public administration. These efforts were most encouraging, but I could not ignore the reaction of one administrator with whom I discussed the merits of considering normative questions. He thought it was fine for academics to be concerned with such questions, but he could not see how it concerned him as a practitioner. "Besides," he added, "I have nothing to do with policy; I work for the IRS." Old dogmas die hard; the bureaucracy seems to have learned its lessons from an earlier generation of political scientists so well that it is impervious to the counsel of the descendants of its erstwhile mentors.

We can, however, take some comfort from the fact that there are over ninety-eight schools of public administration in the United States with an enrollment exceeding 12,153. If the "new" public administration permeates these schools, we should be able to look forward to a more ethically alert bureaucracy in the future.

NOTES

Chapter One originally appeared as "Ethics for Bureaucrats," *America* 128 (May 26, 1973): 488–491. Reprinted with permission.

1. Theodore Lowi, *The End of Liberalism* (New York: W. W. Norton, 1969), p. 236.

John A. Rohr, Public Service, Ethics & Constitutional Practice, Lawrence, KS: U of Kansas Press, 1998, pp. 9-16

2

The Problem of Professional Ethics

Whereas the previous essay explained bureaucratic ethics to the general reader, this chapter explains professional ethics to the public administration community. It concludes with a hint that links the problem outlined in this chapter to the Constitution of the United States and thereby lays the foundation for the rest of the chapters in the book.

Professional codes and statements of ethics often engender cynicism and derision because these statements, couched in terms of broad and generous public spirit, frequently harbor self-serving sentiments that, when exposed, embarrass the professions and delight their critics. The purpose of this chapter is to explain why professional statements tend to be self-serving and to examine the ethics of public administration in light of this explanation. In so doing, I hope to illuminate an aspect of professionalism that should be of particular interest to the public administration community.

UNIVERSAL AND PARTICULAR

Popular discussion of ethical issues tends to be framed in the language of universals—do not steal, do not lie, love your neighbor, etc. This sort of language immediately creates problems for the discussion of professional life. That is, professional life deals with a particular aspect or role in one's life; it does not exhaust one's humanity. The limited (or particularistic) character of role morality immediately challenges the universal quality of most moral propositions. When we say one should not lie or steal or that one should love one's neighbor, we are usually thinking about human beings as such rather than as physicians, journalists, public servants, et al.

Principles v. Exigencies

Universal principles come under considerable pressure when they confront the exigencies of professional life. Familiar examples abound: May a physician lie to his or her patient if there is good reason to believe that the truth would considerably retard the patient's recovery? May an investigative reporter lie to "Deep Throat" to get information that will expose wrongdoing in Richard Nixon's White House? May a "double agent" lie to protect national security? Clearly, these are not the sorts of examples we have in mind when we announce as public doctrine the straightforward, moral principle that lying is wrong. Professional life demands exceptions from these universal moral principles and therefore becomes morally suspect. We fear that the exceptions may soon swallow up the rules and that the chaste simplicity of the moral principle—don't lie—will be fatally compromised by the "what ifs" of the professions' casuistry.

Role Morality

To be sure, it is not only the professions that put pressure on universal moral principles. In a certain sense, all moral acts in the concrete are examples of "role morality"—I act as spouse, parent, citizen, believer, consumer, voter, television viewer, neighbor, taxpayer, welfare recipient, etc. Circumstances may arise in each of these roles that call for an exception to a well-established moral rule—e.g., the familiar example of the parent who steals bread to feed a starving child.

The problem of professional ethics is particularly acute, however, for two reasons. First, there is the elite nature of professional life. Only the few can be physicians, attorneys, and engineers, but all of us are or can be spouses, parents, citizens, and consumers. As a democratic people, we are more comfortable with an exception that, given the proper circumstances, is open to all of us as opposed to an exception that is available only to the few. Better to trigger exceptions by circumstance than by status.

Second, the foundation of the professional's exception differs from the foundation of the exceptions demanded by ordinary persons engaged in ordinary activities. The latter usually rely on a "just this once" argument. The father steals bread today, but tomorrow he will have a job, or sell his wares, or visit the welfare office, or receive money from a rich uncle, or beg for the wherewithal to support the family. Quite literally, he practices *situation* ethics. A unique set of circumstances has conspired to override the rule that bids us respect the property of others, but the rule is overridden "just this once." If he were to institutionalize his behavior, we would say he had taken up a "life of crime"; that he was no longer a concerned parent but a thief. The point here is that moral character is usually determined by one's habits (virtues or vices) rather than by isolated actions.

