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

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As public managers and scholars are intimately aware, impact statements and scorecards are common tools for prodding public administrative organizations to pay attention to specific concerns and values. In federal administration, for example, environmental impact statements, first broadly mandated by the National Environmental Policy Act of 1969 (Public Law 91-109), are complemented by impact statements and assessments regarding the potential effects of agency rules and policies on family values, federalism, environmental justice, and other matters (see Executive Orders 12606 [1987], 12612 [1987], and 12898 [1994]). The contemporary widespread use of scorecards began following the publication of Robert S. Kaplan and David P. Norton's now-classic 1992 *Harvard Business Review* article, "The Balanced Scorecard: Measures That Drive Performance." We have scorecards for the war on terrorism, freedom, civil liberties, school breakfasts, legislative performance, and corporate social responsibility, among others (ACLU Northern California 2002; Food Research and Action Center 2005; Fluke and Kump 2004; Human Rights Campaign n.d.; Levitt 2002; Marcus 2006). The U.S. Office of Management and Budget (OMB) currently uses a scorecard to assess agencies' progress toward the goals on the President's Management Agenda (PMA) (OMB 2001).

Conspicuously missing from the plethora of impact statements and scorecards that are available today are those focusing on the protection and promotion of democratic-constitutional values, including individual rights, constitutional integrity, transparency, and the rule of law. This article proposes (1) that democratic-constitutional impact statements be required as part of all substantial prescriptions for administrative reform and (2) that evaluations of program and policy implementation routinely include democratic-constitutional scorecards. The term *democratic-constitutional* refers to those aspects of U.S. government and politics that have democratized the original constitutional design, as amended.

Freedom of information, open meetings, the Administrative Procedure Act of 1946 (Public Law 79-404), and the expansion of individual rights through constitutional law are examples. It is understood that the United States is a republic, not a democracy.

This essay begins by placing the contemporary failure to consider democratic-constitutional values in context as a recurring historical failure of U.S. public administration. Reviewed are reasons why practitioners and public administration scholars have, at best, marginalized and, at worst, been contemptuous of democratic-constitutional values, as well as why such disregard matters. With this as background, the logic of impact statements and scorecards is discussed, including how these might be developed, administered, and used to inform administrative reforms in the future. Illustrated next are the differences that impact statements and scorecards might make in protecting values that are typically marginalized—if not ignored—by administrative reformers in their prescriptions for improving public management. The essay concludes by confronting several likely arguments against impact statements and scorecards.

Misplacing the Keys to Better Government?

Off and on since Woodrow Wilson famously proclaimed, "It is getting harder to *run* a constitution than to frame one" (1887, 15), public administrative reformers have paid cursory attention to democratic-constitutional concerns in their prescriptions. Most commonly, reformers view variants of cost-effectiveness as the "key to better government" (Savas 1987). They frequently assume that greater cost-effectiveness will automatically improve democratic constitutionalism. For example, in 1937, the President's Committee on Administrative Management (also known as the Brownlow Committee) argued that an aggrandized presidency, diminished Congress, and, consequently, a less vigorous separation of powers were necessary "to make good our democratic claims" while warning that "[i]f America fails" for want of administrative efficiency, "the hopes and dreams of democracy all over

the world go down” (PCAM 1937, 2). Today’s reformers in the Departments of Defense and Homeland Security have followed suit, claiming that the cost-effective defense of democracy requires the curtailment of employees’ rights (McGlinchey 2005; Rutzick 2005a, 2005b, 2005c; Shoop 2005).

Likewise, proponents of other keys to better government have a tendency to slight democratic-constitutional considerations. Reinventers who advocate a heavy emphasis on results offer no plan for protecting values that are not mission based, such as freedom of information and democratic procedures. The National Performance Review, for example, ultimately devalued elections because they have little to do with the ability of administrative agencies to satisfy customers (Gore 1995, 93). Better government reforms in the New Public Administration tradition could easily promote social equity at the expense of the rule of law (Rosenbloom 2005a).

A benign view of reform prescriptions that potentially weaken democratic-constitutional government assumes that their advocates take the stability and durability of the U.S. constitutional system for granted. After all, the “miracle at Philadelphia” in 1787 was said to have produced “a machine that would go of itself” (Bowen 1966; Kammen 1986). No need to worry about constitutional government in this view—ambition will counteract ambition, and checks and balances will prevail (Madison 1788, 268–69).

