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Congress Must End Power Grab by Unaccountable Bureaucrats

by Bonner R. Cohen

There is a cancer spreading through the American body politic that, if not treated urgently and thoroughly, will prove terminal to the enterprise our Founding Fathers launched over two centuries ago.

The U.S. Constitution is nothing if not an effort on the part of some brilliant and world-wary minds to create a political system with checks and balances that limit the power the government has over the governed. Yet the rise of the Washington-based administrative regulatory state since the days of the New Deal has allowed for abuse of power that would never have occurred under King George III.

Every year, hordes of bureaucrats at federal agencies churn out reams of new rules and regulations, each one of which has the force of law behind it. These rules cover everything from the crops farmers plant, the food we eat, and the electricity we use to the vehicles we drive and the medicines we take. The list is as endless and the bureaucrats' discretionary powers are boundless.

But wait. Isn't Congress supposed to pass the laws subject to the approval of the Executive Branch? Yes, that's the way it's supposed to be, but that's not the way it is. Elected Members of Congress, by delegating their constitutionally-prescribed lawmaking authority to unelected bureaucrats, have turned the Constitution on its head.

For a power-hungry administration, unable to ram its legislative agenda through Congress, this arrangement is heaven-sent. Can't get Congress to pass cap-and-trade legislation to limit greenhouse gases? No problem. Just get your political appointees and friendly bureaucrats at EPA to declare that greenhouse gases "endanger" the environment, and – presto – you can clamp down on emissions, and regulate energy use. That's exactly what the Obama Administration is trying to do.

Even when Congress does approve legislation, the resulting law may turn out completely different from what some lawmakers naively envisioned. The ObamaCare law, by itself over 2000 pages long, instructs a host of federal agencies to write what will ultimately be tens of thousands of pages of rules governing how the health care scheme is to be carried out. And the worker bees crafting those rules, who are in effect writing new laws, are accountable to absolutely no one.

Angelo Codevilla, professor emeritus at Boston University, points out that "modern laws are primarily grants of discretion; all anybody has to know about them is whom they empower."⁷ The system is rigged not just to empower government officials, but also to benefit well-connected special interests, such as large corporations, unions, pressure groups, who have the ear of the powers that be in Washington. Confronted by

administrative law texts which are incomprehensible by design, the average citizen has little choice but to accept what his anonymous "superiors" serve up.

John Locke, the 17th century British philosopher whose ideas profoundly influenced the American Founding Fathers, was the first to warn against the perils of delegation. Locke's non-delegation doctrine holds that the governing body to which a particular power has been delegated by the people cannot lawfully transfer that power away from itself.² But that's what elected representatives on Capitol Hill have been doing for decades.

"If you don't want power abused," the Cato Institute's Roger Pilon recently told a conference sponsored by the Property Rights Foundation of America, "don't grant it in the first place."³ This self-evident truth has been completely ignored by generations of Washington lawmakers. Nowhere in Anglo-Saxon Law is there any basis for the legal shenanigans regularly practiced in Washington. The system would be much more at home in France, where the Napoleonic Code created that country's powerful administrative state.

The responsibility for this lies solely with Congress. By delegating its lawmaking power to federal regulatory agencies, Congress is allowing bureaucrats to amend existing statutes. The system permits lawmakers to shake their fists and promise a crackdown on "out of control" bureaucrats every time an agency issues an unpopular rule. But the current arrangement suits many of them just fine. They can brag about their commitment to a cleaner environment without having voted for a new regulation that may shut down a factory in their district or raise their constituents' electricity bills.

A Congress truly committed to reining in the power of government can begin by taking full responsibility, through yes-or-no votes, on any rules imposed by Washington's elephantine, power-hungry bureaucracy.

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Footnotes:

¹ Angelo Codevilla, *The Ruling Class: How They Corrupted America and What We Can Do About It*. New York: Beaufort Books, 2010. p. 31.

² Walker F. Todd, *Progress and Property Rights: From the Greeks to Magna Carta to the Constitution*. Barrington, MA: American Institute for Economic Research, 2009. p. 40..

³ Roger Pilon, "Eminent Domain Principles and Property Rights." Address Before the 14th Annual Conference of the Property Rights Foundation of America, Lake George, NY. Oct. 23, 2010.

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