September 17, 2014

Today is devoted to items about "the administrative state." This is the form that tyranny takes in the United States.

Pickerhead owns a business that fabricates precision metal parts for electronic enclosures. Shears, punch presses, and press brakes all use thousands of pounds of force to work sheets of stainless, aluminum, and cold rolled steel. So there are many opportunities for people to be seriously hurt. I learned the business working as CFO for a company in Chicago that owned five factories in the country. Headquarters was at our plant in Elk Grove Village near O'Hare airport. Every calendar quarter someone was hurt. The most common injuries were shortened or lost fingers. Happy to say, the most serious injury in 34 years of operations of my company was three fingers shortened by fractions of an inch. Some of the reasons for this success are passive because we only buy the safest machinery. Other reasons are more active. For example, we often decline to bid on jobs we think pose safety hazards.

The result is the company goes for years between claims for Worker's Compensation insurance, And the experience modifier for those insurance premiums is an excellent 65%. That means instead of $100,000, the premium paid is only $65,000 because of that good safety record You would think OSHA (Occupational Safety and Hazard Administration) would be pleased with the record and would want to see how that happens.

You would think that, but you would be wrong. They do not care. They only want to see if we are using the processes they currently deem to be proper. Results mean nothing. They only care about the process. And that process comes from the administrative state. Yet, many of the things we do to make work safer have nothing to do with those processes.

We also have zinc and chrome plating lines. Since those are heavy metals the state is interested in how we deal with waste. Once, when the Virginia water people were in the plant they asked questions about our paint booths. A few months later Virginia air people were in and suggested we might need a permit for the paint booths. They left a questionnaire for us to fill out. We did and two months later they wrote telling us we did need a permit and enclosed it along with a $10,000 fine for operating without the permit we did not know we needed.

We hired a lawyer to write a couple of pages that said, in effect; "F**k you." After months of back and forth, we agreed to a meeting at their office in Norfolk. Our lawyer went along so there were two of us. Virginia was represented by six people including an attorney who was late to the meeting and apologized saying she lost track of time walking on the beach.

They came from Richmond. We could have gone there because Williamsburg is halfway between Norfolk and Richmond. But these people were on a boondoggle while they were saving the world. So they drove for two and a half hours and rented hotel rooms in Virginia Beach. Testimony ensued. The best part was that of the person who calculated the fine. He came up with "hard" number for $8,000 and said the final $2,000 was "arbitrary and capricious on my part." He really said that!

The meeting was being recorded and I sat quietly hoping my attorney would let that comment pass into the record without amendment. And he did. Negotiations left the company paying a $1,000 fine. This is a good example of the administrative state. And, mind you, Virginia is supposed to be a state that is good for business.

Then there are the worst people in the world - the county staff. Our county board wrote a good ordinance governing uses of land along waterways that run to the Chesapeake Bay. The county staff, though, wrote the enforcing regulations that created an administrative nightmare for homeowners who live along the James River. That led to the most ignorant people you can imagine tramping in backyards trying to pronounce indigenous - an old Indian word that means 'food for deer.'

Scott Johnson of Power Line starts us off with our lesson on how we came to the American form of tyranny

You may not be interested in administrative law, but administrative law is interested in you. Administrative law is unrecognized by the Constitution, but, according to Colombia Law School Professor Philip Hamburger, it "has become the government's primary mode of controlling Americans." He observes that "administrative law has avoided much rancor because its burdens have been felt mostly by corporations." This is where you come in: "Increasingly, however, administrative law has extended its reach to individuals. The entire society therefore now has opportunities to feel its hard edge."

Professor Hamburger's assessment of the proliferation of administrative law may be an understatement. Formal administrative law — the regulations promulgated by the alphabet soup of federal agencies — dwarfs the laws enacted by Congress. To take one vivid example from the front pages of the news in the Age of Obama, the Affordable Care Act (a/k/a Obamacare) runs for 2,800 pages. Democratic House majority leader Nancy Pelosi famously predicted that we would have to pass the bill to find out what was in it. Pelosi was right in more ways than one. By one count published last year, the regulations implementing the act have consumed 10,000 closely printed pages of the Federal Register, at 30 times the length (in words) of the law passed by Congress. ...

WSJ reviews the book that started the discussion.

In stirring his countrymen to ratify the new Constitution, Alexander Hamilton urged in Federalist No. 70 that "energy in the executive" would be "a leading character in the definition of good government." It was, he argued, critical to national security and equally "essential to the steady administration of the laws." But others in Hamilton's day were less sanguine. George Mason feared that by vesting a president with so much power, "it may happen, at some future day, that he will establish a monarchy, and destroy the republic."

In our own time, Republicans and Democrats can seem united in their distrust of a powerful executive branch, if for different reasons. Republicans contend that the administrative state, with bureaucracies ranging from the Education Department to the Consumer Financial Protection Bureau, is a bloated, unchecked and almost lawless autocracy. Democrats worry that, in recent years, the president has assumed extraordinary war-making powers and has interfered with the proper functioning of regulatory agencies.

Aggressive assertions of executive power are controversial. But are they unconstitutional? Without hesitation, Columbia Law Professor Philip Hamburger would answer "yes." In "Is Administrative Law Unlawful?," Mr. Hamburger looks beyond the usual milestones of American regulatory history—the Interstate Commerce Act of 1887, Roosevelt's New Deal—to trace the origins and logic of dividing the powers of government and, by so doing, limiting the executive's reach. ...

Here's a review from **The Weekly Standard**.

The administrative state is a modern invention. It was, and remains, a necessity in our complex modern age. Or so goes the argument.

“The trouble in early times was almost altogether about the constitution of government; and consequently that was what engrossed men’s thoughts,” wrote Woodrow Wilson in his Study of Administration (1887). “The functions of government were simple, because life itself was simple. . . . No one who possessed power was long at a loss how to use it.” That all changed—apparently in Wilson’s generation—when “present complexities of trade and perplexities of commercial speculation” posed new challenges for government.

“In brief,” Wilson wrote, “if difficulties of governmental action are to be seen gathering in other centuries, they are to be seen culminating in our own.” So we need experts: “[W]e have reached a time when administrative study and creation are imperatively necessary to the well-being of our governments saddled with the habits of a long period of constitution-making.”

Necessary; there is no alternative. As the Supreme Court has declared, “[I]n our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”

That is a convenient narrative for the defenders of the administrative state. But it is fanciful. It is not historically accurate. And the justifications—especially the claim of necessity—are not new. Neither are the powers of the administrative state. Indeed, Philip Hamburger, professor of law at Columbia, argues here that it was precisely these justifications and powers that English and American constitutional law developed to protect us against. Not only is the modern administrative state unconstitutional, it is the very thing our Constitution sought to prevent. ...

... Administrative law depends on epistemological arrogance, assuming that there is one right answer to a given problem. But our entire society (like all free-market societies) presupposes that there exists a diversity of opinions, objectives, and needs. It is precisely in an "increasingly complex" society that there is no one-size-fits-all answer.

If the tendency of modernized society is toward freedom or at least social fragmentation, then continual direction by the federal government may actually be inconsistent with modernity.

Maybe humility—and constitutional government—are better after all.

Scott Johnson again. This time reviewing the book for National Review.
... As Hamburger says repeatedly in this book, administrative law establishes a regime of the kind the United States Constitution was carefully designed to prevent. By his reckoning, we have returned to "the preconstitutional world" of the inglorious reign of James I: Royal edicts are in style, the Star Chamber is in session, and the king is working the outer limits of absolute royal power.

