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## Public Administration Review

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## Reinventing Administrative Prescriptions: The Case for Democratic-Constitutional Impact Statements and Scorecards

**David H. Rosenbloom**

**D**avid Rosenbloom's article deals with a timely and important topic. The promotion and protection of democratic-constitutional values and principles are fundamental to a healthy society and republic, and he makes a strong case that they have been disregarded or devalued. He prescribes scorecards and impact statements as methods for remedying the shortcomings of the legislative and judicial processes, preventing administrative reformers from running roughshod over democratic values and constitutional principles, and rediscovering the "misplaced keys to better

government." We salute him for bringing this concern to the forefront. However, we take issue with the assertion that the failure to consider democratic-constitutional values is "a recurring historical failure of U.S. public administration," as well as with the remedies that he is proposing. In offering our comments, we acknowledge the importance of the concerns that prompted the article and share our perspectives on the positive aspects, negative aspects, and practicality of the prescriptions offered. We also speculate on the potential of these remedies to provoke unintended consequences.

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### Who is the Appropriate Guardian?

The tone of the article implies that constitutional rights are being threatened, including individual rights, constitutional integrity, transparency, and the rule of law. Yet David Rosenbloom's choice of the term "democratic-constitutional" is also meant to encompass the broadening of constitutional rights through such developments as "freedom of information, open meetings, the Administrative Procedure Act of 1946, and the expansion of individual rights through constitutional law." He writes that "practitioners and public administration scholars have, at best, marginalized and, at worst, been contemptuous of democratic-constitutional values." Later, in critiquing the National Performance Review, he asserts that "...deemphasizing rules and enforcing fewer of them translates into greater reliance on discretionary administration and compliance. From a legal perspective, discretion is generally viewed as antithetical to the rule of law, tending toward tyranny, and even 'evil.'"

Let us consider these strong and rather harsh criticisms of practitioners, scholars, and reformers in the context of governmental roles, responsibilities, and checks and balances. All three branches of government have responsibility to uphold the U.S. Constitution, but each has its own particular role and emphasis. The executive branch is bound to the constitution and must respect its prescriptions and protections, but the focus of the executive branch is on the design and implementation of policies and programs. This important role includes, hopefully, ensuring and improving the efficiency and effectiveness of public programs. The legislative branch also focuses on policies and programs, but with emphases on representing citizen interests, reconciling views and values, and building consensus in exercising its public policymaking responsibilities. In exercising its oversight responsibili-

ties, the legislature normally is quick to call the hand of the executive if it perceives constitutional infringement of legislative responsibilities or individual rights. The judiciary has a major role in the protection of individual and institutional rights and serves as the "umpire" of legislative and executive branch efforts to make, interpret, and implement law and public policy consistent with democratic-constitutional rights.

As such, the system designed by the founding fathers includes features intended to curb abusive power. No branch is dominant. Expressed in the article, however, are doubts about relying on these constitutional checks and balances to protect democratic values and constitutional rights, citing President George W. Bush's "ability to assert expansive, largely unchecked executive power" until the Supreme Court stopped him with its *Hamdi v. Rumsfeld* decision. While this may qualify as an example of a serious threat to democratic-constitutional principles, is it not also yet another verification that checks and balances do indeed work? Time after time, the cases cited in the article led to federal court declarations or other interventions halting abuses. Actions have been reversed, excesses curbed. In short, the constitutional system of checks and balances is working. Only the most recent cases stand unresolved. Are additional, burdensome steps needed to protect constitutional integrity? Is it clear that these steps would be effective and worth the cost?

In calling for scorecards and impact statements as methods of drawing legislators' attention to pending infringements of democratic-constitutional values, the author fails to acknowledge the extent to which current procedures already air such concerns. When major issues emerge or important changes are proposed, views and positions on issues are presented during congressional hearings

and fundamental questions about value and other tradeoffs are considered. The debates over the U.S. Patriot Act, for example, focused not only on security, but also on democratic-constitutional values. Congress decided in that instance that national security and secrecy considerations trumped individual rights and transparency. The ongoing debate over immigration policy has surfaced similar tradeoffs.

