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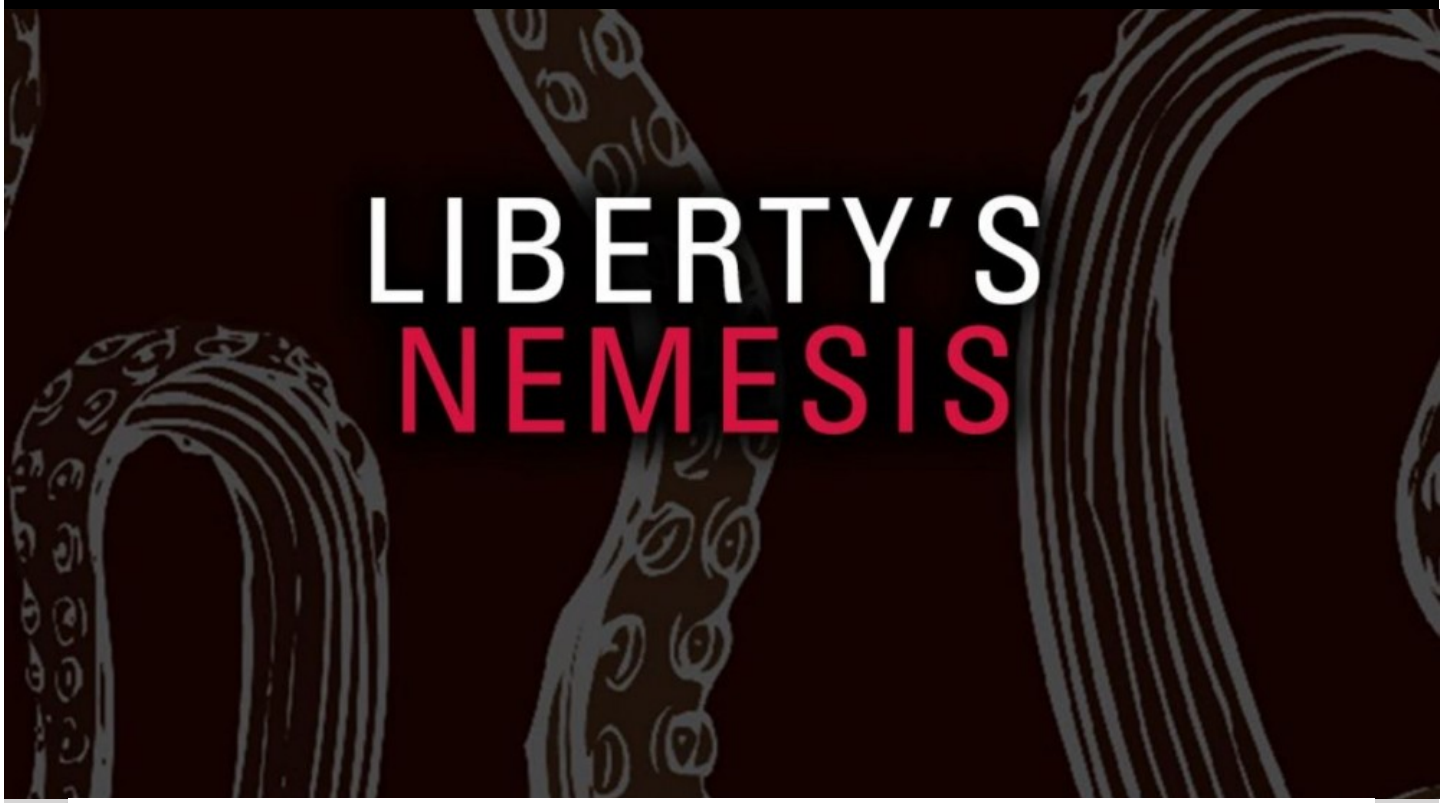

BOOKS

How Unelected Bureauc Nemesis'

Federal employees micromanage every aspect of our lives, and yet, they have no constitutional authority to make the rules. We can't allow them to remake America.

