

The Administrative Threat to Civil Liberties

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Administrative power is the greatest threat to civil liberties in our era. Traditionally, the most systematic threats to civil liberties came in attacks on particular groups, and this remains a problem. But increasingly, there are also broader threats, which affect the civil liberties of all Americans, and administrative power is the primary example of this broad sort of danger. No single development in our legal system deprives more Americans of more constitutional rights. It is therefore not an exaggeration to say that it is our greatest threat to civil liberties.

Not an Economic Critique

At the outset, I must emphasize that this is a legal critique of administrative power, not an economic critique. Most complaints about administrative power are economic. It is said to be inefficient, dangerously centralized, burdensome on business, destructive of jobs, stifling for innovation and growth, and so forth. All of this is painfully true, but economic complaints are not the entire critique of administrative power. There are also constitutional objections, and the economic critique does not fully address these.

Indeed, the economic critique tends to protest merely the degree of administrative regulation, and it thereby usually accepts its legitimacy—as long as it is not too heavy-handed on business. It is therefore no wonder that the economic criticism has not stopped the growth of administrative power.

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In contrast, the argument here is a legal challenge: that administrative power violates one constitutional freedom after another. This argument is therefore not merely against administrative “abuses” or against “inefficient” or “burdensome” regulation. Rather than suggest that administrative abuses should be tamed, my point is that all administrative power threatens our constitutional rights.

Legal Obligation

Of course, in objecting to administrative power as unconstitutional, I am not denying that executive power is extensive. Executive power includes not merely the power to execute the laws, but more broadly the power to execute all of the nation’s lawful force. It thus includes the power to prosecute offenders in court, to exercise discretion in distributing benefits, to determine the status of immigrants, and so forth. The objection here is not to any of this, but rather to extralegal attempts to impose legal obligation.

What do I mean by extralegal attempts to impose legal obligation? Put simply, whereas the Constitution authorizes the government to bind Americans only through the law (and its enforcement in courts), administrative agencies attempt to bind Americans through other mechanisms—and in this sense administrative power is extralegal.

Post-Benthamite theorists reduce law to a sovereign’s command, backed by coercion. But traditionally in America, law was understood to come not merely with coercion, but also with obligation—the obligation to obey the law. Working from underlying ideas about consent, early Americans assumed that a rule could have the obligation of law only if it came from the constitutionally established legislature elected by the people, and that a judicial decision could have legal obligation only if it came from a constitutionally appointed judge exercising independent judgment. The U.S. Constitution therefore places the power to bind Americans in Congress and the courts, not in executive or independent agencies.

Extralegal Power

Nonetheless, the government purports to create legal obligation through executive and other agency edicts. It binds Americans and limits their liberty not merely through acts of Congress and of the courts, but through other mechanisms. In this sense, administrative power is extralegal.

Put another way, administrative power is an evasion of law. Rulers are always tempted to exert more power with less effort. They therefore are rarely content to govern merely through the law, and in their restless desire to escape its pathways, many of them work through other, “extralegal” mechanisms. English kings engaged in binding extralegal governance when they legislated through proclamations, regulations, and interpretations, and when they adjudicated in the Star Chamber and the High Commission. They called this “absolute power.”

Much of absolute power was authorized by statute, but regardless of statutory authorization, it was an extralegal mode of binding subjects. American presidents similarly engage in extralegal governance when they legislate through binding agency rules and interpretations, and when they adjudicate through binding agency decisions. As in the past, such power often has statutory authorization, but it remains an extralegal pathway and a threat to constitutional freedom. In particular, it is an evasion of the Constitution’s legislative and judicial processes.

The danger of extralegal power (of evasions of constitutional pathways) is thus enduring. Whether in monarchies or republics, there will always be those who seek to avoid the trouble of binding persons merely through acts of the legislature or the courts.

The U.S. Constitution’s Response to Extralegal Power

Once one recognizes administrative power as a type of evasion or extralegal power, which runs outside the Constitution’s pathways for binding Americans, one can begin to see that the Constitution was drafted to bar this danger. Apologists for federal administrative power say that it is a modern development, which therefore could not have been anticipated by the U.S. Constitution. But early Americans were familiar with English constitutional history, and they therefore knew the danger from absolute or extralegal power.