Professionals, on the other hand, do institutionalize the exceptions they seek, and the exceptions are hailed as ethical principles of the profession. A successful defense attorney owes no apologies for making a clever argument that diverts the jury's attention from incriminating evidence and contributes to the erroneous verdict that a guilty defendant is innocent. Psychologists do not blush about the statement in their Ethical Standards that the use of deception in research is permissible if the knowledge cannot be generated in any other way. The spy who lies successfully to the enemy stands quite ready to do it again. Attorneys, psychologists, and spies do not appeal to a unique set of circumstances to justify their behavior. On the contrary, their behavior is based on a *principled* demand for exceptions from the rules by which the rest of us are supposed to live.

Public Interest and Self-Interest

The tension between universal principles and particularistic demands is crucial for understanding why professional codes, despite their public service language, are frequently in fact self-serving. The reason is that the justification for the exceptions the professions demand from universal moral rules is grounded in an implicit, utilitarian assumption that the profession itself can produce sufficient benefits to society to outweigh whatever harm is caused by its departure from customary morality. To clarify this point, let me cite several examples from the profession of law.[1]

- The client is the prosperous president of a savings and loan association. In leaner days he borrowed almost $5,000 from a man working for him as a carpenter. He now wishes to avoid repaying the debt by running the statute of limitations. He is sued by the carpenter and calls his lawyer (*Zabella v. Pakel,* 242 F. 2d 452 [1957]).
- The client has raped a woman, been found not guilty by reason of insanity, and institutionalized. He wishes to appeal the decision by asserting a technical defense, namely, that he was denied the right to a speedy trial (*Langworthy v. Slate,* 39 Md. App. 559 [1978], rev'd. 284 Md. 588 [1979]).
- A youth, badly injured in an automobile wreck, sues the driver responsible for the injury. The driver's defense lawyer has his own doctor examine the youth; the doctor discovers an aortic aneurism, apparently caused by the accident, that the boy's doctor had not found. The aneurism is life-threatening unless operated on. But the defense lawyer realizes that if the youth learns of the aneurism he will demand a much higher settlement (*Spaulding v. Zimmerman,* 116 N.W. 2d 704 [1962]).

In each of these cases, professional ethics would counsel counterintuitive judgments in favor of the banker, the rapist, and the driver. The reason, of course, is that the attorney's moral commitment to the client overrides broader principles of what our common sense tells us is right in each of the examples.[2] Such a

commitment can itself be morally justified only on the grounds that (1) the integrity of the legal system demands it and (2) the legal system itself is so valuable to society that, on balance, we do well to tolerate occasional injustices because of the rich benefits the system provides.

Ethics and Self-Interest

Such an argument may well be challenged on empirical grounds, but for the purposes of this chapter it is the *structure* of the argument rather than its validity that is of interest. The justification for professional conduct that defies commonsense notions of right is necessarily grounded in an affirmation of the overriding importance of the profession itself. It is the necessity for making this kind of argument that forges the link between professional ethics and self-interest. Because of the tension between the particularistic demands of the professions and the universal character of moral discourse, the professions must argue that they are worthy of the moral exception they demand. In effect, they must argue that what is good for the profession is good for society, America, humanity, or whatever.

Needless to say, such an argument is freighted with peril. To invite attention to the close connection between the interests of one's profession and broader public interests can lead to keen embarrassment. Indeed, at times it can expose professional self-adulation as ludicrous and absurd.[3]

Overriding Value

I am not interested in the preposterous aspects of professional ethics. Suffice it to say that all professionals, poor sinners like the rest of us, suffer the thousand natural shocks that flesh is heir to. It is the *argument* for professional ethics, an argument rooted in the nature of professional life, that is instructive for our purposes. No matter how upright and decent the members of a profession might be, they will at times demand exceptions from ordinary rules of morality, and when they do, they must justify their demand in terms of the overriding value of their profession for the society whose rules they would transcend. Such an argument quite properly invites close scrutiny and not a little skepticism.