While one might not like the outcome of a given congressional deliberation, the founders decided that the legislative body was the appropriate place, and the legislative process the appropriate vehicle, for raising and resolving these competing and often clashing values and principles, subject to the Court's scrutiny. The founders' failure to prescribe for public administrators a major role as guardians of democratic-constitutional rights was not, we think, attributable simply to their inability to forecast the emergence of expert administrators in government. While it is true that public administrators must respect constitutional rights and be sensitive to potential infringement, is it wise or necessary to propose "triple-teaming" the role of champion of constitutional rights, especially when more constitutionally worthy champions already exist? Is it presumptuous to assume that constitutionally established offices are incapable of ensuring that constitutional protections are honored and that this function must fall largely to administrators?

### **Putting Other Values at Risk?**

Professor Rosenbloom fears that an assault on constitutional balance and democratic values is now being waged by administrative reformers and that something dear to the public will be lost if they are allowed to prevail. In our zeal to protect democratic-constitutional values, let us not forget that the reformers' aim is to restore something

else that is also now at risk: the public's confidence in government's ability to manage the delivery of public services, whether by its own employees or through prudent contracts.

He suggests that "increases in citizen cynicism, diminution of public trust in government, and bureaucracy bashing" are the result of "failing persistently to consider democratic-constitutional impacts of reforms." We would speculate that for most of the general public these attitudes come less from issues of constitutional rights than from perceptions of poor government performance, financial mismanagement, and ethical lapses. Likewise, the author worries about "reinventers' fixation with results," noting that good organizational performance encompasses more than results alone. True enough, but need we remind anyone that for too long and in too many instances governments paid scant attention to results? Robert Behn (2001) argues persuasively that for many decades our accountability fixation has been on accountability for finances and fairness—not on accountability for results. The current article also equates the push for "results-oriented" government with executive-dominated government and with the use of "appointments, executive orders and agreements, proclamations, and signing statements" to achieve executive ends. However, one can support results-oriented government without accepting these tactics.

Privatization and its "almost automatic" adverse impact on worker rights, transparency, and oversight is of particular concern to the author. He argues that outsourcing by government has jeopardized individual rights of employees and transparency of public programs. Although he acknowledges similar protections across sectors in terms of civil rights and even greater rights for private employees when it comes to the ability to

strike, Professor Rosenbloom and his colleagues have noted elsewhere that public employees enjoy advantages in freedom of speech and association, personal privacy, procedural and substantive due process, and equal protection (DiNome, Yaklin, and Rosenbloom 1999).

The implications of this observation are not entirely clear. Once hired, should a public sector employee be guaranteed lifetime employment, thereby limiting service delivery options and virtually guaranteeing a public sector monopoly with no threat of change? What price should the taxpayer be expected to pay to ensure this guarantee for some citizens, but not for all? Should the potential deterioration of public employee rights to the level enjoyed by private sector employees precipitate a democratic-constitutional impact statement? And are these advantages "rights" or "benefits"?

Somewhat ironically, the article also points out that transparency is impeded when functions are contracted because contractors do not always testify to Congress willingly and subpoenas are "subject to challenge in court, related delay, and restriction in scope" by constitutional protections granted to private entities. As evidence, Rosenbloom reports that United Space Alliance, the National Aeronautics and Space Administration's (NASA) chief contractor, has been less forthcoming on Freedom of Information Act requests than NASA itself, yielding some information only after the Columbia Accident Investigation Board released its report. The efforts by U.S. Representative Henry Waxman and the House of Representatives' Government Reform Committee over the past two years to obtain information from Halliburton and its subcontractor, Blackwater USA, to document alleged illegal payments and inflated contract costs are among the most recent illustrations of these types of

concerns. We share them, but ask whether the proposed remedy would make any difference in contractor behavior compared with, for example, public hearings, subpoenas, inspector general investigations, and Government Accountability Office audits.

Proponents of privatization are also portrayed in this article as having little regard for the democratic-constitutional ramifications of outsourcing. Noted, for example, is that one of E. S. Savas' major books on privatization includes little, if any, mention of such ramifications. *PAR* readers are led by this comment to assume that Savas' zeal for privatization would have public officials simply hand over the keys to contractors, allowing them to do as they choose in delivering public services. In fairness, Savas writes that contracting works well when:

- (1) the work to be done is specified unambiguously;
- (2) several potential producers are available, and a competitive climate either exists or can be created and sustained;
- (3) the government is able to monitor the contractor's performance;
- and (4) appropriate terms are included in the contract document and enforced (1987, 109).

A careful reading of these conditions—especially the first, third, and fourth—reveals an expectation that public officials will retain control over the contracted service.