Seventeenth-century English history centered on the attempts of kings to bind subjects extralegally through “absolute” power, and on the struggle of their subjects to establish constitutional limits on such power. I will not recite the history in detail. Suffice it to say that after James I and Charles I openly ruled extralegally, with what they called their “absolute prerogative,” Parliament in 1641 abolished their primary administrative or “prerogative” agencies (the Star Chamber and the High Commission) and then engaged in a civil

war to defeat the king and his pretensions. James II repeated some of his namesake's evasions of law and thereby prompted the English Revolution of 1688. And underlying all of these events were English constitutional ideas. Put simply, constitutional ideas developed in England precisely to defeat the extralegal aspects of absolutism. Constitutional law was thus inextricably intertwined with an early version of what would become administrative power.

Many constitutional commentators said kings should rule only through acts of Parliament and the courts, not through other edicts. Some added that, under the English constitution, legislative power was in Parliament, judicial power in the judges, and executive power in the Crown. From this perspective, the English constitution left no room for the Crown to bind subjects extralegally.

Early Americans were familiar with the English experience, including both the danger of extralegal power or "absolute prerogative" and the need for a constitutional response. It is therefore mistaken to say that the U.S. Constitution could not have anticipated administrative power. Extralegal or absolute power was a familiar problem, and Americans were determined to repudiate it even more systematically than had the English.

The term "administrative power" was not yet ordinarily used in England or America, but absolute power was a known quantity. In the U.S. Constitution, therefore, Americans adopted structures and rights that systematically barred this danger.

The Constitution's Structural Barriers

How exactly does the U.S. Constitution bar administrative power? At the very least, the Constitution's structures preclude extralegal or absolute power.

Let's begin with Articles I and III. Article I blocks extralegal lawmaking by placing legislative power exclusively in Congress. Article III prevents extralegal adjudication by placing judicial power exclusively in the courts. The Constitution thus authorizes only two pathways for binding Americans (in the sense of imposing legal obligation on them). There are some jurisdictional exceptions. But generally, the government can impose binding rules only through acts of Congress (or treaties ratified by the Senate), and can impose binding adjudications only through acts of the courts. Other attempts to bind Americans (by rule or adjudication) are unconstitutional.

These are core civil liberties issues, not merely a matter of structure. Binding agency rules deny Americans their freedom under Article I to be subject to only such federal legislation as is enacted by an elected Congress, and administrative rules thereby dilute the constitutional right to vote. Binding agency adjudications deprive Americans of their freedom under Article III to be subject to only such federal judicial decisions as come from a court, with a real judge, a jury, and the full due process of law. Thus, even under Articles I and III, administrative power is a serious assault on civil liberties.

Administrative lawmaking is often justified as delegated power—as if Congress could divest itself of the power the people had delegated to it. But the Constitution expressly bars any such subdelegation.

“Wait a minute!” you may protest. The Constitution contains no nondelegation clause; so how does it bar congressional subdelegation?

The answer comes in the Constitution’s first substantive word. The document begins: “All legislative powers herein granted shall be vested in a Congress . . .” If all legislative powers are in Congress, they cannot be elsewhere. If the grant were merely permissive, not exclusive, there would be no reason for the word “All.” That word bars subdelegation.

The Constitution’s barrier to subdelegation of legislative power may sound merely technical, but it gives expression to a crucial principle, which underlies the efficacy of the Constitution. The logic is that once the people delegate legislative power to their legislature, any subdelegation would allow the government to evade the structure of government chosen by the people. Alas, this has happened.

I could say more about the Constitution’s structure—for example, about waivers, federalism, and the implications for civil liberties. But time is short. So as to structure, I will simply summarize: To be sure, the United States remains a republic, but administrative power creates within it a very different sort of government. The result is a state within the state—an administrative state within the Constitution’s United States—which deprives Americans of their freedom to make and unmake their own laws.

Juries and Due Process

Now let’s turn to the Constitution’s enumerated rights, especially jury rights and due process. The administrative violation of these rights makes especially clear that administrative power is a serious assault on civil liberties.

The Fifth Amendment secures “the due process of law,” and in defense of administrative adjudication, it is often suggested that due process is centrally a limit on the courts, not so much on the other parts of government. But guarantees of due process of law developed precisely to bar extralegal adjudications rather than merely set a standard for the courts.

These guarantees evolved primarily to bar any binding adjudication outside the courts. The principle of due process became constitutionally significant already in 14th-century English due process statutes, which barred binding prerogative or administrative adjudication. The principle (stated at the head of the 1368 statute) was this: “None shall be put to answer without due process of law.” On this basis, the English asserted due process of law against the High Commission and the Star Chamber, and Americans guaranteed the principle in the Fifth Amendment.

