Public Management: Thinking and Acting in Three Dimensions

First Principles Managerial Accountability to the Rule of Law

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Introduction

The United States is “a government of laws, not of men.” This precept was the guiding principle of the Founders of America’s republican—that is, representative—democracy. In Thomas Paine’s words, the law is king, the king is not law.\(^1\)

But who decides what the law is? That might seem elementary: the laws are made by the legislatures that enact the statutes and the elected executives who sign them. These elected officials also provide administrative direction, with the force of law, to public departments and agencies concerning how to implement those laws. And, of course, the Supreme Court and the high courts of the states say what the law is in cases of disputes over a law’s meaning.

But abiding by the rule of law is anything but straightforward, as the following example demonstrates.

On May 31, 2014, President Barack Obama announced that he had secured the release of Bowe Bergdahl, a U.S. Army enlisted man who had been held captive by the Taliban for 4 years. In exchange for Bergdahl, the president had agreed to release five Taliban fighters captured in Afghanistan and held for many years at the U.S. detention facility at Guantanamo Bay. This prisoner swap was controversial for many reasons: Had the president negotiated with terrorists? Had he paid too high a price for Bergdahl? Was Bergdahl really a deserter who had not served his country with honor? But one thing seemed clear to the president’s critics: he had broken the law.\(^1\)

Section 1035 of the National Defense Authorization Act (NDAA) for Federal Fiscal Year 2014 required the president to notify congressional intelligence committees 30 days in advance of any proposed release of prisoners from Guantanamo Bay.\(^2\) In the case of Bergdahl, the secretary of defense had not notified Congress at all. Was this a clear violation of law by President Obama, a former law school professor?

The president’s justifications for his apparent violation of the law were statements he had made on December 13, 2013, when signing the NDAA into law. Some provisions of the act “would, in certain circumstances, violate constitutional separation of powers principles” by restricting presidential authority to “act swiftly” when conducting negotiations with foreign countries, such as negotiating prisoner exchanges.\(^3\) The president was claiming, in effect, that the president of the United States can disregard specific provisions of a duly enacted law that he regards as unconstitutional. However, this claim has no basis in the Constitution and has not been recognized in U.S. court rulings.

In response to a request from a Senate committee, the Government Accountability Office (GAO) responded that failure to notify Congress of the release of prisoners in exchange for Bergdahl did indeed violate the law. The GAO went further: “In addition, because [Department of Defense] DOD used appropriated funds to carry out the transfer when no money was available for that purpose, DOD violated the Antideficiency Act. The Antideficiency Act prohibits federal agencies from incurring obligations exceeding an amount available in an appropriation.”\(^4\) On both issues, the GAO and DOD were in sharp disagreement.\(^2\)

In fact, a number of seeming anomalies arise in administering the rule of law in this and many other situations:

- On signing into law a bill passed by Congress, the president may issue a signing statement such as the one President Obama issued when signing the NDAA in 2013. Frequently used by recent administrations, presidential signing statements may indicate that the president regards certain provisions in the law to be unconstitutional and that the administration will not enforce them. While
these statements are considered authoritative instructions to executive branch officials on how to administer the law, their legal status is unclear, and their use has been condemned by the American Bar Association as undermining the rule of law.5

- On July 22, 2014, two U.S. Circuit Courts of Appeal issued diametrically opposed decisions on implementation of the Affordable Care Act. A number of lawsuits filed in federal courts claimed that the Affordable Care Act authorized subsidized premiums for health insurance plans purchased on exchanges created by the states but not for plans purchased on the exchange created by the federal government, contesting an Internal Revenue Service ruling that allowed subsidies for plans on the federal exchange. A panel of the U.S. Circuit Court of Appeals for the District of Columbia ruled 2-1 that the IRS ruling was invalid. A similar panel of the U.S. Court of Appeals for the Fourth Circuit in Richmond, Virginia, ruled unanimously that the IRS ruling was valid. If the Supreme Court ultimately invalidated the IRS ruling, millions of U.S. residents who had purchased plans on the federal exchange would lose their subsidies.6

- Unanimous U.S. Supreme Court decisions may mask sharp ideological differences among the justices and may avoid the most controversial and divisive issues raised by a case.7 One view is that such decisions reflect strategic leadership by the chief justice; another view is that rather than settling the core issues, the strategy simply postpones their resolution.

- The actual administration of certain areas of law, such as the administration of the Internal Revenue Code, may be inconsistent with or violate general duly promulgated administrative law standards. The justification for nonstandard or exceptional tax regulations is that the constitutional authority of regulators permits it and practical considerations necessitate it.8

- In many instances, state governors and attorneys general have refused to defend in court or otherwise enforce legislative enactments concerning morally charged and divisive issues such as same-sex marriage, immigration, abortion, and gun control. These refusals often reflect these officials’ views on the constitutionality as well as the morality of controversial laws.

- Individuals and organizations in both the public and private sectors have refused to comply with laws, such as those concerning the reproductive rights of women, to which they object on religious or moral grounds. Examples include pharmacists who refuse to fill prescriptions for contraceptives, physicians who refuse to comply with laws that impose procedural obstacles to abortions, and religious organizations that refuse to provide employees with insurance benefits that, while required by law, are contrary to their religious beliefs. iii

Situations like these that arise in administering the law illustrate how the meaning of the rule of law can be ambiguous and controversial. The reason for such confusion is the nature of the legal system created by the Founders. Following the Declaration of Independence, the framers of the first state constitutions insisted upon dividing state authority among three separate departments, or branches, of government. One of the best-known expressions of the principle behind the rule of law in America was drafted by John Adams for the constitution of the Commonwealth of Massachusetts to provide a rationale for a separation of powers:

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men [emphasis added].9

Thus, in the U.S. legal tradition, the rule of law is viewed in the first instance as a protection against tyranny in the form of an overly powerful central government. iv With respect to public management, the rule of law means that duly promulgated written principles and policies are the basis for the legitimate exercise of managerial authority. The rule of law is a protection against arbitrary, capricious, and nontransparent acts by public managers.

An ironic consequence of America’s constitutional scheme is that the legitimacy of the rule of law depends on an unwritten and unenforceable faith in law and lawful institutions. As legal scholar Michael Mullane put it, The rule of law only exists because enough of us believe in it and insist that everyone, even the nonbelievers,
behave as if it exists. The minute enough of us stop believing, stop insisting that the law protect us all, and that every single one of us is accountable to the law—in that moment, the rule of law will be gone. . . . . It is the rule of law that governs us, that protects each one of us when we stand alone against those who disagree with us, or fear us, or do not like us because we are different. It is the strongbox that keeps all our other values safe.10

Public managers, therefore, must always act in ways that sustain the public’s faith in the rule of law. The authority and the legitimacy of public management—the faith placed in it by citizens, elected officials, and judges—are ultimately derived from public managers’ sense of responsibility to constitutional principles and institutions. These institutions include elected legislatures, elected executives, the courts of law that review political and administrative acts for their lawfulness, and the institutions and conventions created by elected executives and legislatures (these conventions are checks and balances, which are discussed further in Chapter 4).

This chapter explains how the rule of law functions as the framework for public management, in all of its three dimensions: structure, culture, and craft. The next section discusses the meaning of the term rule of law in practice and in principle. Then, the rule of law is viewed from a managerial perspective: finding the laws that govern choices and decisions in particular managerial contexts and the sources of those laws. Next is a discussion of the conceptual and practical challenges of being accountable, which is the ultimate source of legitimacy for lawful public management. The concluding section ties these ideas together and argues that the concept of thinking institutionally should be the ethos of public management practice in governments at all levels.

