

# THE QUALITIES OF PUBLIC SERVANTS DETERMINE THE QUALITY OF PUBLIC SERVICE

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## INTRODUCTION

Bureaucrat-bashing is an old and popular sport in the United States. Indeed, complaints about “faceless bureaucrats” and “soulless technocrats” are so common that they have become part of the background noise of our political discourse.<sup>1</sup> Some of this anti-bureaucratic impulse seems motivated by a hostility to “big government,” with critics deriding civil servants as clumsy, overzealous, or even sinister meddlers in private affairs.<sup>2</sup> Another line

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1. Ulf Zimmermann, *Democracy and Bureaucracy in the U.S.*, in PERSPECTIVES ON AMERICAN AND TEXAS POLITICS 287, 287 (Kent L. Tedin et al. eds., 3d ed. 1992); David Brooks, *The Enlightenment Project*, N.Y. TIMES, Feb. 28, 2017, at A23; see also, e.g., R. Sam Garrett et al., *Assessing the Impact of Bureaucracy Bashing by Electoral Campaigns*, 66 PUB. ADMIN. REV. 228, 228 (2006); Herbert Kaufman, *Fear of Bureaucracy: A Raging Pandemic*, 41 PUB. ADMIN. REV. 1, 1 (1981); Dean Yarwood, *Stop Bashing the Bureaucracy*, 56 PUB. ADMIN. REV. 611, 611 (1996).

2. Editorial, *What the Founders Can Teach Us*, INV. BUS. DAILY, July 2, 1998, at A28. See generally, e.g., RICHARD EPSTEIN, DESIGN FOR LIBERTY: PRIVATE

of attack depicts government bureaucrats as “captured” by special interests—often the industry or sector those bureaucrats are supposed to regulate.<sup>3</sup> Other critiques of career bureaucrats emphasize their lack of political accountability and insufficient responsiveness to the “will of the people.”<sup>4</sup> Recent right-wing paranoia over an alleged “deep state” is a particularly pathological version of this view, but milder forms have long been found across the political spectrum.<sup>5</sup> And then there’s the hoary old stereotype of government bureaucrats as lazy empire-builders (which seems a touch oxymoronic).<sup>6</sup> On this account, civil servants seek to maximize their budgets and their power, while minimizing their work and resisting any changes that would disrupt their comfortable routines.<sup>7</sup>

I trust most readers are familiar with these stereotypes. Like many stereotypes, they may have a kernel of truth. Government bureaucrats are imperfect human beings, and public bureaucracies are imperfect human institutions. But these caricatures of “faceless bureaucrats” and “soulless technocrats” convey a distorted and misleading picture of how our government actually works, and of who

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PROPERTY, PUBLIC ADMINISTRATION, AND THE RULE OF LAW (2011) (detailing the rise of anti-bureaucrat pushback in response to the expansion of American progressivism).

3. See, e.g., Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 217 (1976); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

4. See, e.g., THEODORE LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 311 (2d ed. 1979); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2336 (2001).

5. See, e.g., Jon D. Michaels, *The American Deep State*, 93 NOTRE DAME L. REV. 1653, 1653–54 (2018); Rebecca Ingber, *The “Deep State” Myth and the Real Executive Branch Bureaucracy*, LAWFARE (June 14, 2017, 11:52 AM), <https://www.lawfareblog.com/deep-state-myth-and-real-executive-branch-bureaucracy> [<https://perma.cc/88KK-WEYW>]. The term “deep state” was originally coined to describe the national security apparatus that held real power in nominally democratic regimes like Turkey, Egypt, and Pakistan; in the United States context, the term is sometimes used more narrowly to describe an (alleged) network of national security bureaucrats who are able to use secretly collected intelligence information to influence the decisions of elected officials. Jack Goldsmith, *Paradoxes of the Deep State*, in *CAN IT HAPPEN HERE?: AUTHORITARIANISM IN AMERICA* 105, 106–07 (Cass R. Sunstein ed., 2018). However, during the Trump Administration, the term has been deployed in a much more sweeping fashion to describe (and often to deride) career civil servants throughout the government who are seen as resisting the President’s agenda. See *id.* at 120.

6. See KENNETH NEWTON & JAN W. VAN DETH, *FOUNDATIONS OF COMPARATIVE POLITICS* 152–53 (Cambridge Univ. Press, 2d ed. 2010).

7. See WILLIAM A. NISKANSEN, JR., *BUREAUCRACY & REPRESENTATIVE GOVERNMENT* 36–42 (1971).

these people actually are and what they know and do and care about. Of course, critiques of bureaucratic governance have hardly gone unchallenged. Many distinguished authors, from the New Deal period up through the present day, have advanced vigorous defenses of the administrative state.<sup>8</sup> Yet even in these accounts, the qualities of the bureaucrats themselves—who they are, what they know, what they value—tend to fade into the background.

My objective in this short Article is to provoke what I hope will be a more extended discussion by raising, and briefly exploring, two related ideas. First, the performance of our public bureaucracies depends in significant part on the characteristics (skills, capacities, values, etc.) of the individuals who staff those bureaucracies. Second, our legal, institutional, or political choices influence the sorts of public servants we get, and thereby influence how well or poorly our government operates. In a nutshell, my main argument is that a well-designed bureaucratic system is one that, among other things, attracts, retains, and empowers the right sort of people. This point may seem obvious, even trivial, and in a sense it is. I certainly make no claim to wholesale originality. Many political scientists, legal scholars, and other commentators have explored the themes I will pursue here, and I am indebted to their work.<sup>9</sup> My modest goal in this Article is to pull together a few of the various threads of the existing literature to make a series of arguments about the interrelationship between the quality

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8. See, e.g., JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 1–2 (Yale Univ. Press 1938); CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 160–61 (Harvard Univ. Press 1990); Gillian E. Metzger, Foreword, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 5 (2017); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 99–100 (2000).

9. See generally, e.g., SEAN GAILMARD & JOHN W. PATTY, *LEARNING WHILE GOVERNING: EXPERTISE AND ACCOUNTABILITY IN THE EXECUTIVE BRANCH* (2013); HERBERT A. KAUFMAN, *THE ADMINISTRATIVE BEHAVIOR OF FEDERAL BUREAU CHIEFS* (1981); HERBERT A. KAUFMAN, *THE FOREST RANGER: A STUDY IN ADMINISTRATIVE BEHAVIOR* (1960); DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE* (2008); JAMES G. MARCH & HERBERT A. SIMON, *ORGANIZATIONS* (2d ed. 1993); David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095 (2008); George A. Krause & Anne Joseph O’Connell, *Loyalty-Competence Trade-offs for Top U.S. Federal Bureaucratic Leaders in the Administrative Presidency Era*, 49 PRESIDENTIAL STUD. Q. 527 (2019); George A. Krause & Anne Joseph O’Connell, *Experiential Learning and the Presidential Management of the U.S. Federal Bureaucracy: Logic and Evidence from Agency Leadership Appointments*, 60 AM. J. POL. SCI. 914 (2016); Elizabeth Magill & Adrian Vermuele, *Allocating Power Within Agencies*, 120 YALE L.J. 1032 (2011).

of the public service and the qualities of the public servants who staff it—a discussion that I hope will serve as a reminder that bureaucrats have faces, technocrats have souls, and the values and capabilities that these flesh-and-blood human beings bring to their jobs may matter more for the quality of our government than is often appreciated.

The Article proceeds in two parts. Part I sketches the reasons why the quality of public servants matters, and the qualities we would most want to see in those public servants. Some of the points here are obvious and uncontroversial, but others may be less so. In particular, I argue that we should want to attract and empower bureaucrats who are not only technically competent, but who can function as an effective counterweight to their agency’s politically-appointed leadership and its overseers in the White House and Congress. Part II then considers how factors over which politicians and other institutional designers (perhaps including courts) may have some control can influence the kinds of civil servants we get, and the consequences for overall public sector performance. Here there may be some uncomfortable tradeoffs, which should be front and center in any serious conversation about understanding, and possibly improving, how our government works.

## I. HOW THE MAKEUP OF OUR PUBLIC SERVICE AFFECTS THE PERFORMANCE OF OUR GOVERNMENT

The administrative state is inevitable. Questions about its proper size, scope, and role will always be with us, but at this point nobody, except perhaps the most deluded libertarian fantasist, imagines that we could or should get along without a large federal bureaucracy. That bureaucracy is staffed by millions of people, with a wide range of jobs and levels of responsibility, in a vast array of agencies, bureaus, commissions, and departments. And these people are generally the ones responsible for crafting and carrying into effect the rules, regulations, orders, and directives that make up much of our public policy. Therefore, it ought to be self-evident that the type of people who staff this large and powerful bureaucracy will have a significant impact on the quality of our government.

