VOLUME XIV, NUMBER 4, FALL 2014

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REVIEW OF BOOKS

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Allan H. Meltzer:
The Piketty Boom

Steven F. Hayward:
Perlstein's Reagan

Richard Brookhiser:
The Long Road to Freedom

Peter W. Wood:
Henry David Thoreau

Bruce S. Thornton:
The Parthenon

Christopher Caldwell:
Fukuyama on Democracy

Rich Lowry:
The Pity Party

Bradley C.S. Watson:
Richard Epstein's Liberalism

Algis Valiunas:
George Orwell

William Voegeli:
Turning 60

A Publication of the Claremont Institute

PRICE: $6.95

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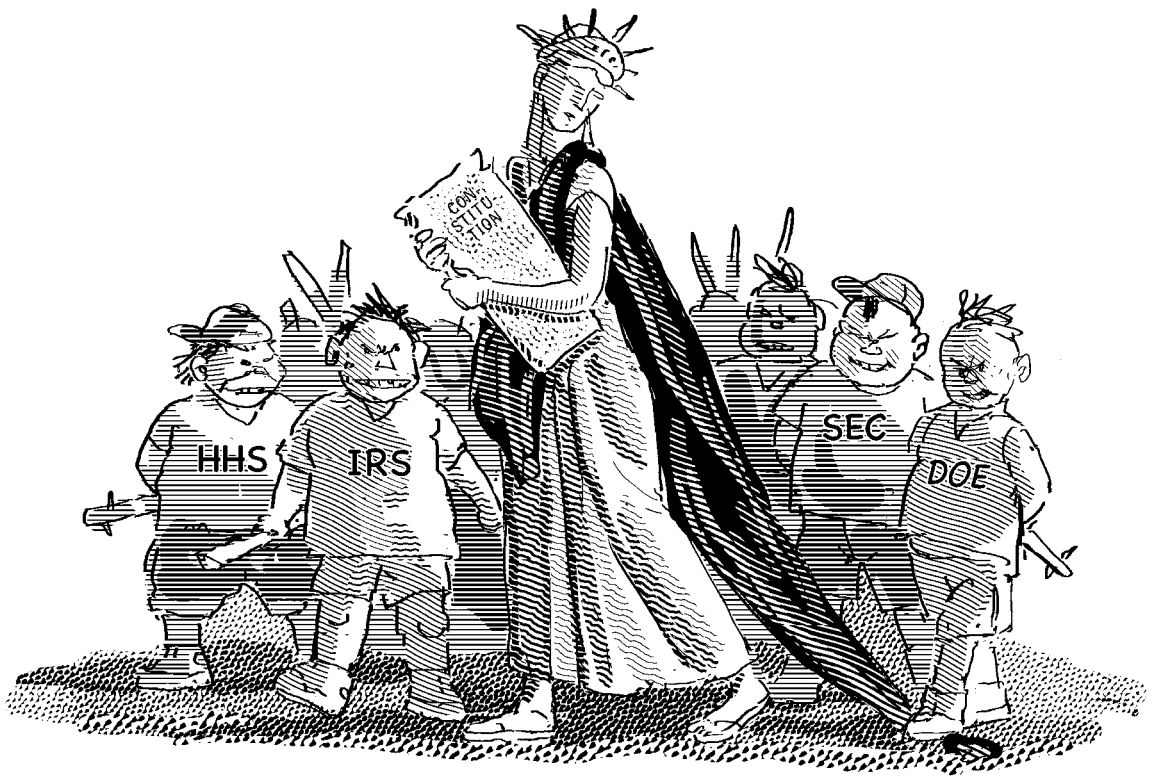
Book Review by Michael M. Uhlmann

Appointed Tyrants

Is Administrative Law Unlawful?, by Philip Hamburger.
University of Chicago Press, 648 pages, $55



Philip Hamburger, the Maurice and Hilda Friedman Professor at Columbia Law School, is a master surveyor of legal history who clearly likes to rummage about in old English and early American legal vaults. His interest is not merely antiquarian but didactic, and when that disposition marries his well-developed wariness of academic fashion, the results can be powerfully instructive. His first book, *Separation of Church and State* (2002), for example, challenged the prevalent secularist bias concerning the First Amendment, which has effectively driven religion from the public square. After sifting through previously un- or under-examined archival evidence (including materials confirming the persistent influence of anti-Catholic prejudice), Hamburger found the secularist dispensation to be historically weak, constitutionally contrived, and injurious to religious freedom. Honest scholars and lawyers writing about the subject henceforth will find it difficult to ignore his arguments. Professor Stanley Katz of Princeton, one of the nation's most honored legal historians, rightly hailed *Separation of Church and State* as "the best and most important book ever written on the subject."