It is a form of government that is, in Hamburger's view, fundamentally unconstitutional, unlawful, and illegitimate. He has some impressive authority on his side. James Madison famously proclaimed "a political truth of the highest intrinsic value" in Federalist 47: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." Hamburger concurs, arguing that it may also justly be pronounced the very definition of agency government.

Well, who is Philip Hamburger and why is he saying these things? Hamburger is not some rabble-rouser with thoughts of fame or fortune in mind looking to make a name or attract an audience. Rather, he holds an endowed chair at Columbia Law School. He is a distinguished scholar specializing in legal history. He is the epitome of respectability. His book bears the imprint of an elite academic publisher and it draws on a deep well of original scholarship to address what he characterizes as a leading danger to the future of limited constitutional government.

The book is in substantial part devoted to English legal history. Hamburger recounts how British monarchs claimed a right to issue edicts with the binding force of law and even to impose taxes under their prerogative power. They also established their own courts — the Star Chamber being the most notable example — to enforce their will.

This prerogative power was reformed over time, with legislative power restricted to Parliament and judicial power to the law courts. The courts rejected edicts promulgated by the king with the binding force of law; in 1641, Parliament abolished the Star Chamber and other prerogative tribunals.

Against this backdrop of legal history, the vesting by the U.S. Constitution of "all legislative Powers" in Congress (emphasis added), of "the executive Power" in a president, and of "the judicial Power" in the Supreme Court and the inferior courts established by Congress sparkles with a new eloquence, at least to me. This tripartite division of power among the branches of the government profoundly reflects the Founders' understanding of the legal history recounted by

Hamburger. They meant to lay out in our fundamental law the painful lessons learned in the long development of the English constitution. ...

Another review comes from the **Library of Law and Liberty**. Sorry this has been so long. But like Kevin Williamson warned in **9/14/14 Pickings** in "Consider the Moose", beware not of ISIS, but of your neighbor telling you how to live.

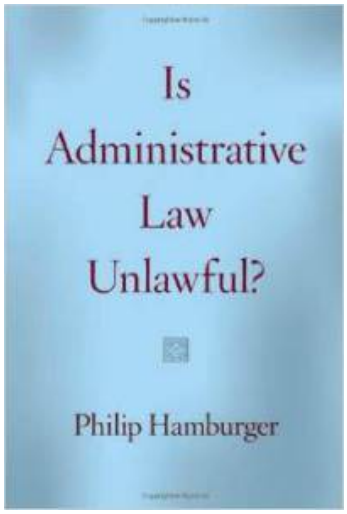
Philip Hamburger's Is Administrative Law Unlawful? is a timely and major contribution to the most significant constitutional crisis of our time. As a work of scholarship it will inform and inspire future thinking on the administrative state for years.

This book, however, will greatly contribute to an emerging consensus about the perils of the administrative state, and help shape the constitutional response. Therefore Professor Hamburger's book may well be the most important book that has been written in decades. Scholars have been denouncing the modern administrative state as incompatible with American constitutionalism for years, but nobody has made the argument as thoroughly and forcefully as Hamburger.

The fundamental thesis of his book is that administrative law is profoundly antithetical to any conception of law, not just the conception of law articulated in the U.S. Constitution. The crisis is not simply a constitutional crisis. It is a crisis of law itself. We risk moving from a nation governed by law to a nation of absolutism – the very absolutism that it took centuries for Britain and America to shed.

Specifically, Hamburger argues that the rise of binding administrative power represents the recurrence of extralegal, supralegal, and consolidated power. Administrative law is extralegal because it is a binding power exercised outside the law. That is, it binds citizens not through the laws and the orders of the courts, "but through other sorts of commands and orders" such as administrative legislation and adjudication. ...

Power Line
Down with the administrative state
by Scott Johnson



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I wrote about the inconsistency of administrative law with what we understand to be our constitutional system in "Crisis of the administrative state." Searching around online for additional sources of learning on the subject, I happened to discover a listing for Professor Hamburger's then forthcoming book, *Is Administrative Law Unlawful?*

Professor Hamburgers's book has now been reviewed both in the Wall Street Journal (behind the Journal's subscription paywall) and the Weekly Standard. I reviewed the book for the August 11 issue of National Review. My NR review appears online as "A new old regime." See also the essay on the book by Boston University School of Law Professor Gary Lawson forthcoming in the Texas Law Review, "The return of the king."

Professor Hamburger demonstrates the regressive nature of the Progressive project. He explains and vindicates the original project of the Constitution in erecting barriers to the exercise of absolute power. As Barack Obama brings the crisis of the administrative state to full boil, attention must be paid.

Professor Hamburger gave the keynote speech this past Friday at the George Mason University Law School's Law and Economics Center program on administrative law (videos of the program are now posted here). Professor Hamburgers's keynote speech summarizes the themes of his book in 10 points. His speech is posted here and below.

Professor Hamburger's speech takes up the first part of the video. I thought he was on fire in these remarks. Following his speech, he is questioned by senior DC Circuit Judge Douglas Ginsburg. All together the video runs 47 minutes, but Professor Hamburger's speech takes up only the first half or so. If you have any interest in the subject, please check it out.

WSJ

'Is Administrative Law Unlawful?' by Philip Hamburger

The separation of powers broke down in the 20th century thanks to progressives who believed commissions could quickly improve society.

by Adam J. White

In stirring his countrymen to ratify the new Constitution, Alexander Hamilton urged in Federalist No. 70 that "energy in the executive" would be "a leading character in the definition of good government." It was, he argued, critical to national security and equally "essential to the steady administration of the laws." But others in Hamilton's day were less sanguine. George Mason feared that by vesting a president with so much power, "it may happen, at some future day, that he will establish a monarchy, and destroy the republic."

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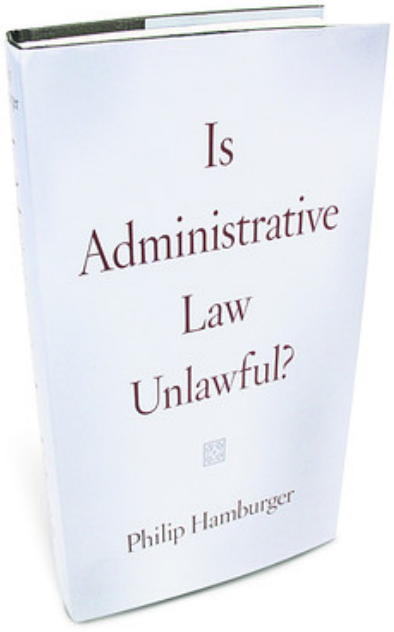

Is Administrative Law Unlawful?

By Philip Hamburger
(University of Chicago, 635 pages, $55)

He begins with Henry VIII, who in 1539 obtained Parliament's authorization to make law through proclamations. Henry's vigorous assertion of that power led Parliament to repeal its authorization just eight years later, yet future kings found ways to follow Henry's example. In 1610, James I claimed inherent authority to assert power in the absence of legislation. As Mr. Hamburger shows, the abuse of royal power was a central concern throughout the 17th century—particularly amid Charles II's and James II's efforts to suspend or dispense laws burdening religious minorities. The result, ultimately, was the Revolution of 1688, in which Parliament adopted the Declaration of Rights that imposed limits on the Crown—including a provision against the suspending and dispensing powers.

This history sets the stage for the basic separation of legislative, judicial and executive branches. Of these three, according to Mr. Hamburger, the last was always least in terms of lawmaking: While the legislature could bind subjects through its bills, and judges could bind subjects through their decisions, the executive itself "could not bind, but at most could impose force, whether by bringing matters to the courts or, ultimately, by physically carrying out their binding acts."

