Bureaucratic Nirvana

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Norton E. Long, *Bureaucracy and Constitutionalism*, 46 **Am. Pol. Sci. Rev.** 808 (1952).

Towards the beginning of his book *Law and Disagreement*, Jeremy Waldron says that he will offer an airbrushed view of legislatures and their capacities, as a deliberate counterpoint to the romantic view of courts so prevalent in the older literature on legal and constitutional theory. Others have offered optimistic accounts of the Presidency. But has anyone done the same for the federal line agencies and civil service — the federal bureaucracy? Will no one give us a vision of bureaucratic nirvana?

An unpromising assignment, to be sure. But it turns out that someone has taken it on, and done it superbly. In 1952 a public administration scholar, Norton E. Long, wrote an article on “Bureaucracy and Constitutionalism” in the APSR. The article offers nothing less than a vision of an American public law order guided, shaped and perfected by a quasi-independent administrative bureaucracy. Long’s article has been cited a couple of hundred times in the public administration literature, but — by my highly unscientific count — only a handful of times in the legal literature. As far as administrative law and the theory of the administrative state go, Long’s article is a neglected classic, although Long’s ideas made their way to the legal literature indirectly through the work of other public administration scholars heavily influenced by Long, such as John A. Rohr (in his 1986 book *To Run a Constitution*).

Long offers two major claims, the first about representation, the second about checks and balances. The first claim is that “[i]f one rejects the view that election is the *sine qua non* of representation, the bureaucracy now has a very real claim to be considered much more representative of the American people in its composition than the Congress” (814). The bureaucracy is an indispensable medium of representation because Congress itself is dysfunctional; it is incapable of acting either as a pluralist aggregator of preferences and interests, or as a locus for civic deliberation on the common good. “Important and vital interests in the United States are unrepresented, underrepresented, or malrepresented in Congress. These interests receive more effective and more responsible representation through administrative channels than through the legislature.” (811).

The claim is striking, but what if anything might make it true? Why exactly is the unelected bureaucracy more representative than Congress? Long’s point is sociological and demographic. Congress is, in effect, a quasi-oligarchic institution dominated by the elite, and inevitably so; as scholars like Bernard Manin have stressed, elections have always been a selection mechanism whose tendency is to favor the natural aristocracy of wealth and position, especially in the large electoral districts characteristic of the United States. By contrast, the federal civil service is a “democratic *carriere ouverte aux talents*” (814). Because of the “origin, income level, and associations” (813) of those who enter the federal civil service, it is far more broadly representative of the mass of the population than are federal legislators. The civil service incorporates middle-income professionals with public schooling and training in diverse practical professions and sciences; above all, the civil service “refus[es] to block the path of the common man by educational qualifications beyond the reach of the poor” (814).

So much for the civil service and Congress. In this article Long does not offer any sustained contrast between the civil service and the institutional Presidency, only because he had earlier argued at length that (what we would now call) presidential administration could not provide an adequate remedy for the

structural deficiencies of Congress. (The article is "Power and Administration," Public Administration Review 9(4): 257-264 (1949)). Presidential administration promises to achieve democratic accountability through policy coherence; it promises to rationalize administrative priorities and regulatory action into a coherent agenda that the voting public might judge at election time. But in Long's view all this is a sheer fantasy. Although in times of war or emergency the public will tolerate short-run coordination of the entire federal bureaucracy, in normal times the Presidency simply lacks sufficient political power to harmonize the administration. Vertical lines may be drawn on the organizational chart, of the executive branch, but de facto political power will remain "dispersed and divided" among congressional committees, heads of agencies, and interest groups, and this will ensure the failure of presidential administration. In this fractured landscape, the independent civil service is the only body that can act coherently and consistently with a view to promoting the public interest.

Precisely because the independent civil service enjoys a broadly representative demographic and sociological base, it may be trusted to act as a kind of constitutional balance wheel among the President, Congress and the judiciary; this checking function of the bureaucracy is Long's second major point. Long sometimes refers to "the administrative branch," and urges that "our great fourth branch of government" should "tak[e] its rightful place" alongside the branches that happen to be mentioned in the Constitution (818). What makes its place rightful, despite its lack of an electoral connection and a dubious constitutional pedigree, is that the bureaucracy contains within itself "a balance of social forces" (813). The enormous standing armies of the Western democracies no longer pose a serious threat to constitutionalism because they are "neutraliz[ed]" by their democratic composition; so too, the internal pluralism of the bureaucracy "insures its constitutional behavior and political equilibrium" (813).

It would, I think, misunderstand the spirit and purpose of Long's article to carp at its roseate view of the bureaucracy. To offer such a view is its very point. We might see Long as standing in the same relationship to the civil service as a myriad of constitutional law professors *d'un certain age* stand, or stood, to the federal judiciary. These law professors took an internal perspective on the work of the Warren and Burger Courts, attempting to put the judges' decisions in their best light — in part by arguing that the courts were, counterintuitively, more democratically representative than malapportioned, corrupt and politically irresponsible legislatures. So too with Long, *mutatis mutandis*. In the tradition of public administration, his perspective on the federal bureaucracy is internal, not external, or at least it is both, not just the latter. (Students of bureaucracy in political science departments, by contrast, take a strictly external perspective; what they see, they see very clearly, but there is a great deal they altogether overlook).

Imagine a trained professional of modest background who has climbed into the ranks of the Senior Executive Service. This civil servant tries to promote the national welfare as best she can, subject to political constraints arising from the absurd demands and irrelevant objections of congressional committees, underlings in the White House, hidebound lawyers and judges, and other actors who distort enlightened policymaking. She may be forgiven for thinking of herself as more representative of the people, more to be trusted with the well-being of fellow citizens, than any of her tormentors. Long sees the American constitutional order through the eyes of someone like that; if it is not a perspective all of us need share, it is good that someone has expressed it.

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