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Taming the Administrative State Leviathan: Restoring the Separation of Powers and Improving Public Accountability

By Anika Horowitz

Now, more than ever, the American administrative state is experiencing a legitimacy crisis. When the administrative state was conceived, there was a belief that bureaucrats would neutrally follow the will of the legislature. But, as laws became more technical, administrative state advocates argued that unelected experts in specialized fields would have a comparative advantage in interpreting broad provisions of laws passed by Congress. After all, how are career politicians and their assorted staffers supposed to determine the workplace exposure standard for carbon monoxide in factories or the confidence interval necessary to consider a new drug effective?

Yet the dream of a priestly class of disinterested experts carrying out the spirit of laws has turned into a nightmare of dictators pursuing their own agendas—using political power for ideological glory and personal gain. What levers can we use to reestablish accountability and trust in the administrative state?

1. Judicial: We must protect the constitutional division of powers by interpreting law "de novo," meaning we cannot accept bureaucrats as authoritative interpreters of the laws or follow judicial precedents that defer to questionable agency interpretations of laws.
2. Intra-agency: We must improve the incentive structures that bureaucrats face so that laws will be implemented more narrowly and effectively. Bureaucrats can be held accountable for their actions via mechanisms such as demotion, reassignment, termination, and reduced qualified immunity.
3. Bottom-up and top-down oversight: Executive agencies must be made more transparent and subject to greater oversight by the public, by the president, and by other executive agencies with competing jurisdictions.

After the massive expansion of the administrative state in the early twentieth century, a series of Supreme Court decisions addressed how reviewing courts should treat administrative interpretations of law. The decisions never held that a reviewing court could defer to agencies on questions beyond the scope of the agencies' narrowly defined authority.[1] These Supreme Court opinions were reinforced by Section 706 of the 1946 Administrative Procedure Act,[2] which enshrined the judiciary as the sole authority in questions of statutory interpretation: "Reviewing courts shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."

But this principle of strict, "de novo" review, established by judicial precedent and federal legislation, was turned on its head by *Chevron v. NRDC*. *Chevron* created

a two-step doctrine that ceded administrative agencies significant authority to interpret statutes. First, courts were to carry out to the "unambiguously expressed intent of Congress." Second, if a statute is ambiguous, the judiciary was now to accept an agency's interpretation where it does not obviously contradict the law.[3] *Chevron* threatens the constitutional division of power by allowing agencies to interpret ambiguous legislation in the broadest way possible.

This opened the door to presidents dramatically increasing their power through executive orders. As Barack Obama famously said, "I've got a pen and I've got a phone. I can use that pen to sign executive orders and take executive actions … that move the ball forward."[4] Obama used this power to bypass the legislative process and enact far-reaching climate and immigration reforms. While Obama and the Democratic Party were bolder in enacting significant legislation through executive order, the Trump administration also did so. To fund border wall extensions, Trump employed Section 2808 of the 1976 National Emergencies Act.[5] This act allows Department of Defense construction funds directly involving the armed forces to be redirected. By interpreting the phrase "essential to the national defense" broadly, Trump was able to justify using defense funds.

Abuse of executive authority has eroded trust in all branches of government. To restore trust, we must return to the division of powers dictated by the Constitution. This must be done by establishing judicial precedents to overturn *Chevron* as well as by enacting legislation that enshrines the judiciary as the sole authority for statutory interpretation.

Chevron violates both Article I and Article III of the Constitution. Justice Neil Gorsuch argues that *Chevron* can be overturned over Article I nondelegation concerns, for Congress has the sole authority to make law. Gorsuch argues that *Chevron* incentivizes Congress to avoid controversy by purposely drafting broad and ambiguous legislation that cedes legislative power to federal agencies. Justice Clarence Thomas argues that *Chevron* can be overturned on Article III separation of powers grounds. Article III establishes the judiciary as an independent branch. Article III was interpreted in *Marbury v. Madison* to establish the process of judicial review, in which it is the sole province of the judiciary "to say what law is." *Chevron* directly violates this rule by deferring to agencies for statutory interpretation.

But reestablishing the constitutional balance of power between branches is only one aspect of reining in the administrative state. Reformers often discuss "draining the swamp" in Washington by drastically reducing and replacing a large percentage of government bureaucrats. This approach implicitly assumes that simply "throwing the rascals out" and replacing them with more competent or ideologically neutral personnel will be enough. But this logic fails to realize that most bureaucrats are responding rationally to the incentive structures at play.[6]

Only 0.18 percent of federal employees are political appointees. The rest are government bureaucrats with lifelong tenures. According to a recent study, only 42 percent of federal employees surveyed agreed with this statement: "In my work unit, steps are taken to deal with a poor performer who cannot or will not

improve."[7] The combination of ironclad job security, strong ideological agendas, and connections to well-organized interest groups often leads bureaucrats to forward their own agendas rather than neutrally seek to follow statutory guidance.