One of the earliest academic commentators on the U.S. Bill of Rights recognized the amendment’s implications. When lecturing on the Constitution at the College of William and Mary in the 1790s, St. George Tucker quoted the Fifth Amendment’s Due Process Clause and concluded, “Due process of law must then be had before a judicial court, or a judicial magistrate.” Similarly, Chancellor James Kent explained that the due process of law “means law, in its regular course of administration, through courts of law.” And Justice Joseph Story echoed both Tucker and Kent. So much for administrative adjudication!

Nonetheless, nowadays, the government often imposes fines and other penalties in administrative proceedings. Administrative adjudication thereby repeatedly violates the due process of law.

Like due process, the right to a jury bars administrative and other extralegal adjudication. Juries are available only in the courts, and the right to a jury (in both civil and criminal cases) thus precludes binding adjudication in other tribunals.

Early Americans understood this point. For example, in the decade after American independence, two state legislatures authorized judicial proceedings before justices of the peace. New Jersey authorized *qui tam* forfeiture proceedings with a six-man jury, and New Hampshire authorized small claims actions without a jury. Rather than accept these evasions of regular judicial proceedings, the courts—in the one state in 1780 and in the other in 1786—held the statutes void for violating the right to a jury under their state constitutions.

The U.S. Constitution in 1788 guaranteed juries only in criminal cases, prompting an outcry for it to protect jury rights in civil cases. The Seventh Amendment therefore secured the right to a jury in “Suits at common law.” This phrase meant civil suits brought in the common-law system, as opposed to those brought in equity or admiralty. The words thus make clear that the amendment secures juries in all civil cases, other than those in equity and admiralty.

But nowadays the Supreme Court says that the government’s interest in congressionally authorized administrative adjudication trumps the right to a jury. In the Court’s strange locution, where the government is acting administratively to enforce newly created statutory “public rights,” these public rights defeat the private assertion of the Constitution’s jury rights. The Court traditionally had used the term “public rights” merely as a label for the lawful spheres of executive action. In *Atlas Roofing Co. v. Occupational Health and Safety Commission* (1977) and other cases, the Court unmoored the phrase from its traditional usage and used it to displace the Seventh Amendment right to a jury in civil cases. But no government power can sweepingly defeat a constitutional right, for the Constitution’s rights are limits on government power. In other words, rights trump power.

Understanding this obstacle, the Supreme Court in *Atlas Roofing* recast administrative power as a right—indeed, as a “public right.” In effect, it denigrated the constitutional right to a jury as merely private, so that the government’s “public” right could defeat the “private” assertion of the constitutional right.

Procedural Rights in General

Administrative adjudications violate not merely jury rights and due process, but almost the full range of procedural rights. To understand this, let’s pause to consider how the Constitution’s procedural rights were drafted.

First, they are mostly in the passive voice. Rather than actively stating that the courts cannot violate various procedures, the procedural rights are typically recited in the passive voice, thereby limiting government in general, including Congress and the executive.

Second, they are added at the end of the Constitution. The drafters initially planned to rewrite particular articles in the body of the Constitution. In this way, for example, they could have modified

Article III. But if they had simply modified that article, they would have limited only the courts, and that would have been inadequate, as they also had to limit Congress in Article I and the executive in Article II. They therefore ultimately added their amendments at the end of the Constitution—so that the procedural rights could limit all parts of government.

These two drafting techniques—the passive voice and amendments at the end—give the procedural rights their breadth in limiting all parts of government and thus barring all binding adjudication outside the courts, including administrative adjudication.

Nonetheless, agencies impose binding adjudication outside the courts, without judges and juries; they issue summons, subpoenas, warrants, and fines without the due process of law of the courts; they deny equal discovery, as required by due process where agency proceedings are civil in nature; they impose prosecutorial discovery, which is forbidden by due process in cases that are criminal in nature; they even reverse the burdens of proof and persuasion required by due process. Agencies thereby repeatedly deprive Americans of their procedural rights.

Ambidextrous Enforcement and the Transformation of Rights

The seriousness of the administrative evasion of procedural rights has not been sufficiently recognized, but it becomes apparent when one realizes that the government now enjoys ambidextrous enforcement.

The government once could engage in binding adjudication against Americans only through the courts and their judges. Now, it can choose administrative adjudication. Sometimes, Congress alone makes this choice; other times, Congress authorizes an agency (such as the Securities and Exchange Commission) to make the selection. One way or the other, the government can act ambidextrously—either through the courts and their judges, juries, and due process or through administrative adjudication and its faux process.

