

# **VII. Federal Administration in the Constitutional System**

## **FEDERAL ADMINISTRATION IN THE CONSTITUTIONAL SYSTEM**

**by David Rosenbloom**

Effectively integrating large-scale public administration into the constitutional system has been one of the major governmental challenges faced by the United States during the twentieth century. The effort to achieve a harmony between constitutional governance and vigorous federal administration has frequently involved attempts to further subordinate the career federal executive to the President and his political appointees, to Congress, and to the courts. Beginning in the 1950s, a complementary approach has evolved—that of “constitutionalizing” public administration, or infusing it with constitutional values and requirements. This approach has changed the content of public administration in a very fundamental way. Understanding the structure of individuals’ constitutional rights has become part of the knowledge base that many federal administrators must have. In addition to being competent in administration, management, or a professional area, public administrators now must be constitutionally competent as well. This chapter provides a framework for thinking about these developments and outlines those constitutional rights that, in general, are most salient to contemporary federal administration. The chapter completes the introductory knowledge federal executives should have in further developing their constitutional literacy.

### **PUBLIC MANAGEMENT AND CONSTITUTIONAL GOVERNANCE**

There are several reasons why it has been difficult to integrate large-scale public administration into the constitutional system. Each emphasizes different values. Public administration is concerned with managerial efficiency, cost-effectiveness, and successful

implementation of public policy. But from a constitutional perspective, these values are often suspect. Hear the Supreme Court in Stanley v. Illinois (1972):

“The Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones...”

Put differently, constitutional values are a constraint on public administration. As Justice William Douglas wrote in dissent in Spady v. Mount Vernon (1974), “today’s mounting bureaucracy, both at the state and federal level, promises to be suffocating and repressive unless it is put into the harness of procedural due process.” But as emphasized earlier, the constitutional system also depends on efficient public administration for its success.

There is also a tension between the Constitution’s commitment to government by the people and public administration’s reliance on a career service imbued with apolitical, technical and managerial expertise. Justice Lewis Powell made this point well in his dissenting opinion in Garcia v. San Antonio Metropolitan Transportation Authority (1985):

“Federal departments and agencies customarily are authorized to write regulations. Often these are more important than the text of the statutes. As is true of the original legislation, these are drafted largely by staff personnel. The administration and enforcement of federal laws and regulations necessarily are largely in the hands of staff and civil service employees. These employees may have little or no knowledge of the States and localities for which they are responsible...

“...My point is simply that members of the immense federal bureaucracy are not elected, know less about the services traditionally rendered by States and localities, and are inevitably less responsive to recipients of such services, than are state legislatures, city councils, boards of supervisors, and state and local commissions, boards, and agencies. It is at these state and local levels—not in Washington...that “democratic self-government” is best exemplified.”

Federal administrators are thus caught in a double tension: they are neither elected nor politically appointed and they are far removed from grass roots democracy.

A second type of conflict between public administration and the Constitution is structural. It has not been easy to fold public administration into the separation of powers. As Justice Robert Jackson stated in FTC v. Ruberoid Co. (1952), administrative agencies “...have become a veritable fourth branch of the Government, which has deranged our three branch legal theories as much as the concept of a fourth dimension unsettles our three dimensional thinking.” Almost everyone would agree with Justice Byron White’s assessment in Buckley v. Valeo

(1976), that “there is no doubt that the development of the administrative agency in response to modern legislative and administrative need has placed severe strain on the separation-of-powers principle in its pristine formulation.”

Public administration compromises the separation of powers by combining legislative (rulemaking), executive, and judicial (adjudicatory) functions in the same agencies. However, the separation of powers sometimes makes effective public administration difficult because administrators are subordinate and responsible to Congress, the President, and the courts. Unless all three branches, but especially the legislative and executive, are sufficiently coordinated, public administrators can be subject to unclear and contradictory direction.

Congress has a great deal of authority over agencies’ structure, budget, mission, personnel, and legal powers. Yet the President is charged with faithful execution of the laws. A great deal of what has become known as “bureaucratic politics” involves effort precisely to achieve coordination sufficient to make the constitutional system work. In the nineteenth century, coordination was largely through political parties. In practice, partisan political machines also hired and fired large numbers of federal employees. Ironically, in today’s politics, when Congress and the presidency are so frequently dominated by different parties, it is members of the merit-oriented apolitical federal service who often do the coordinating.

Short of constitutional amendment, it is unlikely that these tensions between the Constitution and public administration can be resolved fully. Dynamic temporary political adjustments, such as the now defunct legislative veto, are frequently adopted. Today’s emphasis, though, is on a more fundamental effort to constitutionalize public administration so that public administrator maybe able to make the Constitution and public administration more fully compatible in their day-to-day practice.