By Allen Mendenhall

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Whether they realize it or not, Americans are subject to the soft despotism of administrative law. The common-law system of ordered liberty and evolutionary correction that the United States inherited from England is hardly recognizable in our current legal system. Bureaucratic administrative agencies that are unaccountable to voters now determine many of the rules and regulations that have palpable effects on the everyday lives of ordinary citizens.

In many important respects, we no longer live in a constitutional republic—we're subject to the rule of an unaccountable administrative state. This the problem confronted in *Liberty's Nemesis: The Unchecked Expansion of the State*, edited by Dean Reuter and John Yoo.

Although the U.S. Constitution does not expressly endow them with legislative prerogative, or even contemplate their current form and function, administrative agencies issue and enforce binding rules. They arrogate to themselves powers nowhere authorized by the Constitution or validated by historical Anglo-American experience. These agencies, moreover, govern quotidian activities once left to local communities and small businesses—everything from managing hospital beds to issuing permits to liquefied petroleum gas dealers. On both the state and federal level, administrative agencies have intruded upon local customs and practices and have imposed burdensome regulations on resistant groups, trades, neighborhoods, and civic associations.

Unaccountable Administrative Agencies

Administrative agencies are creatures of legislation but directed by the executive branch, which has no constitutional authority to pass laws. Their powers derive from statutes that delegate the quasi-legislative authority to issue binding commands in specified contexts. Administrative agencies generally operate independently from Congress and the courts and possess discretionary rulemaking authority.

They conduct hearings and investigations and adjudicate disputes between parties. Some agencies are household names, such as the Federal Trade Commission and the Environmental Protection Agency; some are less known, especially within state government. For instance, state personnel boards manage employment disputes involving state employers and employees, and smaller agencies regulate all sorts of activity—from cosmetology and barbering to translation services and historical preservation efforts.

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The justifying theory underlying the creation and existence of administrative agencies is that they consist of qualified experts in a specialized field. Whereas the legislature is made up of elected generalists who come and go, an agency is peopled by nonpartisan specialists with unique training and experience who hold permanent positions. Administrative agencies should thus be more reliable and efficient than legislative or executive bodies in promulgating or enforcing rules and regulations. Moreover, they should be isolated from political processes and partisan pressure. Yet this institutional independence that is touted as a virtue has in practice resulted in widespread unaccountability.

It's axiomatic that an agency may not be sued without the consent of the state. Such consent, when given, is typically limited in scope so that any potential substantive liability is narrowed. Administrative proceedings only approximate the processes and protocols recognized in courts of law. An administrative adjudicatory forum seldom replicates or reflects the procedural and functional characteristics of a courtroom. When an administrative tribunal enters a final order, the non-prevailing party may seek redress through judicial review, but the tribunal's decision carries a presumption of correctness on appeal—both on findings of fact and matters of law—except in rare circumstances when a statute prescribes otherwise.

Attacking the Safeguards of Individual Liberty

F. A. Hayek warned about administrative agencies—and what he dubbed the "public administration

movement"—in *The Constitution of Liberty*.

He explained that the public administration movement had adopted slogans about government efficiency "to enlist the support of the business community for basically socialist ends." "The members of this movement," he cautioned, "directed their heaviest attack against the traditional safeguards of individual liberty, such as the rule of law, constitutional restraints, judicial review, and the conception of a 'fundamental law.'" Hayek then traced the history of public administration to show that "the progressives have become the main advocates of the extension of the discretionary powers of the administrative agency."

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Philip Hamburger's *Is Administrative Law Unlawful?* (2014) echoed Hayek's criticism that, in Hayek's words, "the widespread use of [administrative] delegation in modern times is not that the power of making general rules is delegated but that administrative authorities are, in effect, given power to wield coercion without rule, as no general rules can be formulated which will unambiguously guide the exercise of such power."

