

In Praise of Bureaucracy

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Jon D. Michaels, [The American Deep State](#), *Notre Dame L. Rev.* (2018, forthcoming), available at [SSRN](#).

In *The American Deep State*, [Jon D. Michaels](#) pushes back against the increasingly shrill rhetoric charging that shadowy forces deeply embedded within the federal bureaucracy have commandeered the reins of government and are thwarting the President and undermining the democratically expressed will of the people. Michaels does not shrink from the “deep state” terminology, but rather seeks to co-opt it in an ode to what he calls “bureaucratic depth.”

Michaels extols numerous advantages of bureaucratic depth. First, he notes that bureaucratic depth is, as a practical matter, what makes the state work. It is a measure of state capacity. The deep bench of civil servants in the United States “mak[e] and enforce[e] regulations, design[] and run[] welfare programs, combat[] crime and corruption, and provid[e] for national defense.” These functions simply do not work—or do not work well, consistently, and non-corruptly—in states that lack bureaucratic depth. Second, Michaels argues that for precisely this reason, bureaucratic depth generally facilitates the implementation of the president’s agenda. Presidents should not, as a matter of course, wish for a hollowed out administrative state if they want to advance a political agenda. Finally, Michaels argues that bureaucratic depth can serve important stabilizing and accountability functions. “In those rare instances when presidents (and their hand-chosen agency heads) go beyond the proverbial pale, those in the civil service are particularly well-positioned to challenge, and even to resist, directives lacking a scientific, legal, or commonsensical foundation.” At base, his argument is that bureaucratic depth advances important rule-of-law values by serving as a check on lawless exercises of presidential power. Those outside the civil service are unlikely to have the combination of inside knowledge and protection from retaliation necessary to promote transparency about unlawful, unethical, or extraordinarily unwise presidential initiatives.

It is, of course, this last function that riles opponents of the “deep state.” Michaels elaborates two categories of reasons why we should not worry that bureaucratic resistance amounts to anti-democratic appropriation of presidential prerogative. First, he argues that the American deep state is knowable and transparent—in his words, it is “not shadowy.” By law and in practice, American agencies are open and accessible—far more so than either Congress or the White House. The public has many means of obtaining information about agency actions and many avenues for fully and extensively participating in agency decision-making processes.

Like routine agency decisions, Michaels argues that acts of resistance by civil servants tend to be taken publicly and supported by information gathered by the agency. For instance, bureaucrats may publicly state their opposition to political leaders or leak information or reports supporting or discrediting a particular policy or claim supported by political leaders. Michaels’ point is that “on those occasions when the American bureaucracy takes sides against the elected leadership, it tends to show its work, laying bare the justifications for any apparent affront to the White House[.]” This allows members of the public to decide for themselves which side has the better argument, effectively enhancing transparency and democratic accountability. Michaels points out that civil servants lack the legal authority to affirmatively block presidential policy initiatives by substituting their own preferred policies. Civil servants who disagree with political leadership must usually assume a defensive posture, challenging problematic initiatives rather than putting forward initiatives of their own. Even the most resistant bureaucrats cannot take the reins of the state and change laws in ways that suit themselves. In other words, the idea of a coup d’etat by civil service bureaucrats in the U.S. deep state is nonsensical.

Second, Michaels argues that the deep state is well positioned to play the important backstop role assigned to it,

because it is broadly representative of the country at large—indeed, much more so than the political branches. Unlike the political branches, the federal bureaucracy is not populated by elites. Federal civil servants earn an average of \$80,000 a year and only about half are graduates of a four-year college. By contrast, in 2014, there were 210 millionaires in the House of Representatives and 69 millionaires out of 100 Senators. Around this same time frame, twenty Senators had graduated from Harvard or Yale. Thus, “ordinary Americans may have far more in common with the typical federal civil servant than they do with their congressional representatives, cabinet secretaries, and certainly the president.” Beyond class composition, the bureaucracy is internally diverse and broadly representative on several other dimensions. There is substantial geographic diversity, with 85% of civilian, non-postal federal employees employed outside of Washington, DC—roughly half in red states and half in blue states. Women comprise 42% of the federal civil service, more than doubling the percentage of female representation in Congress. The civil service’s percentage of nonwhite employees is almost identical to the percentage of nonwhite citizens in the population generally (37% and 38%, respectively). Finally, there is balance in the political affiliations of civil servants, with 40% identifying as republican and 44% as democratic.

In addition to demographics, Michaels explains that the institutional design of the bureaucracy fragments its power and thus limits its ability to overbear the political branches. Each agency has limited jurisdictional reach, and overlapping agency authority generates bureaucratic competition that allows agencies to check one another’s powers. “[O]ur fragmented deep state has few of the interlocking features that characterize powerful clans’ ready control over multiple ministries and state enterprises, as we find in nations with conventionally labeled deep states. Indeed, our fragmentation makes any type of coordinated, systematic attack on the political branches (or on democracy itself) all but impossible and, in any event, implausible.” Michaels develops this internal separation-of-powers framework in much greater detail in his new book, [Constitutional Coup](#).

I suppose that little of this will be feed-worthy news to administrative law scholars, so why highlight the piece here? I do so because I think it is an important corrective not only to the histrionic political rhetoric about the “deep state,” but also to unspoken assumptions underlying much influential administrative law scholarship. While “deep state” paranoia is not openly peddled in administrative law scholarship, the anxieties that animate it underpin much prominent work in the field. Theories of presidentialism and the turn to political accountability as the touchstone of administrative legitimacy either betray or capitulate to fears of bureaucratic tyranny, and it is high time to reckon with those fears as the political branches mount ever-more aggressive attempts to obliterate bureaucratic depth.

Administrative law scholarship seems to have largely forsaken the virtues of bureaucracy. There are, of course, the [classic Weberian virtues](#): regularity, autonomy, decision-making based on the rule of law rather than personal interests or hostilities. While Weber recognized the dangers and limitations of bureaucratic organization, he plausibly found bureaucracy to be normatively superior to alternative models of political control—namely, domination by a charismatic leader or domination sanctioned by nothing more than longstanding tradition. In addition, there is research suggesting that bureaucracy has important instrumental values, producing social and economic goods: specifically, greater bureaucratic depth is associated with greater economic growth and less corruption. [Scholars have even suggested](#) bureaucracy is a site of myriad and diverse human passions: not only disagreeable passions like isolation and frustration, but constructive (and even enjoyable) passions like focused attentiveness, mastery, and gratitude.

Of course, there are obvious problems and pathologies associated with bureaucracy. But there is a much larger and richer conversation to be had about these issues than we have been conducting in administrative law of late. Michaels’ piece seeks to provoke that conversation by reclaiming the “descriptively powerful concept [of the ‘deep state’] from the bad guys.”

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