Of course, there is still reason for concern. When Benjamin Franklin, a member of the 1787 Constitutional Convention, was asked, “Well, Doctor, what have we got—a Republic or a Monarchy?” he replied, “A Republic, if you can keep it” (Platt 1989, 1593). Ambition may not immediately check ambition, and institutional imbalances may take time to recalibrate. President George W. Bush’s ability to assert expansive, largely unchecked executive power from September 11, 2001, until the U.S. Supreme Court handed down its decision in *Hamdi v. Rumsfeld* (542 U.S. 507 [2004]) is a recent example.

A less sanguine view is that administrative prescriptions for better government are based on disaffection with the U.S. constitutional design and democratic values. Dwight Waldo noted that orthodox public administration was “hostile to the tripartite separation of powers” (1984, 104). Luther Gulick, a pillar of the orthodoxy, only begrudgingly accepted grassroots democracy: “We are in the end compelled to mitigate the pure concept of efficiency in the light of the value scale of politics and the social order. There are, for example, highly inefficient arrangements like citizen boards and small local governments which *may* be necessary in a democracy as educational

devices” (quoted in Waldo 1984, 192; emphasis added).

Whether hostile to the constitutional system or confident in its durability, however, prescriptions for better government are incomplete without an assessment of their potential impact on democratic constitutionalism. Similarly, evaluations of reforms, once implemented, miss a major—arguably, *the* major—dimension of better government when they fail to consider whether the principal effects strengthen or weaken democratic-constitutional values and processes. As Laurence Lynn, Jr., correctly observes, “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. Basic political and legal issues of responsible management in a postmodern era are inadequately defined and addressed” (2001, 155). Lynn contends that “[s]uch a result ill becomes a profession that once owned impressively deep insight into public administration in a representative democracy” (155).

Impact statements and scorecards can force substantial analysis of democratic-constitutional concerns and bring them closer to the forefront of the field, where many share Lynn’s belief that they clearly belong. Presumably, democratic-constitutional impact statements and scorecards would force attention to at least the following concerns: individual rights, constitutional integrity, transparency, and the rule of law. Neglecting these central features of U.S. democratic-constitutional government increases the likelihood that “[n]ew paradigms of dubious constitutional merit and prominent personalities and ideas that appeal to elected executives and consultants [will be] too readily embraced in order to appropriate their popularity” (Lynn 2001, 155). The logic of how and why democratic-constitutional impact statements and scorecards would work follows.

The Logic of Administrative Prescription Impact Statements

Impact statements are prospective assessments of the probable impact of administrative initiatives on particular concerns. For example, the National Environmental Policy Act requires that federal agencies develop impact statements whenever a proposed action will have a substantial impact on the environment. These statements address possible adverse effects, alternatives, long-term consequences, and irreversible and irretrievable commitments. The statements are widely circulated, potentially bringing broader information and perspective to bear on agency decision making. By preventing agencies from ignoring environmental quality and sustainability,

they may lead to changes in policy. For example, in the absence of impact statements and attendant public discussion, an agency charged with the development of nuclear power might not immediately view conservation as an alternative to energy generation (*Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 [1978]). Impact statements can address virtually any political, social, economic, or other matter touched by public administration, sometimes deeply and personally. The Assessment of Federal Regulations and Policies on Families Act of 1998 (Public Law 105-177) currently requires “family policy-making assessments” to evaluate the impact of agency actions on marital commitments, the authority and rights of parents, and the overall performance of family functions.

Although impact statements have been criticized for creating layers of additional requirements before agencies can issue rules or take other actions, their utility is obvious. If used to assess the democratic-constitutional impact of administrative reforms, they may highlight values that are typically neglected by reformers. For example, if there is any mention of the impact of outsourcing on democratic-constitutional government in E. S. Savas’s 308-page book on privatization, it is not prominent. Yet anyone with a basic understanding of constitutional government and administrative law would know that privatization almost automatically incurs three consequences.

First, rights are lost because, with the exception of the Thirteenth Amendment’s ban on slavery and involuntary servitude, private sector workers have no constitutional rights with regard to their employers. By contrast, public employees have a wide (if currently narrowing) array of constitutional rights within the context of their government employment. These include freedom of speech and association, personal privacy, procedural and substantive due process, and equal protection (DiNome, Yaklin, and Rosenbloom 1999). In some areas, such as civil rights, there are similar protections in private employment, and there are other areas in which private employees have greater rights, including a broad right to strike.

However, public employees generally have greater protection against reprisals for whistle-blowing, workplace searches and drug testing, invasions of personal privacy, and adverse treatment based on sexual orientation (DiNome, Yaklin, and Rosenbloom 1999). Ordinary citizens also have constitutional and administrative law rights when dealing with government that are not pertinent to their interactions with private organizations. If, as the Declaration of Independence states, governments are instituted to secure rights such as these, then it follows that

better government requires an assessment of whether rights will be diminished, enhanced, or unaffected by administrative prescriptions.