We are not arguing that public administrators may operate without concern for democratic-constitutional values. They have an important role to play in bringing shortcomings to the attention of policymakers in the design of public policy. These values also are likely to be helpful in noting inconsistencies or inequities associated with implementation, as well as in suggesting adminis-

trative reforms and remedies. Still, in prescribing roles and responsibilities for various government actors, it is important to consider what public administrators uniquely bring to government. Is it their concern for democratic values? No. Although administrators should be and, one would hope, typically are concerned with democratic values, so should most of the other parties in government—legislative, judiciary, citizens, and the media. If public administrators have a unique contribution, it is their ability to carry out government programs skillfully and in a manner that is sensitive to program aims (e.g., quality and effectiveness) and to stewardship responsibilities (e.g., efficiency). That is what the public and its elected representatives expect of administrators.

We also are not suggesting that administrative reformers should be given a pass to focus on efficiency and effectiveness without regard to democratic values and constitutional principles simply because the system of checks and balances offers the ultimate backstop. As David Rosenbloom also notes, Laurence Lynn correctly observes that, "Often missing in the literature and discourse is recognition that reformers of institutions and civic philosophies must show how the capacity to effect public purposes and accountability to the polity will be enhanced in a manner that comports with our Constitution and our republican institutions" (2001, 155). Behn offers similar observations. Administrative reformers should be challenged to explain how strategies of decentralized decision making, exercise of discretionary judgment, responsiveness to the needs of individual citizens, empowerment of civil servants, innovation by frontline workers, and public entrepreneurship square with our notions of democratic government (Behn 2001, 64-65). These all matter and affect public confidence in government, but so do citi-

zens' perceptions of the services they are receiving from government for their tax dollars.

### **How Valid are the Assumptions?**

Are scorecards and impact statements the best methods for providing such explanations? Professor Rosenbloom recommends a scorecard and impact statement approach that would be applied broadly and repeatedly to all forms of administrative change, and asserts that these tools "...can force substantial analysis of democratic-constitutional concerns and bring them closer to the forefront of the field." But we argue that such a broad prescription will impose on governments a burdensome procedure with considerable costs, unclear benefits, and perhaps perverse consequences. This additional expense will nudge upward the costs of publicly produced services and government in general, exacerbating the frustration of taxpayers. In the process, any cost advantages now enjoyed by private sector producers will become even more pronounced. It would be ironic indeed if the cost burden of impact statements inadvertently added to the pressure to privatize even more services.

Both proposed remedies also rest on a number of questionable assumptions: (1) that terms like "individual rights," "constitutional integrity," "transparency," and "rule of law" could be clearly defined, fully operationalized, and widely agreed to by diverse audiences of legislators, administrators, and citizens; (2) that the impact of policy proposals on democratic-constitutional values could be clearly discerned; (3) that accurate and reliable "scoring" of department and agency compliance could be conducted; (4) and that legislators, executives, citizens, and the media would pay attention to the results.

The article points out that "NEPA requires federal agencies to develop impact state-

ments whenever a proposed action will have a substantial impact on the environment." However, the requirement for democratic-constitutional impact statements would be much broader and complex. While the experience with environmental impact statements has been promising, the task of identifying the costs of compliance and consequences of noncompliance with air and water quality standards, for example, is arguably more straightforward than the task of assessing the effects of administrative changes on democratic-constitutional values. For precedent, we need only look to the government's experience in assessing the effects of a legislative proposal or regulation on federalism or on state and local governments, as mandated by presidential executive orders during the Reagan and Clinton administrations. In many instances, these requirements were either "gamed" or ignored by the bureaucracy, with no consequences from inspectors general or the Congress.

We would anticipate similarly mixed results from democratic-constitutional scorecards and impact statements, with only some providing useful information and valuable perspectives. Preparers of scorecards and impact statements on democratic-constitutional values will struggle to achieve the clarity and precision necessary for accurate and reliable measuring or scoring. Consequently, a blanket requirement covering all administrative changes is destined to yield uneven efforts and products of uneven quality. As the author himself observes, without measurable or enforceable results, the costs and implementation impediments associated with impact statements create significant practical obstacles to their use.