So, speaking at a very high level of generality, what qualities ought we to look for in our professional civil servants?<sup>10</sup> What kinds

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10. A potential important caveat or clarification: Throughout this Article I use, more or less interchangeably, terms like “civil servant,” “public servant,” and “bureaucrat.” I have in mind mainly unelected officials below the most senior level,

of bureaucrats would make for a good bureaucracy? I will emphasize four qualities, each of which can be thought of as an aspect of something we might call, for lack of a better term, “professionalism.” The first two qualities—competence and integrity—are obvious and probably uncontroversial. The third—which I will call “commitment”—is a dedication to the avowed goals and priorities of the agency for which the bureaucrat works. Emphasizing the desirability of *committed* bureaucrats may strike some as odd, given that much of the existing literature frets about *excessive* levels of mission-commitment (sometimes derided as “overzealousness” or “tunnel vision”), framing this as a problem that our institutions are supposed to solve.<sup>11</sup> But as I will argue below, while an excess of mission-commitment might indeed be a problem, a deficit of such commitment is also undesirable. The fourth quality I will highlight might be called “propriety”—placing value not only on doing the right thing, but on doing things the right way. (In other contexts “propriety” is largely synonymous with “integrity,” but here I use the term “integrity” to describe a public servant’s honesty, while by “propriety” I mean something more like a commitment to correct procedures that goes beyond honesty per se.) Here too the literature has traditionally emphasized the downsides of *excessive* propriety, criticizing the (allegedly) stultifying bureaucratic fixation on standard operating procedures, routines, and the like.<sup>12</sup> But in pointing out these pathologies, much of the existing commentary has exaggerated their

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but some of what I have to say would apply to officials at, for example, the deputy or assistant level. The line between “career” civil servants and “political appointees” can get blurry, especially when senior posts in a department are filled by individuals who have a long history working in that department at lower levels. Some of the discussion in this Article will be relevant for more senior political appointees, while other points will be less relevant. Rather than trying to develop a typology of public servants or to tease out the applicability of each individual argument to different types of government officials, this Article speaks in broader terms, sacrificing a degree of nuance in favor of greater simplicity and economy.

11. STEPHEN G. BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 10–19 (1993); see also ANTHONY DOWNS, *INSIDE BUREAUCRACY* 107 (1967); Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1081 (1986).

12. See Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability*, 56 DUKE L.J. 377, 434 (2006); Randall P. Bezahson, *The Myths of Formalism: An Essay on Our Faith that Formalism Yields Fairness and Effectiveness in Public Administration*, 69 IOWA L. REV. 957, 957 (1984); Edward L. Rubin, *Bureaucratic Oppression: Its Causes and Cures*, 90 WASH. U. L. REV. 291, 314–15 (2012).

significance relative to the benefits of staffing bureaucracies with people who are punctilious about doing things in the proper way.

Let me say a bit more about each of these four dimensions of what I am calling “bureaucratic professionalism,” starting with competence, defined broadly and admittedly somewhat loosely as the ability to perform certain tasks effectively and efficiently. Competence is the quality of our public servants that most obviously affects the overall performance of our government institutions. After all, the most familiar and pervasive justification for delegation of substantial policymaking authority to bureaucratic agents is that they have superior expertise.<sup>13</sup> Some of this expertise is technical—we want economists who are good at economics, epidemiologists who know a lot about epidemiology, lawyers who are skillful legal advocates, and so forth. But these are not the only kinds of expertise that are important. Many civil servants, especially at more senior levels, have broader managerial responsibilities, and so at this level we also want people who have a distinct sort of managerial expertise.<sup>14</sup> Now, lest I be accused of committing the so-called “fallacy of composition”<sup>15</sup>—assuming that a collective entity has the same attributes as its components—let me hasten to acknowledge that the competence of a *bureaucracy* may differ from the competence of the individual *bureaucrats* who staff it. An agency could be so badly designed that it acts stupidly even if most of the people who staff it are quite smart. It is also possible, though perhaps less likely, that a sufficiently clever institutional design could optimally leverage the talents of even a mediocre agency staff so as to produce high-quality agency decisions. But on the whole, it seems more probable that the quality of bureaucratic outputs will be strongly and positively correlated with the competence of the bureaucrats tasked with doing much of the agency’s work.

The reasons for wanting civil servants who have job-relevant expertise may be obvious, but it is worth noting that there are a number of different characteristics that contribute to the expertise of any given bureaucrat. The most straightforward are raw talent (intelligence, energy, focus) and job-specific knowledge and training. These are

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13. See Matthew C. Stephenson, *Statutory Interpretation by Agencies*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 285, 287–88 (Daniel A. Farber & Anne Joseph O’Connell eds., 2010).

14. See Krause & O’Connell, *Loyalty-Competence Trade-offs*, *supra* note 9, at 533–34.

15. JOHN J. MACKIE, *Fallacies*, in 3 ENCYCLOPEDIA OF PHILOSOPHY 169, 172–73 (Paul Edwards ed., 1967).

related but not the same, and there may sometimes be a trade-off between these two aspects of competence. Moreover, there are also other personal characteristics that may matter quite a bit to a given bureaucrat's overall competence at her job. Consider, for example, the importance of on-the-job experience and the associated acquisition of specialized skills. The people who are most likely to acquire that sort of experience are those who are interested in staying in their roles for a significant period of time, as opposed to those who plan to pursue new career opportunities in relatively short order. Relatedly, acquiring the right sort of expertise, and doing the job well, may also involve effort. This is true of just about all jobs, but in a setting where the remuneration is lower, finding people with the intrinsic motivation to work hard at mastering their jobs may be critical to promoting competence. Thus bureaucratic competence is the product not only of raw ability and training, but also of commitment to the job (the third quality in my list, to be discussed more in a moment).

In addition to competence, another obvious quality one would want in a government bureaucrat is integrity. Although outright corruption is not as much of an issue in the U.S. federal bureaucracy as it is elsewhere, the issue does come up occasionally.<sup>16</sup> And while the integrity of the bureaucracy is partly a function of the laws and institutions that influence the incentives of bureaucrats after they assume their posts (for example, things like anticorruption laws, conflict-of-interest rules, civil service salaries, and the like), individuals also vary in their degree of personal integrity, and those who are more honest before they join public service tend to be more honest once they are entrusted with a public service job.<sup>17</sup> So, a well-designed bureaucracy is one that not only creates incentives to act honestly, but that also tends to select and promote civil servants with high integrity while weeding out those who are more corruptible.

Competence and integrity are qualities we would want in our bureaucrats—and our bureaucracies—even if all we expected of them was to translate the policy decisions, or general policy priorities, of our elected representatives into concrete regulations, rulings, and enforcement decisions. On that “transmission belt” conception of the

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16. See U.S. DEP'T OF JUSTICE, REPORT TO CONGRESS ON THE ACTIVITIES AND OPERATIONS OF THE PUBLIC INTEGRITY SECTION FOR 2018 (2019) 22–24 (presenting data on, among other things, federal public officials charged with and convicted of public corruption offenses).

17. See generally Rema Hanna & Shing-Yi Wang, *Dishonesty and Selection into Public Service: Evidence from India*, 9 AM. ECON. J.: ECON. POL'Y 262 (2017) (presenting evidence supporting this point from outside the United States).

bureaucracy, value choices ought to be made by elected representatives, or at the very least by the high-level officials whom elected officials appoint and directly oversee, while the career civil servants ought to apply their technical, managerial, and other expertise to translate those values and priorities into specific regulatory decisions.<sup>18</sup> On this view, questions of value, or of managing hard trade-offs among competing interests, are—to use a common metaphor that is especially apt here—above the civil servants’ pay grade. If one accepts the transmission belt view, then the other main qualities we should look for in our professional civil servants would be things like loyalty to their political masters, along with a sense of humility—qualities that translate into a willingness to dutifully carry out policy choices made at a higher level. Indeed, on this view civil servants are not supposed to have their own distinctive policy views at all, and the fact that they do is the inevitable but unfortunate consequence of the fact that bureaucrats are human beings.

But the professional civil service performs additional valuable functions in our system, functions that are distinct from—and indeed in considerable tension with—the transmission belt model of the bureaucracy. In particular, there is value to having civil servants with a sufficiently strong sense of professional autonomy that they both can play and want to play a more active role in the policymaking process, a role that goes beyond simply applying their technical competence to translate the choices and priorities of elected officials into concrete policy. Bureaucrats can—and often should—influence the agency decision-making process (within legal limits).

There are a few reasons why this sort of more active role for the civil service may be desirable and why we should not fully embrace the “transmission belt”/“faithful agent” conception of civil servants’ proper role even if that vision could be fully implemented. First, and perhaps most important, the more active involvement of career civil servants—acting with some degree of autonomy and input, whether formal or informal—may help make the administrative policymaking process less politicized. That sentence is likely to set off alarm bells for those worried about “unaccountable bureaucra[ts].”<sup>19</sup> The concern is not wholly misplaced, and I will have more to say about it in just a moment, but before proceeding I want to address another common

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18. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1675 (1975).