PUBLIC ADMINISTRATION AS PROFESSION

Codes of ethics for government employees labor under the suspicion of being self-serving statements. This suspicion can arise from several aspects of government service, but, for the purposes of this chapter, I shall narrow my focus to the ethical concerns over political manipulation of the career civil service. Such interference is, of course, anathema to our sense of professionalism.

Value-Laded Word

I have deliberately used the value-laded word "manipulation" to signal the improper nature of the political activity to which we object. We are, of course, to be "accountable" and "responsive" to the political leadership, but we should not be subjected to political interference, meddling, or partisan pressure—in a word, "manipulation." Language of this sort goes to the heart of the merit system and is thematic in public service codes of ethics. A reaffirmation of this position came from the first director of the Office of Personnel Management, Alan K. Campbell. In response to the charge that the creation of the Senior Executive Service (SES) would lead to the "politicization" of the civil service, Campbell replied that the SES would provide "appropriate responsiveness to the government's political leadership while resisting improper political influence."[4]

One might be tempted to dismiss Campbell's delphic utterance as question-begging verbiage, but this would be a mistake—at least for our purposes. In scoring "improper political influence," Campbell proclaimed the ancient faith of civil service reform. Professional orthodoxy commits us to the belief that resistance to such influence is a cardinal principle of professional ethics. That is all quite obvious. What we tend to ignore, however, is the self-interested character of this principle.

Sphere of Autonomy

In saying that government officers or employees should resist improper political influence is to carve out for them a sphere of autonomy within the governmental process. Such autonomy is crucial for any group that aspires to professional status. The client does not tell the attorney how to cross-examine a hostile witness; the hospital administrator does not tell the physician what medicine to prescribe; the traveler does not tell the engineer when the bridge is safe; indeed, the baseball owner does not tell the manager when to change pitchers—unless the owner is George Steinbrenner.

In each of these examples, there is a sphere of professional autonomy that attorneys, physicians, engineers, and baseball managers guard jealously. It is in their interest to do so, but it is also in the interest of their client, patient, team, etc. So also with public administrators. It is in their interest to protect their administrative "turf," and in so doing, they make government more efficient and effective and thereby promote the public interest.

So the argument goes, and it's not a bad argument. To put a finer point on it, however, my position, reductively, is that in exercising certain aspects of governmental authority, government employees must be exempt from the democratic principle of subordination to political leadership and this in the name of democracy itself. To put the argument this way recalls the attractiveness of the old politics/administration dichotomy. Here was a conceptual tool that finessed the potential embarrassment in our claim to a sphere of autonomy from the elected

leadership. Indeed, it defined the problem out of existence. The discretionary character of contemporary public administration has discredited the dichotomy and forced administrators to assert their autonomy in a more forthright manner.

The Law Is Supreme

A remarkable example of this forthrightness appears in "Principles for the American Society for Public Administration" adopted by that body's National Council on July 12, 1981. The third of its ten principles reads as follows: "The law is supreme. Where laws or regulations are ambiguous, leave discretion, or require change, we will seek to define and promote the public interest."

To be sure, the law is supreme, but it is no secret that the hallmarks of contemporary public law are its ambiguity and its conferral of broad discretion on administrative agencies. Reduced to its simplest terms, the above statement is an announcement of our intention to share in governing the republic, for he who defines the public interest surely governs. The announcement is not a bureaucratic power play; it is a candid (perhaps too candid?) statement of what conscientious administrators have been trying to do for a long time. Given the fact of administrative discretion, what criterion other than the public interest is suitable for its exercise?

Not Uncommon

We should not be surprised to find such a statement in a code of ethics. As we saw earlier in this chapter, it is not uncommon for professional ethics to demand an exemption from ordinary societal standards. This is precisely what we are doing when we claim a sphere of autonomy from political leadership. The American Society for Public Administration's statement is simply a positive formulation of the more familiar negative proposition that the political leadership should not manipulate us in the exercise of our administrative discretion.

This is an example of a particularistic demand against the universal, democratic principle that all governmental activities should be accountable to the electorate. This self-interested claim is grounded in the long-term benefits the sound exercise of administrative discretion can bring to a democratic regime. Like other professional groups, we can make claims that are either plausible or outrageous. In this untidy world, they are usually a little bit of both.