## **CONSTITUTIONALIZING PUBLIC ADMINISTRATION**

Although all public administrator take an oath to support the Constitution, it has only been since the 1950s and 1960s that public administration has been constitutionalized, that is, infused with constitutional values, principles, and methods of reasoning. Constitutionalization was most substantially promoted by the federal courts during the Chief Justiceships of Earl Warren and Warren Burger (1953-1969 and 1969-1985, respectively). It consisted primarily of three elements.

First, the federal courts found or declared constitutional rights for individuals vis-a-vis public administration that had not previously existed or been articulated. Thus, clients of

administrative agencies, such as welfare recipients and children in public schools, were afforded far-reaching protection of their substantive, procedural, and equal protection rights. Brown v. Board of Education of Topeka (1954), contained in this volume, is a stellar example. The constitutional rights of public employees were also strengthened as due process was applied to dismissals, greater freedom of association (including with labor unions) and speech was granted, and equal protection became an important barrier against racial and other prohibited kinds of discrimination.

Continuing in the same vein, individuals involuntarily confined to public mental health facilities were given a constitutional right to treatment or habilitation for the first time. The Eighth Amendment Rights of prisoners against cruel and unusual punishment were strengthened considerably. Persons involved in street-level encounters with police and other public administrators also obtained a variety of new protections, especially with regard to the constitutional rights to privacy and due process. These developments were dramatic—indeed, revolutionary in terms of constitutional doctrine. They could not be ignored by public administrators.

Second, the courts became far more inclined to intervene in public administrative institutions and processes to remedy breaches of these newly declared rights. Many local governmental public personnel systems, public schools, prisons and jails, public mental health facilities, and public housing agencies have been virtually taken over by courts. In the process, public administrators became more cognizant of how the Constitution is interpreted to affect a wide range of administrative practices, including such routine ones as staffing. For their part, many judges seem to have gained a greater appreciation of the practical constraints faced by public administrators.

Finally, there was a radical transformation of the doctrines concerning public officials' legal immunity. Until the 1970s, most public administrators were presumed to be absolutely immune from civil suits for money damages arising out of their official performance. But during that decade, the presumption was changed generally to one of only qualified immunity. As a result, today most public administrators—including federal employees—who violate individuals' constitutional rights, of which they reasonably should be aware, may be held personally liable for compensatory and possibly punitive money damages. Municipalities and administrative agencies throughout all levels of government also face new liabilities.

The switch from absolute to qualified official immunity is the capstone of the process of constitutionalization of public administration. It requires public administrators, as a matter of their job competence, to have reasonable awareness of and respect for the constitutional rights of the individuals upon whom they act. Otherwise, public administrators run real risks of being sued for damages. In Carlson v. Green (1980), the Supreme Court explained that qualified immunity "...in addition to compensating victims, serves a deterrent purpose" that should reduce violations of individuals' constitutional rights. But since the Constitution as applied goes well beyond the specific letter of the document, what constitutionalization really demands is that public administrators have broad constitutional literacy. They must understand landmark court decisions and the style of judicial reasoning, as well as constitutional values and principles.

Much of the necessary is conveyed by the materials in this volume. The following section rounds out this introduction to constitutional literacy by outlining the general structure of those individual constitutional rights that are of most concern generally to federal executives.

## THE STRUCTURE OF CONSTITUTIONAL RIGHTS

It is useful to think of constitutional rights as having a structure, or a pattern of thought through which they are analyzed by the judiciary. In considering these structures, it is important to remember that although constitutional rights may be strongly defended by the courts, they are not considered to be absolute. In theory, they can be abridged under appropriate circumstances, though in practice such circumstances may never arise.

The next sections of this chapter outline and diagram the general structure of individuals' substantive, privacy, procedural, and equal protection rights. While thinking about these rights, it is important to remember that although these outlines capture the basics, the constitutional law is more fluid than they suggest, and exceptions to the general patterns of reasoning may be found.

Substantive Rights. For substantive rights, such as freedom of speech, association, and exercise of religion, the general structure is as follows:

1. What is the governmental practice at issue?
2. Does it infringe upon or abridge an individual's constitutional right?
3. If it does not, there is no violation of the Constitution.
4. If there is an infringement or abridgment, what is the nature of the government's interest in the practice?
  - A. Is the practice rationally connected to the government's interest?
    - i) If not, the practice is unconstitutional in this context.
    - ii) If it is rationally connected, then the inquiry continues.
  - B. Is the government's interest compelling or paramount?

- i) If not, the practice is unconstitutional in this context.
  - ii) If it is compelling or paramount (terms used somewhat interchangeably, then the inquiry continues.
5. Is the method of achieving the government's compelling or paramount interest the least restrictive of the individual's constitutional right?
6. What are other available alternative methods and are they more or less restrictive of the constitutional right?
- i) If the practice is not the least restrictive alternative, then it is unconstitutional.
  - ii) If the practice is the least restrictive alternative, then it is constitutional.

Figure one presents the structure of the individuals' substantive rights in the form of a flow chart.