Hamburger reframed Hayek's criticisms in deontological terms by suggesting that administrative law is not, in fact, law—it is inherently lawless. Hayek and Hamburger both make the compelling case that administrative agencies routinely undermine the rule of law, or the principle that the general rules of society apply equally to all citizens as well as the sovereign.

In addition to Hamburger, several recent books have charted the slow growth of administrative law in the United States. Chief among them are Jerry L. Mashaw's *Creating the Administrative Constitution: The Lost One Hundred Years of Administrative Law* (2012), Joanna L. Grisinger's *The Unwieldy American State: Administrative Politics Since the New Deal* (2012), and Daniel R. Ernst's *Tocqueville's Nightmare: The Administrative State Emerges in America* (2014). These studies are indispensable and together form a comprehensive history of how ordinary citizens succumbed to the supervisory powers of administrative regulators.

Recalibrating The Revolution

Liberty's Nemesis follows in the wake of these rigorous works, though it is perhaps more polemical. The book includes essays by highly visible and influential figures who range from legal practitioners to politicians, academics to activists, jurists to jurisprudents. The book's primary focus is on administrative agencies, but certain essays—such as former congressman Bob Barr's discussion of threats to the Second Amendment or John Eastman's concerns about same, sex marriage—widen the topical scope.

Reuter and Yoo have collaborated before. In 2011 they published *Confronting Terror: 9/11 and the Future of American National Security*, an edition that featured disparate essays by prominent conservatives and libertarians, some of whom have also contributed to *Liberty's Nemesis*.

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Reuter, who serves as vice president for the Federalist Society, has supplied the introduction to the book. His contribution is a primer on American civics with an emphasis on the subtle tyranny of administrative law. Yoo, a law professor at the University of California, Berkeley, who's perhaps best known for authoring legal memoranda regarding torture and the War on Terror during the George W. Bush administration, offers a brief conclusion to the book that calls for conservatives to "recalibrate their

revolution" by turning their activist energies against administrative agencies rather than Congress.

The Politics Of Unlawful Administrative Action

In my view, the most intriguing essays in the book belong to Jonathan H. Adler, Gerard V. Bradley and Robert P. George (coauthors), and Patrick Morrisey and Elbert Lin (also coauthors). Some subjects, such as Ronald A. Cass's appraisal of the so-called Chevron doctrine, under which courts defer to the decisions of administrative agencies, may seem predictable in a text that assails administrative regulation. However, they are no less insightful or important for their predictability.

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Other subjects include immigration, financial regulation, and campus speech. An edition with such diverse chapters defies simple summary and ready classification. Doing it justice in this space is impossible. When the authors of such wide-ranging chapters include sitting senators like Orrin Hatch and former commissioners of federal agencies like Harold Furchtgott-Roth, Daniel Gallagher, F. Scott Kieff, Maureen Ohlhausen, Troy Paredes, and Joshua Wright, the reviewer's task becomes daunting if not impossible.

So permit me a few brief remarks about just three chapters and accept my general endorsement of the book as reason enough to buy it and read it in its entirety. I'll start with Adler, who details, among other things, the manner in which the Obama administration exceeded the scope of its authority by delaying the implementation of the employer mandate found in the Patient Protection and Affordable Care Act, a.k.a. Obamacare. The first time his administration announced this delay was in a blog post.

Similar announcements followed from the Internal Revenue Service (which was under fire for the politicization of its activities) and the Treasury Department. Obamacare itself was silent as to any executive authority to waive the requirements of the employer mandate, which, as its name suggests, mandated the implementation of its terms. Ignoring that mandate, President Obama and his executive officers enjoy the unique distinction of being the first violators of the law they championed and swore to uphold. In light of the foregoing, Adler concludes that President Obama implemented Obamacare through "unlawful administrative action" carefully calculated to avoid Democratic losses in the 2014 midterm elections.

Remapping Religion And Society

Bradley and George, for their part, argue the Obama administration has "remapped" religion and society by erasing (or at least by seeking to erase) religious exercise and expression from the public sphere while subjecting private religious exercise and expression to novel and intrusive regulation.