Second, privatization typically reduces transparency. At the federal level, legal requirements for freedom of information and open meetings do not apply to private organizations that perform outsourced government work. Under the Freedom of Information Act (FOIA) of 1966 (Public Law 89-487), one can obtain information from government agencies but not from the contractors whose work is paid for with the same taxpayer dollars (Rosenbloom and Piotrowski 2005). Likewise, under the Government in the Sunshine Act of 1976 (Public Law 94-409), commissioners of federal regulatory agencies may have to hold open meetings when they draft rules. However, when the task of writing a draft proposed rule is outsourced, contractors are subject to no such statutory requirement.

Third, privatization diminishes oversight. Federal executives and administrators are routinely summoned to testify before and submit documents to congressional committees. The process of obtaining information becomes arduous when Congress has to subpoena private sector executives and employees in order to obtain basic answers regarding the implementation of federal programs and the use of government funds. Being a tool of adversary legal procedure, subpoenas highlight the involuntary quality of individuals’ appearances and their unwillingness to cooperate on their own. Testimony and the provision of documents are likely to be less forthcoming—and personal legal counsel more intrusive—than when federal employees, who are generally deferential to members of Congress, testify before legislative committees. Subpoenas also are subject to challenge in court, related delay, and restriction in scope. The enforcement of subpoenas is by contempt of Congress, which is generally viewed as a drastic last resort involving prosecution by the Department of Justice.

Some might argue that these concerns are overstated because core government functions are not being privatized. However, the differences in legal obligations faced by government agencies and their contractors should not be trivialized on the basis that only noninherently governmental business (or commercial) activities are outsourced. Contractors today analyze proposed legislation; draft reports to Congress; write testimony that agencies deliver to congressional committees; prepare budget documents, proposed rules, and preambles to final rules; respond to public comments submitted as part of the rulemaking process; and conduct public hearings. Even inspector general functions are sometimes outsourced (Light 1999, 14; U.S. Congress 1989, 63, cited in Guttman 2000, 873).

Table 1 presents an example of what a democratic-constitutional impact statement for key National Performance Review prescriptions might look like. Impact statements would consider the specifics of the prescribed administrative reforms, assess their potential implications for key democratic and constitutional values, and suggest means of mitigating or eliminating any threats to democratic-constitutional values that might be present. Ideally, the impact statements would be submitted to the relevant congressional committees, the OMB, the Government Accountability Office, and the Congressional Research Service, as well as published in the *Federal Register* for comment by members of the general public, stakeholders, and experts in public administration and related fields. These impact statements, in turn, might be elaborated and extended to note greater or lesser threats when applied within the context of specific programs. At whatever level applied (generic reforms or within specific programs), one starts with the rebuttable presumption that the implications noted are threats, and the burden of proof lies on reformers, who must demonstrate why the concerns are overstated or how they intend to mitigate them in practice. These can then become grist for broader debate among elected officials, attentive publics, and citizens about administrative reforms than has historically been the case.

The Logic of Administrative Prescription Scorecards

In contrast to impact statements, scorecards are retrospective. They provide evaluative feedback on how organizations are performing on various dimensions. The balanced scorecard, which is said to be used by 50 percent of Fortune 1000 companies, looks at performance along four dimensions: financial, customer

service, internal business process, and learning and growth (Kaplan and Norton 1992; Niven 2003, x). It prevents organizations from neglecting a critical dimension of their overall business strategy or organizational strategic plan. Unfortunately, reinventers' fixation on results parallels the tunnel vision of Kaplan and Norton's hypothetical pilot who has just one cockpit gauge—for airspeed—and none for altitude or fuel consumption (Kaplan and Norton 1992, 1–2). Getting agencies and contractors up to speed in delivering administrative services and constraints is but one aspect of better government.

Following the OMB's scorecard approach to the PMA, red, yellow, and green lights could be assigned to agency performance on dimensions of importance to democratic-constitutional government (OMB 2006a). The OMB describes the PMA as "an aggressive strategy for improving the management of the Federal government. It focuses on five areas of management weakness across the government where improvements and the most progress can be made" (OMB 2006b). These five areas are strategic human capital, competitive sourcing, financial performance, e-government, and budget and performance integration. The PMA is the Bush administration's major domestic management-improvement initiative (Rosenbloom 2005b). Following the OMB format on democratic-constitutional scorecards would be a relatively easy first step toward eventually developing a much greater awareness of the impact of reforms on democratic-constitutional processes and values (see table 2).

