
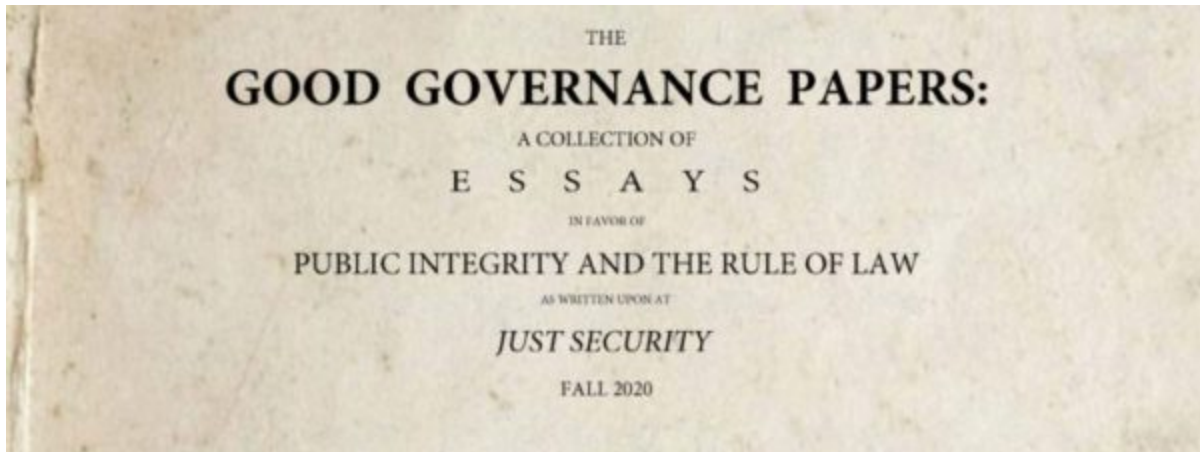


Good Governance Paper No. 17: How to Use the Bureaucracy to Govern Well

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By Rebecca Ingber

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[Editors' note: This essay is one in a series—the *Good Governance Papers*—organized by *Just Security*. In these essays, leading experts explore actionable legislative and administrative proposals to promote non-partisan principles of good government, public integrity, and the rule of law. For more information, you can read the [Introduction](#) by the series' editors.]

In every new presidential administration, the President and political appointees come to power with strong views about the policies they wish to enact and the substantive breaks they wish to make with the administration that came before – including views on where the U.S. government should change legal positions on key issues. But views on substantive positions alone are not enough preparation for a new administration seeking to impose its values on the government. And policy preparation on substance is especially insufficient when an incoming administration's values include norms of process – such as adherence to the rule of law, policymaking based in expertise and information, and the neutral application of justice – that stand in contrast to those of an outgoing administration. At least as important for a new Administration is consideration of how to implement its positions and promote its values within what I call the “bureaucratic architecture” of the executive branch and how to organize that bureaucratic architecture to inform good decisionmaking when novel issues arise. I will call such affirmative consideration of process-based values and how to structure the bureaucracy to accomplish substantive goals “Intentional Bureaucratic Architecture.”

Below I offer four concrete recommendations for deploying Intentional Bureaucratic Architecture within the executive branch. But first, I will establish three key background considerations that provide context for these recommendations. The focus of this piece is primarily executive branch legal decisionmaking, but many of these recommendations apply equally to other areas of policymaking.

First, make room for the views and expertise of career officials. As a political appointee entering a new office, ask those career officials: What are the big issues on the horizon on which we will need to take policy or legal views? What are the problems with the positions I am inheriting? What is and is not working? Where are the points of conflict with our allies abroad or with Congress? Career officials are the institutional memory of the government and often the only real experts in the specific work of their agency. They will know about the skeletons in the closet and where the bodies are buried and all the other metaphors for knowing things that other people do not. Turn to them early. Value them. They will have views informed by experience rather than partisan politics. But all bureaucratic actors, including civil servants, also bring to the table their own biases, and they may overvalue the priorities of their own office over others. Valuing their role does not mean handing the reins over to the civil service—good governance requires exercising judgement and balancing the benefits of experience and expertise with fresh eyes and leadership. A savvy bureaucratic actor might know how to “get around” the bureaucratic roadblocks, but the wise bureaucratic player also knows how much the career bureaucracy has to offer and exercises judgment based in clear values about when to defer and when to overrule.