Mr. Hamburger sees our Founding Fathers as codifying that arrangement in our own Constitution. But he argues that the separation of powers broke down in the 20th century thanks to progressives, such as Woodrow Wilson, who were deeply influenced by German intellectual proponents of administrative power. These progressives believed that expert "commissions" would improve society far faster and better than a government slowed by individual rights and the separation of powers. "German ideas seemed to solve American problems," Mr. Hamburger writes. Progressives began to move against trusts and monopolies "without worrying too much about their implications for liberty." This culminated in FDR's New Deal, which propagated an alphabet soup of federal agencies consolidating legislative, judicial and executive power into a new, unchecked branch of government.

There is danger, Mr. Hamburger argues, not just in the executive's use of administrative power to make new law but also in its attempts to nullify legislative acts. Exhibit A could be President Barack Obama's decision to "waive" portions of the Affordable Care Act, at least temporarily, on the grounds that it would be impractical (not to mention politically difficult) to fully enforce the act as written.

Executive power has increased, Mr. Hamburger notes, in part because legislatures have failed to exercise their own power decisively. For decades, Congress's statutes have provided federal agencies with nearly open-ended power, and the inherent discretion granted to administrators has left "Americans insecure in their freedom," Mr. Hamburger writes. Yet it is no solution to demand, as he does, that the courts simply identify and mandate "the correct interpretation" of any agency's statute, because statutes are often too ambiguous to have a single "correct" interpretation. What James Madison said of constitutions is no less true of many statutes: "No language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas."

When statutes are vague and agency interpretations are challenged, the judiciary branch is often compelled to act as a kind of referee. Here, though, Mr. Hamburger worries that the executive prerogative wins out too often. He complains that judges' "deference" to administrators' interpretations of statutes "is an abandonment of judicial office."

But modern administrative law does not counsel judges to show "deference" in such cases. Rather, when statutes are unambiguous, judges are obliged under current law not to defer to

agencies' statutory interpretations at all. And even in cases of ambiguous statutes, judges are not to defer to agencies' unreasonable interpretations, such as last week in *Utility Air Regulatory Group v. EPA*. In that case, the Supreme Court refused to defer to the EPA's assertion that the Clean Air Act empowered the agency to impose immensely burdensome permit requirements on companies emitting greenhouse gases.

When statutory text has an obviously "correct" interpretation, it is easy to agree with the author that judges must not defer to an agency's contrary interpretation. But it is not nearly so easy when the statute's interpretation isn't so obvious. Unfortunately, Congress's ambiguous statutes seem to far outnumber the unambiguous ones.

Mr. White is a lawyer in Washington, D.C.

Weekly Standard

L'État, C'est Moi

With the stroke of a pen, the executive branch reigns supreme

by Ilan Wurman

The administrative state is a modern invention. It was, and remains, a necessity in our complex modern age. Or so goes the argument.

"The trouble in early times was almost altogether about the constitution of government; and consequently that was what engrossed men's thoughts," wrote Woodrow Wilson in his *Study of Administration* (1887). "The functions of government were simple, because life itself was simple. . . . No one who possessed power was long at a loss how to use it." That all changed—apparently in Wilson's generation—when "present complexities of trade and perplexities of commercial speculation" posed new challenges for government.

"In brief," Wilson wrote, "if difficulties of governmental action are to be seen gathering in other centuries, they are to be seen culminating in our own." So we need experts: "[W]e have reached a time when administrative study and creation are imperatively necessary to the well-being of our governments saddled with the habits of a long period of constitution-making."

Necessary; there is no alternative. As the Supreme Court has declared, "[I]n our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."

That is a convenient narrative for the defenders of the administrative state. But it is fanciful. It is not historically accurate. And the justifications—especially the claim of necessity—are not new. Neither are the powers of the administrative state. Indeed, Philip Hamburger, professor of law at Columbia, argues here that it was precisely these justifications and powers that English and American constitutional law developed to protect us against. Not only is the modern administrative state unconstitutional, it is the very thing our Constitution sought to prevent.

There used to be terms to describe the conduct and powers of the modern administrative state. When the Obama administration issues waivers to favored companies excusing them from some health care regulations, our English ancestors would have called it the dispensing power.

When the administration decides that it will no longer enforce certain immigration laws, our ancestors would have called that the suspending power. When the president issues executive orders that make law—or more commonly, when his administration promulgates rules that bind individuals—they would have called that prerogative lawmaking.

When administrative agencies, which are not courts of law, issue binding orders to appear and testify; when they command homes, businesses, and records to be kept open for inspection; when they require businesses to self-report regulatory violations; when they bind subjects without juries or independent judges—there were terms for such actions, too. They were general warrants and writs of assistance. They were self-incrimination and ex officio proceedings. They were Star Chamber and the High Commission.

They were tyranny.

“The history of administrative law,” writes Hamburger, “reaches back many centuries.”

It is thus not a coincidence that administrative law looks remarkably similar to the sort of governance that thrived long ago in medieval and early modern England under the name of “prerogative.” . . . Administrative law thus turns out to be not a uniquely modern response to modern circumstances, but the most recent expression of an old and worrisome development.

Hamburger meticulously (and sometimes laboriously) demonstrates how the modern administrative state revives all the attributes of the royal prerogative and absolute power. Even in the details, modern administrative law is shockingly reminiscent of 16th- and 17th-century royal conduct.

Today, for example, administrative agencies claim statutory authority to create rules—that is, to make law—where constitutionally enacted statutes are ambiguous. Agencies “interpret” their own statutes, and courts give those interpretations deference. King James I argued that he had the same powers as his common law judges to interpret law and that they must defer to his interpretation.

What has changed?

The similarity is important in its more general contours. Hamburger explains that administrative power is a power exercised outside the law: It is created outside the established constitutional procedures. It is also a power exercised above the law: It excuses both the executive and subjects from following law, as with the dispensing power (i.e., waivers). And finally, it is a consolidated power: The otherwise-separate legislative, judicial, and executive powers are combined—which, Hamburger writes, is the traditional understanding of absolute power.

It is also unconstitutional. There is no constitutional provision granting the president power to dispense with particular health care regulations for certain companies. The Constitution establishes only three powers: the legislative power to make the law, the judicial power to adjudicate cases in accord with the law, and the executive power to execute the law. “None of these powers includes any authority to excuse persons from law,” Hamburger writes. “The power to exclude from law was the old dispensing power, and it simply does not exist in the Constitution.”

Administrative adjudications that bind the parties are also unconstitutional. When Parliament abolished the Star Chamber during the English Civil War, it declared that the property of the subject "ought to be tried and determined in the ordinary courts of justice and by the ordinary course of the law." Our Constitution "even more clearly located judicial power in the courts," writes Hamburger, and the Framers thereby "emphatically reiterated the constitutional bar to any extralegal adjudication." And yet today, the executive branch—"like the Crown in the early 17th century"—enforces its own rules in its own tribunals.

The arguments for administrative power always rely on necessity. But no one has ever proved that, somehow, society is too complex for judicial warrants and lawmaking by constitutional means. Do we really need experts to create regulations? Does Congress not have the expertise to tackle "ever changing and more technical problems" in an "increasingly complex" society? Maybe so.

But there is an easy solution. If experts are needed, there is no dearth of them. Why not have these experts in administrative agencies propose their regulations as legislation for Congress to enact? That would be no different from the current process of administrative rulemaking—except that it would be democratic. It would require political will and popular support. And that is precisely why many liberals would oppose such a modest proposal.