Scoring could be done by any number of organizations. Certainly the Government Accountability Office, the OMB, and the Congressional Research

Table 1 Example of a Democratic-Constitutional Impact Statement for Selected Clinton-Gore National Performance Review (NPR) Initiatives

Specific Components and Implications for Democratic Constitutionalism

Steering, not Rowing (Outsourcing)

- Individual rights: Reduction of constitutional and administrative law rights for individuals
- Transparency: Freedom of Information Act and Government in the Sunshine Act inapplicable; congressional oversight more difficult

Results Orientation

- Rule of law: Loss of attention to non-mission-based values may compromise rule of law
- Transparency: Accountability for procedure may be weakened

Biennial Budgeting and Budget Rollovers

- Constitutional integrity: Weakens congressional power of the purse
- Rule of law: "No year money" reduces legal controls on agency spending

Internal Deregulation and Employee Empowerment

- Rule of law: Enhances agency and employee discretion
- Constitutional integrity: Weakens prospects for effective judicial review

Potential Mitigations

- Tailor overall prescriptions to specific programs
- Include protection of democratic-constitutional values in contracts, such as whistle-blower protections, equal employment opportunity, and transparency requirements

Table 2 Example of a Democratic-Constitutional Scorecard Modeled on OMB's President's Management Agenda (PMA) Scorecard

Initiative*	Individual Rights	Constitutional		
		Integrity	Transparency	Rule of Law
<i>Strategic human capital</i>	<u>Yellow Light:</u> Reduction of due process	<u>Yellow Light:</u> Enhances executive authority	<u>Yellow Light:</u> Individualized financial arrangements	<u>Yellow Light:</u> Enhanced agency discretion
<i>Competitive sourcing</i>	<u>Red Light:</u> Loss of constitutional and administrative law rights	<u>Yellow Light:</u> Legislative oversight more difficult	<u>Red Light:</u> Freedom of information, sunshine laws inapplicable	<u>Yellow Light:</u> Requires effective contract monitoring
<i>Financial performance</i>	<u>Green Light:</u> No impact	<u>Green Light:</u> Enhanced financial accountability	<u>Green Light:</u> Enhanced financial reporting	<u>Green Light:</u> Enhanced control of spending
<i>E-gov</i>	<u>Green Light:</u> Can inform public of legal rights	<u>Yellow Light:</u> Executive-centered control under OMB	<u>Green Light:</u> Enhances transparency	<u>Green Light:</u> Publicizes legal requirements
<i>Budget and performance integration</i>	<u>Green Light:</u> No impact	<u>Yellow Light:</u> Can weaken legislative role in budget decisions	<u>Green Light:</u> Greater information about agency performance	<u>Yellow Light:</u> Potential inattention to non-mission-based legal requirements

*In the PMA scorecard, red indicates at least one serious flaw; yellow indicates success on some but not all criteria; and green indicates success on all criteria. Here, red means danger, yellow means caution, and green means positive or not impact.

Service would be appropriate scorers, as might the National Academy of Public Administration. To the extent feasible, inspectors general could periodically include democratic-constitutional scorecards in their semiannual reports. An agency receiving a red light on a democratic-constitutional dimension from one or all of the scorers would be alerted to the need for improvement. An agency receiving a green light might decide that future resources would be better devoted to different functions, either those on the democratic-constitutional scorecard or others more closely connected to achieving mission-based results. Regardless of choice—and using the same logic of impact statements noted previously—elected officials, attentive publics, and citizens would benefit from the enhanced dialogue requirements imposed on agencies. Others, too, would either have to demur or show how they propose to attenuate any negative implications for democratic constitutionalism identified during the implementation of administrative reforms.

Similar to the PMA and other scorecards, scoring could involve a mix of quantitative and qualitative measures. These could be developed in the context of each agency's activities. For example, some agencies receive thousands of FOIA requests, others very few. Some have few direct dealings with the public in which individual constitutional rights are pertinent. Others, such as the Bureau of Prisons, are so highly constrained by constitutional law that they might consider periodic "constitutional audits" (Feeley and Hanson 1990, 26). The important point is that the scorecard would keep agencies focused on democratic-constitutional concerns, which may not promote cost-effectiveness or be mission related in a narrow sense.

From Theory to Practice: Scorecards and Impact Statements in Action

The following examples are offered as illustrations—and illustrations only—of how impact statements and scorecards could work in practice. These are intended for purposes of argument only. The merits of democratic-constitutional impact statements and scorecards should not prevail or fail on the basis of the particulars of the illustrations, which are well-researched and reasonable (if not definitive) interpretations.