Second, get ahead of decisions: choose vehicles for action carefully and early. The reality of government life is that much of the big decisionmaking happens in the face of a fire drill. As I’ve written elsewhere, the trigger or “interpretation catalyst” that compels the government to consider and assert a position—in other words, the cause of that fire drill—shapes the whole process of decisionmaking and the resulting decision. When an issue arises in defensive litigation, a litigation-driven process controls. That means that career line attorneys shape the government’s legal posture, drawing from longstanding positions and often using language from old briefs. DOJ calls the shots in a context biased toward zealous defense of *past* action. That looks very different from a decisionmaking process that results from the president issuing an executive order or presidential memorandum, a White House official deciding to make a speech, the State Department filing a report with a treaty body, or DOD considering whether to engage in an operation involving force. Each of these interpretation catalysts triggers a different process for decisionmaking that will shape the resulting outcome. But because of the stickiness of government decisions—and the urgent need to move on to the next fire drill—these positions become entrenched once taken. That means that the process and outcome are driven by the hazards of external events, *unless* officials find ways to take the reins and get ahead of them.

And finally, an incoming administration must put real effort into Intentional Bureaucratic Architecture by deliberately and deliberatively creating and managing the bureaucratic processes in which decisionmaking happens. Novel issues arise and fire drills will inevitably happen in even the best prepared administrations. The bureaucratic architecture will dictate how decisionmaking happens from the novel crises to the bread and butter of daily agency work. There are countless varieties of decisionmaking models inside the executive branch, which I have classified in other work. These include a unitary decider model, of which DOJ's Office of Legal Counsel (OLC) is a prime example, an agency decider model, and a group lawyering model. All of these models will continue to co-exist. Most modern national security decisionmaking engages the interests and operations of multiple agencies. Therefore, in a functional government, most of these decisions will involve group lawyering in some format—from agency lawyers picking up the phone to coordinate with counterparts in other agencies to ad hoc meetings to formal regularized working groups with clear hierarchies all the way up to the cabinet. Often these processes evolve organically, as issues arise. Some are created from the top down by presidential administrations that want to impose order on the process. But all of these group lawyering dynamics often lack a well-defined process for determining the outcome in cases of conflict or deciding how to establish a clear output. This requires rule setting and organizing the process from the top down.

How the Executive Branch Should Deploy Intentional Bureaucratic Architecture

What are the components of a bureaucratic architecture that yield good decisionmaking?

Considered conventions. Decisionmaking structures inside the government often develop organically over time and then become entrenched, not through clear intentionality but simply because what has been done before has worn a groove into a path. This can result in ill-considered patterns with respect to who controls the pen on a given decision, which decisionmakers are regularly part of the process, what role the White House or partisan politics can play in particular types decisionmaking, how conflicts are resolved, and who is the ultimate authority. Decisions about process may and should have different answers depending on the particular task at hand, as all of these factors will heavily influence the output, but this requires an intentional, considered approach to decisionmaking that is often lacking.

Recommendation 1: Senior policymakers in a new Administration, including legal advisors, should step back and assess the overarching conventions they intend to govern decisionmaking. These must include, at a minimum, re-instating buffers between partisan politics and law enforcement and intelligence decisions, and shielding experts from partisan meddling in their factual reports or legal analysis, as well as considerations about when politics can and should influence decisionmaking and promote change.

Criticality of expertise. One key element of good decision-making is the inclusion of decisionmakers with relevant expertise and information as well as a commitment to give those decisionmakers authority over decisions within their areas of expertise. Group decisionmaking is often hailed for bringing together all the relevant players with expertise and interest, and for allowing the full airing of views. But it can also stifle dissent, promote group think, and reduce a sense of accountability among the various decisionmakers. It can dilute the relevant expertise in the room, for example when the entire group is asked to weigh in on a matter on which only a small subset have expertise—such as a question of international law. Inclusion is not enough. There must be a strong connection between the relevant expertise in the room and authority over decisions deploying that expertise.