The evasion thereby changes the very nature of procedural rights. Such rights traditionally were assurances against government. Now they are but one of the choices for government in its exercise of power. Though the government must respect these rights when it proceeds against Americans in court, it can escape them by taking an administrative path.

Procedural rights have thereby been transformed. No longer guarantees for the people, they are now merely options for the government. It is difficult to think of a more serious civil liberties problem for the 21st century.

Loss of Procedural Rights in the Courts

Unfortunately, the loss of procedural rights in administrative tribunals is not the end of the matter, for the deprivation of procedural rights persists in the courts. The result is a double violation of rights—first by agencies, and then by the courts themselves.

Let's start with judicial deference to agency interpretations. When courts defer to agencies—regardless of whether they invoke the *Chevron*, *Auer*, or *Mead-Skidmore* precedents—the judges are abandoning their office or duty of independent judgment. Indeed, when the government is a party to a case, the doctrines that require judicial deference to agency interpretation are precommitments in favor of the government's legal position, and the effect is systematic judicial bias in violation of the due process of law. Put bluntly, "*Chevron* deference" (to agency interpretations of statutes) is really *Chevron* bias; "*Auer* deference" (to agency interpretations of rules) is really *Auer* bias; and although "*Mead-Skidmore* respect" (for informal agency interpretations) is not as predictable, it is also a form of bias. All such deference grossly violates the most basic due process right to be judged without any judicial precommitment to the other party.

This deference to agency interpretation is bad enough, but it gets worse, for courts also defer to agency fact-finding. When a court reviews an agency adjudication, the judges rely on the agency's fact-finding, as preserved in its administrative record. Such reliance deprives private parties of their right to a jury trial. Juries (like other procedural rights) are a constitutional right in the first instance—not merely later when one gets to court—as was decided already in some of the earliest American constitutional cases. But the reality is that, even after one appeals from an agency to a court, one still does not get a jury trial!

Even worse is the bias in fact-finding. Where the government is a party to a case, the judges are relying on a record that is merely one party's version of the facts. The judges are thus favoring one of the parties.

Court cases involve two types of questions: those of law and those of fact. Accordingly, when there is systematic judicial bias in favor of

the government on both the law and the facts, what is left for unbiased judgment?

The judicial bias continues even after courts hold agency acts unlawful. Courts usually hesitate to declare an unlawful agency action void (instead remanding it to the agency). And the *Brand X* doctrine often allows agencies to disregard judicial precedent about the interpretation of statutes.

The administrative assault on the Constitution's procedural rights is thus pervasive. Administrative adjudication denies many of these rights in agency proceedings; and then, in defense of administrative power, the courts add their own assaults on procedural rights. The result is a double violation of such rights, both administrative and judicial.

Equal Voting Rights

The most basic administrative assault on civil liberties concerns equal voting rights. The two preeminent developments in the federal government since the Civil War have been voting rights and the administrative state. It must therefore be asked whether there is a connection.

Federal law was slow to protect equal suffrage. In 1870, the Fifteenth Amendment gave black men the right to vote; in 1920, women acquired this right; and in 1965, equality for blacks began to become a widespread reality.

Interestingly, administrative power tended to expand in the wake of expanded suffrage. In 1887, Congress established the first major federal administrative agency, the Interstate Commerce Commission; in the 1930s, the New Deal created many powerful new agencies; and since the 1960s, federal administrative power has expanded even further.

Of course, it would be a mistake to link administrative power too narrowly to the key dates for equal voting rights. But growing popular participation in representative politics has been accompanied by a shift of legislative power—out of Congress and into administrative agencies.

The explanation is not hard to find. Although equality in voting rights has been widely accepted, the resulting democratization has prompted misgivings. Worried about the rough-and-tumble character of representative politics, and about the tendency of newly

enfranchised groups to reject progressive reforms, many Americans sought what they considered a more elevated mode of governance.

Some early progressives were quite candid about this. Woodrow Wilson complained that “the reformer is bewildered” by the need to persuade “a voting majority of several million.” Wilson especially worried about the diversity of the nation, which meant that the reformer needed to influence “the mind, not of Americans of the older stocks only, but also of Irishmen, of Germans, [and] of Negroes.”

Elaborating this point, he observed, “The bulk of mankind is rigidly unphilosophical, and nowadays the bulk of mankind votes.” And “where is this unphilosophical bulk of mankind more multi-farious in its composition than in the United States?” Accordingly, “in order to get a footing for new doctrine, one must influence minds cast in every mold of race, minds inheriting every bias of environment, warped by the histories of a score of different nations, warmed or chilled, closed or expanded, by almost every climate of the globe.”