An alternative to across-the-board use of impact statements might be selective application when certain "triggering" conditions related to prospective effects on democratic-

constitutional values are discerned. This approach could be more practical, more focused, and less costly to manage overall, while yielding more thorough, more carefully analyzed, and more useful products. Yet unlike the Unfunded Mandates Reform Act (UMRA) of 1995, where reaching a specified target fiscal threshold triggers a "point of order" procedure to make legislators aware of cost burdens before deciding, the warning signal of possible adverse impact on democratic-constitutional rights that would trigger an impact statement could be far less clear. Perhaps allowing individual concerned legislators to request an impact statement would be feasible, although the possibilities of opponents of a measure using this remedy to stall the legislative process should not be ignored. Still, even UMRA has not lived up to expectations, because of exemptions from coverage and underestimating of fiscal consequences to avoid the trigger mechanism.

### **How Much Value Do Impact Statements and Scorecards Add?**

In his article, David Rosenbloom describes a case in which a homosexual employee of a church-sponsored institution providing government services was dismissed for her sexual orientation. He argues that a comprehensive democratic-constitutional impact statement would have raised concerns for individual rights before launching faith-based service delivery and thereby would have avoided this problem. If the impact statement had led to rules prohibiting dismissals for sexual orientation, the institution could have chosen either to forego government contracts or to honor these rights.

We offer one observation and a pair of questions. First our observation: The issue of hiring prerogatives and termination rights of religious institutions did come up in discussions of President Bush's faith-based initia-

tive, even without democratic-constitutional impact statements; this was not an issue discovered only after an incident occurred. We should consider carefully whether the additional burden being contemplated in the form of impact statements will actually add commensurate value to our awareness of potential democratic-constitutional infringements.

Now, our questions: How confident are we that impact statements will uncover all potential democratic-constitutional impacts? How certain are we that, once uncovered and reported in impact statements, the issues will be addressed in favor of democratic values and constitutional principles—that is, how effective do we think democratic-constitutional impact statements will be? Rosenbloom recognizes that some critics will state that he is looking for a solution in search of a problem. Again, we do not challenge the view that the breakdown of democratic-constitutional values and principles is a problem; however, we simply do not agree with the recommended solution.

While the administrative process can be useful in ensuring efficiency and effectiveness, social equity, and accountability for results, it is through the political system and the legislative process that competing and conflicting values inherent in public policy deliberations are recognized and reconciled. We might not like some of these policy calls; but, made by our elected representatives, these decisions possess constitutional legitimacy. Are not legislative hearings focusing on executive excesses a better vehicle for prompting legislative action than scorecards or impact statements? If Congress is unwilling to schedule hearings on a given action, would it heed a scorecard or impact statement?

Many prescriptions have been offered for improving elections and the legislative process. These range from: public funding of election campaigns to reduce the influence of special interests and divert representatives' attention from substantive business to raising money; to using fiscal notes and points of order procedures to flag important negative impacts before decisions are reached; to improvements in committee organization and procedures; to calling on Congress to treat its legislative work more seriously. These and other changes have been proposed in hopes of increasing the capacity of Congress to do its job. Moreover, the now-divided government in Washington may be moved to institute much-needed systemic improvements that could provide still other prescriptions to bring the cure the author seeks. By comparison, we argue that another wave of impact statements and ill-conceived and unreliable scorecards, featuring performance measures rendered questionable by linkages to ambiguous objectives, would be an administrative remedy that adds costs and delays without assuring results, and poses additional barriers to administrative reform.

### **Conclusion**

To summarize, public administrators must be sensitive to and vigilant about the protection of democratic-constitutional rights in policymaking and implementation. However, prescriptions to ensure these values must not be developed in a vacuum. Government performance is important. Results are important. Administrative reform is and will continue to be needed. We must therefore be cautious about adopting measures that could ultimately make reform more difficult. We are convinced that the remedies offered in this article will add costs and delays, which could impede the administrator's

imperative for efficiency and effectiveness. We are not convinced that impact statements will flag possible abuses that would not otherwise arise in the course of processes already in place. We need to work hard to improve these processes, not superimpose another layer on them that could produce unreliable and unintended results.

## References

- Behn, Robert D. 2001. *Rethinking Democratic Accountability*. Washington, DC: Brookings Institution Press.
- DiNome, John, Sandra Yaklin, and David H. Rosenbloom. 1999. Employee Rights: Avoiding Legal Liability. In *Human Resource Management in Local Government*, edited by Siegrun Fox Freyss, 93-131. Washington, DC: International City/County Management Association.
- Lynn, Laurence E., Jr. 2001. The Myth of the Bureaucratic Paradigm: What Traditional Public Administration Really Stood For. *Public Administration Review* 61(2): 144-60.
- Savas, E. S. 1987. *Privatization: The Key to Better Government*. Chatham, NJ: Chatham House Publishers.