19. Steven G. Calabresi, *The Revitalization of Democracy in the New Millennium*, 24 HARV. J.L. & PUB. POL’Y 151, 152 (2000).

critique of proposals that seek to “depoliticize” the administrative decision-making process.

That critique runs as follows: Complaints that a given regulatory decision was “political,” or that the decision-making process has been “politicized,” are misplaced because administrative policymaking is *inevitably* political; the idea that regulatory decisions could be made simply by applying “neutral expert[ise]” is a New Deal-era myth that may never even have existed then, and has certainly been buried now.<sup>20</sup> That critique is misguided in two respects. First, though of less importance for present purposes, the claim that politics will always have *some* role in administrative decisions does not refute claims that, in a given context, politics may play *too much* of a role. Second, and of greater significance here, the critique conflates two different senses of the term “political.” One sense of “political” means, essentially, normative: there are competing values at stake, and so making a decision requires not only knowing empirical facts about the world but also making value-laden choices about what would be best for the polity. Virtually all important administrative decisions are “political” in that sense. But there is a second sense in which we sometimes say that a particular decision or decision-making process is “political,” a sense is closer to “partisan.” A decision might be motivated not so much by a conclusion that it would be best for the polity but rather by a calculation that the decision would be in the interests of the current government (or of an individual politician), perhaps because it would be broadly popular in the short term (regardless of its ultimate merits), or perhaps because it would appease certain influential supporters. The rhetorical trick, which really is so obvious that we should all stop falling for it, is to respond to concerns that a given administrative decision or decision-making process was “political” in this second sense (that is, partisan) by pointing out that administrative decisions are inevitably and properly “political” in the first sense (that is, concerned with value trade-offs). When I say here that semi-autonomous career civil servants can reduce the “politicization” of administrative decisions, and that this would be a good thing, I am referring to politicization in the parochial, partisan sense.

When I suggest that semi-autonomous civil servants can resist the politicization of bureaucratic decision-making, what do I have in

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20. Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1331–34 (1984); see also Wendy E. Wagner, *A Place for Agency Expertise: Reconciling Agency Expertise with Presidential Administration*, 115 COLUM. L. REV. 2025–26 (2015).

mind? Political actors (directly or through their high-level appointees) may pressure bureaucrats—explicitly or implicitly—to reach results that would be politically advantageous, even if they would not be in the public interest. Bureaucrats can either accede to or resist such pressure. That resistance can take a variety of forms, and at least the legitimate ones do not involve any overstepping of appropriate bounds, legal or otherwise.<sup>21</sup> For example, bureaucrats tasked with performing a cost-benefit analysis of a proposed regulation can write a report that best reflects what the bureaucrats think is the “right answer” (on technical grounds), rather than slanting the analysis so that it produces the result that their political overseers want. Likewise, when asked to evaluate a range of regulatory options head-to-head, bureaucrats can give their honest opinion rather than telling elected officials what they want to hear, and can create a paper trail to support their conclusion. Bureaucrats can set enforcement priorities within the bounds permitted by law and official policy that would best advance their agency’s mission, even if this involves bringing enforcement actions that would embarrass or annoy the government, or not pursuing cases that would embarrass the opposition.<sup>22</sup>

Now it is true that career civil servants have their own political values, which may diverge not only from those of their immediate principals (the President, the President’s political appointees, and Congress), but also from those of the general public. To that extent, giving the bureaucracy influence over policy decisions may be “undemocratic.” And civil servants may also have partisan interests and biases, just as the rest of us do. I certainly would not advocate a system in which unelected bureaucrats get to make all, or even most, of the key decisions regarding policies, values, and priorities. Rather,

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21. Here, I am deliberately bracketing the more fraught questions of whether or when bureaucrats might properly go outside legitimate channels and perhaps break, or at least bend, the law to influence policy decisions—for example, by leaking sensitive information or threatening to do so. For an insightful discussion of these questions in the national security context, *see generally* Goldsmith, *supra* note 5, at 105.

22. To be clear, I am not focusing on situations in which bureaucrats have been asked to undertake or participate in activities they believe are illegal or grossly unethical. The challenges associated with that setting—whether to stay or to resign, whether or how to report through formal channels, or whether to leak to the press or the opposition—have long been considered and debated, and these issues have taken on even greater prominence in the Trump Administration. *See, e.g.*, Oona Hathaway & Sarah Weiner, *Dissenting from Within the Trump Administration*, JUST SECURITY (Jan. 17, 2017), <https://www.justsecurity.org/36420/dissenting-trump-administration/> [<https://perma.cc/B5HM-DLJC>]. But I do not explore those fraught problems here.

I am suggesting that there is a trade-off: Giving the professional civil service more influence over policy decisions may exacerbate the “democratic deficit” in administrative policymaking, but at the same time doing so may reduce the degree to which administrative policymaking is politicized in the bad, partisan sense. The challenge is striking the right balance. Yet the existing literature has tended to focus overwhelmingly (though not exclusively) on one side of the equation, obsessing over the possibility of excessive bureaucratic “tunnel vision” and “mission orientation,” while emphasizing the idea that the President—or offices close to the President, like the Office of Information and Regulatory Affairs—have a superior democratic pedigree and are likely to take a broader, more “synoptic” view of policy.<sup>23</sup> There may be some truth to this, but in focusing so much on this aspect of the problem, commentators may have developed their own kind of tunnel vision, failing to recognize that there are risks in the other direction too. Contrary to stereotypes, the people who work at regulatory agencies may have policy priorities that are not too far from those of most members of the general public, and the greater risk of distortion may often come from elected politicians (or their surrogates) placing a higher priority on reaching policy decisions that will confer partisan or other political advantages.

A second consideration, one that is perhaps a variant on the idea that a semi-autonomous career civil service can help “depoliticize” administrative policymaking, is that the bureaucratic inertia—often decried in pathological terms as “sclerosis” and “ossification”—can help moderate what might otherwise be wild swings in administrative policy following changes in partisan control of the White House. Nobody seriously contests the idea that the President ought to be able to set policy and priorities for the administration, and there is a strong political accountability argument for enabling the President to exert substantial control over the bureaucracy. Yet in an era where the major parties’ platforms are very far apart but national elections are almost always extremely close, very small changes in vote distributions or turnout, which may be determined by factors having little to do with the candidates’ policy platforms, can lead to gigantic swings in White House policy preferences. Insofar as the career bureaucracy tends to persist across administrations, and career bureaucrats are likely to have relatively more stable views of the right way to carry out their

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23. See John D. Graham & James Broughel, *Stealth Regulation: Addressing Agency Evasion of OIRA and the Administrative Procedure Act*, 1 HARV. J.L. & PUB. POL’Y 30, 35 (2014); see also Kagan, *supra* note 4, at 2336–37, 2384.

agencies' responsibilities, a more active bureaucratic role in the policymaking process will tend to dampen the magnitude of the policy swings that follow changes in partisan control of the presidency. And notwithstanding the truism that "elections have consequences," this moderating influence may be in the interest of a majority of the electorate, at least most of the time.<sup>24</sup>

A third reason that we might embrace, at least to a certain extent, a more active role for career civil servants in the policymaking process comes into play if we embrace an "interest representation" model of the administrative process.<sup>25</sup> Just as much of our constitutional theory assumes that *Congress* has interests that transcend the partisan or political interests of individual Members of Congress, and that the *Presidency* has interests that may not always correspond to the interests of an individual President, so too we might recognize that bureaucratic agencies have institutional interests that ought to be represented in the policymaking process. Now, the analogy is inapt in one important respect: unlike the three official branches of the U.S. federal government, the various entities that make up the federal bureaucracy do not have the same elevated constitutional status.<sup>26</sup> But that does not mean that many of the normative arguments for representing institutional interests in the push and pull of the policymaking process do not apply to the institutional bureaucracy, in much the same way as these arguments apply to the institutional presidency or the institutional Congress. For example, when the Department of Justice (DOJ) makes enforcement decisions (whether about general priorities or about a specific case), it may be useful to ensure that some of the people involved in making those decisions are thinking about how they might affect the DOJ's long-term institutional interests. While the Attorney General and other high-level political appointees may think along those lines to some extent, it is more likely that senior career DOJ lawyers, who serve across administrations, would give voice to those institutional interests in internal discussions.

If we want civil servants who will be actively involved in policy formation, and in particular civil servants who will resist politicization and represent their agency's institutional interests, what qualities

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24. See Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 53 (2008).