The rule of law is a protection against arbitrary, capricious, and nontransparent acts by public managers.

What Is Meant By The Rule Of Law?

Public management in America is, and must be, lawful. Its ambiguities aside, what does that mean, in practice and in principle?

The Rule of Law in Practice

The law is the framework for public management practice in America’s constitutional scheme of governance, enabling and constraining discretion by public managers.

• Example: Performance-Based Organizations in the Clinton Administration’s “Reinventing Government” Initiative

One element of the highly publicized Reinventing Government initiative sought to imitate Great Britain’s Next Steps reform, an initiative of British prime minister Margaret Thatcher. Next Steps aimed to give the heads of government agencies the incentive and authority to perform efficiently. Next Steps created agencies (organizations headed by chief executive officers or CEOs) to administer specific governmental functions and activities under the supervision of ministries (organizational units in Britain that are equivalent to U.S. cabinet-level departments). Over 130 agencies were created; examples are the Education Funding Agency and The Royal Parks. The CEOs were bound by performance agreements setting out specific measures and targets. Although the CEOs were civil servants, their pay was based on meeting performance targets, and they could be fired for poor performance. The Clinton administration called its version of such agencies performance-based organizations (PBOs).

Public administration scholars Andrew Graham and Alasdair Roberts have shown that America’s constitutionally defined separation of powers meant that, unlike Great Britain, “an influential third party—Congress—threatened to complicate negotiations over the content of annual performance agreements.”11 Such agreements were to commit future Congresses to provide budgets for PBOs. But future
Congresses cannot legally be bound by the decisions of a sitting Congress, and power and politics can change from one Congress to the next.

An additional issue was that public managers in the United States do not have access to management strategies that are available to many foreign governments or to private sector executives who do not confront separate centers of power. For example, the Next Step agreements specified conditions for CEO termination. In the U.S. system of governance, Congress “may not limit the ability of the President to remove appointees, unless those appointees exercise quasi-legislative or quasi-judicial functions that require some independence from the administration.”12 The three PBOs ultimately created were thus denied significant flexibilities and were a pale reflection of the British model.

• Example: Civil Rights Violations by Local Law Enforcement Agencies

Local law enforcement agencies such as police departments, especially those in large metropolitan areas, have long been vulnerable to complaints by citizens about police misconduct that violates their civil rights, frequently resulting in class action lawsuits. Parts of the Violent Crime Control and Law Enforcement Act of 1994 addressed this problem. Section 210401, “Cause of Action”, states

1. UNLAWFUL CONDUCT.—It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

2. CIVIL ACTION BY ATTORNEY GENERAL.—Whenever the Attorney General has reasonable cause to believe that a violation of paragraph (1) [sic] has occurred, the Attorney General, for or in the name of the United States, may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.13

This law authorizes federal intervention in the management of local law enforcement agencies engaged in patterns of conduct that violate citizens’ civil rights. The first consent decrees, beginning with Pittsburgh in 1996, prescribed systems to identify misconduct (and those likely to engage in it) and supervision and training to change police behavior.

In May 2013, a civil society organization called the Police Executives Research Forum (PERF) v issued a report entitled “Civil Rights Investigations of Local Police: Lessons Learned.”14 This report reviews the history of suits brought against local police departments. Following investigations by the Civil Rights Division of the U.S. Department of Justice, these suits typically result in consent decrees that prescribe actions for police departments in order to come into compliance with federal laws. Actions taken by police department officials to comply were monitored by a court-appointed official for a period initially required to be 5 years but usually extended for many more.

The decrees require police administrators to establish systems to identify problematic behavior (and those likely to engage in it) and “pathways to correction.” The Pittsburgh decree established 14 categories of behavior for which the department would be required to collect data. The decree did not, however, “specify what degree of unacceptable behavior would trigger supervisor involvement or what to do with miscreants.” Significant latitude was left to police department managers and supervisors as to how to create incentives to comply and to create a culture of compliance with civil rights laws.

Pittsburgh’s police chief at the time, as have executives from other cities, welcomed the investigation and consent decree because the need to comply can put pressure on city councils and on labor unions to provide funds and support bringing the department into compliance. The department created the Performance
Assessment Review System, which became “a model early intervention system throughout the country.” This management tool “compares officers’ behavior to a peer group within their unit and shift, and it identifies positive behaviors as well as negative behaviors.”

Consent decrees are not guaranteed to produce compliant behavior. The reasons are many: “insufficient resources, unclear or unfocused mandates, or police resistance to federal oversight.” Many police chiefs assembled at a PERF conference identified the department’s relationships with the monitor appointed to oversee the compliance process as “a critical factor in how swiftly reforms can be made and a consent decree ended.” Thus, a department’s administrators are accountable not only to the city’s legislators but also to an official with the power to determine whether they met the Justice Department’s objectives.

Over time, according to the PERF report, the Justice Department has become more aggressive with respect to the terms it will accept for consent decrees. The decrees cover a wider range of issues and remedies, including officer interactions with suspects who have mental health issues and the manner in which sexual assault complaints are handled. For example, the decree for New Orleans “is a 122-page document that mandates hundreds of police department policy changes dealing with use of force, searches and seizures, arrests, interrogations, performance evaluations, misconduct complaints, off-duty work assignments, and more.” Specific requirements are included, such as “respecting that bystanders to public-police interaction have a constitutional right to observe and record officer conduct, and creating a policy to guide officers’ interactions with gay, lesbian, bisexual and transgender citizens.”

Many other government agencies providing individual and social services have similar constraints imposed on them by the rule of law. Public managers now must comply with written contracts (that is, consent decrees) enforced essentially by an individual (the monitor) who is, in turn, accountable to a judge. In New Orleans, the monitor is a team from the law firm Sheppard, Mullin, Richter, and Hampton, appointed by a federal district judge. The team includes a former deputy monitor of the consent decree for the Washington, DC, police department. Public managers must become skilled at negotiating the terms of the decree and at maintaining productive relationships with the teams of lawyers in addition to meeting the many other pressures that the local political context creates.

Managerial discretion is a fundamental aspect of the rule of law, not an exception to it.

The Rule of Law in Principle

The above examples demonstrate how the law—even in its most exalted form, the Constitution—shapes and constrains the managerial prerogatives of American governments at all levels. No consequential matter requiring managerial discretion lies beyond the law’s actual or potential influence.

The necessity for managers to exercise discretion and judgment, however, is by no means extinguished by the rule of law. Managerial discretion is a fundamental aspect of the rule of law, not an exception to it.

Justice Scalia wrote in Printz,
against federal intrusion upon state authority is not likely to be an effective one.\textsuperscript{18}

In other words, it is difficult to know where to draw the “no policymaking allowed” line when carrying out a public responsibility. Thus, managerial discretion is inevitable. But it must be disciplined by constitutional principle.

The lawmaking and fiscal powers assigned to legislatures and the powers assigned to the courts by Articles I and III of the U.S. Constitution, elaborated since the founding by countless U.S. Supreme Court decisions, result in a hierarchical fiscal and administrative framework, or backbone, that structures American public management. Apart from the powers expressly assigned to the executive by Article II (as interpreted by federal courts), managerial judgment in the executive branches of American governments is formally, and conditionally, checked by the powers assigned to the other two branches.

