



The Biggest Threat to Constitutional Liberty: Federal Bureaucracy

In drafting the U.S. Constitution, our Founding Fathers feared, above all else, centralized government. They understood that power once gained would accumulate, then corrupt, and inevitably subvert liberty. This understanding led them to create a constitutional order of balanced government with clearly delineated lines between the executive, legislative and judicial branches of government, operating within a federal system. Their close reading of history and recent experience with England imparted a deep distrust of executive power and the importance of a legislature to constrain this power. English history showed how the rule of law and constitutional tradition had been threatened by proclamations of the Crown and the royal court, and extra-judicial trials and judgments of royal court bodies such as the Star Chamber.

The Founding Fathers understood all too well how tyranny can arise not only through a dictator, but through executive administration that places itself above the law. In short, executive administration itself, not just an executive officer—even a duly elected president—could undermine liberty.

The essential principle of the American settlement, Thomas Jefferson confirmed in a 1797 letter, “is that of a separation of legislative, Executive and Judiciary functions.” And as far as possible, he added, it is incumbent upon “every friend of free government” to keep it that way.

This fear of centralized executive power found further expression in the 19th century by Alexis de Tocqueville in his second volume of *Democracy in America* (1841), in which he warned of a soft despotism that could come through the administrative power of a centralized government.

Today, the warnings of the framers of our Constitution and Tocqueville about the erosion of the rule of law, the Constitution and our liberties by centralized federal bureaucracies should be echoing through the ears of every American citizen. Federal bureaucracies willfully sabotage the rule of law by issuing regulations, rules, waivers and fines that have the power of legal enforcement without

regard to Congress, the states or the citizens. Federal regulations spilling forth from bureaucrats in Washington bind citizens in the same ways that previous Crown proclamations and the Star Chamber did in pre-modern England.

To decry the Divine Right of Bureaucrats is not hyperbolic. Examples of executive overreach abound. The most recent example is President Obama’s actions on immigration. The mainstream media have contended that President Obama’s executive orders are not any more numerous than his predecessors’. The issue, though, is not the number of Obama’s executive orders, but the full implications of his actions that replace legislative power with executive prerogative. In the past, executive orders and rulings usually were intended to implement and enforce laws passed by Congress. While there are notable exceptions to this—Jefferson’s purchase of the Louisiana territory and wartime actions by Abraham Lincoln and Franklin Roosevelt—there are no examples of a president of the United States mandating a change in immigration policy because Congress, the constitutionally authorized legislative power, could not agree on this issue. The immediate consequences of President Obama’s immigration actions are many, but the long-term implications for the rule of law under the Constitution are profound and far-reaching.

Agencies Run Amok

But this is just the tip of the iceberg of executive overreach. The Department of Health and Human Services, Environmental Protection Agency, Food and Drug Administration, Federal Communications Commission, National Labor Relations Board, Internal Revenue Service, and on and on, have come under recent criticism for some of their more outrageous regulations, waivers and policies. These extreme actions deserve condemnation, but a larger issue gets buried by focusing on the most egregious examples of the out-of-control regulatory state. The day-to-day actions of these agencies, whenever

they issue on their own regulations, rulings, waivers and fines, systematically empower the executive branch to assume the constitutional roles of the legislative and judicial branches of government.

Skirting legislative bodies, whether the U.S. Congress or state legislatures, has become so commonplace today that most Americans take it for granted. Americans are pummeled with news articles announcing new regulatory rules. The headlines tell us about executive agency overreach coming from the EPA, HHS, FCC and NLRB. Here is just a sample of some of the federal agencies that are involved in issuing mandates without congressional approval (headlines are taken from news and opinion articles on the Internet during the last several years of the Obama administration):

- “Obama EPA Issues Coal-Killing Rule to Cut Carbon Emissions 30 percent”
- “HHS finalizes over 1,200 waivers under healthcare reform law”
- “Delayed: Obamacare’s employer mandate for small businesses”
- “\$174K-Per-Year Congressmen Will Get Special Obamacare Subsidy”
- “New Committee Report Outlines Fundamental Flaws of ‘Clean Power Plan’ ”
- “Senate Should Reject EPA’s Regulatory Overreach on Global Warming”
- “12 States Sue Obama Administration for Regulatory ‘Overreach’ ”
- “House passes bill to limit EPA overreach on ditch water”
- “FCC regulatory overreach threatens the Internet”
- “More Regulatory Overreach at the FCC”
- “U.S. innovation is hostage to regulatory overreach”
- “Is the FDA Getting Out of Control?”
- “The Latest FDA Overreach”
- “NLRB overreach in state education”
- “National Labor Relations Board Overreach Against Boeing Imperils Jobs and Investment”

These actions by themselves—whatever we think of the content of the regulations—undermine the principles of constitutional government, replace the rule of law with absolutist governance and acclimatize a citizenry

to complacent acceptance of a soft despotism that Tocqueville warned Americans about over a century and a half ago.

Is Administrative Law Unconstitutional?