CONCLUSION

If public administration resembles other professions in cherishing a sphere of autonomy, it also differs from them in some important ways. The precise grounds on which we base our claim for autonomy may be less clear for us than it is in

other professions. The "learned" professions of law, medicine, and religion can point to a lengthy period of formal training that is followed by a certification process prior to admittance to the bar, ordination, etc. The profession of engineering is more relaxed than law, medicine, and some churches in determining who belongs to the profession, but, like the learned professions, engineering also bases its professional status on technical knowledge. The profession of journalism relies less on formal training than the other professions mentioned. The journalists' claim for exceptional ethical standards rests on the vital role they play in rendering operative the public's "right to know."

Our profession lacks these advantages. In the days of the politics/administration dichotomy, we could ground our profession in the administrative skills, which, by definition, were distinct from politics. The discretionary character of contemporary public administration has taken this argument from us. We know Carl Friedrich was right when he said (in his *Public Policy and Administrative Responsibility*) that to execute public policy is to make it. Our problem is that we are really claiming an expertise in governing, a claim that is not likely to fall on sympathetic ears in a democratic society. It is for this reason that I believe the question of professionalism in public administration will always be somewhat controversial in the United States.

There is one line of argument that might possibly legitimate our claim to share in governing the republic. In the famous 1803 case *Marbury v. Madison,* Chief Justice John Marshall developed an argument in support of the power of the federal courts to declare acts of Congress unconstitutional. The argument rested in part on the oath taken by judges to uphold the Constitution of the United States. Marshall's point was that it would be immoral for judges to enforce legislative enactments contrary to the Constitution they are sworn to uphold.

Marshall ignored the fact that not only federal judges but presidents, senators, representatives, state legislators, and "all executive and judicial Officers, both of the United States and of the Several States," are required to take an oath to uphold the Constitution. The significance of Marshall's argument is that it suggests a link between the oath of office and the legitimacy of exercising an otherwise questionable power—like that of judicial review of acts of Congress. Perhaps the statutory mandate that requires from federal public administrators an oath to uphold the Constitution could provide a glimmer of hope for legitimating a principled defense of professional autonomy.

NOTES

Chapter Two originally appeared as "The Problem of Professional Ethics," *The Bureaucrat* 11 (summer 1982) and was reprinted in "The Best of *The Bureaucrat*" 20 (summer 1991): 9–12. Reprinted with permission.

1. These cases are taken from the *Report from the Center for Philosophy and Public Policy* 1 (summer 1982): 6. They are discussed more fully in David Luban, "Calming the Hearse Horse: A Philosophical Research Program for Legal Ethics," *Maryland Law Review* 40 (1981).

2. A good discussion on legal ethics can be found in Geoffrey Hazard, *Ethics in the Practice of Law* (New Haven: Yale University Press, 1978).

3. See *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977); *Ohralik v. Ohio State Bar Association,* 436 U.S. 447 (1978).

4. *Public Administration Times* 2 (August 1, 1979): 1.

PART II
Education and Training

The chapters in Part II will be of particular interest to those people who teach academic courses or conduct training sessions in administrative ethics. Since most management training courses can devote only a few hours to ethics, the constitutional approach I advocate will have to be handled quite expeditiously. For such endeavors, I believe more time should be given to a clear presentation of the problem than to its constitutional "solution." Chapter Four should be helpful for trainers concerned about how to apportion the little time they can allow for ethics training. Academicians will find Chapters Three and Five more helpful. Since they can offer full-semester courses in ethics, they will have ample opportunity to develop the ideas therein as fully as they wish.

John A. Rohr, Public Service, Ethics & Constitutional Practice, Lawrence, KS: U Kansas Press, 1998, pp. 68-75.