Legality is not the only source of legitimacy for managerial conduct, however. The Constitution, after all, is a means to a broad societal end, as its Preamble makes clear: “We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”\textsuperscript{19} Legitimacy is conferred on public management by evidence of managerial commitment to forming a more perfect Union, by managerial respect for individual liberties and for members of society as citizens, and by personal qualities of character and integrity that inspire trust. Yet the constitutional backbone operates even when public managers derive power and influence from sources beyond statutory mandates, including

- the decentralized nature of policy and program administration in states and communities,
- the creation of networks linking public and private agencies, and
- the various forms of direct democracy, such as public consultation, advisory bodies, and power-sharing arrangements with citizens.

A manager’s discretionary actions may be oriented toward community values, guided by the policy preferences of superiors, influenced by the interests of particular constituencies, or reflective of conscience and ethical promptings. No matter how well-intentioned, the legitimacy of managerial conduct is ultimately reviewable, at the behest of citizens, by legislatures and courts.

But what if the law is silent, incomplete, or ambiguous? What is the relationship between the exercise of delegated authority—that is, the authorized discretion to use one’s best judgment—and the rule of law? What if laws appear to be in conflict with one another? What if elected executives and legislators disagree on how a law should be interpreted or carried out? Obedience to the rule of law is not straightforward for public managers. Discretion and judgment are needed.

A sufficient test of lawfulness is that the public manager’s actions do not violate clearly established statutory or constitutional rights that a reasonable person in his or her position would have known.\textsuperscript{20} A superficial grasp of what lawfulness requires is insufficient for reasonable and responsible public service: Public managers must make the effort to educate themselves about the lawful foundations of the activities for which they are responsible.

**Practicing Lawful Public Management**

Writing in 1933, political scientist and public administration scholar Marshall Dimock advocated “a more realistic, a more complete development of public administration.”\textsuperscript{21} He observed, “Law is not something outside [the administrator’s] work, boring in on him. Rather, it is an integral part of his unfolding plan and strategy of accomplishment.”\textsuperscript{22} Dimock emphasized the importance for public administrators of “finding the law.”\textsuperscript{23} He depicted a logical process based on his experience while drafting an administrative manual for field officials in the Immigration Service. The process involves answering six basic questions (\textsuperscript{Box 2.1}).
Managers’ actions are of course subject to judicial review. Public administration scholar Yong S. Lee elaborates on the implications for lawful public management. A doctrine of objective reasonableness has emerged to govern the conduct of public officials under the rule of law:

The concept of objectively reasonable conduct is measured by reference to clearly established law. The conduct of a public official is deemed objectively reasonable and, hence, deserving of the defense of qualified immunity [from individual tort liability], if and when the [official’s] conduct does not violate sufficiently clearly established statutory or constitutional rights that a reasonable person in that position would have known.24

Other sources provide guidance for lawful public management beyond the doctrine of objective reasonableness. For example, public law scholar Philip Cooper’s work provides a comprehensive discussion of administrative responsibility that resonates with Dimock’s more realistic and complete public administration.25 Public management scholars Anthony Bertelli and Laurence Lynn argue that the rule of law in the American constitutional scheme of governance calls for public administrators to act in accordance with an axiomatic precept of managerial responsibility: the balanced and reasonable exercise of judgment, which defines accountability and earns legitimacy in the constitutional scheme.26

Sources of Law

The Founders were moved by precepts of natural law in declaring U.S. independence and creating republican institutions. As a practical matter, however, as the above discussion suggests, “the law” has come to refer to positive law, or rules of administrative conduct found in constitutions, statutes, lawful administrative directives and guidelines, common law, and international law. Positive law both enables and constrains the work of public managers. It enables by delegating discretion to act. It constrains by imposing substantive and procedural restrictions on their choice making.

Rule in the term rule of law refers to the “supervising mechanisms” employed to audit the use of managerial discretion and ensure that it conforms to the law.27 These mechanisms are not confined to the judicial branch. They also include political mechanisms that have an important bearing on the exercise of administrative discretion. Such political mechanisms include elections and checks and balances that are defined in or derived from the Constitution (discussed further in Chapter 4).

The Constitution is not the only source of law, but it is the most important among five distinct sources: constitutional law, statutory law, administrative law, common law, and international law.

Constitutional Law

Constitutional law is the body of law that codifies the decisions of the U.S. Supreme Court and of state higher courts of review. vi Legislative and executive branches make decisions and take actions that ultimately are subject to review and reversal by the U.S. Supreme Court or by equivalent state courts. These decisions define and interpret the meaning and implications of the formal constitutional provisions. The body of constitutional law resulting from judicial review carries considerable weight in subsequent decision making, though precedents are sometimes overturned. Consider the far-reaching public management effects of Brown v. Board of Education (1954), which overturned Plessy v. Ferguson (1896).

Box 2.1 A Public Manager’s Guide for Finding the Law

- 1. What is our statutory authority?
- 2. What is the ruling case law as found in court cases that serve as precedents?
- 3. 

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What are our own sub-legislative or policy interpretations of statutory authority by means of which we give effect to steps in the administrative unfolding of the law not specifically provided in the words of the statute?

• 4. Behind the statutory authority and controlling and limiting it, what is our constitutional authority?

• 5. What standards of fairness as found in administrative due process of law are we expected to observe?

• 6. What internal standards of administration are we prepared to follow in order to give fuller effect to the foregoing?


Positive law both enables and constrains the work of public managers. It enables by delegating discretion to act. It constrains by imposing substantive and procedural restrictions on their choice making.

**Statutory Law**

The second and most widely recognized source of law is statutory law. It is the body of law that codifies the enactments (subject to signature by the executive) of the U.S. Congress and of state and local legislatures. The power to legislate is not unconstrained. All acts of Congress must be presented to the president for approval and are subject to veto (although vetoes may be overridden). Article I of the U.S. Constitution enumerates the legislative powers of Congress and the limitations on those powers. Article I, Section 7, for example, states that “All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.”

**Administrative Law**

The third source of law is administrative law, which consists of rulemaking and the adjudication of alleged rules violations by administrators in executive agencies such as the Environmental Protection Agency (EPA) and the Federal Aviation Administration (FAA) and by independent regulatory agencies such as the Federal Trade Commission, the Federal Labor Relations Board, and the Federal Mine Safety and Health Review Commission. Rulemaking—the issuance of regulations to accomplish the agency’s purposes—can be both substantive and procedural. Administrative law scholar David Rosenbloom cites the example of the director of the FAA issuing rules concerning child safety aboard airplanes. The failure to issue rules may also be consequential. Ten states sued the EPA for its alleged failure to issue rules on carbon dioxide emissions. Administrative law concerns the procedures for the lawful issuance of such rules and for their application in specific cases: the rules for issuing and applying rules.

Adjudication of alleged rules violations by administrators takes the form of court-like proceedings in which individual petitions for relief are heard and decided by an administrative law judge or a hearing examiner, positions authorized by the Administrative Procedure Act (APA) of 1946. David Tatel, a judge on the U.S. Circuit Court of Appeals for the District of Columbia argued,

Doctrines of administrative law are not barriers erected by activist judges to prevent agencies from exercising their natural authority to make public policy. Just the opposite. These doctrines exist for a compelling constitutional reason: they keep agencies tethered to Congress and to our representative system of government. They ensure that the complex administrative state of the twenty-first century functions in
accordance with the constitutional system established in the eighteenth. . . . The fundamentals of administrative law really do matter, and they should be understood as engines of administrative policymaking, rather than merely obstacles cluttering the road.30

Executive authority is of considerable importance in administrative law. An executive order is a declaration issued by the president or a governor that has the force of law. Executive orders are usually based on existing statutory authority and require no action by Congress or a state legislature to become effective. At the federal level, executive orders are published in the Federal Register as they are issued and then codified in Statutes at Large and Title 3 of the Code of Federal Regulations each year.31

Common Law

The fourth source of law is the body of case law that makes up American common law. According to the common law, a citizen may sue another individual or organization for the harm or injury (termed a tort) to plaintiffs that the defendants allegedly have caused and be awarded compensation or damages if a judge or jury agrees with the plaintiff. Under the common law doctrine of sovereign immunity, the state, and those operating on its behalf, may not be sued for causing harm unless sovereign immunity has been waived or the courts have recognized a specific exception. If the state and its officers cause injury, the individual's usual recourse is to persuade a legislature to specifically authorize compensation for such injury.