Rather than try to persuade such persons, Wilson welcomed administrative governance. The people could still have their republic, but much legislative power would be shifted out of an elected body and into the hands of the right sort of people.

Far from being narrowly a matter of racism, this has been a transfer of legislative power to the knowledge class—meaning not a class defined in Marxist terms, but those persons whose identity or sense of self-worth centers on their knowledge. More than merely the intelligentsia, this class includes all who are more attached to the authority of knowledge than to the authority of local political communities. This is not to say that such people have been particularly knowledgeable, but rather that their sense of affinity with cosmopolitan knowledge, rather than local connectedness, has been the foundation of their influence and identity. And appreciating the authority they have attributed to their knowledge, and distrusting the tumultuous politics of a diverse people, they have gradually moved legislative power out of Congress and into administrative agencies, where it can be exercised in more genteel ways by persons like themselves.

In short, the enfranchised masses have disappointed those who think they know better.

Of course, the removal of legislative power from the representatives of a diverse people has implications for minorities. Leaving aside Wilson’s overt racism, the problem is the relocation of

lawmaking power a further step away from the people and into the hands of a relatively homogenized class. Even when exercised with solicitude for minorities, it is a sort of power exercised from above—and those who dominate the administrative state have always been, if not white men, then at least members of the knowledge class.

It therefore should be no surprise that administrative power comes with costs for the classes and attachments that are more apt to find expression through representative government. In contrast to the power exercised by elected members of Congress, administrative power comes with little accountability to (let alone sympathy for) local, regional, religious, and other distinctive communities. Individually, administrators may be concerned about all Americans, but their power is structured in a way designed to cut off the political demands with which, in a representative system of government, local and other distinctive communities can protect themselves.

Administrative power thus cannot be understood apart from equal voting rights. The gain in popular suffrage has been accompanied by disdain for the choices made through a representative system and a corresponding shift of legislative power out of Congress.

Although the redistribution of legislative power has gratified the knowledge class, it makes a mockery of the struggle for equal voting rights. It reduces equal voting rights to a sort of bait and switch, and it confirms how severely administrative power threatens civil liberties.

Conclusion

Administrative power is a profound threat to civil liberties:

- It denies us our freedom to be bound only by laws made by our elected legislature.
- It denies us our freedom to be bound only by adjudications held in courts.
- It transforms our constitutional procedural rights from guarantees for the people into mere options for government.
- And this massive violation of procedural rights happens not only in administrative proceedings, but also in the courts themselves—thus corrupting judicial proceedings and making administrative power one of the most shameful episodes in the history of the federal judiciary.

- Although I am not able in this brief essay to discuss the administrative threat to substantive rights, let me simply note that administrative power comes with profound costs for the freedoms of speech and religion—as when the FCC and FEC engage in prior licensing of political speakers or speech and the IRS restricts the political speech of churches.
- Last but not least, administrative power undermines equal voting rights. The people are told they have equal rights in voting for their lawmakers, but much lawmaking has been shifted out of the legislature.

Such has been the fate of civil liberties in America.

What is to be done? Part of the solution is candor—to talk about the problem in terms that avoid fictional, legitimizing labels. For example, rather than speak about “administrative law,” we should talk about “administrative power”—to make clear that what we are discussing is a type of power, not a type of law. Similarly, the term “administrative law judges” should be placed in scare quotes.

Another part of the solution is to recognize administrative power as a threat to civil liberties. For too long, those who are skeptical of this sort of power have condemned it merely as a threat to business, free enterprise, and the economy. Such things are important, but administrative power is more basically an assault on the constitutional freedoms of all Americans. On this foundation, it will be possible to oppose the threat in a broad-based civil liberties movement.

Last but not least, the movement against administrative power needs to include litigation. Indeed, we need to litigate against administrative power in a manner that has not been done before. I have therefore started a new civil rights organization, the New Civil Liberties Alliance, to pick up where other civil rights organizations have left off—in particular to protect civil liberties from the sort of systemic threats that come from administrative power. The NCLA is the only civil rights organization largely devoted to checking the administrative state.

In the ongoing struggle, there is a role for everyone, not merely lawyers. If Americans are to defeat the administrative state’s threat to civil liberties, each of us has to stand up for our constitutional freedoms. As I tell my students, do not expect anyone to stand up for your rights unless you are willing to stand up for theirs.