Protecting Individual Rights

The free exercise of religion is a fundamental human right that is protected by the Constitution's First Amendment. The U.S. Constitution explicitly mandates that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States" (Article VI, Section 3). This clause applies at all levels of U.S. government (*Torcaso v. Watkins*, 367 U.S. 488 [1961]). However, it did not protect an employee working for the Kentucky Baptist Homes for Children, a contractor providing outsourced at-risk youth services for the state of Kentucky. Although conceding she was an excellent worker, the contractor's president explained that the employee had been fired because "[t]o employ a person who is openly homosexual . . . does not represent the Judeo-Christian values which are intrinsic to our mission" of providing "Christian support to every child, staff member and foster parent" (Press 2003, 187–88).

If this employee had been employed directly by a state agency, her situation would have been radically different

as a matter of law. The agency could not have a mission of providing Christian support to anyone without violating the First Amendment's establishment clause. It could not have made adherence to Judeo-Christian values a job requirement without violating religious freedom. At a minimum, the Fourteenth Amendment's equal protection clause would require the governmental employer to have a rational, job-related basis for firing an employee for his or her homosexuality. Substantive due process under that amendment might require a more stringent standard of review if the dismissal were deemed an interference with the fundamental personal liberty "to engage in [homosexual] conduct without intervention of the government" (*Lawrence v. Texas*, 539 U.S. 558, 578 [2003]).

A comprehensive democratic-constitutional impact statement would raise these concerns for individual rights as part of the process of prescribing the faith-based delivery of public services. Assuming faithfulness to the Declaration of Independence, the Constitution, and national ideals, potential contractors would be notified that all personnel actions involving outsourced government work must comport with the clearly established constitutional standards that apply to public employment. Kentucky Baptist Homes could forego government contracts and continue its refusal to employ openly homosexual persons. It would not be free to repress them gratuitously while performing government work.

Preserving Constitutional Integrity

Reform prescriptions often seek to alter constitutional checks and balances by enhancing executive power while reducing legislative roles in public administration. Confusing the president as "chief executive officer" with "sole executive officer" (Rohr 1986, 139), the Brownlow Committee asserted that "the responsibility for the administration of the expenditures under [a legislative] appropriation is and should be solely upon the executive" (PCAM 1937, 22). It viewed checks on the executive's "final authority to determine the uses of appropriations, conditions of employment, the letting of contracts, and the control over administrative decisions, as well as the prescribing of accounting procedures" (PCAM 1937, 49–50), as interferences with the president's constitutional responsibility to "take Care that the Laws be faithfully executed" (Article II, Section 3). This view is so alien to the constitutional design for "joint custody" over federal administration that, in 1937, members of Congress rejected it as dictatorial (Karl 1963, 24; Rourke 1993). By 1946, Congress had responded to the growth of the executive branch (in size and in power) by self-consciously designing a substantial and coherent role for itself in federal administration. In much the same vein, the Supreme Court rejected President Bush's blank-check approach to implementing

the 2001 congressional Authorization for Use of Military Force (*Hamdi v. Rumsfeld*, 542 U.S. 507 [2004]; *Hamdan v. Rumsfeld*, Docket No. 05-184 [2006]).

Undeterred by history, reinventers in the 1990s echoed the Brownlow Committee in calling for fewer congressional earmarks, line items and other spending directives, reporting requirements, and agency staffing floors (Gore 1993, 13, 17, 34). At the same time, they sought greater presidential rescission power and agency budgetary flexibility, including the authority to roll over 50 percent of unspent, unobligated year-end budget balances (Gore 1993, 20). Understandably, not being prone to view its supervision of federal administration as micromanagement, Congress failed to go along with the reinventers' design for a weaker institutional role in the separation of powers.

President Bush's PMA is another example of administrative prescription with potentially significant implications for constitutional integrity (OMB 2001). Before taking office in 2001, Bush explained, "My policies and my vision of government reform are guided by three principles: Government should be citizen-centered, results-oriented, and wherever possible market-based" (Bush 2000). In this context, "results oriented" apparently means executive dominated insofar as possible. Bush has successfully used the tools of executive dominance—appointments, executive orders and agreements, proclamations, and signing statements—to such a degree that it is fair to ask "whether the extensive use of administrative actions for governance has jeopardized the balance of power between the executive and legislative branches" (Warshaw 2006, 23). Less tentatively, an American Bar Association report indicated that "[i]f left unchecked," Bush's practice of issuing signing statements "does grave harm to the separation of powers doctrine and the system of checks and balances that have sustained our democracy for more than two centuries" (CNN 2006).