Congress and state legislatures have passed various tort claims acts that waive sovereign immunity in certain circumstances, allowing citizens to make claims of negligence against public officials. An alternative—allowing unlimited legal liability—is not regarded as feasible because it would provide incentives for bringing claims and result in the legislature reducing public services and qualified professionals being hesitant to enter public service. The U.S. government, through the Tucker Act of 1887, has waived its sovereign immunity in specific circumstances, such as lawsuits arising out of contracts to which it, or one of its agencies, is a party. Congress has also passed civil rights acts that allow suits against officers acting under the authority of state law who violate constitutional and statutory rights intentionally or through negligence.

International Law

The fifth source of law is international law incorporated in duly-ratified treaties and conventions, such as the North American Free Trade Agreement, the U.S.-Canada Agreement on Air Quality, and the Geneva Conventions defining the laws of war. If a treaty and a federal statute are in conflict, the more recent or more specific will typically take precedence. Treaties, moreover, are often implemented by federal statutes.

American public management may also be affected by the decisions of regional and international judicial institutions. In May 2006, the European Union’s (EU) highest court ruled that the EU had overstepped its authority by agreeing to give the United States personal details about airline passengers on flights to the United States in an effort to fight terrorism. The decision forced the two sides to renegotiate their agreement at a time when European concerns for infringements of civil liberties were rising.

Together, these five sources of law—constitutions, statutes, administrative directives, case law, and international agreements—create an extensive, complex, and intrusive environment for public management.

What is Meant By Accountability?

The rule of law implies that public officials are accountable to the people and their representatives. Yet accountability is one of most elusive issues in public management. How can “the people” and their elected representatives hold public managers accountable to duly constituted authority? How in turn can managers hold their employees accountable as they exercise their own delegated authority? What should managers do if demands for accountability come from several sources whose expectations are in conflict? Because the
execution of policies and programs must be delegated, and because public managers and their subordinates must inevitably exercise judgment and discretion, accountability is a fundamental challenge for public management. Indeed, many of the distinctive challenges of public management described in Chapter 1 are directly concerned with ensuring accountability.

Accountability in Historical Perspective

Accountability is deeply rooted in constitutional principle. Defined by Alexander Hamilton as “due dependence on the people in a republican sense,” the idea of accountability has been central to public administration's claim to constitutional legitimacy from the beginning of the Republic. As James Madison expressed in Federalist No. 37, “the genius of republican liberty seems to demand . . . not only that all power should be derived from the people, but that those entrusted with it should be kept in dependence on the people.”

Often referred to as the accountability clause, Article I, Section 9, Clause 7, of the Constitution states, “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.” This clause focuses on financial accountability, but many other constitutional provisions bear on accountability, including, but not limited to, the following:

- Congress is required to keep and publish a journal of its proceedings.
- The president is required to report to Congress on the state of the Union and to publish reasons for vetoing legislation.
- Criminal defendants must be tried in public.
- Public officers may be impeached and removed from office for cause.

State constitutions contain similar provisions, as well.

In the largely prebureaucratic America between 1789 and the beginnings of the Progressive era in the late 1800s, accountability was direct, personal, and haphazard. Extensive delegation of authority was unnecessary because of the practice at the time of specifying in detail the expectations of the legislature for administrative actors. As James Hart described that era,

With the theory abroad in the land that the legislature should legislate as little as possible, it was entirely possible for it to debate and prescribe every minute detail and try to anticipate every contingency. And with problems before them of relative simplicity and stability, the laymen who are chosen by popular elections could with less absurdity than today attempt to decide in detail for future events.

But some contingencies could not be foreseen. Coping was left to administrative officers (many of them elected) to function independently of executive authority, with legislatures appropriating funds directly to their offices. According to public administration scholar Dwight Waldo, “the lack of a strong tradition of administrative action [i.e., supervision] . . . contributed to . . . public servants acting more or less in their private capacities.” A spoils system (to the victor belongs the spoils or privileges of office) of rotation in office with each election dominated nineteenth-century selection and control of administrators so that officials were beholden to political parties. Legislators, political parties, and the courts exercised intermittent oversight of administration.

The issue of accountability first became urgent in the latter part of the nineteenth century. Governments at all levels expanded rapidly to meet the needs, expressed politically, of an industrializing, urbanizing, demographically changing United States. The most prominent of Progressive-Era administrative reforms involved separating politics from administration in an effort to rescue municipal governments from the spoils system’s corrupt machines and to professionalize the management of urban services. The most significant innovation was the city-manager form of government in which city councils hire or remove a professional city manager on the basis of merit. That form of government contrasts with the mayor-council form of government where administrative authority rests with the elected mayor. The goal in city-manager governments was, and
still is, accountability that is less political and corruptible, with administration conducted in compliance with
impersonal and lawful rules by qualified professionals.

But the politics-administration dichotomy was not the dominant orthodoxy that many public administration
scholars have claimed it was. Woodrow Wilson is credited with advocating a politics-administration dichotomy
as doctrine in his famous 1887 essay, “The Study of Administration.” But his more important observation
in that essay was “there be no danger in power if only it be not irresponsible.”\(^{39}\) In other words, because
the Founders’ political doctrines predated the emergence of American bureaucratic institutions, the doctrines
proved inadequate to resolve the issues of accountability raised by widespread delegation of authority to
administrators. It fell to the emerging professions of public administration and public law to develop new
doctrines for the rapidly emerging government bureaucracies.

In traditional public administration literature, the concept of responsibility emphasized by Wilson is often
equated with accountability. Public administration scholar Frederick C. Mosher observed, “responsibility may
well be the most important word in all the vocabulary of administration, public and private.”\(^{40}\) Noting the
importance of “responsibility and accountability of the agencies of administration,” public administration
scholar Wallace Sayre identified a common concern: how to reconcile the great, unprecedented growth of
administrative power with democratic government.\(^{41}\) Although no regime of rules can eliminate possibilities
for self-interested behavior by subordinate officials, argued public administration scholar John Millett in 1954,
“management guided by [the value of responsibility] abhors the idea of arbitrary authority present in its own
wisdom and recognizes the reality of external direction and constraint.”\(^{42}\)

In traditional public administration, the function of democratic institutions is to preserve an appropriate balance
between administrative flexibility in serving the public interest, on the one hand, and the accountability
of administrators to democratic authority, and especially to representative and judicial institutions, on the
other.\(^{43}\)

**Accountability Institutions**

The inevitable emergence of new structures and processes of public management carries with it a constant
redefinition of an ideal balance between administrative discretion and accountability. Such developments
often lengthen and weaken the chains of delegation that link citizens, their elected representatives, and
the delivery of publicly supported services. These new structures and techniques include the service and
regulatory agencies and administrative technologies created during the legislatively active Progressive,
New Deal, and Great Society periods. They also include special districts, local-regional corporations at the
state and local levels, government corporations, government-sponsored enterprises, and quasi-governmental
organizations created since World War II to ensure a businesslike distance between politics and service
delivery. In recent times of budgetary stringency and heightened legislative scrutiny, popular movements
toward decentralization, deinstitutionalization, devolution, privatization, and outsourcing have necessitated
new structures and processes for meeting public needs (discussed in **Chapter 5**).