But there is something even more fundamental about "necessity" and social "complexity." The administrative state is a poor way to handle the complexity that has justified its exist-ence all along. The administrative state assumes that it has reached answers to questions that ultimately might not have scientific conclusions. Federal agencies, thus, "have difficulty keeping up to date with science," because their particularized controls for particularized problems are inflexible and cannot adapt to technological change.

Administrative law depends on epistemological arrogance, assuming that there is one right answer to a given problem. But our entire society (like all free-market societies) presupposes that there exists a diversity of opinions, objectives, and needs. It is precisely in an "increasingly complex" society that there is no one-size-fits-all answer.

If the tendency of modernized society is toward freedom or at least social fragmentation, then continual direction by the federal government may actually be inconsistent with modernity.

Maybe humility—and constitutional government—are better after all.

Ilan Wurman is clerk to Judge Jerry E. Smith of the U.S. Court of Appeals for the Fifth Circuit.

National Review

A New Old Regime

Obama's exercise of prerogative power is not progressive — it's a throwback to the British Monarchy.

by Scott W. Johnson

Every day the headlines bring news of the Obama administration's rule by executive edict. From the regularization of illegal-immigrant DREAMers, to the rewriting of Obamacare and of federal

drug laws, to the imposition of onerous environmental laws by agency regulation, the administration exercises or threatens to exercise executive power to write and rewrite and waive the duly enacted law of the land. Now Obama threatens to regularize the immigration status of millions more illegal immigrants by decree as well.

The practice of rule by decree is of dubious constitutionality, to say the least, and Obama is extending it to the breaking point. While of dubious constitutionality, the practice is not without precedent. The precedent, however, is the prerogative power claimed in the past by the British king. It is the power against which the British revolted in the Glorious Revolution of 1688 and against which we revolted in 1776.

Now comes Professor Philip Hamburger with a serious work of legal scholarship on the return of the prerogative power to our government. The power returns in the dry-as-dust form of "administrative law," reflecting the agency form of government. Administrative law has not been a matter of substantial intellectual controversy for a long time. Professor Hamburger comes not to bring peace, but rather a sword of understanding and ultimately of action. He means for us to understand what we have lost or are losing.

To adapt the adage misattributed to Trotsky that is achieving the status of a cliché, you may not be interested in administrative law, but administrative law is interested in you. Hamburger declares that although administrative law is unrecognized by the Constitution, it "has become the government's primary mode of controlling Americans." He observes that "administrative law has avoided much rancor because its burdens have been felt mostly by corporations." This is where you come in: "Increasingly, however, administrative law has extended its reach to individuals. The entire society therefore now has opportunities to feel its hard edge."

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Beginning roughly with the New Deal, but ever more since then, we have been ruled by agency government. In this form of government, Congress delegates its legislative authority to an administrative agency in the executive branch. The agency promulgates regulations with the binding force of law. It prosecutes citizens for violating the regulations. It also acts as the judge and jury in prosecutions it brings. The agencies therefore combine legislative, executive, and judicial functions in the same body.

The Interstate Commerce Commission, established in 1887, is recognized as the first administrative agency established by federal law. The agency form of government, however, came into its own in the Progressive era and the New Deal. It purported to be something new under the sun, an adaptation of republican government to the modern age. The Administrative Procedure Act, passed in 1946, formalized the triumph of the agency form of government.

It is Hamburger's contention that agency government is in essence not new at all, but rather something antique and retrograde, dating back to the early Middle Ages. According to

Hamburger, agency government represents a return to the prerogative power of the English monarchy before the reforms of Magna Carta (1215) and the acts of Parliament and decisions of the law courts in the 16th and 17th centuries.

As Hamburger says repeatedly in this book, administrative law establishes a regime of the kind the United States Constitution was carefully designed to prevent. By his reckoning, we have returned to “the preconstitutional world” of the inglorious reign of James I: Royal edicts are in style, the Star Chamber is in session, and the king is working the outer limits of absolute royal power.

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The book is in substantial part devoted to English legal history. Hamburger recounts how British monarchs claimed a right to issue edicts with the binding force of law and even to impose taxes under their prerogative power. They also established their own courts — the Star Chamber being the most notable example — to enforce their will.

This prerogative power was reformed over time, with legislative power restricted to Parliament and judicial power to the law courts. The courts rejected edicts promulgated by the king with the binding force of law; in 1641, Parliament abolished the Star Chamber and other prerogative tribunals.

Against this backdrop of legal history, the vesting by the U.S. Constitution of “*all* legislative Powers” in Congress (emphasis added), of “the executive Power” in a president, and of “the judicial Power” in the Supreme Court and the inferior courts established by Congress sparkles with a new eloquence, at least to me. This tripartite division of power among the branches of the government profoundly reflects the Founders’ understanding of the legal history recounted by Hamburger. They meant to lay out in our fundamental law the painful lessons learned in the long development of the English constitution.

Hamburger focuses on prerogative power, or absolute power, as he also calls it, in three aspects that recur in administrative law. His somewhat awkward terminology summarizes his critique. First, like the edicts issued under the prerogative power claimed by kings, administrative pronouncements are outside the law, or *extralegal*. The power to enact law is delegated by the people to Congress. Edicts promulgated by administrative agencies are, so Hamburger argues, outside the law.

Second, administrative pronouncements are above the law, or *supralegal*. The regulations and adjudications of administrative agencies demand and receive deference from Article III courts. Hamburger contends that such deference places administrative law and proceedings above the law.

Third, administrative law represents power that is *consolidated*. What the Constitution carefully puts asunder into three branches, administrative law has come to join in unholy union. As it was meant to do by its progressive advocates, it defeats the separation of powers.

Hamburger seeks to revive arguments about the legitimacy of agency government that, but for the exertions of a few hardy legal scholars, have long been interred. In this book and in his hands, old or forgotten arguments take on new life.

One such argument has to do with Congress's delegation (or, as Hamburger emphasizes, subdelegation) of its lawmaking authority to agencies of the executive branch. The regime of administrative law depends to a great extent on Congress's delegation of its lawmaking authority to these administrative agencies. The Supreme Court has purported to limit Congress's authority to delegate its lawmaking power under an extremely lenient nondelegation doctrine (Congress's lawmaking delegation must articulate an "intelligible principle"). The last time it enforced the doctrine to strike down a statute was in 1935. Reports of the death of the nondelegation doctrine are not greatly exaggerated.

The Court's history to the contrary notwithstanding, Hamburger argues in a key chapter that Congress's delegation of lawmaking authority is flatly unconstitutional; this argument is central to his indictment of administrative law. Among other things, Hamburger argues that delegation is expressly prohibited by the text of the Constitution. Hamburger dryly observes: "In a republic, it is not too much to expect that law will be made by a legislature composed of representatives of the people." He cites John Locke ("The legislative can have no power to transfer their authority of making laws, and place it in other hands") and other authorities in support of his argument that legislative power may not be delegated (or subdelegated), yet the Supreme Court has rejected such a flat prohibition, and Hamburger lacks much support among critics of administrative law in making this argument. Hamburger persuades me completely on this important point, but he is a voice crying in the wilderness.

How is the perverse genie of administrative law to be put back into the bottle? Unlike many books devoted to the analysis of a dire problem, Hamburger's does not propose a solution to the problem of administrative law. Toward the end of the book, he briefly implores federal judges to revisit the doctrine of nondelegation and suggests how they might usefully do so. He alludes to the right of revolution ("when the English Crown justified its absolute power as constitutional, the English and eventually the Americans engaged in revolutions against it"). Mostly, however, he provides the intellectual wherewithal for us to think through the problem on our own.