25. Stewart, *supra* note 18, at 1760–62.

26. This is not to say that the Constitution does not envision a federal bureaucracy of some kind—it clearly does. See, e.g., U.S. CONST. art. I, § 8, cl. 18 (referencing "Officer[s]" and "Department[s]" of the U.S. government); *id.* art. II, § 2, cl. 1 (same).

would we want those civil servants to have? As I noted above, one quality we might look for is commitment to the agency's mission, or more generally a commitment to the values that the agency purports to stand for. This does not mean that we want civil servants dedicated to the single-minded pursuit of one particular goal (say, environmental quality), come hell or high water, regardless of costs. But we likely do want (to continue with this example) an Environmental Protection Agency (EPA) staffed by people who care about environmental protection and who elevate the achievement of the agency's mission over, say, partisan loyalties or other ideological commitments.

Another quality that is important in our bureaucrats—if we want them to play this role as semi-autonomous resisters of partisan pressure—is what I have termed a sense of “propriety,” an intrinsic value placed on doing things in the right way. There are two senses of propriety that are relevant here. One is propriety in the professional sense of executing professional tasks in the proper manner. For an economist, this might mean analyzing economic data in the way one would if one were writing a paper for a professional academic journal. For a lawyer, this might mean giving legal advice that represents one's best understanding of the law, according to the accepted norms and practices of legal interpretation. A second sense of propriety, also important, is more specific to the bureaucratic setting: a commitment to following standard procedures and going through the proper channels, unless there is a very good reason not to. These two senses of propriety are distinct, and in some contexts might be in some tension, but I group them here because they both involve a willingness to subordinate the desire to reach a particular outcome to adherence to certain ideas about how the evaluation and decision process ought to proceed.

What kinds of people are most likely to exhibit the strong senses of commitment and propriety that I have embraced? There is likely no definitive set of criteria, but a few characteristics naturally suggest themselves. First, we would want bureaucrats who have a strong sense of identification with—and concern over their reputation with—their professional community, be it the community of economists, scientists, doctors, lawyers, or what have you. Relatedly, we would want civil servants who prioritize the “craft” values associated with their work, as well as norms of proper professional conduct. My working hypothesis is that bureaucrats with these qualities are more likely to resist pressure to reach certain politically expedient conclusions that would require them to depart from strongly held professional norms. In contrast, individuals who are more concerned

about their reputation with a partisan political audience than with their professional community are less likely to care about mission-commitment or professional propriety, and therefore are likely to be more concerned with whether the results they reach fit with a political or ideological agenda. (There is, however, at least the possibility for an internal tension here. An individual who is passionate about an agency's mission—say, environmental protection—may exhibit higher levels of commitment to that mission, which I have argued may be a good thing, but such a committed individual might also be less concerned about strict adherence to certain norms, such as rigorous data analysis, that would be expected in a professional setting.)

Another relevant consideration may be whether a given bureaucrat is a long-term public sector employee, or instead is a short-term likely to move on to other things. Here the implications for commitment and propriety are less clear, and may cut in different directions. For example, a career bureaucrat may have a stronger sense of identification with the agency and its mission, but might care less about her reputation with a professional community from which she may feel less directly connected.

To sum up, and speaking at a very high level of generality, we're likely to get a better public bureaucracy when we staff it with bureaucrats who are competent, honest, and committed both to the agency's mission and to norms of propriety. In short, we want bureaucrats who exhibit a high degree of *professionalism*, on multiple dimensions. Now, my list of criteria is likely incomplete. (For example, one potentially important quality that may not quite fit into the four I have laid out here is "good judgment," which some suggest is distinct from technical or managerial competence.) I certainly make no claims to comprehensiveness. That said, my omission of some qualities, such as "loyalty," is deliberate. While "loyalty" may be a desirable quality in a senior political appointee, whose job it is to represent and advocate for the views of the President (or perhaps some other principal), this sort of partisan, ideological, or personal loyalty is *not* something that we want to see in our career civil servants. In lieu of loyalty, some might argue for the importance a related but milder quality, perhaps something like "humility" or "knowing one's place"—an appropriate understanding that one's narrow field of expertise does not include everything that might be relevant to a public policy question, and that in the end the responsibility to decide hard questions of values and priorities falls to elected representatives. I would accept that, and I acknowledge that bureaucratic hubris or insubordination could indeed be problems. But I do not emphasize

those issues here, because they seem to me less significant relative to the amount of attention they have already attracted in the literature and public commentary.

## II. HOW POLICIES AND INSTITUTIONS AFFECT THE MAKEUP OF OUR PUBLIC SERVICE

If we agree that it is important to recruit and retain civil servants characterized by competence, integrity, commitment, and propriety, what follows? In this section, I will sketch a few preliminary ideas—some obvious, others perhaps less so—about how institutional, legal, and policy choices might improve or worsen the quality of the bureaucracy along these various dimensions. I will group these factors into three broad categories: (1) institutions relating to the appointment, promotion, and removal of civil servants; (2) monetary and non-monetary compensation of civil servants (things like salary, working conditions, and factors affecting morale); and (3) issues related to the so-called “revolving door”—movement between government and the private or nonprofit sector.

### A. Appointment, Promotion, and Removal

The rules and institutions that most obviously and directly affect the makeup of the civil service are those related to the appointment, promotion, and removal of bureaucrats.

With respect to hiring and promotion, the most fundamental decision concerns the degree to which civil service hiring and promotion is driven by political actors, as contrasted with a more formalized, bureaucratized, and “meritocratic” system. In the current U.S. federal system, public sector appointments are done through a mix of political and bureaucratic processes. Typically, the more senior the position, the greater the involvement of political actors. That is probably as it should be; the question is one of the proper degree and extent of political influence on hiring at various levels. It would be possible to have a system that is close to a purely party-controlled appointment process, something along the lines of a patronage system. It would also be possible to have a much more politically insulated civil service, with only a limited role for political influence on appointments below the very top level. And in between these extremes are a whole range of intermediate options.

What are the consequences of a more political appointments process for the four core values emphasized in Part I (competence,

integrity, mission-commitment, propriety)? A plausible first-cut hypothesis is that the average politically-appointed bureaucrat will likely be worse along all of these dimensions, for the simple reason that political actors are likely to prioritize other things, like partisan loyalty or ideological fealty, when making appointments. Furthermore, partisan loyalty and a strong sense of professional propriety may often be in tension, as the former prioritizes results over process while the latter prioritizes process over results. Moreover, even when there is no direct trade-off, in practice it is inevitable that when focusing on one set of characteristics, performance on other dimensions is worse: All else equal, politicians usually prefer a more competent bureaucrat to a less competent bureaucrat, but if they care more about ideology than competence, they will at least sometimes end up appointing or promoting a less competent but ideologically congruent candidate over a more competent but ideologically suspect candidate.<sup>27</sup> Again, that is not necessarily a bad thing, especially at the more senior leadership levels, but on the whole it seems likely that giving partisan political actors a stronger say in bureaucratic appointments will tend to select for bureaucrats who are, on average, less competent and (perhaps) less honest, with a weaker sense of commitment to the agency's mission (as opposed to their patron's political agenda), and less devotion to norms of propriety.

That hypothesis, though, is based on an important implicit assumption that needs to be brought to the surface and scrutinized more closely: The assumption is that in a professional, bureaucratic, and (allegedly) meritocratic appointment and promotion system, civil servants will be selected for one or more of the qualities advocated here. This is by no means inevitable. Indeed, it is not entirely clear how much or how well real-world bureaucratic selection systems prioritize these values. The one that is most likely given high priority in existing systems is competence, or at least those aspects of competence that are easiest to measure through credentials, experience, and (in cases of exam-based recruitment and promotion systems) test scores. Selection for managerial competence is trickier, and it is possible that political selection systems may actually do somewhat better on this dimension, at least in those cases where

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27. See Krause & O'Connell, *Loyalty-Competence Trade-offs*, *supra* note 9, at 533–34. Of course, a politician would ideally like to appoint someone who is *both* extremely competent *and* loyal to and ideologically aligned with the politician herself, and sometimes the politician may be able to find such an ideal candidate. The point here is not that there is *always* a tradeoff between competence and loyalty, but that there *often* is.

politicians are more likely to appoint people with significant public or private sector management experience.<sup>28</sup> Integrity is much more difficult to measure at the hiring stage, though bureaucracies do try to do some degree of screening in the hopes of identifying candidates with high ethical standards. (At a minimum, thorough interviewing and background checks are meant to screen out the most worrisome cases.)

What about the other desiderata emphasized here, mission-commitment and propriety? These qualities, like integrity, are difficult to measure at the hiring stage, though perhaps doing so is feasible to some degree. These qualities might come into play more at the promotion stage, and here a system in which promotions are determined through an internal, semi-autonomous process might be more likely to emphasize these qualities, on the logic that career bureaucrats in management positions are more likely than politicians to place a high value on the agency's mission and on professional norms and standard operating procedures.