Similar to the innovative idea of professional city management, new accountability institutions often rely
on professional and legal forms of accountability. “Using the corporate device . . . involves trusting board
members and executives after giving them a firm mandate and discretion.”\(^ {44}\) But accountability and the
rule of law may be weakened under these arrangements. Therefore, new institutions concerned with
accountability have long accompanied the expansion of new structures and processes of public management.

- Among the earliest of these accountability institutions were the Progressives’ innovative forms of
direct democracy: initiative, referendum, and recall, which allow citizens to propose and vote on laws
and constitutional amendments and to remove officials from office, thereby directly holding elected
officials accountable for their performance.

The initiative and the referendum are popular in many states, especially California, where a 2003
recall vote resulted in Governor Gray Davis being removed from office.
Another early accountability institution is the General Accounting Office, now called the Government Accountability Office (GAO). Created by the Budget and Accounting Act of 1921 to audit an executive branch swollen by Progressive reforms and World War I, the GAO, whose chief executive is the comptroller general of the United States with a 15-year term, is an agency of the U.S. Congress.

The GAO has substantial discretion to investigate fraud, waste, and abuse in the executive branch and to publish reports containing its findings and recommendations. “The comptroller general retains from his heritage, and has gained by statute, elements of authority that in any other national jurisdiction are lodged with executive officials.”

Some accountability institutions emphasize transparency as a way to promote accountable action by public agencies. These institutions include laws, such as the federal Freedom of Information Act, which "establish a public right to information held by government agencies. Such institutions establish a presumption that government documents should be publicly accessible and provide methods for compelling officials to comply with its requirements."

Other transparency institutions include the Federal Advisory Committee Act of 1972, which requires meetings of federal advisory committees to be open to the public, and the Government in the Sunshine Act of 1976, which requires meetings of federal commissions to be open to the public. Each act contains exemptions for material relating to national security or to certain personnel or law enforcement matters.

In 1978, Congress created the office of inspector general (IG) in many federal agencies. By 2014, there were 74 statutory IG offices. IGs are empowered to conduct and supervise audits of the programs and operations of their agencies with the purpose of identifying and recommending solutions for waste, fraud, and abuse.

IGs report to their agency heads, but they are appointed by the president, confirmed by the Senate, and formally protected from political interference: “Neither the head of the establishment nor the officer next in rank below such head shall prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena during the course of any audit or investigation.”

The President's Council on Integrity and Efficiency and the Executive Council on Integrity and Efficiency were established by Executive Order 12805, on May 11, 1992, to “address integrity, economy, and effectiveness issues that transcend individual Government agencies, and increase the professionalism and effectiveness of IG personnel throughout the Government.”

Protections for whistleblowers constitute another venerable accountability institution. Whistleblowers are individuals who report misconduct in their agencies or organizations. The first federal legislation with the intent to protect whistleblowers was the Lloyd-La Follette Act of 1912, which guaranteed the right of federal employees to furnish information to Congress.

Whistleblower protection became popular in the late twentieth century, especially in the new regulatory agencies such as the Environmental Protection Agency and the Occupational Safety and Health Administration. In the Civil Service Reform Act of 1978, Congress established the Office of Special Counsel, an independent federal investigative and prosecutorial agency, “to safeguard the merit system by protecting federal employees and applicants from prohibited personnel practices, especially reprisal for whistleblowing.”

In 1989, Congress enacted the Whistleblower Protection Act “to strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government.”
Because of America’s separation of powers and steadily evolving and increasingly complex system of checks and balances (discussed further in Chapter 4), accountability and accountability institutions will also evolve and become more complex as the executive, the legislature, and the courts interpret accountability’s requirements and create new forms to ensure them.

New institutions concerned with accountability have long accompanied the expansion of new structures and processes of public management.

Frameworks for Analyzing Accountability

The difficulties in pinning down accountability are evident in historical concerns for responsible action by unelected bureaucrats. The evolving, complex institutions of public management mean that holding organizations and individuals accountable is, as emphasized, not a straightforward matter. Competing pressures and expectations from different sources introduce further complications.

Public management scholar Robert D. Behn has observed, “To ‘hold people accountable’ has become a cliché” yet its meaning is not consistent among those who use the term.51 William T. Gormley, Jr., another public management scholar, has argued that accountability is a “procedural value” that, along with other procedural values such as responsiveness, leadership, effectiveness, and fairness, should be invoked only when it is possible to “define them more precisely, to defend them more persuasively, and to place them in the context of other values.”52

Thus, an analysis of accountability first seeks clarity regarding the meaning of accountability in a given situation. Next, it engages in systematic inquiry, informed by the model deliberative process described in Chapter 1. Accountability concerns span the three dimensions of public management. Structure is the dimension most often used in attempts to ensure accountability. Though they are more difficult for external authorities to influence, culture and craft are fundamental as well. To support an analytical approach to accountability, the remainder of this section reviews different meanings of accountability from the literature. In so doing it illustrates the difficulty of operationalizing a concept that at first may seem straightforward.

• Public administration scholar Mark Bovens suggests that public accountability serves five essential functions in a representative democracy:
  ◦ assuring democratic control,
  ◦ enhancing integrity,
  ◦ improving performance,
  ◦ maintaining legitimacy, and
  ◦ providing catharsis after tragedy or failure.53

• Behn points to three typical targets of accountability:
  ◦ for finances,
  ◦ for fairness, and
  ◦ for outcomes.

He argues that the first two targets “reflect concerns for how government does what it does,” and the third target reflects a concern for “what government does—what it actually accomplishes.”54

• Public administration scholars Herbert A. Simon, Victor A. Thompson, and Donald W. Smithsburg define accountability as “the enforcement of responsibility.” They emphasize responsibility as “the extent to which administrators are responsive to other persons or groups, in and out of the bureaucracy.” They identify other meanings of responsibility as well: “as a synonym for legal authority,” “to denote the compliance with generally accepted moral obligations,” or as “responsiveness to other people’s values.”55

• Frederick C. Mosher defined accountability in relation to what he termed objective responsibility,
which “connotes the responsibility of a person or an organization to someone else, outside of self, for some thing or some kind of performance. It is closely akin to accountability or answerability.”56 He distinguished objective responsibility, which reflects the structure dimension of public management, from subjective responsibility, which is more closely associated with the culture dimension, in the sense that it focuses on “identification, loyalty, and conscience” and “hinges more heavily upon background, the processes of socialization, and current associations in and outside the organization than does objective responsibility.57

- Public administration scholars Barbara S. Romzek and Melvin J. Dubnick offer a definition of accountability that reflects Mosher’s conceptualization of objective responsibility: “a relationship in which an individual or agency is held to answer for performance that involves some delegation of authority to act.”58

Romzek and Dubnick develop a framework for analyzing public accountability. They delineate four types of accountability systems based on the source of control over an agency’s action: whether control originates within or outside the organization and the degree of that control (see Table 2.1).