9

The Oath of Office

Several of the previous chapters refer to the oath to uphold the Constitution as the moral foundation for public service ethics. The present chapter develops this idea more fully and concludes with a call for the public administrator to develop "a professional competence in the constitutional heritage." Taken from the final pages of To Run a Constitution, *this chapter pulls together several themes developed in that book.*

THE OATH OF OFFICE

The oath of office captures nicely the tension between administrative autonomy and subordination. The oath justifies the administrator's claim to a certain professional autonomy in choosing among constitutional masters, and the concept of "profession" necessarily implies some sort of independent judgment. This is true of physicians, attorneys, clergymen, teachers, engineers, musicians, and athletes. If public administration is in *any* sense a profession, administrators must *in some sense* be independent of their constitutional masters in carrying on their professional activities. A principled justification of some sort of independence is the great strength of the politics/administration dichotomy and explains its survival in the face of so much embarrassing evidence demanding its demise. This independence is heady wine. It suggests rogue elephants, runaway bureaucracies, headless fourth branches, and so forth. In this chapter, I argue that the oath to uphold the Constitution legitimates some kind of administrative independence; but precisely because it is an oath to uphold the Constitution, it has the potential to tame, channel, and civilize this independence in a way that will make it safe for and supportive of the founding principles of the republic.

These, then, are the two major points I shall develop: (1) that the oath of office legitimates a degree of professional autonomy for the administrator and (2) that the object of the oath, the Constitution itself, can keep this autonomy within acceptable bounds.

OATH JUSTIFIES AUTONOMY

> *Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it and not as it is understood by others.*
>
> Andrew Jackson

The idea of the oath to uphold the Constitution being a source of independent judgment is nothing new. It was used by Chief Justice John Marshall in 1803 in *Marbury v. Madison,*[1] the case in which the Supreme Court discovered that it had the power to declare acts of Congress unconstitutional. The Constitution has no explicit language on this point. One of the arguments that Marshall used to justify the Court's power to nullify acts of Congress was that the justices are required to take an oath to support the Constitution. Marshall maintained that such an oath would be a "solemn mockery" if judges had to render decisions based on laws contrary to the Constitution they were sworn to uphold. Thus, for Marshall, the oath of office was woven into the fabric of an argument that interpreted the Constitution as conferring on judges a professional independence that permitted them to sit in judgment on at least some acts of Congress. Interestingly, Marshall ignored the fact that the Constitution also imposes an oath "to support this Constitution" upon the president, all members of Congress, all state legislators, and "all executive and judicial Officers, both of the United States and of the several States."

This point was not lost on President Andrew Jackson. In his famous veto message against the renewal of the charter of the Second Bank of the United States, Jackson cited his oath of office as the basis for challenging the constitutionality of the bank, despite a Supreme Court ruling in support of the bank. "Each public officer," said Jackson, "who takes an oath to support the Constitution swears that he will support it as he understands it and not as it is understood by others."[2]

In citing these examples from Marshall and Jackson, I do not suggest that a parallel argument can be made to support such independence in constitutional matters for the civil service. State and federal employees take oaths that are based on statutes and administrative regulations whereas the oath taken by presidents and judges is mandated by the Constitution itself. Indeed, the very words of the president's oath are prescribed in the Constitution. He must "preserve, protect, and defend" the Constitution, which is a broader duty than that of the administrator

who swears to "support and defend" it. Despite these important differences in the wording and source of the respective oaths, it is still true that both the president and the administrator take an oath to support the Constitution of the United States. If it is in the nature of an oath to confer independence, then administrators have some sort of independence in living out their oath in practice. To establish this point, we must look more closely at the nature of an oath.

Early in the Reagan administration, the public was invited to reflect on this question when the president repeatedly referred to the public servant's oath in order to justify his firing of the striking members of the Professional Air Traffic Controllers Organization (PATCO). Under these circumstances, the oath was invoked as an instrument to compel obedience. The president's position was that the air traffic controllers should be fired for violating their oath not to strike. He may well have been correct in firing the strikers; but if so, in relying on the oath not to strike, he was right for the wrong reason. The controllers had never taken an oath not to strike. They had taken an oath to uphold the Constitution and had made a promise not to strike. As we shall see later, there is an important difference between an oath and a promise. As far as the PATCO strikers were concerned, the president might well have justified his decision by arguing that termination is a just penalty for an open violation of law in a serious matter, after appropriate warnings have been given. In fact, the president sometimes made this argument, but he invariably embellished it with references to a nonexistent oath not to strike. In so doing, he trivialized the oath. He reduced a profound moral commitment to a shallow legalism.

