

CONSTITUTIONAL ADMINISTRATION AND COLLECTIVE BARGAINING: A SYMPOSIUM ON PHILIP HOWARD'S *NOT ACCOUNTABLE*

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Some constitutional powers are also constitutional duties. Perhaps the most famous is the president's responsibility to "take Care that the Laws be faithfully executed."¹ The Constitution assigns this duty to the president, and the president alone.

"But the President alone and unaided could not execute the laws," Chief Justice Taft wrote for the Court in *Myers v. United States*.² "He must execute them by the assistance of subordinates."³ Our government needs more than just a president; it needs good constitutional administration—a body of political appointees and other civil servants and employees who will administer Congress's laws under the president's direction. This has been one of the central challenges of constitutional government, from the very start: not simply the creation of executive departments, but their staffing with good leaders and employees.⁴

William Howard Taft knew this firsthand, of course, from his own time in the White House—indeed, given his own frustrations with adversaries within his own government,⁵ there is weight in his further observation in *Myers* that each president "must place in each member of his official family, and his chief executive subordinates, implicit faith."⁶

Can such implicit faith be fostered in an adversarial process—that is, in the collective bargaining process that in recent decades has come to define modern agency employment?⁷

FDR was famously skeptical of such a notion. "All Government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted into the public service," he wrote to federal employees threatening to strike in 1937.⁸ "It has its distinct and

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¹ U.S. CONST., art. II, § 3.

² 272 U.S. 52, 117 (1926).

³ *Id.*

⁴ See, e.g., LEONARD WHITE, *THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY* 116–27 (1948) (on the creation and early staffing of the Treasury Department); *id.* at 257–63 (on President Washington's personnel decisions more broadly).

⁵ See, e.g., Adam J. White, *Chief Justice Taft, President Taft, and the Myers case*, YALE J. ON REGUL. NOTICE & COMMENT, Aug. 30, 2020, <https://www.yalejreg.com/nc/chief-justice-taft-president-taft-and-the-myers-case/>.

⁶ *Myers*, 272 U.S. at 134.

⁷ Exec. Order 10,988, 3 C.F.R. § 130 (1962) (President Kennedy's authorization of public sector unions).

⁸ Letter from President Franklin D. Roosevelt to Luther C. Steward, President, Nat'l Federation of Federal Employees (Aug. 16, 1937), <https://www.presidency.ucsb.edu/documents/letter-the-resolution-federation-federal-employees-against-strikes-federal-service>.

insurmountable limitations when applied to public personnel management. The very nature and purposes of Government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with Government employee organizations.”⁹

Recent years have seen a significant re-evaluation of the role of public sector unions in American government,¹⁰ particularly amid urgent debates over the power of such unions in policing and education. Now Philip Howard puts the constitutional point front and center, in *Not Accountable: Rethinking the Constitutionality of Public Employee Unions*.¹¹

The book is helping to inform and elevate this crucial debate about constitutional administration, spurring thoughtful responses in turn—including this symposium, which the Gray Center was pleased to help organize.

⁹ *Id.*

¹⁰ See, e.g., DANIEL DISALVO, GOVERNMENT AGAINST ITSELF: PUBLIC UNION POWER AND ITS CONSEQUENCES (2015); PAUL VERKUIL, VALUING BUREAUCRACY: THE CASE FOR PROFESSIONAL GOVERNMENT (2017).

¹¹ PHILIP K. HOWARD, NOT ACCOUNTABLE: RETHINKING THE CONSTITUTIONALITY OF PUBLIC EMPLOYEE UNIONS (2023).