- Bureaucratic (or hierarchical) accountability is characterized by hierarchical relationships within an organization that are accompanied by and characterized by rules and clearly defined expectations. These types of relationships correspond with structures that are further discussed in Part II.
- Legal accountability is concerned with “a formal or implied fiduciary (principal/agent) agreement between the public agency and its legal overseer” and by definition is imposed by formal authorities external to the organization. Like bureaucratic accountability, legal accountability tends to be manifested in structures.
- Political accountability is concerned with representativeness and responsiveness of the public manager or organization to a constituency. “Constituencies include the general public, elected officials, agency heads, agency clientele, other special interest groups, and future generations.”59
- Professional accountability is concerned with discretion and deference to the expertise of professionals in an organization. This type of accountability reflects Mosher’s concept of subjective responsibility and the culture dimension of public management.
- Political scientist Judith E. Gruber focuses on ensuring accountability in democracies. The task is not unique to governments or to democracies, but it takes on special urgency in democracies because unaccountable power flies in the face of the central norms of such political systems. When the legitimacy of a government derives from the consent of the governed, the problem becomes not merely an inability to get the governmental apparatus to act in ways the leaders or citizens wish but also a challenge to the fundamental nature of that government.60

### Table 2.1 Types of Accountability Systems

<table>
<thead>
<tr>
<th>Degree of Control Over Agency Actions</th>
<th>Source of Agency Control</th>
</tr>
</thead>
<tbody>
<tr>
<td>High</td>
<td>1. Bureaucratic 2. Legal</td>
</tr>
<tr>
<td>Low</td>
<td>3. Professional 4. Political</td>
</tr>
</tbody>
</table>


Gruber is concerned with issues of democratic control of the bureaucracy—that is, control that stems from
citizens. Bureaucratic behaviors, she argues, exhibit two dimensions for which they can be held accountable: the procedures they use and the substance of decisions they make. The combination of these dimensions results in four idealized types of bureaucratic actors: autonomous actors, end achievers, procedure followers, and clerks. Each has a corresponding system for ensuring accountability through democratic control (Table 2.2).

Table 2.2 Idealized Perspectives of Bureaucratic Democracy and Approaches to Democratic Control

<table>
<thead>
<tr>
<th>Substantive Constraint</th>
<th>Procedural Constraint</th>
</tr>
</thead>
<tbody>
<tr>
<td>Low</td>
<td>Low</td>
</tr>
<tr>
<td>Actor: Autonomous actor</td>
<td>Approach: Self-control</td>
</tr>
<tr>
<td>High</td>
<td>High</td>
</tr>
<tr>
<td>Actor: End achiever</td>
<td>Approach: Public interest</td>
</tr>
</tbody>
</table>

Source: Adapted from Figures 1 and 2 in Judith E. Gruber, Controlling Bureaucracies: Dilemmas in Democratic Governance (Berkeley: University of California Press, 1987), 15, 18.

- Self-control approaches apply in situations characterized by both low substantive and procedural constraints.
- Participatory approaches apply in situations characterized by low substantive but high procedural constraints.
- Public interest approaches apply in situations characterized by high substantive but low procedural constraints.
- Accountability approaches apply when substantive constraints are low, and when procedural constraints span from moderate to high. These approaches focus on “guaranteeing that decisions are made in an ‘appropriate fashion’ with only peripheral concern for what the decisions are.”
- Clientele-oriented approaches apply when both substantive and procedural constraints are moderate. These approaches “are more concerned with the substance of decisions made in administrative agencies than with the procedural fact that they are made solely by administrators.”

The use of analytic frameworks like the ones described in this section can support public management analysis by helping to clarify the meaning of accountability in a given situation and among different actors with different interests. Incorporated into a model deliberative process, these frameworks can support analysis of accountability issues by informed citizens and public managers alike.

Thinking Institutionally

Managing under the rule of law—finding the law—might be construed as requiring the drawing of distinctions between “the unambiguously expressed intent of Congress” (or of any legislative body) and “the interstices created by statutory silence or ambiguity” and then using common sense in those interstices. Indeed, Supreme Court Justice Sonia Sotomayor recently stated, “The government must be allowed to handle the basic tasks of public administration in a manner that comports with common sense.”

The reality, however, is that the unambiguously expressed intent of a legislature, not to mention what
constitutes common sense, may be ambiguous, or at least so it may be claimed by elected executives and their appointees in managerial roles. In the American scheme of governance, the process of judicial review resolves conflicting claims about managerial discretion.

Some in public administration and management wish it were otherwise. They dream of a public administration with greatly enhanced power and autonomy, able to define its own mission and take risks guided by, but not subordinate to, lawmakers, policymakers, and lawyers. It is not hard to imagine that the design of policies to control air pollution would be the business of highly trained scientists and policy analysts empowered to make technically rational choices subject to peer review and to ultimate approval by the people’s representatives.

The danger is that, if not held in check by the rule of law, those who possessed such autonomy—whether they are members of the American Society for Public Administration or of the Federalist Society vii—could be prone to making judgments that subordiante the rule of law to their own preferences, perhaps even with the backing of respectable values and scientific sanction. Doing so could deprive administration of the only legitimacy that ultimately counts: that which adheres to the constitutional scheme.

The implication of this argument is that public management’s practitioners, scholars, and teachers must internalize a commitment to the law by exercising the habit of what political scientist Hugh Heclo calls “thinking institutionally” about public administration and management. Thinking institutionally means more than knowing the rules of the game: that is, the rule of law as legality and constraint. It means respecting the game you are playing: the rule of law as a principle of responsible administration.

Someone who thinks institutionally exhibits “a coherent, sensitive awareness in making judgments,” in this case about fulfilling the constitutional scheme. Institutional thinking is infused with value that “stretch[es] the time horizon backward and forward [and] senses the shadows of both past and future lengthening into the present.”63 Without this type of thinking, Heclo argues, institutions—legislatures, agencies, courts—are little more than empty formalities. Without it, the rule of law is little more than legality.

Responsible management, then, is management that reflects the habit of thinking institutionally with respect to the rule of law, which, after all, an administrator’s oath of office requires. As a report to the American Society for Public Administration, a committee led by public administration scholar Nicholas Henry put it,

The profession’s central commitment must be to give specific and principled meaning to the oath of office and what it means to be accountable to that oath. Public administrators are thus required to follow constitutional, statutory, and administrative law, plus decisions and orders of the courts. Within this framework, the defining practice of governance is the interpretation and exercise of public authority.64

Not only are public officials sworn to govern lawfully, the separation of powers guarantees that failure to exercise good judgment concerning the meaning of lawful invites the other branches to constrain the exercise of official discretion. These constraints may undermine administration’s capacity to contribute effectively to democratic governance, further disempowering the profession that “runs the Constitution.”

Law is the root system of public management. Public management that ignores its roots will be rightly seen as a parasite.

Thinking institutionally means more than knowing the rules of the game: that is, the rule of law as legality and constraint. It means respecting the game you are playing: the rule of law as a principle of responsible administration.

**Key Concepts**

- Separation of powers
- Rule of law
- Performance-based organizations
Case Analysis: The Rule of Law in Action: Massachusetts v. Environmental Protection Agency

Public law scholar Phillip Cooper observes, “sooner or later, most important political problems in America are transformed into administrative problems which, in turn, find their way into the courts.”65 A clear-cut example of this process is how the ongoing problem of air pollution and climate change are addressed politically, administratively, and, ultimately, legally.