This is not a perfect book. One would not wish it a page longer than it is; one would wish it to be shorter. It is not elegantly written and it is not easy reading. It makes few concessions to the general reader, pursuing its arguments in both footnotes and endnotes; indeed, Hamburger frequently continues the footnotes in the endnotes.

Yet this is a book that rewards the reader willing to make the necessary effort with a deepened understanding of the Constitution and the challenges that confront us in the task of restoration. Though it was not written to be the book of a season, the news of the day repeatedly buttresses the powerful case Hamburger makes against the legitimacy of the vast administrative apparatus

that does so much to dictate the way we live now. It is a book not only of this season but of many seasons to come.

— Scott W. Johnson is a Minneapolis attorney and a contributor to the website Power Line. *This review is adapted from one that appeared in the August 11, 2014, issue of NR.*

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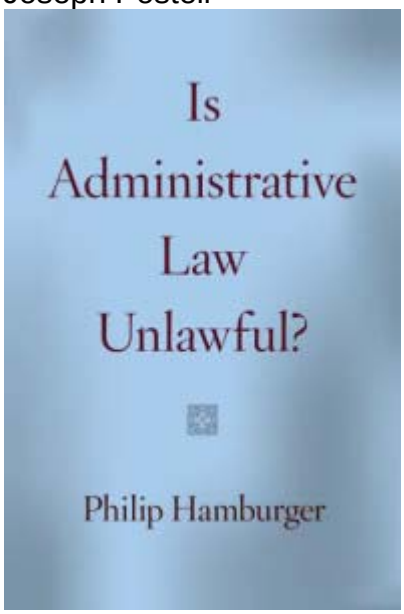
Erasing the Fundamental Commitments of American Constitutionalism

by Joseph Postell



Philip Hamburger's *Is Administrative Law Unlawful?* is a timely and major contribution to the most significant constitutional crisis of our time. As a work of scholarship it will inform and inspire future thinking on the administrative state for years.

This book, however, will greatly contribute to an emerging consensus about the perils of the administrative state, and help shape the constitutional response. Therefore Professor Hamburger's book may well be the most important book that has been written in decades. Scholars have been denouncing the modern administrative state as incompatible with American constitutionalism for years, but nobody has made the argument as thoroughly and forcefully as Hamburger.

The fundamental thesis of his book is that administrative law is profoundly antithetical to any conception of law, not just the conception of law articulated in the U.S. Constitution. The crisis is not simply a constitutional crisis. It is a crisis of law itself. We risk moving from a nation governed by law to a nation of absolutism – the very absolutism that it took centuries for Britain and America to shed.

Specifically, Hamburger argues that the rise of binding administrative power represents the recurrence of extralegal, supralegal, and consolidated power. Administrative law is extralegal because it is a binding power exercised outside the law. That is, it binds citizens not through the

laws and the orders of the courts, “but through other sorts of commands and orders” such as administrative legislation and adjudication.

Administrative law is supralegal because these administrative commands and orders are considered to be above the law, and therefore not subject to the scrutiny of judicial review. Despite the fact that judges “have an office or duty that requires them to exercise their own, independent judgment,” they have accepted the legitimacy of extralegal administrative power and even constructed a regime of judicial deference around it. By substituting appeals from administrative proceedings for adjudication through the courts themselves, “the judges have come to participate in the administrative regime, and they thereby have been drawn into circumstances that invite deference” to administrative agencies. “The overall result is an entire jurisprudence of deference” in administrative law, Hamburger argues, and “not even James I got such consistent deference to his proclamations, regulations, interpretations, and adjudications” as agencies get today.

Hamburger’s argument contains a twist on previous accounts of the administrative state: in his view, the administrative state is not a new phenomenon but the return of a very old one. He alerts us to “the danger that the government already has returned to the preconstitutional past.” “Although the details of absolute power in England may at first seem merely historical, it gradually will become apparent that they are disturbingly like the details of contemporary American administrative power.” A great deal of the first half of the book explains how developments in American administrative law parallel the British Crown’s assertion of prerogative powers in the centuries prior to the American Revolution.

One way to understand this argument is to revisit the Declaration of Independence, and read the often-overlooked indictments that comprise the middle of the document. The very charges brought by the Americans against the British in July 1776 are replicated, Hamburger argues, by contemporary administrative power.

“Giving his Assent to their Acts of Pretended Legislation”

Hamburger argues that “contemporary administrative legislation returns to an extralegal regime of lawmaking. Like the old prerogative bodies, administrative agencies act outside the law, the legislature, and the legislative process to impose binding rules and interpretations. The agencies thereby return to extralegal governance, which is precisely what constitutional law developed in the seventeenth century to prevent.”

Although they are euphemistically called “rules,” many agency rules are legally binding on citizens and have the same force and effect as laws passed by Congress. Calling a law by another name makes it no less a law. Agencies’ rules, to borrow from the Declaration, are “acts of pretended legislation.”

To make this case, Hamburger must confront the claims of scholars such as Jerry Mashaw and Kenneth Culp Davis that the Founders delegated rulemaking powers to administrative agencies from the very beginning of the republic. Davis and Mashaw offer numerous historical examples in favor of their position, and one of the great contributions of Hamburger’s book is his confrontation with those examples.

To address these examples Hamburger draws a basic distinction: “the natural dividing line between legislative and nonlegislative power was between rules that bound subjects and those that did not.” “When executive rules purport to bind subjects, they create a regime of legislation

outside the law and the lawmaking institutions and processes established by the Constitution." But some administrative decisions, such as those which regulated executive officers themselves, or those which applied to people who were not subjects of the United States "affected the public, but did not purport to bind them," and therefore do not serve as precedent for administrative legislation. Hamburger's application of this distinction to numerous cases in early American history is a great contribution to the debate over the nondelegation doctrine (as Gary Lawson, one of the great defenders of that doctrine, noted in his review of the book).

"Judges Dependent on his Will Alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries"

Administrative law is not only extralegal in the sense that binding legislation is produced outside of the regular legislative process. Agencies render specific determinations, or adjudications, in addition to making their own laws or rules. In this way, Hamburger argues, agencies exercise not only extralegal legislative power, but also extralegal judicial power. And these adjudications are not carried out by independent judges, but by administrative decisionmakers.

As a result, the idea of an independent judge with an independent will is sacrificed. Administrative decisionmakers, Hamburger writes, "must do less than exercise independent judgment, for they are precommitted to carrying out the government's policy in its regulations, and they must submit to having their decisions reconsidered by executive officers – neither of which is compatible with judicial independence."

Administrative law judges, to make matters worse, are not really independent, "as they can be removed or…demoted to a lower pay scale for failing to follow administrative regulations." Thus, "they lack the independence of judges on the essential question, the lawfulness of their own administrative proceedings and of administrative regulations." Finally, the decisions of these officials are typically reviewable by political appointees, who can make their own determinations.

Therefore, across the board, there is a stunning repudiation of independent adjudication in the administrative process. At the bottom, informal determinations are made by low-level officers who are hardly independent of the agencies for which they work. Further up, administrative law judges lack constitutional tenure and salary protections and are overseen by political appointees who review their decisions. Hardly independent, the judges of the administrative state are truly dependent on the will of another: one of the core complaints in the Declaration of Independence.

"For Depriving us in Many Cases, of the Benefits of Trial by Jury"

Not only do administrative adjudications result in binding decisions without independent judges, they also violate "a wide range of procedural rights," including the protections of trial by jury. Administrative agencies have the power to launch open-ended inquisitorial investigations without a grand jury, can charge offenders with violating their regulations without a grand jury, and can reach verdicts in cases involving fines without a jury.

