The Rule of Waivers

David Boaz - August 15, 2011

Displaying the civility that liberal pundits have been calling for in these polarized times, Matt Yglesias tweets that "David Boaz is dumb" for suggesting that the use of waivers of existing law by three Cabinet secretaries is "the exercise of arbitrary and autocratic power" when, he notes, "Cabinet secretaries get the authority to waive legislation from congress." It's true that I didn't realize that the new Federal Aviation Administration funding bill, entirely written in the Republican House of Representatives and passed without alteration by two senators representing the Democratic Senate, included a provision (Section 406(c)) allowing the secretary of transportation to waive the small-airport subsidy cap:

> Subsidy Cap- Subject to the availability of funds, the Secretary may waive, on a case-by-case basis, the subsidy-per-passenger cap established by section 332 of Public Law 106-69 (113 Stat. 1022). A waiver issued under this subsection shall remain in effect for a limited period of time, as determined by the Secretary.

Since that was the entire sticking point between House and Senate, it didn't occur to me that the House would have included a clause allowing the secretary to ignore it. And actually, it's not clear they did; the law says "subject to the availability of funds," but waiving the subsidy cap—i.e., allowing the subsidies to continue—is going to cost more money, not less. Still, it's at least plausible that Secretary Ray LaHood is within the law to waive the cap and continue business as usual.

But that's not the main point. The real problem, as I wrote last week, is that:

> The rule of waivers is not the rule of law.

We've been reminded in the past few weeks that we live in a world where Congress passes vast, expansive laws that make grand promises and that few if any members of Congress actually read, and then inserts into them the power for the president or his appointees to waive sections of them when they become unworkable or bump up against the interests of the well connected. Secretary of Education Arne Duncan announced that he will waive the always unrealistic centerpiece requirement of the No Child Left Behind school accountability law, that 100 percent of students be proficient in math and reading by 2014. Health and Human Services Secretary Kathleen Sebelius has already granted more than 1,000 waivers from the provisions of the new health care law. One problem with such waivers, of course, is the suspicion that they will be granted to the politically connected or even to political supporters. Philip Hamburger of Columbia Law School says waivers raise "questions about whether we live under a government of laws. Congress can pass statutes that apply to some businesses and not others, but once a law has passed—and therefore is binding—how can the executive branch relieve some Americans of their obligation to obey it?"

The delegation of legislative power to the bureaucracy is an increasing problem. Until Franklin Roosevelt's New Deal, it was understood that the U.S. Constitution gave the exclusive power of lawmaking to Congress. In conformity to the rule of law, it gave the president the power to execute the laws and the judiciary the power to interpret and enforce them. In the 1930s, however, Congress started passing broad laws and leaving the details up to administrative agencies. Such agencies—the Agriculture Department, the Federal Trade Commission, the Environmental Protection Agency, and countless more—now churn out rules and regulations that clearly have the force of law but were never passed by the constitutional lawmaking authority. Sometimes Congress didn't know how to make its broad promises real, sometimes it didn't want to vote on the actual tradeoffs involved in giving some people what they wanted at the expense of other people, sometimes it just couldn't be bothered with the details. The result is tens of thousands of bureaucrats churning out laws—80,000 pages of them in a typical year—for which Congress takes no responsibility.

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Compounding the insult to the rule of law is that these agencies then interpret and enforce their own rules, deciding how they will apply in each individual case. They are legislator, prosecutor, judge, jury, and executioner, all in one agency—as clear a violation of the rule of law as one could imagine. A particular problem is the federalization and criminalization of environmental law over the past three decades. In its zeal to protect the environment, the federal government has created a web of regulations so dense that compliance with the law is essentially unachievable. Prosecutors and courts have stripped environmental criminal suspects of such traditional legal defenses as good faith, fair warning, and double jeopardy, while effectively requiring potential suspects to incriminate themselves. It is when pursuing a goal as public-spirited as environmental protection that we must remind ourselves to be most careful in following rules and abiding by constitutional protections, lest the worth of the goal lead us to erode the principles that allow us to achieve all our goals.

Over the past decade Congress has passed many such expansive and aspirational laws—the Patriot Act, the No Child Left Behind Act, TARP, the stimulus bill ("the Democrats' Patriot Act"), the Patient Power and Affordable Care Act—that put power into the hands of the bureaucracy. My colleagues at the Cato Institute and I have often warned members of Congress about the dangers of that practice, often pointing out that someday the White House will be in the hands of the other party, and they may not like what their opponents do with such sweeping powers. Appealing to conservatives in a column on the detention of Jose Padilla, Robert A. Levy wrote, "Even persons convinced that President Bush cherishes civil liberties and understands that the Constitution is not mere scrap paper, must be unsettled by the prospect that an unknown and less honorable successor could exploit some of the dangerous precedents that the Bush administration has put in place." In a column on President Obama's intervention into the economy, I asked Democrats, "If you still have warm feelings toward Obama and his good intentions, ask yourself this: Will you feel comfortable one day when the appointees of President Romney or President Palin are exercising unconstitutional, unauthorized, unreviewable authority to restructure the economy the way they see fit?"

And that's why I wrote in the Britannica entry on libertarianism, "A fundamental characteristic of libertarian thinking is a deep skepticism of government power." Would that liberals and conservatives displayed the same skepticism.

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