This excessive regulation by executive agencies raises the obvious question whether these actions break with constitutional principles. This question is answered by Columbia University law professor Philip Hamburger in his scholarly study *Is Administrative Law Unlawful?* (University of Chicago Press, 2014). His answer is a bold “No! It’s not constitutional.” As author of two important historical books on the separation of church and state and judicial review, Hamburger brings great erudition to our understanding of the conflict between constitutional principle and administrative action. Other legal scholars, such as Richard A. Epstein, have argued that many administrative regulations are unconstitutional notwithstanding the U.S. Supreme Court’s general acquiescence in the rise of the administrative state. What Hamburger does is root this conflict in a longstanding tension in English and American law between constitutional principle and executive prerogative.

He observes that it is not a coincidence that modern American administrative law looks “remarkably similar to the governance that thrived long ago in medieval and early modern England under the name of ‘prerogative,’” in which the Crown and the royal court sought to impose binding mandates on the citizenry outside the constitutional rights of the Parliament. These royal prerogatives derived from absolutist principles that ran outside the law and parliamentary rights founded on English constitutional principles. This struggle between Crown and Parliament was resolved in the English Civil War in the 17th century in favor of the Parliament.

The struggle over absolutist power, Hamburger argues, continues today. He warns that “administrative power threatens the liberty enjoyed [by American citizens] under the law”.

Seventeenth-century English opponents developed clear constitutional principles to bar royal prerogatives and executive evasions. This fear of extralegal government through royal prerogative drove American colonists to declare independence in 1776 and to write a new constitution following the revolution that clearly delineated the powers of the executive and the legislature.

James Madison, a key constitutional theorist at the Philadelphia Convention, expressed the widely held sentiment of the framers when he noted that if “men were angels” there would be no need for government. History taught, however, that men were not angels, and that any government administered by men over other men needed to be constructed to control itself as well as

the governed. The framers sought to limit centralized power by constructing a political structure that separated the powers of the legislature, executive and judicial branches within a federal system of national and state powers. As a consequence the U.S. Constitution carefully vests legislative and judicial power in Congress and the courts. The U.S. Constitution was designed to prevent government by executive edicts as had been seen in England. Subversion of this separation of powers, and the evasion of constitutional principles through executive agency regulations and administrative law, working outside legislative approval, rapidly reverses “what took a thousand years to achieve” (Hamburger, p. 412).

Progressives Revitalized an Ancient Threat

The threat of absolutist government, therefore, has a long and continuous history. Although the regulatory state emerged with greater strength in the late 19th century and grew in intensity and power in the 20th century, it would be a mistake to see this comparatively recent growth as a revival of a dead theory of absolutism. Instead, it represents a continuation of absolutist principles, which have deep ideological roots in English and Continental history. For centuries major writers in Europe upheld the “divine right of kings” and administrative power as superior to parliamentary and representative government.

Absolutist ideology was repackaged by progressive architects of the administrative state in the late 19th century, who drew on French and German anti-constitutional thought. In the closing decades of the 19th century, American reformers in academia and journalism relied on Continental and especially German anti-constitutional ideas to justify administrative power. Typical in this regard was Frank Goodnow, a political science and law professor at Columbia University, whose books on municipal reform and administrative law influenced a generation of reformers.

After studying in Paris and Berlin, Goodnow articulated the need for expertise in administrative bureaucracies to overcome the excesses of popular democracy. Goodnow found in the German ideal of administrative government and law the means for overcoming what he saw as the corruption of popular government. The influence of the German absolutist model was expressed in popular magazine articles published at the time such as “The Government of German Cities: The Municipal Framework” and “What German Cities Do for Their Citizens: A Study of Municipal Housekeeping,” which appeared in the widely read *Century Illustrated* magazine in 1894.

Beginning in the late 19th century, reformers, many of them trained at German universities, became convinced that the nation was threatened by a dangerous mass electorate consistently manipulated by machine politicians who showed unscrupulous and flagrant disregard for any notion of public

morality. Writing in 1901 for the *Atlantic Monthly*, Woodrow Wilson, then a university professor, captured this reform sentiment when he told his readers, “It is no longer possible to mistake the reaction against democracy. The 19th century was above all others a century of democracy; and yet the world is no more convinced of the benefits of democracy as a form of government at its end than it was at the beginning.” Wilson believed that if popular democracy had failed, a new breed of “scientifically” trained men and women could be placed in government administration to provide expertise and specialized knowledge to overcome the corruption of elected representatives and an ignorant electorate.

Wilson was blunt in his recommendation when he declared, “Representative government has its long life and excellent development, not in order that the common opinion, the opinion of the street, might prevail, but in order that the best opinion, the opinion generated by the best possible methods of general counsel, might rule in public affairs.” Of course, what Wilson meant by “best opinion” were those who shared his disdain for popular democracy; and what he meant by “representative government” were unelected bureaucrats who served the new administrative state.

Progressive social scientists such as Woodrow Wilson later downplayed the German influence on their call for an administrative state, but American and European progressive reformers sought a single goal: Empower an administrative state run by bureaucratic expertise trained in the “new” science of administration. While American progressives adopted a softer version of the German administrative state, the American version of government was no less anti-constitutional in its transfer of power from the legislature to the executive branch.

