Forbes

Too Bad We Stopped Taking The Constitution Seriously: Delegation Of Powers

By George Leef

October 6, 2014

Do you think you would like living in a country where the ruler or his minions could declare what the law was, change it at will, and decide whether someone was guilty of a violation?

Certainly not. People risk their lives to escape from such places, North Korea and Cuba, for instance.

Long ago, Englishmen began to rebel against such government – rule by royal prerogative – beginning in 1215 with Magna Carta, which kept the King from arresting and punishing subjects except in accordance with established legal procedures. Later, English judges would rule that the King could not govern through royal proclamations, and in 1641 Parliament abolished King Charles' Star Chamber and High Commission, key tools in his heavy-handed reign.

The rule of law – known, fair, and stable – was replacing royal prerogative and the people were far better off for it.

In America, the grievances of the colonists were grounded in the vestiges of royal prerogative. After winning independence, the people wanted to make sure that they would not suffer anything like it. As Columbia University law professor Philip Hamburger explains in a recent talk (available in the September 2014 Hillsdale College Imprimis), "Early Americans were very familiar with absolute power. They feared this extra-legal, supra-legal, and consolidated power because they knew from English history that such power could evade the law and override all legal rights."

Those concerns gave rise to the Constitution's separation of powers.

Article One, Section One provides that all legislative powers vest in Congress. Neither the executive nor the judicial branches are to create law. Each branch is to stay within its narrowly and precisely prescribed functions to guard against encroachments on the people's liberty.

It worked – for a while.

During the so-called Progressive Era (better called the Big Government Must Solve All Our Problems Era), Congress began establishing administrative agencies charged with implementing statutes it passed, the Interstate Commerce Commission, for example. That was constitutionally permissible, but before long, Congress sought to give such agencies legislative powers – to make law through regulations. The Supreme Court ruled that unconstitutional because Congress was not empowered to delegate its legislative power to any other body.

Thus was born the non-delegation doctrine, and it held through 1936. Numerous New Deal statutes foundered upon it. But in 1937, the Supreme Court chose to ignore it in the pivotal case of NLRB v. Jones & Laughlin Steel. In passing the National Labor Relations Act, Congress had put de facto legislative power over labor relations in the hands of a bureaucratic agency, the National Labor Relations Board. The Court did not overrule the earlier cases (such as Carter v. Carter Coal in 1936), but gave the NLRB the green light. Ever since, it has turned a blind eye to the increasing delegation of legislative power to unelected bureaucrats.

Along with most of America, the Court's justices have blithely accepted the idea that Congress simply cannot write all the laws needed today because our problems have become "too complex." Under that notion, the best (and constitutionally unobjectionable) course for Congress is to enact vague, general statutes that leave it to supposed experts in administrative agencies to figure out all the details and enforce them. Thus, our enormous body of administrative law is just a matter of necessity – or so the argument goes.

Professor Hamburger is not persuaded. "Administrative law is commonly defended as a new sort of power, a product of the 19th and 20th centuries that developed to deal with the problems of modern society in all its complexity. From this perspective, the Framers of the Constitution could not have anticipated it and the Constitution could not have barred it," he writes in the essay above.

He continues, "What I suggest, however, is that administrative power is actually very old. It revives prerogative or absolute power and thus it is something the Constitution centrally prohibited." In his recent book, Is Administrative Law Unlawful? he fully presents his argument against the constitutionality of lawmaking through administrative edict.

I think Professor Hamburger is right on the constitutional question, but I'd also say that, quite apart from its constitutional defects, administrative law is a bad development for America. In many, many aspects of life, we now face thick piles of administrative regulations. Knowing and comprehending them is a virtual impossibility. We would be far better off without them, our conduct instead governed by the simplicity of common law.

Labor relations, for example, is covered by a heavy blanket of administrative rules and decisions of the National Labor Relations Board, but labor relations are no more "complex" now than they

were prior to the creation of that agency in the NLRA. Common law rules of contract, property, and tort sufficed to regulate the field and would do so again if we could ever repeal the NLRA and eliminate the needless (and usually partisan) NLRB.

Where common law might not suffice (arguably that's the case with respect to pollution, e.g.), Congress could and should take enough time to write the exact laws that need to be enforced. Instead of deferring to supposed experts in agencies, who are not elected (and often act in cahoots with lobbyists from special interest groups), Congress should listen to debate among actual experts, then draft bills open for public comment and debate the matter further before voting.

That would be infinitely better than enacting vague laws to be mostly filled out by functionaries in the bureaucracy.

It is probably too much to hope that the Supreme Court would reverse its almost 80 years of abject deference toward the delegation of legislative power to governmental entities, but not to hope that it will at least pull the plug on delegation to non-governmental bodies. That is the issue in a case the Court will hear in December, Department of Transportation v. Association of American Railroads.

Under the Passenger Rail Improvement and Investment Act of 2008, Congress gave Amtrak, a for-profit, quasi-public hybrid, a hand in writing regulations that will apply to its competitors. That's an appalling idea.

In this Cato@Liberty post, attorney Ilya Shapiro explains what is at stake: "Many agencies are already dominated by the private interests they're supposed to regulate (a dynamic known as 'regulatory capture'), but allowing a private entity to secure a legislative role in governing its competitors not only exacerbates the problems that the administrative state already poses, it makes a mockery of the Constitution and erodes one more important structural protection for liberty."

Absolutely right. While rule by federal bureaucrats appeals to the statist instincts of our "progressives" (exemplified by the book Philip Dru, Administrator by Woodrow Wilson's top adviser, Colonel Edwin House), it is neither desirable nor permissible under the Constitution.

Rolling back our vast, often wasteful and authoritarian administrative state is a journey of a thousand miles, but if the Court stands firm against delegation in this case, at least we will have taken the first step.