Responding to the growing power of the environmental protection movement, Congress passed the Clean Air Act of 1970 (CAA), which authorized the creation of the Environmental Protection Agency (EPA). It “gave authority to EPA to designate air pollutants, determine acceptable concentrations of those pollutants, review state implementation plans for regulation of stationary emissions sources, and directly regulate mobile source emissions.”66 Section 202(a)(1) of the CAA required the EPA administrator to establish standards, “applicable to the emission of any air pollutant from . . . new motor vehicles or new motor vehicle engines, which in [his or her] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare” [emphasis added].67

In subsequent years, mounting scientific evidence suggested that global warming was occurring, and that an important cause was the man-made greenhouse gases (GHGs). Although some climate scientists demurred from the emerging consensus, support grew for regulating emissions of GHGs. Proposals to do so were politically controversial, however, because of opposition from firms and industries responsible for those emissions. Nonetheless, pressure on EPA to use its authority under the CAA to take action increased among
environmentalists. Concerns focused on CO₂, a pollutant caused by the use of carbon-based fuels by energy producers and by mobile sources such as automobiles.

Arguments for No Regulation

In 1998, in response to the political pressure, EPA administrator Carol Browner asked EPA's general counsel, Jonathan Cannon, to provide an authoritative statement concerning the EPA's legal authority to regulate CO₂ under the CAA. Although CO₂ met the law's definition of a pollutant, Cannon argued that the EPA could not regulate it because the administrator had not issued a legally required finding that public health and welfare were endangered by CO₂ emissions.  

This judgment by the EPA's top lawyer caused political controversy to focus on the issuance of such a finding. The International Center for Technology Assessment (ICTA), a bipartisan nonprofit research organization, submitted a petition to compel the EPA (under CAA section 202(a)(1)) to regulate the emissions of four GHGs: CO₂, methane, nitrous oxide, and hydro-fluorocarbons, all of which are emitted by new mobile sources.

In September 2003, the EPA, then under a Republican administration, published a denial of ICTA's petition. In a reversal of Cannon's judgment, EPA general counsel Robert Fabricant argued that GHGs were not pollutants under CAA. The agency, he said, "must determine that Congress intended for the grant to give the agency authority to regulate in that specific area." Fabricant also argued that "Congress did not intend the CAA to give EPA authority to regulate GHG emissions from mobile sources." Further, even if CAA gave authority to regulate carbon emissions, the EPA had no obligation to determine whether those emissions "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare," that is, the EPA had no obligation to issue an "endangerment finding."

The Massachusetts Complaint

The ICTA had failed to convince the U.S. Court of Appeals for the District of Columbia Circuit to reject the EPA's arguments. Then on March 2, 2006, the State of Massachusetts filed a petition for a writ of certiorari—a request for a Supreme Court review of the lower court's ruling. Certiorari was granted on June 26, 2006. Massachusetts sought the high court's review of the EPA's interpretation of its statutory authority under the CAA.

Specifically, the Commonwealth of Massachusetts argued that CAA section 302(g) defines an air pollutant as an "air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive substance or matter that is emitted into or otherwise enters the ambient air." Because CO₂ and other GHGs are chemicals emitted into the ambient air by new motor vehicles, they are air pollutants that can be regulated under section 202(a)(1) of the CAA. The state argued that the EPA had misapplied prior Supreme Court rulings that the EPA believed restricted its authority. Moreover, the EPA was incorrect to interpret the CAA's use of the words "in [administrator’s] judgment" to mean that the EPA "had no obligation" to regulate.

The EPA argued in response that the State of Massachusetts had no standing to file this lawsuit. That is, it could not demonstrate that the EPA's judgments in this matter had caused harm to the state, that GHG emissions from vehicles were not significant enough to harm the state's climate. It argued, further, that Congress had not intended to authorize regulation of pollutants if doing so had significant "economic and political consequences."

The Supreme Court Rules

On April 7, 2007, the Supreme Court ruled, in a narrow 5–4 decision, that the state of Massachusetts had standing to file its complaint. On the merits of the complaint, the Court ruled that "the plain meaning" of the CAA's broad language was that the EPA had the authority to regulate GHGs. Moreover, the EPA had not
reasonably explained its decision. The Court reasoned,

As we have repeated time and again, an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities. See Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U. S. 837, 842–845 (1984). That discretion is at its height when the agency decides not to bring an enforcement action. Therefore, in Heckler v. Chaney, 470 U. S. 821 (1985), we held that an agency’s refusal to initiate enforcement proceedings is not ordinarily subject to judicial review.

In this case, however, the “affected party” had “an undoubted right to file” a complaint, and a refusal to promulgate rules is susceptible to judicial review, albeit a review that is extremely limited and highly deferential to the agency. As the agency clearly had the authority to promulgate rules controlling GHG emissions, denial that such authority existed and that, even if it did exist, promulgating such rules would conflict with “other administration priorities,” the Court must hold such a denial to be “arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law.”

Although the EPA’s administrators could take “scientific uncertainty” into account in declining to regulate, the Court declared that the uncertainty must be “so profound” that a decision not to regulate is reasonable. To say that uncertainty, along with other factors such as conflicting priorities, is a reason for declining to regulate is not reasonable. The implication was that it was not reasonable for the EPA to argue that the science underlying global warming claims was contested, that regulating GHGs would have harmful economic consequences, and thus to justify the decision not to regulate.

The implication was that it was not reasonable for the EPA to argue that the science underlying global warming claims was contested, that regulating GHGs would have harmful economic consequences, and thus to justify the decision not to regulate.

Managerial Discretion and Its Limits

Public administrators are entitled to deference from the courts when their actions and decisions are “reasonable.” This doctrine, known as Chevron deference, was first promulgated by the Supreme Court in its ruling on Chevron U.S.A. vs. Natural Resources Defense Council in 1984. That ruling provided a two-step test for an agency’s entitlement to judicial deference:

1. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court as well as the agency must give effect to the unambiguously expressed intent of Congress.

   If, however, the Court determines that Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute . . . Rather,

2. If the statute is silent or ambiguous with respect to the specific question, the issue for the court is whether the agency’s answer is based on a permissible construction of the statute.

More recent Supreme Court decisions have clarified the doctrine of judicial deference to administrative judgment. For example, a regulation promulgated under the “notice and comment” provisions of § 553 of the Administrative Procedure Act (APA) would likely receive Chevron deference. The notice-and-comment procedure “was expressly fashioned by Congress in 1946 to legitimize the broad delegation of administrative authority that began during the New Deal” on the condition that the exercise of such delegated authority was subject to “robust judicial review.”

Agencies are required to provide the public with adequate notice of a proposed rule followed by a meaningful

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opportunity to comment on the rule’s content. Although the APA sets the minimum degree of public participation the agency must permit, ‘[matters] of great importance, or those where the public submission of facts will be either useful to the agency or a protection to the public, should naturally be accorded more elaborate public procedures.’ 77

Yet some agency interpretations of statutes and rules are made outside the regular rule-making process. For example, the Securities and Exchange Commission (SEC) might send a letter to a particular firm saying that no administrative action will be taken. “Although the SEC addresses no-action letters to particular recipients, because the letters are publicly disseminated on the SEC website, they have the effect of encouraging SEC-favored actions by other similarly situated entities and securities practitioners.” 78 The Courts have not exercised “strong Chevron deference” with respect to nonlegislative rules such as the SEC no-action letter but instead have applied a less stringent test for deference. 79 In general, according to Judge Tatel,

Congress delegates authority to administrative agencies not to authorize any decision at all, but to permit agencies to apply their expertise. The reason-giving requirement allows courts to determine whether agencies have in fact acted on the basis of that expertise. . . . At a minimum, the requirement of reasoned justification ensures that the best arguments that can be marshaled in favor of a policy are enshrined in the public record, so that anyone seeking to undo the policy will have to grapple with and address those arguments. In this way, the reason-giving requirement makes our government more deliberative. And even when it slows agency action, it makes government more democratic. 80

Politics or Expertise?