Privacy Rights. For privacy rights, the structure varies with the context of the search. Law enforcement searches face more substantial barrier than do administrative ones. However, in general terms, the structure is as follows:

1. Did a governmental practice have implications for an individual's privacy rights under the Constitution?
- A. If not, then the practice is not unconstitutional.
  - B. If there were implications, then the inquiry continues.
2. Did the individual challenging the governmental practice have a reasonable expectation of privacy in the specific circumstances in which the encounter occurred?
- A. If not, the practice is not unconstitutional.
  - B. If the individual did have such an expectation, then the inquiry continues.

3. Did the government officials engaging in the search have:
  - A. A warrant for search?
  - B. Probable cause for the search?
  - C. A reasonable basis for undertaking the search and for its scope?
    - i) If the officials had none of the above, the search is unconstitutional.
    - ii) If there was a valid warrant, the search is constitutional.
    - iii) If the government action is based on a claim of probable cause or reasonability, its constitutionality will depend on the specific circumstances involved.

Figure two presents the structure of privacy rights in flow chart form.

Procedural Due Process. For procedural due process, the structure involves a weighing of three considerations:

1. The private interest, such as liberty or property interests, affected by the government's action;
2. The risk that the procedures used will result in an error, and the probable value of additional or other procedures in reducing the error rate;
3. The government's interest in using the procedures afforded, including the administrative and financial burdens that other procedures would entail.

In any given set of circumstances, due process requires that an appropriate balance among these factors be reached. Thus, the more substantial the private interest, the more elaborate the procedures required are likely to be in order to avoid errors. At some point, though, additional or substitute procedural protections may become so costly that they will not be required.

Figure 3 presents the structure of procedural due process rights graphically.

Equal Protection Rights. For equal protection of the laws, the structure of analysis is the following:

1. Does the governmental policy or practice intentionally classify individuals in an invidious or benign way?
  - i) If not, there is no violation of equal protection.
  - ii) If so, then the inquiry continues.
2. Does the classification involve race or ethnicity?
  - i) If so, it is “suspect” and either “invidious” or “benign”
    - A) If invidious, then the government will need a compelling interest to support it, and
    - B) The government’s claim of a compelling interest will be subject to strict judicial scrutiny (that is, the court will not give deference to the government’s claim or judgment)
  - ii) If the classification is “benign” (e.g., some forms of affirmative action), then
    - C) A state policy will be subject to strict scrutiny.
    - D) A federal policy will be subject to the national basis test.
3. If the classification involves another factor, such as age or sex, it is not considered suspect and
  - A) The government will have to show a rational basis for it, and
  - B) The government’s claim will be subject to ordinary, rather than strict, scrutiny.
4. Invidious suspect classifications serving a compelling state interest in the least restrictive way will be constitutional.
5. Benign suspect classifications will be constitutional if they are narrowly tailored (that is, limited in scope and duration, realistic, of little or no burden to any group of individuals and rationally related to a legitimate governmental purpose).
6. Non-suspect classifications will be constitutional if there is a rational basis for them.

Figure four maps out the general structure of the right to equal protection.

In thinking about equal protection it is important to remember that the issues of classification and intention are critical. If two individuals who are essentially identical are treated differently by the government, the appropriate constitutional category is due process rather than equal protection. Policies that have a harsher impact on member of one race than another are not in violation of equal protection unless the disparate effect is intentional.

Again, the outlines presented above are only guides; they are not definitive or applicable in all circumstances. The constitutional law is always in flux. That is how a society on the threshold of the twenty-first century adapts an eighteenth century charter to its contemporary

needs. For example, in view of dramatic changes in the legal rights of women and in sex roles during the past three decades, it would not be surprising if sex were eventually considered a suspect classification.

## **TOWARD CONSTITUTIONAL LITERACY FOR FEDERAL EXECUTIVES**

There are many benefits to constitutional literacy among federal executives. Certainly among the most important are that it gives greater meaning to the oath of office, it emphasizes what is especially “public” in public administration, it is likely to lead to a public administration that comports better with the constitutional system, and that it enables public administrators to play a greater role in constitutional discourse. The United States needs both good constitutional government and good public administration. Constitutional purposes cannot be achieved without effective public administration. American public administration cannot be satisfactory if it stands apart from constitutional values. At this time in the nation’s history, federal executives have much to offer in the continuing effort to successfully integrate public administration more fully into the constitutional system. Constitutional literacy is both a prerequisite and a key to that endeavor.

The materials in this book provide the basis for constitutional literacy. They are arranged chronologically, thereby enabling the reader to see the flow of American constitutionalism: from the formative years in which the Union was forged; through the crisis of the Civil War and the constitutional reconstruction that followed it; to the Progressive and New Deal Eras, in which our contemporary public administrative processes and patterns were established; and then to World War II and beyond, when a whole host of present-day civil rights and liberties became one focal point of constitutional debate and the constitutional aspects of foreign affairs became another. The book’s selections are invaluable for constitutional literacy.