The upshot of this discussion is that, while there is a strong case to be made for the President, Congress, and other political actors taking the leading role in selecting an agency's head and other senior leaders, one should be very careful before extrapolating from the democratic accountability argument for political appointments of senior leaders to the rest of the civil service. There are good reasons to think that a more non-political, routinized, and at least aspirationally meritocratic appointment and promotion system for the rest of the civil service has considerable advantages. Admittedly, taking a stand against Jacksonian-style patronage is not exactly a bold move in the early twenty-first century. Yet there are troubling signs that the enthusiasm for political appointments is getting out of control in some quarters, and we may see increasing pressure for sweeping an ever-growing set of civil servants into the category for which a political appointment process is legally required.<sup>29</sup> Doing so might increase a certain form of "democratic accountability," but would come at a steep cost in terms of other values.

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28. See *id.* (finding a substantially stronger trade-off between measures of political loyalty and policy expertise than between measures of political loyalty and managerial competence).

29. See Philip K. Howard, *Civil Service Reform: Reassert the President's Constitutional Authority*, AM. INT. (Jan. 28, 2017), <https://www.the-american-interest.com/2017/01/28/civil-service-reform-reassert-the-presidents-constitutional-authority/> [<https://perma.cc/G5GB-HQ9L>].

In addition to the question of *how* civil servants are appointed, there is also the question of *how many* civil servants are appointed. The size of the bureaucracy may correlate with the average quality of the bureaucrats, and if selection systems are approximately rational, aiming to select for the best available candidates, then this correlation will be negative. The reasoning is straightforward: Suppose the government wants to hire people for some important public job, say serving as border patrol agents or Securities and Exchange Commission (SEC) investigators. If the government hires 500 people for these positions in a given year, it will presumably screen all the applications and take the best 500. If the government wants to increase the total manpower available for the relevant task, it can hire 1,000 people instead of 500, but that means hiring 500 people who would not have been good enough to make the original cut. This observation that increasing quantity can dilute quality is as applicable in government as it is elsewhere. That does not mean that expanding total government staffing is always, or even usually, a bad idea. Depending on the context, the impact on quality might be negligible or substantially outweighed by the benefits of more manpower. But the relationship between the size of government bureaucracy and the need to compromise on various dimensions of quality must be taken into account.

In addition to the question of who can hire and promote civil servants—and the criteria they use when doing so—there is a related set of questions concerning the removal of civil servants. A well-known and ongoing debate in U.S. constitutional law concerns whether or under what conditions Congress may limit the President’s ability to remove agency heads, and I do not have much to add to that debate here.<sup>30</sup> But a related set of questions, concerning the appropriate and legitimate degree of tenure protection for other civil servants, has received substantially less attention. Tenure protections for civil servants have some well-known downsides, the most important of which relate to some of the qualities highlighted in this Article. Most notably, we want bureaucrats who are competent and honest, but tenure protections can make it more difficult to remove bureaucrats who lack one or both of those qualities.<sup>31</sup> In addition, a system with strong tenure protections may select for the “wrong” sort of applicants.

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30. See JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION: CASES AND MATERIALS* 566–605 (3d ed. 2017).

31. See DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR* 34 (1992).

Potential candidates who know they are highly capable, and who intend to work hard at their jobs, may care less about strong tenure protections because they are confident that they would not be fired even if they lacked those protections. Potential candidates who are less confident in their own abilities, or who lack a strong work ethic, may find jobs with strong tenure protections more attractive, precisely because they know they will not need to meet a high performance standard to retain their positions. Thus, when civil service jobs come with stronger tenure protections, the candidate pool may include a greater proportion of low-quality applicants looking for an easy life. Of course, as discussed above, this problem might be addressed by better screening at the front end, but such screening is never going to be perfect.

So, tenure protections might undermine average bureaucratic competence or integrity. That said, tenure protections for civil servants have a number of advantages, some well-known, others perhaps underappreciated. First, although tenure protections can reduce the average competence of bureaucrats if these protections make it hard for the agency's leadership to fire those who are bad at their jobs, tenure protections might increase average bureaucratic competence through other channels. For starters, secure tenure is a form of non-monetary compensation that can make public service jobs at least somewhat more competitive with private sector jobs, thus making it easier to attract competent people to the public sector. The private sector will usually pay more, sometimes a lot more, for talented individuals, but a private sector job is also riskier, with more uncertainty and instability. The pay cut a talented person takes by choosing the public sector over the private sector hurts a bit less if the public sector job comes with reduced uncertainty about long-term employment stability. And while it is possible that the increased job security will select for those with less confidence in their own ability, or a lower work ethic, it is also possible that it will mainly select for people who are more risk-averse, which does not seem like much of a problem (as there is no particular reason to believe that risk-aversion is negatively correlated with competence). By contrast, in a world where public sector employees do not have greater job security than private sector employees, but the latter earn dramatically higher salaries, it may be much harder to recruit and retain high-quality public servants.

Another reason why civil service tenure protections might actually increase the average competence of public sector bureaucrats has to do with the fact, noted in Part I, that certain aspects of

bureaucratic competence come primarily from on-the-job investment in job-specific knowledge and expertise, aspects of which might not translate well into the private sector. A government bureaucrat who has security of tenure has a stronger incentive both to stay in public service for a longer period, and to invest time and effort in getting really good at those aspects of her government job that are not all that portable. A civil servant without security of tenure, who worries she could be removed at any time, may be more likely to look for exit options after a relatively short time in government, lest she end up unemployable in the private sector after investing many years or even decades in a public sector job that does not have a good private sector analogue. Now, this consideration may only apply to a subset of public servants. DOJ prosecutors will probably never have trouble finding high-paying jobs at private sector law firms, for example. But in other fields, security of tenure may be important to convincing capable people not only to take public sector jobs, but to stay in those jobs for long enough to get really good at them (or, as the economists might put it, to invest sufficient effort in developing job-specific human capital).<sup>32</sup>

Yet another reason why tenure protections for civil servants may increase rather than decrease average bureaucratic competence relates to the previous discussion of patronage versus merit appointment at the hiring and promotion stage. The idea that tenure protections might undermine bureaucratic competence or integrity is premised on the idea that, in the absence of such protections, those who wield the removal power would be more likely to dismiss civil servants who are incompetent or dishonest. But what if those with the power to remove bureaucrats actually prioritize other factors, like partisan loyalty? In that case, stripping away tenure protections would not improve average bureaucratic competence, and might even worsen it—if, for example, the qualities that those with the dismissal power value most highly are negatively correlated with competence or honesty. Indeed, perhaps the most widely discussed benefits of civil service tenure protections relate to the ability of career civil servants to execute their responsibilities without fear of reprisals on political grounds.

Thus, if we want civil servants who are not only honest and competent, but who have strong senses of both mission-commitment and propriety, then tenure protections have important advantages, at least if we worry—plausibly—that an agency’s political overseers

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32. See Sean Gailmard & John W. Patty, *Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise*, 51 AM. J. POL. SCI. 873, 875 (2007).

might place too little value on those latter qualities, and in some cases might view those qualities as a negative, particularly if they lead to resistance to the implementation of a partisan agenda.

## B. Salary, Morale, and Working Conditions

In addition to the rules and practices for hiring, promoting, and dismissing civil servants, there is a second cluster of institutional and policy decisions with a clear and important influence on the type of people who staff the public sector: the formal rules and informal practices that affect the conditions of government employment. The relevant conditions include both direct, tangible factors like salary and benefits, as well as more indirect, intangible factors that influence morale and prestige.

Start with salary and other forms of material compensation like health insurance, pensions, and other perks—which for simplicity I will just lump together as part of “salary.” The most obvious dimension of bureaucratic quality that is affected by salary is competence. More capable individuals, all else equal, are able to command higher salaries in the private sector than are less capable individuals, which means the pay cut associated with choosing a public sector job over a private sector job is larger for more competent people. (This is less true, however, for aspects of competence that are highly job-specific and not easily transferred to the private sector, which might imply that the public sector salary needed to retain experienced bureaucrats with a lot of job-specific human capital might be lower than what is required to retain someone whose talents are more portable.) While public sector salaries virtually never match private sector salaries for talented individuals, the size of the public-private wage gap will have an influence, at the margin, on the ability of the public sector to attract talent. Thus, all else equal, one should expect that raising public sector salaries will increase civil servants’ average competence, while low salaries will tend to degrade bureaucratic competence.

