BOOK REVIEW:
PHILIP HAMBURGER,
IS ADMINISTRATIVE LAW UNLAWFUL?

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*Is Administrative Law Unlawful?* is a masterful look at the origins and legitimacy of American administrative law. Columbia Law School professor Philip Hamburger, a distinguished legal historian, argues that scholars of the administrative state typically start from a false premise. They believe that administrative law began in the late nineteenth century in response to the need to regulate new large-scale industries such as railroads.

Given that purported origin, it follows that the Constitution has little to say about administrative law. The Framers could not have anticipated the need for it, and therefore did not address it in the Constitution. The so-called fourth branch of government was destined to coexist uneasily within a constitutional framework that is inherently agnostic toward it.

Hamburger, by contrast, suggests that administrative law—by which he means legally binding rules that are developed through unilateral actions by the executive branch—has existed since colonial times and beyond, and that claims of administrative autonomy are direct descendants of the claims of the English monarchy to executive omnipotence. The Framers of the Constitution were well aware of such claims, and utterly rejected them.

Before the American Constitution was written, the English Parliament fought a long-term battle to restrain the monarchy’s power. Parliament sought to ensure that the king was bound by the “law of the land;” that is, parliamentary legislation and court decisions. This in turn would ensure that the king would respect the liberties of the English people and not rule as a despot, although it is understandable that kings preferred absolute power. Pleading necessity (as do defenders of the modern administrative state), kings established star chamber courts that made rules, enforced them, and adjudicated them (similarly to modern administrative agencies). Apologists for the monarchy claimed that it was within the king’s “prerogative power” to govern unilaterally, ignoring the common law and legislation, when necessary, to govern effectively. Eventually, the unwritten English constitution eliminated the prerogative power, requiring that all legislative power come from the Parliament, and that all judicial power come from independent courts.

Between that and the strict separation of powers written into the American constitution, administrative law, as Hamburger defines it, was largely abolished in the Anglosphere. On the European continent, however, Prussian and French political culture favored a strong administrative state. The Prussians in particular were contemptuous of the very notion of the separation of powers, which they saw as a recipe for weak, ineffective states.

Many of the greatest American legal minds of the late nineteenth and early twentieth centuries studied in Germany and directly conveyed what they learned to the United States. German legal theory is often credited with
precipitating, or at least hastening, the demise in the United States of tradition-
al Anglo-American jurisprudence in favor of so-called sociological jurispru-
dence. Perhaps less widely appreciated is the extent to which American
students returning from Germany assimilated absolutist notions of executive
power, which in turn influenced how the nascent administrative state was
conceived.

As with sociological jurisprudence, the key move was to replace the prima-
cy of individual rights with consequentialist concern for effective government
action. American jurists repackaged German ideas into language and concepts
more suitable to American tastes. With regard to administrative law, Hamburger writes, this resulted not in the “hard absolutism” that plagued
Europe, but in the “soft absolutism” of the American administrative state.

Hamburger identifies three ways that modern American administrative law
is unlawful (hence the title). First, it is extralegal, existing alongside, but not
within, the lawful structures created by the Constitution. Second, it is suprale-
gal, in that it exists only because courts (improperly) defer to it, allowing ex-
tralegal rules to take precedence over the judicial duty to ensure that legislative
power is exercised only by Congress. Hamburger also suggests that the courts
improperly allow agencies to engage in adjudication without obeying constitu-
tional niceties, with agencies neglecting most of the procedural rights guaran-
teed by the Constitution. Third, administrative law improperly consolidates
executive, legislative, and judicial power in executive agencies.

Hamburger believes that administrative law embodies precisely the evils
that the Constitution sought to prevent, and therefore must be unraveled.
Administrative law’s defenders would rejoin that Congress has delegated sub-
stantial authority to executive agencies, and retains the power to retract its del-
egations. Moreover, thanks to the Administrative Procedure Act, Americans
receive statutory protection from agency abuse, including judicial review.
And regardless, society’s reliance on administrative law is too entrenched
for it to be undone.

I predict that most readers will find Hamburger’s historical analysis com-
pelling. Somewhat fewer will share his “originalist-ish” claim that the
Constitution, properly understood, is at odds with modern administrative
law. Many fewer, given pre-existing ideological commitments, will agree
that the administrative state is despotic and must be dismantled, with power
flowing instead back to the judiciary and Congress. Nevertheless, anyone in-
terested in the rise of the American administrative state will benefit from
this original, erudite, and thought-provoking book.

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