Hamburger argues persuasively that this cuts against episodes in the 1780s where governments tried to impose fines and forfeitures without juries, only to be struck down on constitutional grounds by state courts. Where the courts in the 1780s vindicated the right to trial by jury, and the Founders enshrined it in our Bill of Rights, modern administrative trials flaunt these requirements. Clearly the right to due process and trial by jury was prominent in the Declaration's denouncement of King George III in 1776, but many of these indictments could be leveled at administrative process today. As I have previously written on this site, this might

actually be the most alarming aspect of extralegal administrative power, because of the potential for abuse and intimidation of particular citizens.

"Altering Fundamentally the Forms of our Governments"

Administrative law, Hamburger argues, is not only extralegal and supralegal. It is also consolidated. By consolidated, of course, he is referring to the fact that administrative power flies in the face of the Constitution's separation of powers. But Hamburger's argument is slightly different than the typical argument for separation. He recasts the question as one of specialization – administrative power is unspecialized because it is undivided.

"Specialization is not a familiar way of thinking about the separation of powers," he admits, "but it reveals how much the administrative consolidation departs from the Constitution." "A fundamental advantage of the separation of powers is that it institutionalizes specialized decisionmaking," yet "an agency can blend these specialized elements together…[and] can avoid separately deliberating about its legislative will, its executive force, and its adjudicatory judgment." Thus the issue is not simply one of conflict of interest, where the same person can make, judge, and enforce the law. The consolidated nature of administrative power is fundamentally contrary to the forms of constitutional government, where power is separated so that the specialization of functions can be given full effect.

"A Jurisdiction Foreign to Our Constitution and Unacknowledged by our Laws"

When briefly reviewing a book as expansive, important and detailed as *Is Administrative Law Unlawful?* it is almost impossible to do more than summarize the chief arguments of the book. The most important matter is that people know about the book and why it is worth a careful read. But there are some questions that need to be raised, if for no other reason than to prompt the author to further the important work that has begun.

One question which I have raised in various places is whether the description of judicial deference is accurate. Hamburger's argument that administrative law is supralegal is an argument that the courts defer to administrative agencies. Certainly we could identify many examples of judicial deference to agencies, and the "*Chevron* doctrine" is a chief culprit. But do courts really defer when they profoundly disagree with an agency's decision or decisionmaking process? I think the answer is more complicated. When teaching administrative law, many of the major recent cases involve judicial intervention in overturning an agency decision: think *Massachusetts v. EPA, Gonzales v. Oregon, Motor Vehicle Manufacturers Association v. State Farm, FDA v. Brown & Williamson*, and so on. On climate change, assisted suicide, airbags, and regulation of tobacco, the courts have been pleased to intervene and overturn an agency.

If the courts aren't always deferential, however, that would complicate but not contradict Hamburger's argument. It would simply mean that this whole extralegal and supralegal regime is supported by judges who are more than happy to usurp the binding powers that normally belong to agencies – hardly better than if they kept to themselves and deferred to the administration. In the end, Hamburger is still correct that the courts fail to fulfill the basic function of constraining administrative power, and in many cases judicial intervention only serves to feed the beast.

A second (and perhaps inevitable) quibble is that the book proceeds too hastily at certain points in the argument. Despite extensive and important discussions of British and American legal history, the most interesting chapters come near the end. There, Hamburger delves into constitutional principles involving representation and the separation of powers, as well as the

roots of administrative law's infiltration of the American legal system. There are fascinating sections on questions of class and the theory of scientific knowledge undergirding the conception of American public administration, but they are strikingly brief. This is an area where more explanation in further work would be highly profitable.

Along the same lines, there is little historical analysis of the evolution of the administrative state after the Founding period. While that is not the purpose of Hamburger's book, our understanding of the administrative state would be greatly advanced by a more thorough study of its historical development and evolution. In particular, Hamburger at times sweeps state and local administration under the rug. He acknowledges that some local regulations consolidated power and bound citizens outside the law, but diminishes their importance: "to the extent local determinations crossed into legislation, they are historical anomalies – inherited local exceptions from American constitutional principles rather than evidence of such principles. And because they occurred at the local level, they never posed the threat of centralized extralegal power that has come with federal administrative law." Such hasty dismissals of state and local practices are unlikely to satisfy scholars who think that they *do* reflect American constitutional principles rather than anomalies. If forced to integrate these practices into his argument rather than dismiss them, how might Hamburger deal with the nature of local regulation and administration?

Finally, in discussing how administrative law is "foreign to our constitution," Hamburger inevitably confronts "The German Connection" to American administrative law. The chapter on this subject is perhaps the most interesting of the book. Hamburger's treatment of the relationship between German legal thought and American administrative law is commendably balanced. He acknowledges the influence but does not overstate it: ""It would be a mistake, for example, to assume that German ideas were in any strong sense a cause of what happened in the Anglo-American sphere." Rather, the American progressives "ended up assimilating elements of the heritage of Continental civilian absolutism, as transmitted through German scholarship, partly because their own anxieties and hopes led them to see their situation through lenses borrowed from the Continent, and partly because the German ideas seemed to solve American problems."

The book's discussion of the German-American relationship could serve as fertile soil for many future articles, but the best features of the chapter are Hamburger's illustration of the ways in which American municipal law and police power assimilated German thought and his discussion of the (classical) liberal reformers who attempted to bring the *Rechtstaat* to Germany. Not all of the German reformers wanted an unfettered administrative state, and the story of the *Rechtstaat* has not been adequately explored. Hamburger's discussion of it is brief but a great start (and has prompted some fine comments from Michael Greve on this site), though it is clear that Hamburger thinks the *Rechtstaat* is a poor substitute for rule under and through law.

These quibbles aside, *Is Administrative Law Unlawful?* is an impressive book that makes a powerful case that the modern administrative state is profoundly "foreign to our constitutions" and "unacknowledged by our [fundamental] laws." The argument is novel and will certainly influence the direction of future scholarship on the administrative state for years to come. Let's hope that Professor Hamburger himself will give us an encore.

Joseph Postell is Assistant Professor of Political Science at the University of Colorado-Colorado Springs. His research focuses primarily on regulation, administrative law, and the administrative state. He is the editor, with Bradley C.S. Watson, of Rediscovering Political Economy (Lexington Books, 2011), and with Johnathan O'Neill, of Toward an American Conservatism (Palgrave Macmillan, 2013).