Recommendation 2: The State Department Legal Adviser’s office, which holds much of the government’s expertise in international law, should receive some deference on those matters, as should other offices when they have specific expertise that other agency actors do not. Executive branch lawyers who convene and oversee group legal processes, such as the National Security Council Legal Adviser, the White House Counsel, the Attorney General, or others, must ensure that dissenting views are heard, and that the relevant expertise is not merely in the room, but also given appropriate weight.

Clarity of output. Often, and particularly on matters of significant debate, as I have explored in the context of Obama era war powers lawyering, group decisionmaking results in an ambiguous output. This arises because actors seeking consensus will coalesce around the lowest common denominator, the most basic premise around which they can agree, and will inevitably have to stop at a level of generality when there is debate over anything more precise. When the question on the table is the legality of action, and there are differing views on the appropriate legal rationale, this may result in a decision to act but with no clear consensus on why it is lawful. In fact, this may mean that the government takes action even when a majority of the relevant officials are opposed to any one legal rationale for doing so. In addition, the fire drill phenomenon addressed above can result in the need to orally brief under time pressure a legal rationale that is then inadequately memorialized—or recognized to be insufficiently theorized—after the fact. Intentional bureaucratic architecture requires attention to output, including the legal analysis undergirding that output. At a minimum, the outcome should be clear and disseminated to the relevant government stakeholders. Moreover, making the output *public* (or as much of it as possible) incentivizes clarity of output and allows for broader debate and accountability when the legal rationale for government action is overly generalized or otherwise weak.

Recommendation 3: The National Security Council Legal Adviser, White House Counsel, Attorney General, the State Department Legal Adviser, as well as the other general counsels of departments and agencies, should establish guidelines for their offices as well as for their group processes to memorialize their legal rationale for government action, with a presumption that they will publish that view unless they provide a compelling reason that prevents it.

Re-considering Consistency. Consistency is an important value in governance, but it can at times be used instrumentally as a barrier to necessary change, especially when a president who values norms favoring consistency follows an administration that has flouted them. This can create a tension: an administration that seeks to restore the buffers around law enforcement decisions from a White House that has politicized it, for example, will first need to be able to clean up the decisions left over from that Justice Department. Even within a given administration, it is important to be able to reconsider certain decisions, given the often ad hoc and firedrill-driven nature of decisionmaking noted above.

Implementing intentional bureaucratic architecture must include consideration for *when* consistency is a critical value. Has there been significant reliance on the position the government has espoused? Have other parties, such as treaty partners, organized themselves around the position? Will people or other parties be harmed as a result of a change? At times a stable system is more important than any particular substantive set of rules, but often the converse is true. And it is particularly dangerous to entrench decisions that are not reached through cautious, deliberative, forward-looking processes, that do not appropriately buffer law enforcement or intelligence decisions from partisan politics, that do not appropriately marry expertise to authority, and that do not reflect well-considered rules for addressing conflict and reaching a clear output—in short, decisions reached outside of a well-functioning Intentional Bureaucratic Architecture.

Recommendation 4: The president should request that the Attorney General as well as general counsels of cabinet-level departments and agencies conduct a review alongside career attorneys in their offices of the major, salient decisions made in recent years as well as ongoing decisions for both substance and process. This review should take into account the value of consistency alongside the conventions I discuss above, as well as the nature of the decisionmaking process. This is a modification of norms that historically entrench and favor the status quo without regard for how we ended up there. It is also a significant commitment of time, of which government actors have precious little. But it is necessary to ensure that the single norm of consistency, while often important, does not trump all others.

The structure of decision-making inside the executive branch is often overlooked in favor of the substantive policies Presidents and policymakers come into office seeking to establish. This is a mistake and a missed opportunity. Intentional bureaucratic architecture is not only essential to establishing those substantive policies. It also means entrenching procedural norms of good government and creating an effective decisionmaking structure to make clear, fair, and informed decisions going forward.

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