Tocqueville’s Warning of Soft Despotism

Proponents of the administrative state at the turn of the 20th century and today have argued that modern times, technological and scientific advancement, the complexity of government and the need for specialization necessitate administrative law and bureaucratic power. Hamburger challenges this rationale, showing that in the end, “The liberty established by the Constitution is a liberty under law, not a liberty under administrative fiat. It is a complete freedom to do whatever is not forbidden by law, and any attempt to impose extralegal constraints is unconstitutional” (p. 497).

Hamburger turns to Tocqueville’s warning to Americans in his second volume of *Democracy in America*, published before the Civil War, that the greatest threat to the American experiment in liberty is the rise of an apathetic electorate that defers to unelected bureaucrats. Tocqueville shared with his

readers one major anxiety about America's future: Americans, as a people, were so egalitarian in their outlook, individualistic in their spirit and materially competitive that he worried about the decline of what he described as "civil spirit" in the new nation. Democracy worked, he asserted, only if citizens remained involved in democratic political culture. He warned that if Americans became too absorbed in their personal lives, too materially oriented, and inordinately focused on their economic advancement in place of civic involvement, America would be left only with the guise of democracy.

If this occurred, he predicted, Americans would be governed by a "soft despotism," tolerated by citizens absorbed in their individual "petty pleasures" and selfish interests. In this corrosive culture, democratic government is subverted by an administrative bureaucratic sovereign state. Tocqueville bears quoting in detail on this point: "After taking each individual in this fashion by turns into its powerful hands, and after having kneaded him in accord with its desires, the sovereign extends its arms about society as a whole; it covers its surface with a network of petty regulation, complicated, minute, and uniform—through which even the most original minds and vigorous souls know not how to make their way past the crowd and emerge into the light of the day."

Americans now confront a "soft despotism" of bureaucratic power that subverts constitutional government, the rule of law, and individual liberty. We cannot expect the U.S. Supreme Court by itself to fix this problem. Only an aroused citizenry, who demand that their duly elected representatives in Congress and state legislatures fulfill their responsibility to uphold constitutional order, can maintain our nation's unique experiment in liberty for future generations.

The Most Important Person on Earth is a Mother

Cardinal Mindszenty's respect for mothers was deep. Below is the Cardinal's quote, available on a 5 1/2" x 3" card in color.



The Most Important Person on earth is a mother. She cannot claim the honor of having built Notre Dame Cathedral. She need not. She has built something more magnificent than any cathedral—a dwelling for an immortal soul, the tiny perfection of her baby's body ... The angels have not been blessed with such a grace. They cannot share in God's creative miracle to bring new

saints to Heaven. Only a human mother can. Mothers are closer to God the Creator than any other creature; God joins forces with mothers in performing this act of creation ... What on God's good earth is more glorious than this: to be a mother?

—*Joseph Cardinal Mindszenty*

Order a supply of colorful cards with the beautiful pro-life message. Insert with your letters, bills; give out at church and meetings.

Cost includes postage:

| | | | |
|----------|--------|-------------|---------|
| 20 cards | \$6.00 | 100 cards | \$12.00 |
| 50 cards | \$8.00 | 500 cards | \$42.00 |
| | | 1,000 cards | \$80.00 |

The Mother card is available in Spanish at the same cost as English above.

Mindszenty Report Reprints

The Mindszenty Report is published monthly by
Cardinal Mindszenty Foundation
7800 Bonhomme Ave.
St. Louis, MO 63105
Phone 314-727-6279 Fax 314-727-5897

Subscription rate: \$20.00/year, \$36.00/two years.
Outside the U.S.A. \$28.00

The Mindszenty Report is not copyrighted, and subscribers are invited to have it printed in their local newspapers.

Contributions to the Cardinal Mindszenty Foundation are tax deductible as allowed by law.

Eleanor Schlafly, *Publisher*
e-mail: info@mindszenty.org
web site: www.mindszenty.org
orders.inquiries@mindszenty.org

FERGUSON AND THE RULE OF LAW: RHETORIC OF RACIAL DIVISION FOMENTS VIOLENCE. Irresponsible reporting of deaths of men resisting arrest undermines policing and leads to more crime. Ask for 1/15

ENGINEERING BABIES: SURROGATE MOTHERHOOD UNDERMINES THE NUCLEAR FAMILY. The growing practice of renting poor women's wombs violates Catholic doctrine of the family and often deprives the child of a mother's love. Ask for 12/14

A GRISLY HARVEST IN CHINA. Documentation of continuing arrests, torture and detention of ethnic minorities, persecution of the peaceful Buddhist Falun Gong, and a macabre practice of profiting from the harvesting and sale of human organs from dissidents. Ask for 11/14

| | | | |
|-----------|---------|-------------|----------|
| 1 copy | \$.75 | 100 copies | \$25.00 |
| 20 copies | \$10.00 | 500 copies | \$110.00 |
| 50 copies | \$15.00 | 1000 copies | \$210.00 |