Examples are endless, ranging from the lowest-level intern to the greatest heights of power. According to James Sherk at the America First Policy Institute, Department of Health and Human Services bureaucrats undermined President Trump's hiring freeze by altering new employees' start dates to the day before President Trump took office; the Department of Justice Civil Rights Division discharged cases involving Yale University's racial discrimination against Asian-Americans and nurses being forced to participate in abortions; and Department of Labor staff intentionally delayed producing a priority regulation, taking an entire year to draft a regulation that a private sector attorney could have finished in three weeks.[8]

To prevent such misconduct, it must be easier to remove regulatory staff. Reducing job security will make bureaucrats more accountable to the president, incentivizing them to neutrally apply the law. This can be accomplished by eliminating Chapter 75 of Title 5, United States Code.[9] Chapter 75, covering adverse actions taken toward an employee, requires an advance written notice, a reasonable time to answer orally, in writing, and by affidavit, attorney representation, a written decision, copies of the notice of proposed action, and provision of supporting material upon employee request. Only 25 percent of supervisors have confidence that they could navigate this process to fire an employee for poor performance.[10] Similar efforts must be made for disciplinary action short of firing, such as demotion or reassignment. Competent and expedient government is impossible if executive branch leaders cannot control defiant or poorly performing employees without facing unreasonable delays or litigation.

But expediting the removal process alone is not enough to reform agency incentive structures. Often, members of upper-level management are philosophically aligned with staff members who engage in misconduct, and therefore they will encourage or turn a blind eye to violations that forward their shared agenda. For example, Dr. Deborah Birx bragged about purposely defying senior White House officials' request to moderate lockdown procedures. Such senior-level staff are unlikely to punish lower-level staff for similar violations.[11]

There must also be greater accountability for government bureaucrats in the form of reduced qualified immunity. Qualified immunity provides immunity to government officials from civil lawsuits. Qualified immunity is only overridden when an official violates a "clearly established statutory or constitutional right of which a reasonable person would have known."[12] Over time, this language has been interpreted to mean that there must be precedent in the form of an existing case on record that ruled in favor of the defendant with almost identical facts of the case. This creates a vicious cycle in which new precedents cannot be established. Because almost every civil lawsuit has slightly different circumstances and details, almost all federal employees are immune from legal action.

Qualified immunity is often discussed in the context of law enforcement, where life-and-death decisions must sometimes be made within seconds. This leaves little time to consult the details of laws. Yet most government officials do not face such constraints. They should be treated like private sector workers, who face legal action when they violate the law. For most regulators, qualified immunity must be drastically reduced.

One way to accomplish this would be to return to the original qualified immunity standard established in *Wood v. Strickland*. This would once again narrow the range of officials subject to qualified immunity, covering only state mental institution administrators, law enforcement officers, and prison officials.[13] The standard in *Strickland* would ensure that qualified immunity only applied to officials working in dangerous and time-sensitive environments, in which referencing exact provisions of law is not feasible.

Increasing transparency is a related mechanism. The public is skeptical of the huge and complex executive branch bureaucracy, viewing it as an opaque labyrinth of smoke and mirrors. The Freedom of Information Act, known as FOIA, was supposed to mitigate public distrust by giving federal agencies twenty working days to respond to a request to release previously undisclosed documents.

But FOIA has failed to live up to its promises. After filing thousands of FOIA requests, a security researcher at the Massachusetts Institute of Technology said, "The FBI will do anything in their power to maintain functional immunity from FOIA requests. They're outright hostile to FOIA."[14] At of the end of fiscal year 2020, the number of FOIA cases pending in the federal court was three and a half times the number of pending cases in 2010. Additionally, between 2019 and 2020, the number of people waiting 51 months or longer grew by 51 percent.[15] Eliminating qualified immunity for most government officials will allow the public to sue bureaucrats who withhold damning information or wait to fulfill requests until after time-sensitive deadlines have passed.

Another way to promote transparency within agencies would be to increase the number of political appointees to positions at the lower levels of agencies. Currently, oversight to ensure that regulations are in line with the president's agenda is conducted through the Office of Information and Regulatory Affairs (OIRA). But because OIRA is a separate agency with a relatively small staff, it has difficulty controlling and identifying misconduct in other agencies.

Measuring policy implementation for regulatory reform is more difficult than measuring the effectiveness of reforms in many other parts of the economy. Regulatory reform usually results in increased efficiency across all parts of the economy. But reforms are often passed in administrations that favor other market-friendly policies like tax cuts and smaller deficits. Various other factors affect each part of the economy. Therefore, it is often difficult to measure the effect of regulatory reform in isolation.

One approach would attempt to generate market-like feedback by improving public comment periods and procedures. Currently, a proposed regulation is filed and then published in the Federal Register, giving the public the opportunity to comment for a specified period of time (usually about sixty days) before the regulation is enacted. But there should be longer, recurring comment periods, with binding accountability to cabinet-level officials. This will allow groups impacted by regulations to give more effective, recurrent feedback, to which presidents must respond directly. More effective FOIA and qualified immunity practices would make such an approach even more effective.

The Founding Fathers carefully crafted a governmental system in which no single branch could obtain absolute power. But the modern administrative state has become a tyrannical fourth branch that threatens this careful balance and creates a broader legitimacy crisis for all three branches. Using a variety of complementary methods, the executive branch must once more be checked by the other branches and held accountable to the people.

Endnotes

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