Confronting the Administrative Power Grab

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Commentary

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Administrative law is the collection of rules governing the welter of government agencies -- ranging from the Environmental Protection Agency and Food and Drug Administration to the Securities and Exchange Commission -- that are neither legislatures nor courts but which make binding law. It appears to be a dull and arcane topic, remote from the great issues of the day and reserved for judges, lawyers, and the most dedicated students of constitutional law and public policy. But administrative law may prove to be the battleground on which the decisive struggles for constitutional freedoms will be fought.

This is not how most Americans conceive of the contemporary threats to freedom. The conventional views are encapsulated in the controversy over President Trump's executive order temporarily banning entry into the United States of foreign nationals from six countries determined by two successive administrations to present a heightened terrorist threat.

The consensus on the left is that the greatest present danger to freedom in our country stems from the Trump administration. Therefore, progressives applauded the judges on the U.S. Fourth Circuit Court of Appeals who *invalidated* the president's executive order on the grounds that Trump's crude utterances—on the campaign trail and in office—revealed impermissible motives that could prompt infringement of American Muslims' constitutional rights.

Many on the right think the Fourth Circuit's decision lawlessly defied clear Supreme Court precedent. Under settled law, an executive order denying admission to an alien passes constitutional muster provided that it is based on "a facially legitimate and bona fide reason." Protecting America against jihadism is such a reason.

From the conservative point of view, the Fourth Circuit's blocking of Trump's executive order illustrates the typical progressive attitude that formalities of law and constitutional government must yield to policies that advance progressive ends. The relentless growth of the regulatory and welfare state, according to the conservative critique, stems from progressives' putting their partisan preferences ahead of the Constitution's clear and explicit commands.

Legal scholar Philip Hamburger believes the conservative critique is nearer to the mark, even as it underestimates the invidious legal mechanisms by which the federal government regulates Americans' lives and redistributes their wealth. In "The Administrative Threat," a brisk pamphlet published by Encounter Books, he distills the central argument of his daunting 2014 scholarly work, "Is Administrative Law Unlawful?" His chief contention is that "administrative power evades governance through law and thereby circumvents constitutional process and procedural rights." A professor at Columbia University Law School and perhaps the nation's premier historian of the American constitutional tradition, Hamburger comes to the drastic conclusion that we should "reject all administrative power" and "consider it the civil liberties issue of our time."

When administrative power is faulted, Hamburger notes, it is usually for economic reasons. Critics contend that administrative power "is inefficient, dangerously centralized, burdensome on business, destructive of jobs, and stifling for innovation and growth." This is all true, argues Hamburger, but it does not get to the root of the matter. The limitation of the economic critique is that it "usually accepts the legitimacy of administrative power—as long as it is not too heavy-handed on business."

Hamburger attacks the very idea of administrative power. The simplicity of his argument belies its far-reaching implications. "Under the U.S. Constitution," he writes, "legislative and judicial acts are the only ways for the federal government, at the national level, to create domestic legal obligation." Yet administrative agencies routinely promulgate rules and regulations, issue interpretations, and announce quasi-judicial rulings that have the force of law.

A reflexive response to Hamburger is that administrative law is an indispensable innovation developed to deal with the complexities—unforeseeable by America's 18th century founders—in governing a vast, complex, transcontinental 21st-century nation-state. Hamburger replies that the administrative threat reflects the natural desire of rulers to evade the constraints of the rule of law. It predates the Constitution, he stresses, and is a form of "absolute power" at odds with the tradition of freedom precisely because it operates outside the pathways prescribed by the rule of law.

Administrative power, Hamburger observes, finds its antecedents in 17th-century English absolutism. In defiance of established parliamentary mechanisms, King James I used "prerogative tribunals" such as the notorious Star Chamber and High Commission to regulate the economy and make new law through statutory interpretation. His tribunals also tried subjects in inquisitorial proceedings that disregarded the procedural rights guaranteed by courts. And, when it pleased the king, they suspended or dispensed with the law altogether

Hamburger asserts that when the Affordable Care Act authorizes the Department of Health and Human Services to issue brand new binding rules; when the EPA conjures up "the Clean Power Plan" to create sweeping standards regulating power plants' greenhouse gas

emissions; when the SEC pursues insider trading cases before SEC administrative judges—then, and in countless similar actions, the American administrative state exercises, as did King James's prerogative tribunals, absolute power because it is unaccountable power.

The Founders were united in their determination to eliminate the exercise of absolute power, and the Constitution incorporates numerous safeguards against it. It places legislative power exclusively in Congress and judicial power exclusively in courts. It prohibits both branches from delegating their powers. It withholds from the executive the power to waive or suspend law. Although Article I grants Congress power to make all laws that are "necessary and proper" to implementing government's legitimate powers, the Constitution withholds from Congress the authority to create extra-constitutional powers or violate constitutionally enumerated rights and procedures. Finally, the Constitution's federalism provides that only federal laws enacted in accordance with constitutional procedures trump state laws.

Administrative power today routinely flouts constitutionally protected due process of law and substantive rights. "Federal agencies can demand testimony and private records and can impose fines without even going to court, let alone offering much administrative process," Hamburger writes. Administrative agencies, moreover, adjudicate legal claims while denying the right to a jury. Without due process they issue summonses, subpoenas, warrants, and fines; disregard the basic requirements of discovery; and reverse the burdens of proof. They can even, as with the Federal Election Commission, heavily regulate political speech and political participation, core activities protected by the First Amendment.

Administrative power thus drastically contracts civil liberties. Drawing on Alexis de Tocqueville, Hamburger argues that still worse is that it causes "a loss of the independent and self-governing spirit upon which all civil liberties depend."

The rise of progressivism and the growth of the administrative state go hand in hand. Administrative power is an anti-democratic and illiberal means by which intellectual elites and political professionals have transferred legislative and judicial power to bureaucrats insulated from democratic accountability.

The major obstacle to the three branches working together to return legislative power to Congress and adjudicatory authority to the courts, maintains Hamburger, is not the cost in efficiency and effectiveness in pursuit of legitimate government ends. Rather, it is the determination of political class members to exercise power unconstrained by constitutional limits.

That only underscores the administrative threat to constitutional freedoms.

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