or deny benefits.

Legislative institutions as well as individual legislators and their principal staff influence the use of discretion by administrators. A proposed amendment to a bill or statute, or merely a phone call from a legislator or staff director