



WHO ARE THE MOST POWERFUL PEOPLE IN AMERICA?

PHILIP HAMBURGER

If someone suggested to you that Americans should reject representative government and return to the rule of kings, you would laugh.

“This is America,” you would say. “In our revolution, we got rid of monarchy.”

And, of course, you’d be right – but only to a point. Monarchy is making a comeback – though not in the way you think. Let me explain.

A king is one person. Get rid of him and you might get your freedom back. But what do you do when the nation has come to be controlled by thousands of little king—almost supreme in their specialized fiefdoms—who have vast power over your life, much as a king might? Good question, because that’s what we’re up against.

This regime is called the “administrative state.” Its little kings are unelected “bureaucrats,” officially known as “administrators,” “secretaries,” or even “czars.” And, make no mistake, they are very powerful. Their decisions affect us every day. The FDA, the FCC, the SEC, and so on and so on. Put together almost any three or four random letters and chances are you’ve stumbled on a government agency. These agencies and the people in them shape our lives—often for the worse.

Many farmers in California lost their livelihoods because the Fish and Wildlife Service decided that the delta smelt (a tiny fish) was more important than the farmers’ water supply. That decision may have been right, or it may have been wrong. My point is simply that the decision should have been made by our lawmakers—who are accountable to us at the next election.

Those farmers are among the millions of hard-working people directly hurt by the administrative state. And many more millions have been indirectly hurt—such as all those discouraged from even starting a business by miles of bureaucratic red tape.

This is not an argument against government regulation per se, but against regulation imposed by bureaucrats rather than by our elected lawmakers whom we can hold accountable at the next election. Here’s the larger danger: As bureaucracy grows, individual freedom diminishes.

How did we get into this mess? And, more importantly, how do we get out of it?

America’s Founders recognized the problem. They didn’t like being told what to do by people they hadn’t voted for. They built all kinds of protections into the U.S. Constitution, starting with its very first line after the Preamble:

“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”

All legislative powers, not some. This means only Congress can make the nation’s laws. Congress thus cannot divest itself of that power to a bureaucracy. And that’s how America operated for most of its first hundred years.

This changed when many Americans—such as Woodrow Wilson—fell in love with centralized bureaucratic power. Wilson was a university professor before he moved into politics and eventually became president in 1912. A self-described “progressive reformer,” he was impatient for power. He wasn’t interested in persuading the American people to come over to his point of view—that would take too long. So instead, he aimed to shift lawmaking power out of Congress and into the hands of a professional class of government workers—in other words, bureaucrats.

Franklin Roosevelt (who served in Wilson’s cabinet) perfected his mentor’s vision when he became president. For him, as for Wilson, there were few problems administrative power couldn’t solve. FDR’s presidency produced an alphabet soup of new government programs that vastly expanded the administrative state. And since then, it has grown even more dramatically.

Congress still passes laws. But it leaves it to the bureaucracy to fill in the gaps. And these gaps can be enormous. Consider, for example, the Affordable Care Act of 2009—what came to be known as “ObamaCare.” The bill itself was over 2,500 pages, but Congress left much unspecified. So, career government officials—elected by no one—went to work. And by 2013, there were an additional 10,000 pages of regulations

So, how do we rein in these faceless monarchs?

First, Congress should actually do its job and take responsibility for the laws it passes. Don’t hold your breath. But they at least could do this: Congress should end legal immunity for bureaucrats who abuse their power. If they know they can be sued, they’ll be a lot more sober about imposing rules others have to live by.

Second, the courts should do *their* job. They must follow the law. That means protecting our constitutional freedoms, including our right to representative government. No more bureaucratic rule-making.

And, finally, we have to do *our* job. We must assert our freedom—in conversation, on the web, and in the courts. We don’t want to be ruled by a king—or thousands of little kings.

As the Founders would have said, “No regulation without representation.”

I’m Philip Hamburger, professor of law at Columbia Law School and president of the New Civil Liberties Alliance, for Prager University.