Intentionally or not, the PMA also serves the interests of expansive executive power. Implementation in each of its five areas provides political appointees with greater flexibility to manage career employees and provides additional strength to the OMB's already powerful role in federal administration. Briefly, strategic human capital looks toward initiatives at the Departments of Homeland Security and Defense that serve as a model for future personnel reforms that would enhance managerial flexibility while reducing federal employees' collective bargaining rights and protections against unfair or illegal adverse actions (McGlinchey 2005; Rutzick 2005a, 2005b, 2005c). Likewise, the OMB is the chief policy-making agency and rule writer for competitive sourcing. Its Circular A-76, "Performance of Commercial Activities," is the

instruction manual for organizing competitive sourcing exercises and decisions (OMB 2003). At the same time, improving financial performance requires the OMB to play a more vigorous role in designing agencies' financial systems. The OMB also has a major role in overseeing agencies' e-government activities and executive branch efforts to institute performance budgeting.

Perhaps it is a moot question whether efforts to improve administrative cost-effectiveness, such as those associated with the Brownlow Committee, Clinton-Gore reinvention, and the PMA, truly threaten constitutional integrity. It is nevertheless one that could be addressed through democratic-constitutional impact statements and scorecards when reforms are first proposed and again after they are implemented. Writes Shirley Anne Warshaw, a leading expert and author of seven books on the presidency,

When the Justice Department argues that the president does not need to adhere to legislative actions that unconstitutionally infringe on his authority, what is the recourse in our political structure? The recourse must emanate from Congress itself, but seems unlikely since both Houses are controlled by Republicans whose leadership remains dominated by conservatives. The issue is problematic through the courts. Matters between the executive and legislative branches often fall under the rubric of a "political question" which the Supreme Court refuses to adjudicate. Thus, unless the public can put substantial pressure on Congress, which is unlikely, the continued use of administrative actions will continue to dominate the policy process. The most likely recourse will be when divided government returns. (2006, 23)

Many reasonably consider sacrificing constitutional integrity and then restoring it through divided government a very high price to pay for whatever gains in administrative cost-effectiveness or policy goals may accrue as a result of straying from the Madisonian system. Some trade-offs are obviously tempting and may be necessary. It is important to remember that the definitive guide for making them lies in constitutional law requirements for different degrees of judicial scrutiny, rather than the preferences of reformers, officials, or the public. Recall the Supreme Court's words in its ruling on *INS v. Chadha* (462 U.S. 919 [1983]), in which the Court checked what it perceived to be a legislative power grab:

The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that

permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided, either by the Congress or by the President. . . . With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.

Enhancing Transparency

Two illustrations of recent administrative prescriptions for greater cost-effectiveness that have diminished transparency readily come to mind. First, as noted earlier, outsourcing typically reduces transparency. Although the work may be identical, regulations requiring freedom of information and open meetings typically apply when work is done by government agencies but not when it is outsourced. This lesson was brought home to the media after the space shuttle *Columbia* disintegrated in 2003. The National Aeronautics and Space Administration (NASA) generally responded well to FOIA requests for e-mails and other sources of pertinent information. However, NASA's chief contractor, United Space Alliance, had no legal responsibility to be as forthcoming and was less so. Much of the information held by United Space Alliance—said to do roughly 90 percent of the launch work (Bonné 2003)—became widely available only after the Columbia Accident Investigation Board was convened and released its report.

Importantly, several states provide models of how freedom of information can be applied to contractors, as does the U.S. Department of Energy Acquisition Regulation (Rosenbloom and Piotrowski 2005, 116–17). Nevertheless, as a rule, when government work is outsourced, the public loses the right to know how it is being performed. If James Madison is correct, cumulatively, this is no small matter because "a people who mean to be their own Governors, must arm themselves with the power which knowledge gives" (Madison 1999, 790; see also U.S. Senate 1974, 37–38).

Second, as a practical matter, results-oriented public administration has difficulty accommodating and funding non-mission-based activities. For example, improving performance in meeting FOIA requests received very limited attention in federal agencies' Government Performance and Results Act (Public Law 103-62) performance plans for fiscal year 2001 (Piotrowski and Rosenbloom 2002, 650–53). Nevertheless, the fact that 4 of 24 major agencies included specific goals or targets for FOIA requests in their plans demonstrates that appropriate measures exist.

For one of those agencies, the National Archives and Records Administration, freedom of information is mission based. The other three were the Departments of State and Energy and the Office of Personnel Management. Eleven cabinet departments and six agencies made no mention whatsoever of freedom of information in their performance plans. This group included the Department of Justice, which spent about \$69 million on FOIA and related transparency activities, the Department of Defense (\$36.5 million), and the Department of Veterans Affairs (\$25 million). The remaining agencies in the sample mentioned FOIA in their performance plans but without specific goals or targets (Piotrowski and Rosenbloom 2002, 651–53).