Undaunted by high praise, Hamburger delivered a second major work a few years later with *Law and Judicial Duty* (2008), a learned 700-page commentary on Anglo-American judicial customs from medieval times through the late 18th century. Once again, he patiently unearthed important evidence that had previously escaped scholarly attention and, by so doing, cast new light on a well-worn subject. Though Americans are prone to think of judicial review as an invention that more or less began in 1803 with Chief Justice John Marshall, Hamburger showed that long before William Marbury filed his famous complaint, judges believed their oaths obliged them to restrain, as best they could, official action that contravened the law of the land. R. Kent Newmyer, another much-honored legal historian and a close student of both John Marshall and Joseph Story, predicted that *Law and Judicial Duty* would "reshape the scholarly debate about the origins and nature of judicial review."

We shall find out in due course whether the same will be said of Hamburger's new book, *Is Administrative Law Unlawful?* In the meantime, publication of his third major work in twelve years affirms his status as the nation's most stimulating—and most prolific—legal historian. The new volume is broader in focus than his earlier ones but, like them, deeply researched and well written. It is also the author's most ambitious, even daring, work, for not only does it question important features of administrative law; it challenges (as the title suggests) their very legality. This frontal assault on the citadel of the administrative state is obviously not calculated to win friends in those academic and governmental precincts where the idylls of the administrative state are commonly sung. But Hamburger isn't interested in making friends; he wants to start an argument.

At the risk of undue abridgement, here is what troubles Professor Hamburger. Where-

as the Constitution celebrated and took elaborate pains to establish government at once limited in scope and republican in form, the overwhelming majority of the laws that now govern the nation consist of administrative edicts promulgated by officials who evince little interest in limited government and are neither chosen by, nor easily controlled by, their fellow citizens.

How this dramatic alteration came to pass has occasioned a sizable and unusually thoughtful literature in recent years. Those schooled in the ideas and institutions of the American political tradition have focused on the intellectual rebellion against the founding principles that began in the late 19th century and came to dominate the politics of the Progressive and New Deal eras. Here, the contributions of Ronald Pestritto, Thomas West, John Marini, and Charles Kesler come most immediately to mind. A second group of legal scholars has focused on specific constitutional doctrines that mark the change from the founders' regime to the new administrative order. Here, the critiques of Gary Lawson, Richard Epstein, and David Schoenbrod have received prominent attention. Hamburger's book complements these contributions in diverse ways, while bringing something new and uniquely valuable to the literature—his intimate knowledge of English constitutional development, in particular the struggle against prerogative. His new book is a veritable cornucopia of fresh and significant insights that will greatly enrich the existing literature.

It should be said at once that *Is Administrative Law Unlawful?* is a work of encyclopedic breadth and erudition, confirming that its author is equally comfortable with grand themes and matters of granular detail. While the United States remains the book's primary focus, Hamburger moves seamlessly back and forth among relevant continental, English, and American legal institutions and commentaries. He is well acquainted with Woodrow Wilson's thought, but no less so with Tudor statutory enactments. He has new and interesting things to say about the development of due process in England, and, as well, about the Administrative Procedure Act in the United States. The influence of the German *Rechtsstaat* on American reformers in the 19th century seems as familiar to him as the latest permutations of the Supreme Court's Chevron Doctrine (which established deference to an administrative agency's interpretation of a statute it administers).

Is Administrative Law Unlawful? defies convenient labeling. It is at once historiography, legal treatise, philosophical commentary, and public policy polemic. It almost has to be all of these things to accomplish Hamburger's purpose, which is to show that administrative law is anything but a routine, if somewhat specialized collection of procedural rules. To the contrary, Hamburger argues that administrative law rests on principles that are deeply repugnant to constitutionalism and limited government. Once the origins and history of those principles are examined, he argues, administrative law will be seen as the modern institutional equivalent of royal prerogative, i.e., an effort to bind subjects by rules that are by definition extralegal. The nearly 800-year struggle against the prerogative, which fed and was fed in turn by the growth of parliamentary institutions and an independent judiciary, is for Hamburger the most noteworthy achievement of English constitutional history—and not least because it inspired the thought and work of the American Founders.