An oath is a profound commitment because its object is always something that is or should be of great significance to the juror. The playwright Robert Bolt captures this idea when, in *A Man for All Seasons,* he has Thomas More explain to his daughter why he cannot violate his conscience by taking an oath that recognizes Henry VIII as head of the church in England: "'When a man takes an oath, Meg, he's holding his own self in his hands. Like water. *(He cups his hands.)* And if he opens his fingers *then*—he needn't hope to find himself again. Some men aren't capable of this, but I'd be loathe to think your father one of them.'"[3]

It is no coincidence that oaths, such as the oath to uphold the Constitution, usually call upon God to witness the swearing. The religious context of oaths is well known and suggests an appeal to someone or something transcendent. The sacral language of oaths directs attention beyond the parties by whom and before whom the pledge or statement is made. For this reason, an oath can never be reduced to a question of subordinating the will of one human being to that of another. Such subordination would destroy the transcendent focus of the oath.

The same point can be put in more familiar secular terms. Many of us would find the violation of an oath morally offensive because in terms of a secular ethic we believe that oaths bind in conscience. Perjury, for example, is often looked upon as a moral abomination as well as a crime. A contemporary secularist might consider the invocation of the deity quaint verbiage without retreating from the moral position that the oath itself binds in conscience. For such a person an oath cannot be simply a pledge of obedience by one person to another because no one can resign his or her conscience to the safekeeping of another. An unqualified oath to obey is a contradiction in terms. Oaths, precisely because they are of moral significance, cannot be reduced to an abdication of one's will and judgment in favor of another human being.

When President Reagan invoked the controllers' oath of office as a justification for firing them, he confused several issues. The act of firing a subordinate occurs within the context of the employer-employee relationship. This relationship, important as it is for putting bread on the table, does not rise to the level of the sort of activities that are worthy of an oath. An oath to obey a foreman at a General Motors plant is absurd. To the religious man or woman it would be a shocking example of taking the Lord's name in vain. At one level of analysis we can say that President Reagan was a boss firing some workers because they had failed to do what they were told. The argument over the justification of such an action can only be confused by references to an oath of office.

At another level we can view the president as the chief executive officer of the republic who fired the strikers for their lawlessness pursuant to his constitutional responsibility to attend to the faithful execution of the laws of the United States. At this level of argument, the oath of office is relevant, but it is the president's oath, not that of the strikers, that is at issue.

A third area of confusion is the mistake the president made in suggesting that the controllers had taken an oath not to strike. This is the oath that the controllers actually took:

> I, ———, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter, so help me God.

They also made this promise:

> I am not participating in any strike against the government of the United States or any agency thereof, and I will not so participate while an employee of the government of the United States or any agency thereof.

In criticizing the controllers for breaking their oath not to strike, the president confused a promise with an oath. The confusion is understandable; oaths and promises are both commonly thought to bind in conscience. The difference between the two is that oaths are reserved for human activities of the highest order: marriage, citizenship, the healing arts, the pursuit of justice, divine worship, and so forth. Promises can be serious or somewhat trivial. I can promise to sing at your wedding, to meet you for lunch, to send you a postcard, and so on. If at

the last minute I should wantonly break my promise to sing at your wedding, I would be doing something wrong because I would needlessly cause you and the wedding party considerable inconvenience. Suppose, however, that my reason for canceling was that at the last minute I had discovered that your bride was your own sister. My refusal to sing at the incestuous nuptials would then be understandable. I could plausibly argue that my moral objection to incest overrides my moral commitment to keep my promise, that when I made the promise, I had not realized what it was you were actually asking of me. Only a person with the morals of a Rumpelstiltskin would fault my decision.

Promises are morally binding, but they can always be reconsidered if unforeseen circumstances of a higher moral order intervene. Thus, if I break my promise to meet you for lunch because on the way to the restaurant I rescued a child from a burning building, no one would question the integrity of my decision. On the other hand, suppose I told you the reason I missed the luncheon was that I had decided that the greatest good of the greatest number in the long run would be further advanced by my staying home to plant nasturtiums. You would then rightly look upon me as a singularly unreliable fellow who does not take his word very seriously. The purpose of the institution of promise keeping is precisely to impose cloture on utilitarian calculations about the greatest good. The utility of promise keeping in human affairs trumps any such calculation.[4] This is at least one reason why we are morally obligated to keep promises. The obligation, however, is subject to reappraisal when moral considerations of a higher order intervene—such as the incestuous nuptials or the child in the burning building.