The lack of attention to non-mission-based activities in results-oriented public administration is not surprising. It is axiomatic, as an FOIA expert at the Defense Department explained, that “[w]e all struggle with insufficient funds, insufficient staff, and too many requests to handle in a timely fashion. The people who run the daily mission programs in the agencies find it hard to devote the time to FOIA” (Foerstel 1999, 94). The predictable shortchanging of non-mission-based democratic-constitutional values, procedures, and programs is not inevitable. It might have been prevented by subjecting the Government Performance and Results bill to a democratic-constitutional impact analysis and modifying it accordingly. Including democratic-constitutional scorecards in the agencies’ annual performance reports would almost certainly help protect these values, procedures, and programs by making them more salient in evaluating administrative performance.

Ensuring the Rule of Law

Contemporary administrative prescriptions for greater cost-effectiveness, better customer service, and other objectives emphasize the desirability of increasing managerial flexibility, employee empowerment, deregulation, and client and contractor self-regulation (Gore 1995, 11–33; Sparrow 1994). The National Performance Review was particularly hostile to rules: “The perverse effect of ‘rule by rules’ is that instead of reducing arbitrariness it appears to increase it; instead of fostering cooperation it destroys it; instead of solving problems it worsens them” (Gore 1995, 19). 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, potentially fostering tyranny and even evil (Warren 2004, 345–347; *Delaware v. Prouse*, 440 U.S. 648 [1979]). Two examples, one routine and the other extraordinary, should make the point.

The National Performance Review showcased the Cooperative Compliance Program of the Occupational

Safety and Health Administration (OSHA) as a model of common sense, collaborative regulation. Under the program, OSHA offered employers a choice: voluntarily complying with the standards developed by OSHA in consultation with employers and employees or incurring a 70 percent to 90 percent greater chance of being inspected, perhaps wall to wall (Gore 1995, 25–27, 32–33; Graves n.d.; LaBombard 1998). Viewed and sued by industry for being “a shakedown,” “more like coercion than cooperation,” and “ambush rulemaking” in violation of the Administrative Procedure Act of 1946, the program was declared illegal by a federal court and subsequently terminated (Harris 1999; LaBombard 1998; *Chamber of Commerce v. Occupational Safety and Health Administration*, 174 F.3d 206 [D.C. Cir 1999]).

Ironically, OSHA’s “Maine 200” initiative, on which the Cooperative Compliance Program was based, received the Innovation in American Government Award from the Ford Foundation and was celebrated with a coveted Hammer Award from the National Performance Review. A democratic-constitutional impact statement addressing the core issue of whether the prototype or the national program circumvented the Administrative Procedure Act’s rulemaking requirements could have obviated OSHA’s misguided preemptory steps, the subsequent litigation, and the embarrassment of showcasing a program that so obviously flouted the rule of law.

A second example—outsourcing a part of the Iraq War—resulted in a much more disturbing breach of the rule of law. In the spring of 2006, President Bush said, “The biggest mistake that’s happened so far, at least from our country’s involvement, is Abu Ghraib” (Elliott 2006; Thomas 2006). If those who issue administrative prescriptions were held to the same liability standards as medical doctors who prescribe drugs, the mistake might have been avoided. A doctor who prescribes a potentially dangerous or addictive drug without taking predictable patient behavior into account engages in some level of malpractice. The same can be said of administrative reformers who prescribe outsourcing, administrative entrepreneurship, and partnering with contractors in an environment in which violation of the rule of law is all but inevitable.

These are the pertinent administrative facts regarding Abu Ghraib: The U.S. Army needed interrogators to obtain information from some of the prisoners held at Abu Ghraib. It turned to the Department of Interior’s National Business Center to find a private contractor who could supply interrogators. Using a professional engineering services schedule to procure interrogators, the National Business Center issued a contract to CACI International, despite prior federal government experience that had led the General Services Administration to conclude that it is “inappropriate to use

[a] technology contract for interrogation work” (Harris 2004a). On the ground at Abu Ghraib, a CACI employee “supervised” military personnel, which is illegal but far from the greatest abuse that occurred (Crawley and Adelsberger 2004). Further breakdown of the rule of law was abetted by the army’s failure to send the military officer responsible for overseeing the contract interrogators’ performance to Iraq. Investigators concluded that “it is very difficult, if not impossible, to effectively administer a contract when the [contracting officer’s representative] is not on-site” (Harris 2004b; see also Crawley and Adelsberger 2004).

The army broadly followed administrative prescription in outsourcing interrogation through the entrepreneurial National Business Center. However, this attenuated approach to getting its work done and its failure to supervise CACI personnel all but ensured inadequate accountability for the abusive interrogations. Could a democratic-constitutional impact statement for contracting out work in prisons have stopped the depravity at Abu Ghraib? Perhaps. Domestic experience with contracting out prison health services has established that exceptional measures are necessary to protect the rule of law in penal environments (von Zielbauer 2005).