His book is in major part an effort to familiarize (or refamiliarize) readers with the history of that struggle and its contemporary significance for administrative law. By so doing, Hamburger hopes to dispel the notion that administrative law is a modern invention, a merely pragmatic innovation born of necessity; that the founders' Constitution, in its preoccupation with natural rights, limited government, and the separation of powers, was simply incapable of addressing the pressing problems of industrial society.

The creators of modern administrative law took pains to promote that notion, and their successors have reechoed it ever since; indeed, it remains the principal justification for abandoning the separation of powers. The argument from necessity has produced two undesirable consequences: it in effect asserts that the Constitution is no longer relevant to modern life; and it obscures the ways in which administrative law reinstantiates the idea of prerogative. On Hamburger's reckoning, our administrative system is not only unwise and unwieldy; it is as lawless as its royal antecedents against which the Glorious Revolution of 1688 and the American Revolution were directed.

His thesis, in a nutshell, comes to this: the Constitution contemplates only two kinds of edicts that may bind citizens—rules enacted by Congress, and orders issued by duly authorized courts. Administrative edicts, by contrast, seek to bind citizens by commands that are neither legislatively enacted nor judicially decreed. They are, strictly speaking, lawless.

That is a stark way of stating what's wrong with administrative rulemaking and adjudication, and one can almost hear the sputters of outrage at Hamburger's suggestion that administrative law is built on a constitutional house of sand and, for openers, that Congress ought to get back to the business of legislating as if it really mattered, instead of empowering administrative agencies to do the heavy lifting. (Even in this highly technical era, there are any number of ways in which Congress, with some relatively minor institutional adjustments and additional funding, might once again become a fully functioning legislative institution.)

The experts may sputter and congressmen may shudder at the prospect, but the idea may not strike many Americans as inherently absurd. There was a time not long ago when arguments like Hamburger's would have seemed neither odd nor trivial. Such sentiments, atavistic as they sound to contemporary ears, were once the common coin of the Anglo-American constitutional realm, taught in the schools, and repeated and praised by learned dons. Historians might even have pointed out that the longest section of the Declaration of Independence, in 27 separate paragraphs, indicts the king for abusing his office even as he claimed legal authority to do as he did. The Declaration in that sense might be said to be the most powerful American expression of the principle that emerged from the centuries-long struggle to subdue prerogative—the same principle that is instantiated in the Constitution's most important structural feature, the separation of powers.

But that was then, and this is now. Most teachers and practitioners of administrative law, one suspects, will view this old-fashioned constitutionalism as hopelessly reactionary if not downright perverse. They will in any case consider it to be irrelevant. No matter how loudly Philip Hamburger and his allies blow their trumpets, the critics will say, the walls of the administrative state are not going to come tumbling down.

Perhaps they are correct, but their optimism may be almost willfully blind to cracks that have begun to appear in the foundations. Apart from the accelerating growth and cost of regulation, which are no longer a marginal feature of everyday economic and social life, qualitative difficulties of a sort not commonly

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seen mark the activities of today's administrative system. Bloated overstretch exacerbated by inadequate oversight from Congress and the courts has begun to breed official arrogance, which in turn produces public distrust, indifference, or cynicism. We can see signs of all of these things, for example, in the politically manipulated legerdemain that has become the defining hallmark of the Affordable Care Act (ACA). They are also shockingly apparent in the presumption by Internal Revenue Service officials that tax regulations may be used for political purposes. They may also be observed in the government's hapless (and disingenuous?) efforts to stem the flow of Central American émigrés across our Southern border.

And what is one to make of officials in the Veterans Affairs hospital system deliberately losing track of patients (in some cases allowing them to die) in order to make their averages look better? Then there is the president's own Secret Service detail and its penchant for hiring prostitutes while advancing overseas presidential trips, which perhaps explains why an intruder can make it as far as the White House East Room before being apprehended.