Oaths, however, are not as easily reappraised. One reason for this is the religious origin of oaths. The believer who calls upon a omniscient, omnipotent, and benevolent deity to witness his oath would be well advised to concentrate on fidelity to that oath and not to worry about the consequences. Such a person has a powerful reason for saying, "Thy will be done." The secularist lacks the assurance of the believer, but he or she is also likely to be quite cautious in saying what circumstances, if any, would justify a physician's deliberately harming a patient or an attorney's suborning perjury. These questions raise intricate problems about absolute and relative moral principles that need not detain us here. My point is simply to stress the difference between an oath and a promise and to suggest that when President Reagan confused the two in the PATCO case, he trivialized the oath.

The focus of this argument has been to present the moral significance of the oath of office as the reason for suggesting that it is a statement of professional independence rather than subservience. The argument has been played off against President Reagan's reference to the oath as a commitment simply to obey. There is something unsettling about this argument, however. What kind of independence do we want in public administrators? Surely the oath to uphold the Constitution cannot be the basis for legitimating a runaway bureaucracy.

OATH GUIDES AUTONOMY

> *In the law beyond the law, which calls upon us to be fair . . . each of us is necessarily his own chief justice. In fact he is the whole Supreme Court from which there lies no appeal.*
>
> Earl Warren

The response to the concern about a runaway bureaucracy goes to the heart of the issue of professional autonomy. If professionalism necessarily implies some kind of independent judgment, it also implies restraint in the exercise of this independence. The restraint comes from the discipline of the professional community; the oath of office can be looked upon as the rite of initiation into that community. The moral character of the oath confers *professional* independence, not personal isolation. Ordinarily, oaths are social acts. They are recited publicly, and they bring the juror into some kind of relationship with others. Thus, the vertical relationship implied in an oath's invocation of the deity is supplemented by the horizontal relationship consequent upon entering the community of the sworn. This horizontal relationship is the basis of professional standards and mores by which the initiated can tutor and discipline neophytes in the hope of keeping the profession's independence within reasonable bounds. These standards and mores can be both altruistic and self-interested.

If public administration is a profession at all, it is a nascent one and therefore lacks the specific standards that one finds in the traditional professions. As a starting point, however, in our quest for self-restraining principles on professional independence, we would do well to begin with fidelity to the constitutional heritage to which the oath of office commits the juror.

We may easily grow impatient with an expression such as "fidelity to the constitutional heritage" because we tend to think of the Constitution as law and of law as command. It is much simpler to say, "Do what you are told" than to say, "Be faithful to the constitutional heritage."

To obviate this problem, it is important to recall that although the Constitution is law, indeed "the supreme law of the land," it is a very peculiar type of law. It is quite different from, say, a traffic law. The latter simply commands: Stop! Parts of the Constitution issue commands—the decennial census, the quadrennial presidential elections, and so forth—but on a deeper level the Constitution expresses and creates a community. It brings a political order into being and gives it formal definition. It is covenant more than command. For this reason, the Constitution is a worthy object of an oath whereas a traffic law is not—even though traffic laws save lives. The Constitution is the symbol of our common life as a people who are organized for action in history. It teems with majestic generalities such as "due process of law," "privileges and immunities," and "equal protection of the laws." Such language invites those who are banded together in civic friendship to join a great public argument over the meaning of the good life.

It is an ongoing argument that has been graced by the likes of Publius and Abraham Lincoln. The document, itself, drafted in 1787, can be looked upon as the conclusion of one great public argument that began in 1607 and the premise of another great argument that is still going on today.

If we can think in terms of the Constitution not simply as command but also as covenant, symbol, conclusion-and-premise-of-public-argument, expression-and-creation-of-community, and so forth, we may begin to make more sense out of "fidelity to the constitutional heritage" than the legal positivist would allow. The oath to uphold the Constitution can then be seen not simply as a pledge to obey but also as initiation into a community of disciplined discourse aimed at discovering, renewing, adapting, and applying the fundamental principles that support our public order. The task is to see the oath more as an act of civility than of submission. The word *civility* suggests both the independence and the self-restraint we look for in professionals.