A similar argument can be made regarding integrity, though here matters are a bit less clear. A classic argument, though raised more often in the context of relatively poor countries than in wealthy nations like the United States, is that low civil service salaries heighten the risk of bureaucratic corruption.<sup>33</sup> There are several reasons why this

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33. See Agnes Cornell & Anders Sundell, *Money Matters: The Role of Public Sector Wages in Corruption Prevention*, 98 *PUB. ADMIN.* 244 (2020); Caroline Van

might be so. First, if wages are very low, bureaucrats may supplement their incomes through bribes or embezzlement simply to avoid poverty (corruption that stems from need rather than greed). Second, and relatedly, when bureaucratic salaries are low and enforcement of anticorruption rules is relatively lax, bureaucrats may interpret this as a signal that the government expects and tacitly condones some degree of petty corruption, thus eroding the stigma and perceived legal risk of this sort of misconduct. Third, low pay breeds resentment among civil servants, especially if others with similar backgrounds are getting rich in the private sector. Disgruntled bureaucrats may come to feel that they are entitled to take a little (or a lot) extra. Fourth, when anticorruption rules are enforced, a bureaucrat found to have behaved unethically may lose her job—and the value of that job depends on the salary and other benefits that come with it. (Of course, corruption might also lead to criminal prosecution, but there are often cases in which the evidence is not clear enough to support criminal charges, but still enough to lead to dismissal.) For these reasons, many have argued that improving public sector integrity entails increasing public sector salaries.

The empirical evidence on this point, however, is unclear. In extreme cases, the hypothesis does seem to hold: Where civil service wages are below subsistence levels, it is unsurprising that corruption is rampant. And while we have fewer examples of countries where public sector wages are extremely high, there are a handful—most notably Singapore, where public sector wages rival or even exceed private sector wages—and in those countries bureaucratic corruption levels are generally viewed as quite low.<sup>34</sup> But between these extremes, the evidence that public sector wages are correlated with bureaucratic integrity is equivocal.<sup>35</sup> One reason for this may be that the range of variation in public sector wages is not large enough to make much difference—public sector wages are typically both well above subsistence levels but well below private sector wages for comparable jobs—and variance within the usual range may not matter

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Rijkeghem & Beatrice Weder, *Bureaucratic Corruption and the Rate of Temptation: Do Wages in the Civil Service Affect Corruption, and by How Much?*, 65 J. DEV. ECON. 307, 308 (2001).

34. See Jianlin Chen, *Curbing Rent-Seeking and Inefficiency with Broad Takings Powers and Undercompensation: The Case of Singapore from a Givings Perspective*, 19 PAC. RIM L. & POL'Y J. ASS'N 1, 51 (2010).

35. See generally Carl Dahlstrom et al., *The Merit of Meritocratization: Politics, Bureaucracy, and the Institutional Deterrents of Corruption*, 65 POL. RES. Q. 656 (2012).

that much. Another possible explanation is that higher salaries may attract more materialistic individuals, and such individuals might be more tempted to supplement their incomes still further.<sup>36</sup> That hypothesis does not seem terribly persuasive, however: Given that public sector salaries, at least for highly skilled people, are almost always well below private sector salaries, it is hard to see how raising public sector salaries, even by a healthy percentage, would be sufficient to attract an influx of applicants who are in it for the money and for that reason are significantly more corruptible.

That said, higher salaries may have an indirect effect on what I have called commitment, and what the political science and public management literatures generally refer to as “intrinsic motivation” or “public service motivation.”<sup>37</sup> (The concepts are a bit different, but here they overlap.) Consider a set of talented individuals choosing between a public sector career and a private sector career. To keep the example simple, suppose each individual is motivated by a combination of two factors: the salary differential and the “career satisfaction” differential. The former is determined by the gap between the private sector wage and the (lower) public sector wage. The latter is determined by how much happier the individual believes she would be working in the public sector rather than the private sector. Some individuals get no more intrinsic satisfaction from public sector work than from private sector work—a job is a job—and those individuals would always prefer a private sector career if they can get it. Others, though, would get more intrinsic satisfaction from public sector work, and would be willing to take a government job for lower pay if that intrinsic career satisfaction is strong enough. Those with the strongest sense of mission-commitment—those who think that the agency’s work is very important, and that by taking a job there they would be doing good in the world—are willing to accept the largest salary gap to work in the public sector. So, when public sector salaries are very low, the applicant pool will consist in part of those who cannot get private sector jobs (the competence problem noted earlier), but also of those who have such a strong sense of commitment to the agency’s

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36. See generally Sebastian Barfort et al., *Sustaining Honesty in Public Service: The Role of Selection*, 11 AM. ECON. J.: ECON. POL’Y 96 (2019).

37. Yannis Georgellis et al., *Crowding Out Intrinsic Motivation in the Public Sector*, 21 J. PUB. ADMIN. RES. & THEORY 473, 473 (2011); James L. Perry, *Antecedents of Public Service Motivation*, 7 J. PUB. ADMIN. RES. & THEORY 181, 185, 191 (1997); Canice Prendergast, *Intrinsic Motivation and Incentives*, 98 AM. ECON. REV. 201, 204 (2008); Bradley E. Wright, *Public Service and Motivation: Does Mission Matter?*, 67 PUB. ADMIN. REV. 54, 54–56 (2007).

mission that they are willing to work there for much less than they could make in the private sector. Increasing public sector salaries might well improve the civil service applicant pool on the dimension of competence for the reasons discussed earlier, but, among the highly capable applicants in the pool, the average level of commitment to the agency's mission might well be lower. In the extreme case, where public sector salaries equal or even exceed private sector salaries, applicants for public sector jobs would not have any higher intrinsic motivation to advance the agency's mission than do applicants for private sector jobs. Of course, there may be other ways to screen for mission-commitment, as discussed previously, but they are likely imperfect. So there may be some optimal public-private sector wage gap that balances the trade-off between attracting competent bureaucrats (which militates in favor of higher public sector salaries) and hiring committed bureaucrats (which suggests a reason for public sector salaries to be somewhat lower). In practice, the public-private sector wage gap is already so large at higher levels (lawyers, managers, scientists, economists, etc.) that I doubt that even large increases in civil service pay would have much effect on the mission-commitment of those who want to work in the public sector, but this possibility is at least worth considering.

In addition to salary and other material benefits, there are various forms of non-monetary compensation that can help the public sector attract and retain capable individuals. As noted in the previous section, tenure protections are a form of non-monetary compensation for bureaucrats (as they are for professors): most people would be willing to take a lower salary in exchange for higher job security, though how much lower depends on a range of factors, including one's risk aversion and self-confidence. Another form of non-monetary compensation is a job's social status or prestige. Admittedly, this is not the sort of thing that formal laws or institutions directly affect. But political leaders, commentators, and others employ rhetoric and symbolic actions that affect public sector morale. For example, as this Article's introduction noted, it is all too common for politicians and commentators to engage in bureaucrat-bashing. Criticism of government agencies is of course entirely legitimate, and government officials are for that reason also fair game. But that said, the way we talk about not only government agencies, but the people who staff them, may have an indirect, though potentially consequential, impact on the prestige of serving as a government official, which in turn may affect the quality of the bureaucracy. Talented and idealistic young

people may find the idea of being a “public servant” attractive, but nobody wants to be a “faceless bureaucrat.”

Furthermore, as just discussed in the salary context, the intrinsic satisfaction of public service may be one of the most important forms of non-monetary compensation that can attract highly capable people into government. Institutions, policies, and practices may affect the degree of such satisfaction in many ways. Perhaps most significant is the degree of autonomy and influence that civil servants have over the policy issues they care about. As I noted in Part I, there are good reasons why we might want bureaucrats to have some degree of autonomous influence over policy, and I suggested some of the individual qualities that might lead bureaucrats to be more willing and able to play such a role. Here I want to explore the complementary but distinct notion that the laws, policies, or practices that determine the extent of civil servants’ influence over policy outcomes may have a substantial effect on the kinds of people who choose to seek out those jobs.