Conclusion: You Get What You Measure

The rationale for impact statements and scorecards is clear. In today’s performance-oriented world, what is not assessed or measured is apt to be ignored (Radin 2006). Democratic-constitutional values are weakened by default when they are not addressed in administrative prescriptions. Although trade-offs may be necessary, democratic-constitutional impact statements and scorecards could help institutionalize Radin’s admonishment to call on the political system, not administrative reformers, to make them. Requiring impact statements and scorecards also could help to recover the “impressively deep insight into public administration in a representative democracy” that public administrative professionals “once owned” (Lynn 2001, 155).

Historically, administrative reforms were often presented as means of perfecting or democratizing constitutional government. Thomas Jefferson, Andrew Jackson, the civil reformers of the late 19th century, and the Progressives of the early 20th century viewed their reforms in this way (Goodnow 1900; Rosenbloom 1971, 39–41, 47–50, 70–80; Skowronek 1982). In retrospect, some of these reforms were misguided, but ultimately they were thoughtfully presented in terms of democratic constitutionalism.

Regardless of what drives today’s administrative reformers—cost-effectiveness, business-like models, faith in executive power, social equity, accountability

for results, or other concerns—they infrequently focus on whether their prescriptions will promote or diminish individual rights, constitutional integrity, transparency, and the rule of law. In some cases, such concerns are an afterthought at best. Without further explanation—much less analysis of the foreseeable impact of its strategies on democratic constitutionalism—the National Performance Review declared that it sought to “transform bureaucracies precisely because they have failed to nurture” the values of “democratic governance—values such as equal opportunity, justice, diversity, and democracy” (Gore 1993, 8).

Given the tenor of contemporary administrative reform, the need for democratic-constitutional impact statements and scorecards is probably greater now than at any previous time. Are there obstacles to requiring them? Three potential objections are predictable. First, some may argue that democratic-constitutional impact statements and scorecards are a solution in search of a problem. The examples presented in this essay should caution otherwise. Despite some prescient warnings (Moe and Gilmour 1995), the field of public administration lags the courts and legal scholars in addressing the problems that these examples illustrate (Rosenbloom and Piotrowski 2005).

Second, adding costs and impediments to administrative action is always a concern. However, in terms of democratic-constitutional impact statements and scorecards, the underlying question is not one of additional cost per se. It is one of priorities, and a key question is whether the money spent could be better used in some other fashion—or, put differently, whether public funds spent for other purposes might be better used to ensure that administrative prescriptions do not detract from U.S. democratic constitutionalism. As for encumbrances, Supreme Court Justice Felix Frankfurter may have said it best: “Remember, there are very precious values of civilization which ultimately, to a large extent, are procedural in their nature” (U.S. Congress 1940, 13664). Although the National Performance Review claimed that “process sometimes cost[s] more than what [is] protected” (Gore 1995, 33), procedure also significantly reduces litigation. Moreover, as public reaction to cases such as those mentioned here indicates, impact statements and scorecards also can help attenuate a more intangible but nonetheless costly dimension of failing persistently to consider the democratic-constitutional impacts of reforms: an increase in citizen cynicism, the diminution of public trust in government, and bureaucracy bashing. These are, after all, outcomes that administrative reformers typically claim their prescriptions are designed to combat.

Third, developing best practices for implementation may take time and involve a moderate learning curve,

especially at a time when a great deal of results-oriented activity is devoted to the war on terror. Initial difficulties can be expected, but democratic-constitutional impact statements should be no more difficult than environmental impact statements or impact assessments regarding families and other matters. “Enacting democracy” through them might even help strengthen public administration’s “moral and intellectual authority” in the polity (Lynn 2001, 155). There is already substantial guidance for adapting, developing, and implementing scorecards in the public sector (Kerr 2002; Niven 2003).

The particular challenge posed by democratic-constitutional scorecards is to develop appropriate measures for different programs and agencies. The risk is twofold: Measures must be appropriate because “you get what you measure” (Niven 2003, 185); not measuring may be tantamount to neglect. This challenge, though formidable, should not prove insuperable to practitioners who are well versed in the use of scorecards and performance measurement. In this area, as in others, public administration depends on them to be at the forefront of implementation.

Will Franklin’s republic be preserved or lost based on the use of democratic-constitutional impact statements and scorecards? Neither is likely to be the case. However, they can contribute to its strength by guarding against the weakening of individual rights, constitutional integrity, transparency, and the rule of law by default. Reinventing administrative prescriptions in light of the importance of these values in our constitutional republic is important, long past due, and within the grasp of administrators and scholars in the years to come.

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