When public managers use their delegated discretion to implement public policies, their decisions are inevitably political. That is, they affect “who gets what, when, and how.” Yet judicial review may hold public managers accountable to standards of technical rationality rather than political rationality. The exercise of managerial discretion is legitimate to the extent that it reflects the application of the agency’s expertise free of political pressures. It is the application of expertise that was the reason for creating the agency in the first place and for delegating to it the implementation of public policies. This expertise-forcing, however, is arguably in tension with one leading rationale of the Chevron doctrine, a rationale that emphasizes the executive’s democratic accountability and that sees nothing wrong with politically inflected presidential administration of executive branch agencies. . . . expertise-forcing has its roots in an older vision of administrative law, one in which politics and expertise are fundamentally antagonistic. 81

From that perspective, Massachusetts v. EPA suggests that “the Court has at least temporarily become disenchanted with executive power and the idea of political accountability and is now concerned to protect administrative expertise from political intrusion.” 82

The Saga Continues

In December 2009, with the EPA under a Democratic administration, the EPA administrator reversed the earlier assessment regarding GHGs:

the current and projected concentrations of the six key well-mixed greenhouse gases—carbon dioxide (CO2), methane (CH4), nitrous oxide (N2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF6)—in the atmosphere threaten the public health and welfare of current and future generations [and that] the combined emissions of these well-mixed greenhouse gases from new motor vehicles and new motor vehicle engines contribute to the greenhouse gas pollution which threatens public health and welfare. 83

Active EPA rulemaking followed for both stationary (electric power plants) and mobile (light-duty trucks) sources of GHG emissions. One new regulation required new or modified “major emitting facilities” such as
power plants subject to the CAA’s “prevention of significant deterioration” (PSD) provisions to obtain permits for emissions exceeding limits. The limits were measured in tons per year of a regulated pollutant. The EPA added four GHGs to the list of regulated pollutants, including CO₂.

However, the EPA also made a significant change in public policy. Instead of imposing the statutory limits of 250 tons per year for PSD facilities and 100,000 tons per year for other sources on the newly added GHGs (the limit beyond which a permit was required for previously regulated pollutants), the EPA changed the threshold for the new GHGs to the 100,000 tons per year appropriate for major polluters. The reason was straightforward: thousands of previously unregulated small to medium facilities emit 100 to 250 tons of the newly added GHGs per year, and the EPA did not want to extend its regulatory reach so dramatically.

The EPA's decision provoked a rash of lawsuits by states and industries. Plaintiffs again contested whether the CAA authorized the regulation of GHGs but also challenged the EPA's policy decision to lift the emission thresholds, saying that the EPA was trying to “design its own climate-change program.”

On June 22, 2014, the Supreme Court announced its decision in one of these lawsuits, Utility Air Regulatory Group v. Environmental Protection Agency. The court upheld the EPA's authority to regulate GHGs in accordance with its 2007 decision in Massachusetts v. EPA. It also ruled, however, that the EPA was not authorized to require permits based solely on GHG emissions or for facilities that do not have other emissions above threshold levels. The Court indicated that a quantitative limit could not be used that was different from the one in the statute. The ruling noted that EPA could thus control 83 percent of GHGs, not the 86 percent the EPA design proposed to control.

The Supreme Court’s decision in Utility Air Regulatory Group v. Environmental Protection Agency was about the extent of public managers’ discretion—in this case, that of the EPA administrator—to design their own policy implementation strategies. The EPA claimed it had exercised its legally recognized “discretion” to make a court-recognized “reasonable construction of the statute.” The court rejected this claim, however, saying,

Even under Chevron’s deferential framework, agencies must operate “within the bounds of reasonable interpretation.” And reasonable statutory interpretation must account for both “the specific context in which . . . language is used” and “the broader context of the statute as a whole.” . . . Thus, an agency interpretation that is “inconsistent[ with the design and structure of the statute as a whole, “does not merit deference. . . . Agencies exercise discretion only in the interstices created by statutory silence or ambiguity; they must always “give effect to the unambiguously expressed intent of Congress.”

Discussion Questions

1. Analyze the EPA's actions in this case through the lens of Justice Scalia’s comment in the Printz decision, excerpted in this chapter.
2. Judge David Tatel, quoted at different points in this chapter, has commented, “when reading a set of briefs or listening to oral argument, I sometimes wonder whether the agency consulted its lawyers only after it found itself in court.” Consider Dimock’s guidelines for “finding the law.” Presumably the EPA had skilled attorneys during the different administrations described in this case. Was the difficulty in this case “finding the law”? Or was it something else?
3. Of the different sources of law described in this chapter, which are evident in this case (including those directly involved in the lawsuits)?
4. What does accountability mean in the context of this case? Which accountability institutions are evident?
5. Discuss what it means for an EPA public manager to think institutionally concerning the issues raised in this case.
6. What are the tensions between technical rationality and political rationality evident in this case?

Notes


2. The notification requirement in Section 1035(d) of the NDAA states, “The Secretary of Defense shall notify the appropriate committees of Congress of a determination of the Secretary under subsection (a) or (b) not later than 30 days before the transfer or release of the individual under such subsection.” http://www.gpo.gov/fdsys/pkg/BILLS-113hr3304enr/pdf/BILLS-113hr3304enr.pdf.


12. Ibid., 147.


15. Ibid.

16. Ibid., p. 3.


22. Ibid., 32


32. Bertelli and Lynn, Madison’s Managers, 206.


47. All are members of the Council of Inspectors General on Integrity and Efficiency, at http://www.ignet.gov.

48. 5 U. S. C. App. § 3(a).


56. Mosher, Democracy and the Public Service, 7.

57. Ibid., 8.


61. Ibid., 20, 22–23.


68. Sugar, “Massachusetts V. Environmental Protection Agency,” 533.

69. Ibid., 534.

70. Ibid., 535.

71. Ibid., 537.

72. Ibid., 537.


79. Ibid., 1303–1329.


82. Ibid., 54.

83. Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, last modified November 22, 2013, http://www.epa.gov/climatechange/endangerment/.


86. Ibid., 19, 24.


i One discussion of the issues raised by the president’s action can be found at http://thedailybanter.com/2014/06/right-left-attack-obama-signing-statement-rationale-bowe-bergdahl-swap/.

ii In March 2015, following an investigation, the U.S. Army charged Bergdahl with one count of desertion and one count of misbehavior before the enemy.

iii A Supreme Court decision in June 2014 upheld the right of “closely-held corporations” to refuse on religious grounds to comply with the Affordable Care Act’s requirement that company-provided insurance cover the costs of contraceptives, a decision which raised many more issues than it resolved.

iv A useful online source of definitions related to the rule of law is at http://www.quickmba.com/law/sys/. Articles from the electronic journal of the former United States Information Agency offer a comprehensive overview of how the U.S. court system works. See http://usinfo.state.gov/journals/itdhr/0999/ijde/ijde0999.htm. Access to a comprehensive body of informative links for the federal government, the states, and other sources of law is at http://www.lawsource.com/also/ # [United%20States].

v The Police Executives Research Forum provides research and management services, technical assistance, and executive-level education to support law enforcement agencies; http://www.policeforum.org/home/.

vi For an annotated text of the U.S. Constitution, see http://www.law.cornell.edu/constitution/index.html.

vii The Federalist Society for Law and Public Policy Studies is an organization that promotes conservative and libertarian interpretations of the Constitution.

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