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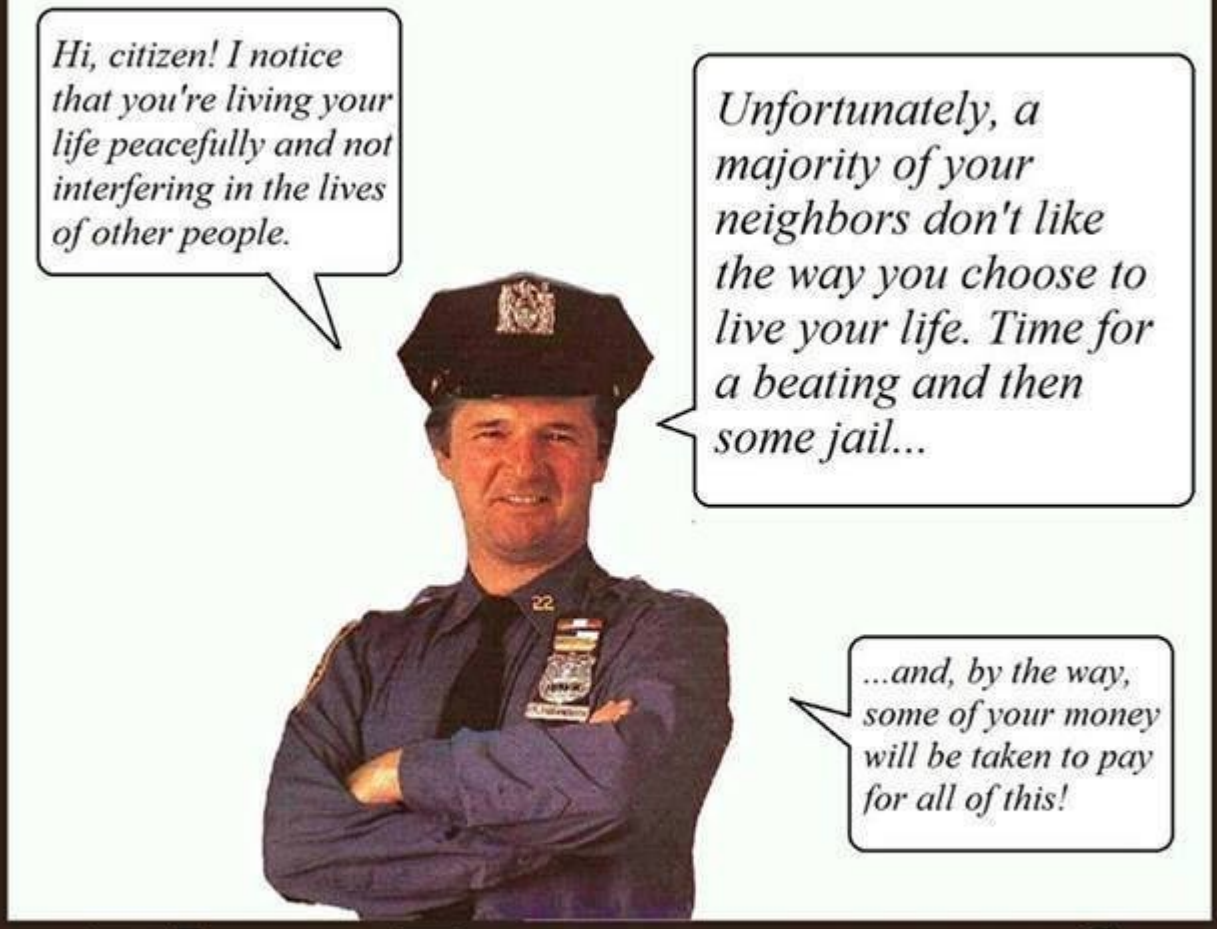