Let us now try to see what it might mean in practice for the professional administrator to look to the constitutional heritage for guidance in how to exercise his or her professional autonomy to choose responsibly among constitutional masters. Take the case of one whose administrative tasks bring to his attention presidential activities that are legally or even constitutionally questionable. It is clear to the administrator that if the president is to succeed in his dubious undertaking, he will need the support of a good number of reliable administrators and their staffs. The administrator's problem is whether the right thing for him to do is to resist, support, or ignore the questionable activity. If he reflects upon his oath of office for guidance, what is he likely to discover? Very little. The case as described is too general to yield a sensible answer. Suppose, however, that the case actually involves

1. President Nixon establishing a system of warrentless wiretapping for purposes of national security; or
2. President Jefferson considering the Louisiana Purchase; or
3. President Lincoln suspending the writ of habeas corpus without congressional authorization; or
4. President Franklin Roosevelt planning during World War II to establish "relocation centers" for U.S. citizens of Japanese origin on the West Coast; or
5. President Truman seizing the steel mills during the Korean War.

Clearly, the answer to the question of whether to resist, support, or ignore each of those constitutionally questionable activities is circumstantial, not doctrinaire. Quite literally, "It all depends." The oath to uphold the Constitution is not a talisman. Nor is it an abstract proposition from which one rigorously deduces correct behavior. It is, as suggested earlier, an initiation into a community of disciplined discourse in which one learns the ways of the constitutional heritage.

Careful study of each of the situations given above will provide the administrator with the professional competence to have a *sense* of what is constitutionally appropriate. "Sense" is emphasized because it captures the movement toward the

particular and the concrete and away from the universal and the abstract—a movement that is crucial for this argument. An example will help. In a deposition to a Senate committee investigating illegal intelligence activities, former president Richard Nixon drew a parallel between his own national-security wiretapping activities and Lincoln's paying soldiers from Treasury funds without congressional appropriation. On an abstract level, Nixon had a good point. Both presidents had engaged in dubious activities for what they considered to be serious reasons of state. It is only when we look at the issues concretely—the men and the times involved—that we see how outrageous Nixon's comparison really was.

What I am suggesting is that among the skills and knowledge that we should look for in the public administrator is a professional competence in the constitutional heritage. This should not be confused with the lawyer's competence in constitutional law, which must be up-to-date and focused on advocacy. The case for the administrator as constitutionalist deals more with history than with the present, with insight rather than advocacy, with argument rather than law. A particularly instructive example is the debate in Lincoln's cabinet over the admission of West Virginia to the Union. Secretary of State William Seward, Secretary of War Edwin Stanton, and Treasury Secretary Salmon Chase read papers defending the proposition that the loyal counties in the northwestern section of secessionist Virginia could be established as a new state. The papers of Attorney General Edward Bates, Navy Secretary Gideon Welles, and Postmaster General Montgomery Blair denounced the proposition as a violation of Article IV of the Constitution, which forbids the creation of a new state from part of an existing state "without the Consent of the Legislatures of the States concerned." Questions of military policy were nicely balanced against constitutional scruples over whether Virginia was still a state and, if so, where its legislature was to be found. Administrators who are steeped in constitutional traditions of this sort will have a profound sense of professional propriety. They will have a principled basis and, above all, a "sense" for when to bend and when to hold firm. They will know statesmanship when they see it.

NOTES

Chapter Nine originally appeared as "The Oath of Office," in John A. Rohr, *To Run a Constitution: The Legitimacy of the Administrative State* (Lawrence: University Press of Kansas, 1986), pp. 186–194.

1. 1 *Cranch* 137 (1803).
2. Mortimer J. Adlen, ed., *The Annals of America,* vol. 5 (Chicago: Encyclopedia Britannica, 1976), p. 528.
3. Robert Bolt, *A Man for All Seasons* (New York: Random House, 1962), p. 81.
4. John Rawls, "Two Concepts of Rule," *Philosophical Review* 64 (1955): 3–32.