It will be said that such stories provide only random evidence of bureaucratic bungling. Perhaps, but they may alternatively be a measure of deep institutional stress, perhaps even of potential system failure. The bright sunny vision of beneficial government regulation that appeared on the Progressive horizon early in the 20th century must have seemed spectacularly promising when measured against the regulatory burdens of the day. But when the ambit of federal regulatory control extends, as it now does, to almost all levels of economic activity, it becomes increasingly difficult to keep an administrative system trim and tidy, or for that matter free of corruption. Though government officials for self-interested reasons may not see themselves as suffering from bloated expectations, the public may have an altogether different view. The presumption of expertise, which is the *sine qua non* of the administrative state, goes only so far when it has to be spread so thin. A public grown complacent by the prospect of goodies under the Christmas tree may exhibit a very different attitude when Santa doesn't show up as promised. And it may board up the chimney if every time Santa shows up, he comes with a long list of demands about the kind of light bulbs you use in your house or the number and kinds of calories your child is allowed to consume while at school.

The most noticeable pattern in regulatory activity since the 1970s is the shift to what is called the new "social regulation." By that is meant rules that cut more deeply into private behavior than prior regulatory schemes, which for the most part were directed at particular lines of commercial activity—banking and securities, railroads, trucking, aviation, radio and television transmissions, etc.—and addressed issues of market power, rates, and access. The newer modes of regulation are much more diffuse in their focus and operations—environmental matters, employment, consumer affairs, civil rights (including matters of race, gender, and sexual orientation), health care, and the like.

Regulating these kinds of activity necessarily brought more and more citizen behavior within the ambit of government control. A public that might be indifferent to (or favor imposing) regulatory burdens on, say, ExxonMobil or Blue Cross/Blue Shield may develop quite different opinions about the value of regulation when the long arm of government seeks to control sensitive or previously private matters. This may present political problems for administrative officials (and for congressional delegators of rulemaking authority) of a kind they have not seriously had to contend with before.

The persistent, widespread, and increasing unpopularity of the Affordable Care Act may be an indicator of public exhaustion with the new regulatory paradigm. Despite early enthusiasm for health care "reform," it gradually began to dawn on the public that a government plan to coordinate health care services all the way down, so to speak, is going to have a lot to say about when, where, how, and by whom you are treated, and for how long. And the government is not always going to say please and thank you as it steers citizens into mandated health care chutes. Despite repeated promises by politicians from the president on down, it turns out that large numbers of people will not be able to keep their previous health plan or doctors. And their new insurance policies in all probability will cost them more—considerably more.

Only time will tell, but it is entirely possible that with the Affordable Care Act, the administrative state may have finally jumped the shark. After more than four years into the Act's implementation phase—if such it can be called—only skilled experts who are paid large sums of money to know such things could tell you how many waivers, suspensions, postponements, carve-outs, and exceptions (not to mention carefully disguised and specially targeted taxes and subsidies) have been necessary just to keep the badly listing ACA vessel from sinking altogether. This is precisely what Hamburger warns against in his indictment of prerogative.

Those who remain skeptical might consider one of Hamburger's examples. He discusses the 1539 Act of Proclamations enacted by a cowed Parliament at Henry VIII's insistence. The Act authorized the king to "set forth…proclamations, under such penalties and pains" as might be thought "necessary and requisite" by the king and his council. These proclamations "shall be obeyed, observed, and kept as though they were made by act of Parliament."

The language is a bit gruff by modern standards, but it nevertheless has a contemporary ring to it, does it not? *Mutatis mutandis*, it might have been lifted from the text of the Affordable Care Act, the Dodd-Frank Act, or any number of other major regulatory authorizations enacted by Congress in recent years. Philip Hamburger is on to something, and it's a good bet that his book will generate precisely the debate he hoped for. It couldn't happen at a more propitious time, for there is much at stake. As he notes,

> The history of government is largely a story of elite power and popular subservience. Americans, however, turned this old model upside down. By establishing a republican form of government, they eventually made themselves masters and made their lawmakers their servants. More than two centuries later, the shell of this republican experiment remains. Within it, however, another government has arisen, in which new masters once again assert themselves, issuing commands as if they were members of a ruling class, and as if the people were merely their servants. Self-government thus has given way to a system of submission.

Who knows, one of these days a candidate for president just might pick up on language like that and ask the people to support a renovation of the administrative state. There may be a more receptive audience for that proposition than at any other time in recent history.

Michael M. Uhlmann teaches political science at Claremont Graduate University.