Bradley and George argue the Obama administration is erasing religious exercise and expression from the public sphere.

For example, the Obama administration promulgated rules that compel religious employers to subsidize not just contraception but abortifacients for their female employees. The exception to this requirement was crafted such that no religious institution could qualify to opt out. The Obama administration promulgated another rule that may effectively eliminate government contracts with religious-based humanitarian organizations that provide care and counseling for crisis pregnancies. Executive Order 13672, which became effective in April of last year, adds sexual orientation and general identity to the non-discrimination categories or classes under Title VII of the Civil Rights Act of 1964. The list could go on—and does go on in Bradley and George's sustained critique.

Finally, Morrisey, and Lin present a firsthand perspective on the overreach of environmental regulations that have crippled the economy in West Virginia and Appalachia more generally. They target the Environmental Protection Agency, which used Section 112 of the Clean Air Act as a pretext for regulating power plants in West Virginia.

Morrisey is the current Republican attorney general of West Virginia, having defeated the five-term Democratic incumbent Darrell McGraw in 2012. Morrisey's political rise in West Virginia, which coincided with the Republican takeover of that state's government, has generated national attention in addition to speculation about his future in higher office.

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The fresh-faced Lin, a graduate of Yale Law School, is the Solicitor General of West Virginia, making him the chief appellate lawyer for the state. His experience includes a stint in private practice in Washington DC as well as clerkships with Justice Clarence Thomas, Judge William ("Bill") Pryor, and Judge Robert E. Keeton. Morrisey and Lin, who actually practice what they preach, give the following warning that sums up the message of the book: "The worst that can be done with respect to an overreaching federal agency is to simply accept it and allow it, through sheer inertia, to remake this country according to the preferences of a handful of unelected bureaucrats."

Securing The Hope Of Freedom

Although the composition and character of the U.S. Supreme Court is undoubtedly the most important issue in the 2016 election because of the president's power to appoint a successor to Justice Scalia—and possibly other justices nearing retirement—voters must also bear in mind the rapid and steady expansion of the administrative managerial state under President Obama. Conservatives now populate state legislatures in vast numbers; state attorneys general collaboratively have begun pushing back against federal agencies; state supreme courts have welcomed traditionalist jurisprudents who revere their state constitutions and the federalist system envisioned by the American Founders.

It will take a new kind of president to roll back the administrative state altogether. State resistance alone is no longer enough. Without any pressure from the executive branch, Congress will remain content to pass off touchy political decisions to administrative agencies, which, unlike politicians, cannot be voted out of power. Congress, in turn, can blame the agencies for any negative political consequences of those choices.

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We may never recover the framework of ordered liberty that the Founding generation celebrated and enjoyed. But for the sake of our future, and to secure the hope of freedom for our sons and daughters, our grandchildren and their children, we must expose and undo the regulatory regime of administrative agencies. It's our duty to do so.

Those concerned must applaud Reuter and Yoo for their efforts at publicizing the complex problems occasioned by administrative agencies. But there's still much work left to do. Practical solutions will not come quickly or easily. Yet they'll be necessary if we're ever going to reverse course and remain a nation of promise and prosperity.

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adjunct professor at Faulkner University and Huntingdon College. Author of Literature and Liberty (2014), he has two books forthcoming with university presses: an edition of the collected essays of John William Corrington and a study of Ralph Waldo Emerson's influence on Oliver Wendell Holmes Jr. Views expressed here are the author's alone and do not reflect those of his employer.

Administrative State | bureaucrats | Constitution | Dean Reuter | federal agencies | John Yoo | Law | Liberty's Nemesis

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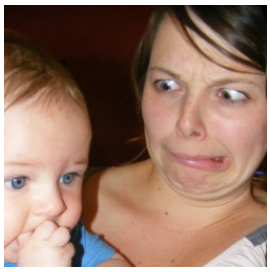

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