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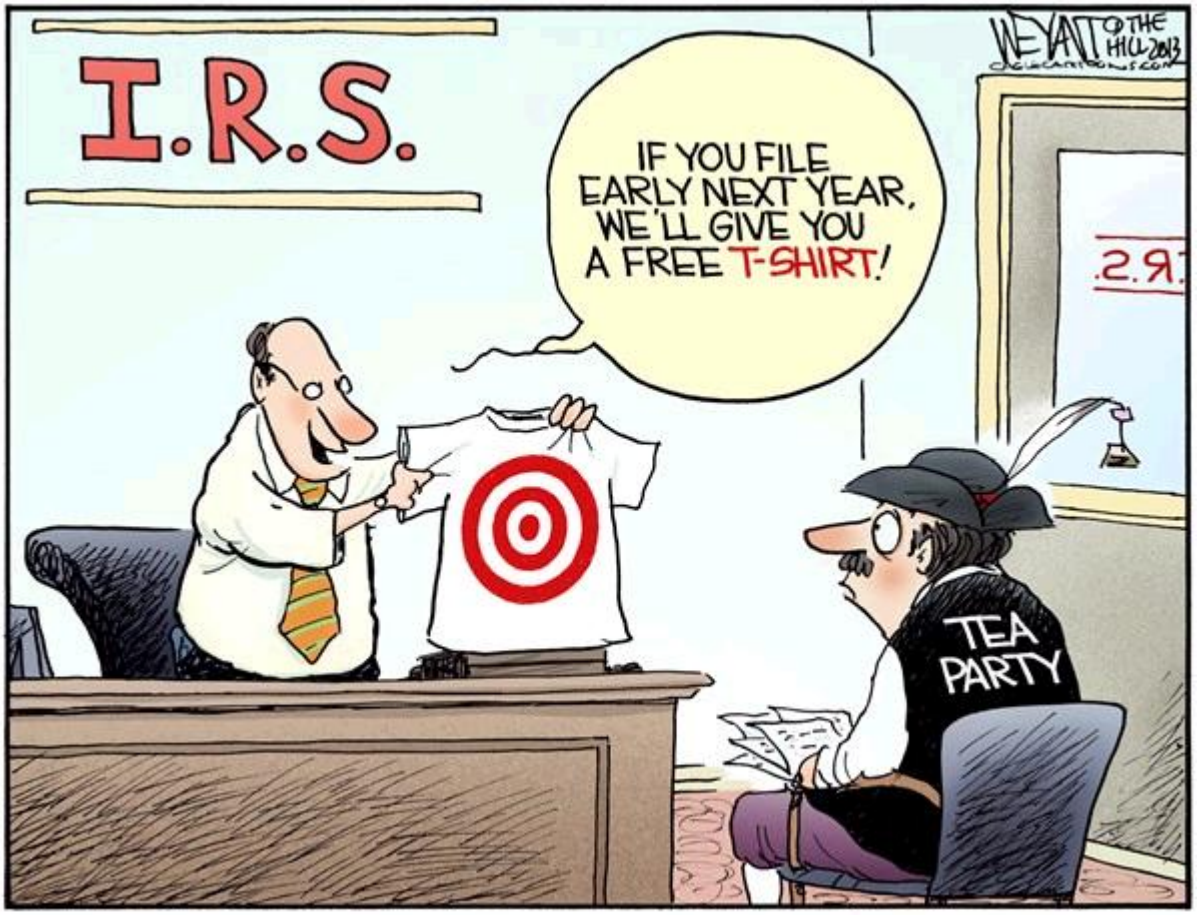
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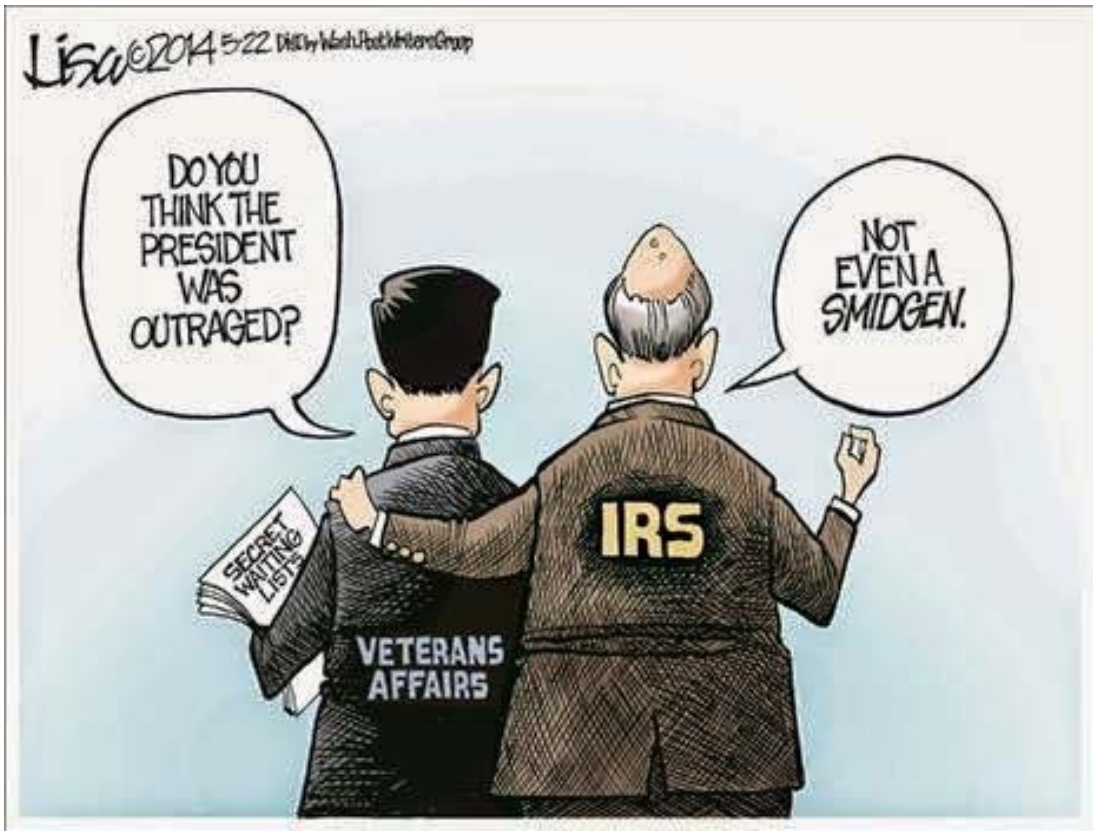
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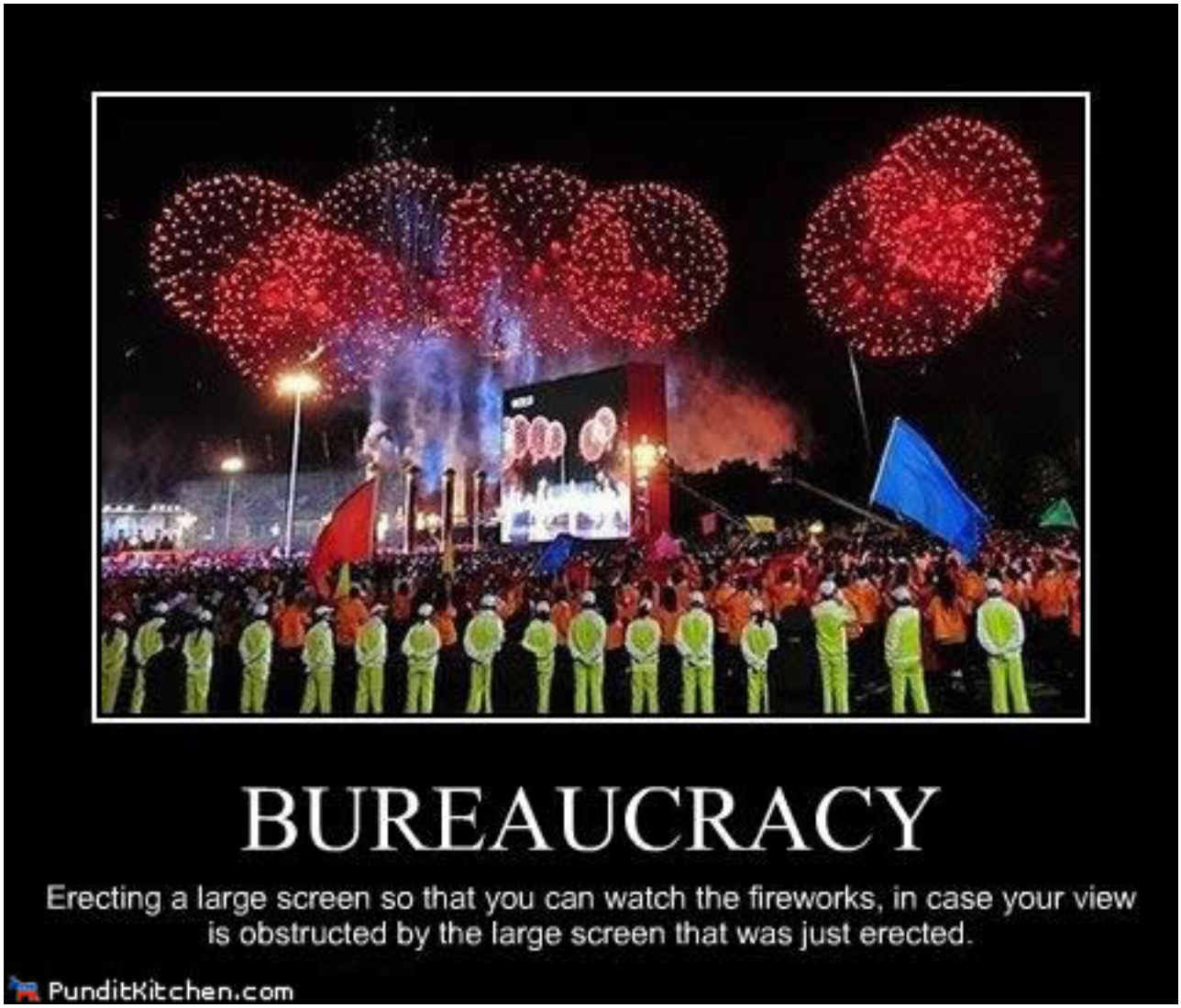
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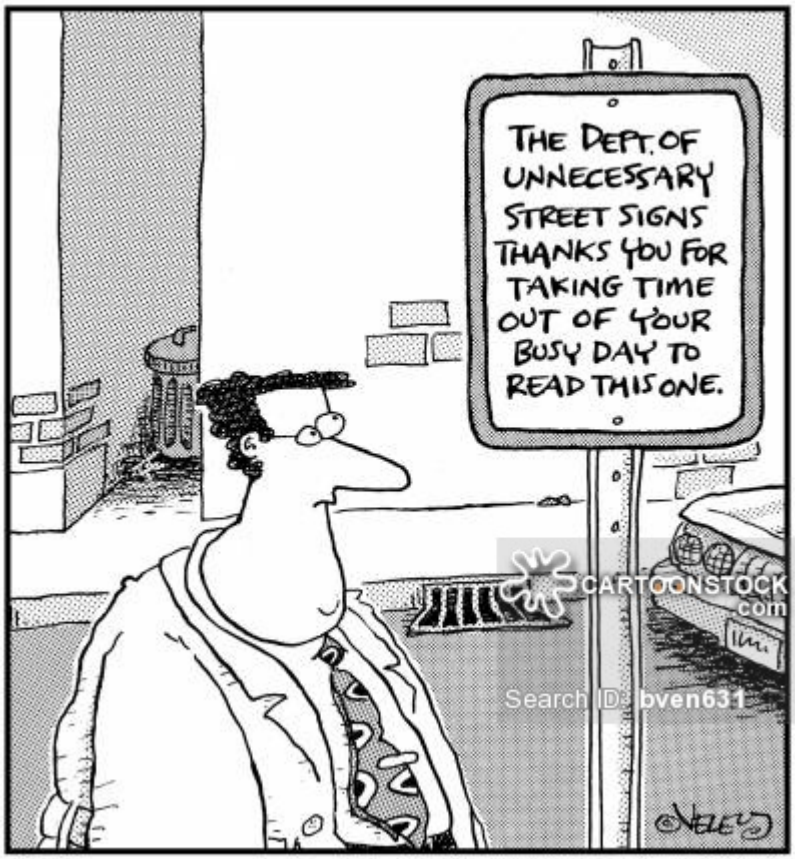
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