Think about it this way: Suppose we adopted the strong form of the “transmission belt” conception of bureaucrats’ proper role and designed our institutions accordingly. In this world, civil servants (at least those below the senior political appointee level) do not help formulate policy; they just translate the policies and priorities of their political superiors into concrete actions. What kind of person might want a job like that? If someone believes strongly in the agency’s mission, she may want to take such a position out of a sense that she is part of something larger, loyally executing a program she believes in. That might be enough to attract talented people at a relatively junior level. But administrations come and go, and it is inevitable that over a long period of service a career bureaucrat will end up working for political principals with policy objectives that differ from each other’s and from her own. That is as it should be, but it means that we cannot rely solely on a sense of loyalty to the agency’s agenda to convince highly capable people to spend their careers as mere “transmission belts.” Similarly, people who know and care a lot about a topic will generally want to feel like their voices are heard and that their opinions matter. Such people will get frustrated in jobs where they are expected to salute smartly and execute decisions made by others—especially when these talented people could earn a lot more elsewhere. And when it comes to the question whether to stay in a public sector job over the long term, developing a lot of job-specific expertise that might not be so transferable to the private sector, a talented individual may be more willing to make such a long-term investment if she thinks the payoff

will be helping to more effectively achieve goals that she shares (at least partially).<sup>38</sup>

If this assessment is roughly accurate, then insisting on a strong version of the transmission belt model of the bureaucracy, in which the role of bureaucrats in shaping policy is tightly constrained, is likely to degrade the quality of the civil service along several dimensions. Diminishing the intrinsic satisfaction associated with public sector jobs by reducing even relatively high-level civil servants to mere functionaries will make it harder to attract and retain talented people. Those who do take public sector jobs will have weaker incentives to develop substantial job-specific expertise if they feel like that expertise will only serve to advance the agendas of others, rather than to serve policy goals that the civil servants themselves have a hand in shaping. And the kinds of people who care deeply about an agency's mission are also more likely to place a high value on being able to advance that mission in a way that seems sensible, and to bristle at the idea that they must entirely subordinate their own sense of the agency's responsibilities to decisions made by their political masters. Therefore, even those who do not share my sense that a semi-autonomous role for the career civil service in policymaking is generally good for the nation might nevertheless need to consider the possibility that making some concessions along these lines might be necessary to attract the kinds of capable people we need for the bureaucracy to function effectively. To put the basic idea another way, since we cannot or will not pay senior public servants enough money to compete with the private sector, we should give them jobs in which they feel like they are helping to shape public policy in a meaningful way. That sort of policy influence is a kind of non-monetary compensation that helps make the public sector more competitive in attracting talented people, and has the added benefit of disproportionately attracting those who have the strongest sense of dedication to their agency's mission.

Now, this all assumes that the people in power actually want an effective bureaucracy. They may not. Indeed, they may deliberately adopt strategies designed to weaken the bureaucracy by changing its personnel—reducing not only the average level of mission-commitment, but also competence, in order to reduce the scope and effectiveness of government regulation without actually changing formal law or policy. The basic approach, which I will call the “hollowing out” strategy, would look something like this: Suppose a

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38. See Gailmard & Patty, *supra* note 32, at 879–80, 882.

new administration, hostile to “big government,” wants to push policy in a deregulatory direction. There are a variety of legitimate means for doing this, including pressing Congress to pass deregulatory legislation or, if that proves infeasible, shifting policy and enforcement priorities within the permissible bounds of the existing legal framework. But these policy tools might not be viewed as fully satisfactory by an administration bent on deregulation, for three reasons. First, sometimes existing statutory mandates require regulatory action. Second, it might sometimes be too politically costly to overtly retract or weaken certain regulations, or to announce a policy of non-enforcement. Third, an administration thinking about the long term would want to lock in its deregulatory policy shift in a way that will persist even if the other party wins the next election. So, what else can the anti-regulatory administration do? One possibility is that the administration can make the agency professional staff’s lives so miserable that they leave. This can be done through formal means—restricting their autonomy, forcing them to work on meaningless or counterproductive tasks, depriving them of resources, and so forth—and through informal means like denigrating their work and treating them with disrespect. When this happens, talented people will start to depart, taking their years of experience and expertise with them. This degrades the capacity of the agency, possibly for years to come. The agency becomes less effective, and that is the point. This “hollowing out” strategy may be more important, and dangerous, than has been fully appreciated. One particularly pernicious feature of this strategy, in addition to its lack of transparency, is that it tends to feed on itself, because as good people leave, the jobs of those who remain become even more unpleasant, making them likely to look for exit options as well.

That last point relates to a larger observation concerning working conditions and morale in government agencies (and elsewhere): Like attracts like, a fact that will tend to give rise to virtuous and vicious circles with respect to the kinds of people who staff our civil service.<sup>39</sup> Consider a talented, honest person who is deeply committed to, say, environmental protection, and who has a strong sense of professional propriety. Such an individual would be more likely to want to work at the EPA if that agency is staffed mainly by similar sorts of people. She would be less likely to want to go work for an EPA staffed by

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39. See Matthew C. Stephenson, *Corruption as a Self-Reinforcing “Trap”*: *Implications for Reform Strategy* 11–12 (Quality of Gov’t Inst., Working Paper No. 2019:10, 2019).

incompetent partisan hacks. A positive agency culture can therefore be self-sustaining, while a bad agency culture can be very difficult to fix without significant effort and investment.

### C. The Revolving Door

Another cluster of laws and rules that might affect the quality (or qualities) of our civil servants are those that regulate the movement of individuals between government careers and careers in the private sector—the so-called “revolving door.” The revolving door issue has attracted a great deal of attention and worry, mainly focused on how movement between the public and private sectors may create conflicts of interest (not necessarily in the narrow legal sense) that might distort government decision-making in undesirable ways.<sup>40</sup> There are various rules in place to address these concerns, and many others have been proposed.<sup>41</sup> But how we regulate the revolving door may have consequences for the kinds of people who staff our public bureaucracies. (There are also issues related to the revolving door at higher levels of government, but here, as elsewhere, my focus is mainly on career civil servants rather than elected officials or senior political appointees. Some of what I have to say here might apply to these more senior officials, but some of it may not.)

It might be useful, at the outset, to distinguish between the revolving door’s two directions. Although commentators often speak of the revolving door as if it were one thing—indeed, the metaphor itself implies regular cycling of the same people in and out and in and out of government—the concerns related to “revolving in” (moving from the private sector to public service) might be quite different from the concerns implicated by “revolving out” (from public service to the private sector). Indeed, some people “revolve out” of government without ever revolving back in, while sometimes (though probably less frequently) people “revolve in,” leaving the private or nonprofit sector for a career government job, and never revolve back out. This distinction between revolving in and revolving out is also useful because the regulation of *entry* into government service (in an attempt to address concerns about “revolving in”) might have quite different consequences for the quality of the civil service, on various

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40. See REVOLVING DOOR WORKING GROUP, A MATTER OF TRUST: HOW THE REVOLVING DOOR UNDERMINES PUBLIC CONFIDENCE IN GOVERNMENT—AND WHAT TO DO ABOUT IT 7 (2005).

41. See David Zaring, *Against Being Against the Revolving Door*, 2013 U. ILL. L. REV. 507, 524–26 (2013).

dimensions, than does the regulation of what former public servants can do after they *exit* (regulations that are meant to address concerns about “revolving out”). Therefore, the discussion below will consider each type of regulation separately, though as I will discuss more in a moment, the issues are linked in important ways.

Consider first revolving out: the movement of individuals from public sector jobs to private sector jobs. The most prominent concern raised by critics of revolving out is that public servants’ interest in securing a future private sector job will affect how they exercise their government responsibilities in ways that are detrimental to public welfare and the agency’s mission. We might worry, for example, that an SEC regulator who hopes to work for an investment bank in a few years might be too solicitous of the interests of a particular bank, or of the banking sector in general, so as not to alienate potential future employers. Another concern is that if affluent private interests hire former public servants in order to take advantage of their connections with their former colleagues, the firms or organizations that are able to make these hires will have an unfair advantage in lobbying the agency. For these and other reasons, we may want to impose some limits on when, how, and for whom former government bureaucrats can work in the private sector. Such regulations might vary in strength from relatively mild cooling-off periods to more draconian bans from certain lines of work, and the breadth of these regulations might range from narrow (limited to certain issues that the former public servant directly worked on while in government) to expansive (for example, covering any matters handled by the ex-bureaucrat’s former agency).

How might such restrictions, whatever their other effects, influence the kinds of people who are likely to hold public sector jobs? One advantage of restrictions on post-government private sector employment is that they might tend to produce a public service applicant pool that has proportionally more individuals who are fully committed to public service careers, and who intend to remain in their civil service posts for an extended period of time, investing in job-specific skills and expertise. For someone who intends to stay in public service for a long time, restrictions on post-government employment will not matter much, and will be discounted accordingly. But those who intend to stay in government only for a few years, getting some useful experience and a line on their CV before “cashing out” by going to the private sector, might be discouraged if there are stringent limits on post-government employment or lengthy cooling off periods.

While this is an advantage, restrictions on post-government employment may also have disadvantages with respect to the kinds of

people who are attracted to public sector jobs. First, as emphasized above, public sector jobs generally do not pay as well as comparable private sector jobs, and this pay gap is largest for those who are most talented (or at least those who appear the most talented to the market). It is unrealistic to expect the U.S. government to be willing to pay agency officials salaries commensurate with the social value of their work. Yet the government is still able to attract a great many extremely capable people—people who are taking a substantial pay cut relative to what they could make in the private sector. One reason the government is able to do this is that these people know that they can exit in a few years and take a high-paying private sector job, and that the salary they will be able to command in the private market will be substantially larger as a result of their government experience. A hotshot young lawyer might be more willing to go work as a DOJ prosecutor for the first decade or so of her career, despite the lower salary, in part because she anticipates that later on she will be able to move to a law firm for much higher pay. If she were prohibited from doing so (or if there were other sorts of limitations that reduced the economic value of making the jump), she might eschew government service from the start, and simply pursue a private sector career.<sup>42</sup>

Note that the back-and-forth arguments here parallel the previous discussion of the costs and benefits, from a recruiting perspective, of higher public sector salaries: Paying bureaucrats lower salaries makes it harder to attract those with high competence, but may help select for those who care most about the agency's mission. This parallel is not coincidental: restrictions on post-government employment function in part as the equivalent of a salary reduction.

But restrictions on post-government employment may have additional effects on things like bureaucratic competence, because a government employee's market value in the private sector may depend on how she invests her time and energy during her time in the public sector. A former government lawyer, for example, is likely more valuable to a private law firm if that lawyer proved herself to be highly capable in her government job.<sup>43</sup> Here, the previous discussion of the relative portability of the skills and experience one might develop in a public sector job again becomes relevant. All else equal, a civil servant who anticipates making the jump to the private sector will have stronger incentives to invest in portable skills, both in absolute terms

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42. See *id.* at 507.

43. See Yeon-Koo Che, *Revolving Doors and the Optimal Tolerance for Agency Collusion*, 26 RAND J. ECON. 378, 378 (1995).

and relative to investment in non-portable skills.<sup>44</sup> The former effect—greater overall investment in skill development—is likely a good thing all else equal, while the latter effect—greater emphasis on the development of portable relative to non-portable skills—may be good or bad, depending on the particular job and skill sets in question.

Furthermore, turning back to the mission-commitment part of the equation, restrictions on post-government employment may increase the average bureaucrat's commitment to the agency's mission not only through the effect on the composition of the applicant pool at the front end, but also through a second mechanism: By increasing the average bureaucrat's expected tenure with the government agency, such restrictions might strengthen civil servants' sense of connection and identification with their agency. Officials who anticipate being at an agency for a long time—who see public service as their career, not as a waystation—are more likely to identify with the agency, to be personally invested in the agency's success in its mission, and to care about the agency's long-term institutional health and position. This is not to say that we would not see plenty of public servants who care deeply about their agency's mission under a system with fewer restrictions on post-government employment and higher public sector turnover. But as a relative matter, those public servants who anticipate being at the agency for a long time, and who are surrounded by similarly-situated colleagues, are likely to develop a stronger sense of commitment to the agency's mission than are those government employees who start off with an eye on the door, or perhaps one foot already out of it.

In sum, while there are lots of other effects that would need to be considered, the main trade-off with respect to the impact of post-government employment restrictions on the quality of agency bureaucrats is basically a trade-off between competence (at least in some forms) and commitment. Such restrictions may make it harder to attract very talented people to government service and may weaken incentives to cultivate and demonstrate exceptional skills while in those positions. On the other hand, these limits also mean that, all else equal, those who seek government employment are more likely to start with a strong sense of commitment to the agency's mission, and that sense of commitment is likely to grow stronger given that the post-employment restrictions tend to encourage remaining in public service for a long time, perhaps permanently. It is impossible to say anything general about how to resolve this trade-off, as so much depends on the

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44. *See id.* at 379.

details of particular contexts. But the trade-off itself appears to be one that would appear in many settings.

The same sort of trade-off likely exists—though the mechanisms are somewhat different—when we consider possible restrictions on movement in the other direction: “revolving in” from the private sector to public service. On the one hand, perhaps the most significant concern that might justify measures to limit or discourage revolving in, at least from certain jobs or sectors, is that individuals might identify more with their former non-governmental employers than with the agency, and this sympathy to one’s old industry and colleagues might influence the public servant’s decision-making. This need not be deliberate or nefarious. It might simply be the case that people often come to share the worldviews of those with whom they spend a lot of time. If you are a banker, and you spend all your time hanging out with bankers, then you see the world from a banker’s perspective. That does not necessarily change (or at least does not change quickly) if you go to work for the Treasury Department or the SEC. (Some scholars sometimes describe this phenomenon as a form of “epistemic capture,” distinct from the more familiar and materialist forms of regulatory capture.<sup>45</sup>) Of course, everyone who enters government service, except for those who come in straight out of school or from some other government employment, was previously employed somewhere else. But critics have expressed concerns that individuals who come from certain professional backgrounds—particularly working or lobbying for the industry the agency is supposed to regulate—are especially likely to have too little commitment to the agency’s mission, especially when that mission clashes with the interests of their previous employers.<sup>46</sup>

This problem is exacerbated if those who “revolve in” to government from the private sector typically “revolve out” within a few years. An individual who shifts from the private sector to the government with the understanding and expectation that she will remain in public service for a very long time, perhaps the rest of her career, is more likely to shift her identification and orientation from her old private sector role to her new public sector role than is someone who rotates into the public sector but hopes and expects to cycle back into the industry from whence she came within a few years. Thus

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45. See Oren Bar-Gill & Cass R. Sunstein, *Regulation as Delegation*, 7 J. LEGAL ANALYSIS 1, 12–13 (2015).

46. See *id.* at 13.

while I have separated the “revolving out” and “revolving in” issues in the discussion here, they are linked in this respect.

So, figuring out some way to limit or discourage individuals with certain sorts of professional backgrounds from entering the public sector might help avoid a situation where large numbers of agency personnel, particularly in more senior positions, are insufficiently committed to the agency’s mission due to excessive sympathy with their former employers and colleagues. But such limitations may, all else equal, lower the average competence of public servants, at least if some forms of relevant competence tend to correlate with prior work experience in the sectors or industries that the agency regulates. After all, if the SEC wants to regulate the banks, it needs people who really understand the banking sector at a granular level, and people with that level of understanding are disproportionately likely to work in banks. (As Senator Phil Gramm colorfully put it back in 1989, the idea that we want to avoid appointing government officials who previously worked in the regulated sector implies that our ideal public servant “would be a fellow that just came in on a turnip truck who would agree not to ever make a decision related to turnips or trucks.”<sup>47</sup>) In some areas this may not be all that much of a problem, because there are a sufficient number of experts in the relevant technical fields who were not previously employed by the sector to be regulated. But in other areas this will be more of a difficulty. As with the discussion of the revolving out problem, it is impossible to say anything general about the right way to manage this trade-off. Figuring out the correct approach would depend on the details of particular contexts in which the issue might arise. But the basic dilemma likely crops up in many different areas.

#### CONCLUSION

The study of the administrative state, in the United States and elsewhere, has generally focused on “big picture” institutional questions regarding things like the design of accountability, oversight, and coordination mechanisms, as well as longstanding debates about the bureaucracy’s appropriate size, scope, and powers. These issues are of fundamental importance. But the focus on these broad questions, coupled with the understandable emphasis on the struggle for control at the highest levels (involving the President, Congress, the

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47. *Excerpts from Senate’s Debate on the Nomination of Tower*, N.Y. TIMES, Mar. 3, 1989, at A1, A22.

agencies' top leadership, and the courts), has perhaps obscured the extent to which the quality of our government depends substantially on the characteristics of the individual human beings who staff it—not only the cabinet secretaries and agency heads, but the mass of senior career civil servants and the appointed deputies and assistants who may not be household names even among the most dedicated political junkies, but who are collectively responsible for much of what our government does and how well it performs.

My goal in this short Article has been to emphasize, first, that if we want our government to function effectively, and to advance some normatively attractive notion of the “public interest” (recognizing but bracketing longstanding debates about how to understand that concept), then we should try to design our laws and institutions so as to attract, retain, and empower public servants with a set of desirable qualities. In addition to obvious and uncontroversial qualities like competence and honesty, we should also prefer public servants who exhibit a high level of commitment to the mission of their agencies, coupled with a strong sense of propriety, both in the sense of professional propriety (performing analysis that meets high professional standards even if it produces results that are politically unpalatable) and bureaucratic propriety (following the right procedures, crossing the *t*'s and dotting the *i*'s). These latter qualities are not only likely to contribute to public servants' overall performance, but are more likely to establish the civil service as a bulwark against the excessive politicization (in the bad, partisan sense) of the administrative state. My second objective has been to sketch, briefly and admittedly superficially, some of the ways that the quality of our public service, along these various dimensions, might be affected by laws and policies related to things like the appointment, promotion, and removal systems; compensation and working conditions; the extent to which public servants have a degree of autonomy and meaningful input into the decision-making process; and how we choose to regulate (or not to regulate) the “revolving door” between the public and private sectors. Even this cursory treatment illuminates some challenging trade-offs, and more generally indicates the need to pay closer attention to how our institutional, legal, and policy choices—including certain choices that are not, on their face, about influencing the makeup of the civil service—may have a substantial effect on the quality (or qualities) of our public servants, and hence on the quality of our government.