The Checks & Balances of the Regulatory State

By Paul R. Verkuil

POLICIES FOR THE NEXT ADMINISTRATION. PART 5: THE REGULATORY STATE
This is the fifth in a series on the major policy ideas — from Left and Right — that should guide the next presidential administration's agenda. (For the opposing view, see Philip Hamburger, "Administrative Power.")

The regulatory state is deeply misunderstood. No one denies the importance of federal agencies in formulating the rules that shape the modern economy and civil society. But the regulatory state is not, as its critics maintain, an illegitimate "Fourth Branch" of government, operating on its own. It is, instead, a vital function of government, which is part of the executive branch (though not within the White House), and is subject to numerous constitutional checks and balances.

The most important of these checks and balances is that the regulatory state is an empty vessel until Congress acts to fill it. And Congress has done so since the Founding (think customs officials and military paymasters). Congress turns the spigot on or off based on legislation it wants to be implemented, and the federal agencies, such as the Securities and Exchange Commission, the Food and Drug Administration, and the Social Security Administration, respond (as the many thousands of Federal Register pages attest to). Congress also provides procedural rules (such as the Administrative Procedure Act and the Freedom of Information Act) that control the agencies in dealings with regulated entities and the public. It also decides whether or not to grant agencies substantive rulemaking authority, which gives agencies legislative-like power.

But Congress is not done yet: It also holds oversight hearings (which can be terrifying experiences for agency heads), and can use its budgetary power explicitly to stop agency actions. Finally, Congress has created the civil service, which assures career and non-political management of much agency activity. (This latter point is the subject

of my recent *New York Times* op-ed and the theme of my forthcoming book, *Valuing Bureaucracy: The Case for Professional Government*.)

The judicial and executive branches also place checks and balances on the regulatory state. The courts review agency actions to decide whether they are lawful (not "arbitrary and capricious") and consistent with congressional dictates. This is also where the contested Chevron doctrine comes in. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* is a landmark case in which the Supreme Court held that federal agencies should be given "administrative deference" (now sometimes called "Chevron deference") in interpreting their statutes when congressional intent is ambiguous. The assumption the Court makes is that when the law is not clear, agencies, who are closest to the situation, should have the first shot at interpretation. My take on *Chevron* (which I recently stated in an article in *The Hill*) is that it honors the separation of powers by deferring to the two elected and political branches (Congress and the executive), rather than having the unelected judicial branch take the lead.

The executive branch also provides checks and balances over agencies under the Article II of the Constitution, according to which the president has the duty to see that laws are faithfully executed. One way this duty is manifested is by appointing (often with senate concurrence) agency leaders and, if necessary, removing them for performance failures.

Another way the president assures faithful execution of the laws is by reviewing significant agency rules for consistency with administration policy and for efficiency (e.g., costs and benefits). This function is performed by Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA), and its mission is sometimes controversial. Much of that controversy can be overcome if it is understood that the president is not, as a *New York Times* piece from last summer put it, the "prolific author of major regulations," but, instead, the coordinator of regulatory policy. Congress usually makes the agency heads the author of regulations by placing authority in them directly.

So why, with all these checks on the power of federal agencies, is Congress unhappy with the "out of control" bureaucracy? It's really a question of two things: 1) the enormous grants of regulatory authority Congress has provided over the decades; and 2) the realities of divided government.

The Republican Congress deeply resents the Obama administration's exercise of executive power through existing agency rulemaking powers, rather than coming to it for statutory authority (which would not be forthcoming). In response, Republicans in the House recently passed a bill, H.R. 4768, the "Separation of Powers Restoration Act," to "reverse" *Chevron* and to require *de novo* judicial review of all questions of law. They also passed the Review Act (H.R. 3438) to slow down, if not stop, agency rules. The latter says that no high-impact agency rule can go into effect if it is challenged in court within 60 days of promulgation and a stay is issued. While the anti-*Chevron* act is not so consequential — judges were adept at judicial review before *Chevron* and they will be after it — the Review Act could stymie the regulatory state. After all, it applies to all important rules whether they add to or decrease regulatory burdens and takes policymaking power away from the executive. If we get a Republican president and the bill passes both houses, I doubt he would sign it.

What, then, should we do to improve and control the regulatory state, rather than trying to stop it in its tracks? Three ideas come to mind, which should appeal to whoever takes the White House.

1. It's true that there are many inconsistent, outmoded, and burdensome rules. To combat this we should encourage agencies to do retrospective review of rules to see whether they should be modified, eliminated, or strengthened. The Obama administration made some progress in this regard, with billions in reduced regulatory costs, despite its pro-regulation reputation. Though some in Congress are considering giving the rule review task to a separate agency, the best way to go is to have OIRA, which knows about rules, do the job. OIRA will need people to do this, of course, in addition to the current staff of 45. A small investment here will have a big impact. And, since agency officials know best of all where the rule problems lie, federal agencies, themselves, should also be bolstered to perform the retro review function. That will mean more staffing for independent agencies, which are not subject to OIRA review.

2. We should also give the next president reorganization authority. Such authority was granted by Congress as a matter of course until the mid 1980s, but not since — despite the fact that President Obama had some good ideas about how to make agencies more effective by reorganizing them. If left uncoordinated, the regulatory state becomes too large and less effective. Here we should learn from the congressional Government Accountability Office, which has carefully studied reorganization.

3. Finally — my favorite — we should reform the civil service. Bipartisan legislation to fix the way we hire and fire civil servants is long overdue (the last effort was in 1978), and it will make a real difference to the way the regulatory state operates. Today, we have the same number of government employees President Kennedy had available over 50 years ago. Since then, the GDP has grown by more than five times and we have created many new agencies with broad missions (e.g., the Environmental Protection Agency and the Department of Homeland Security). Because we do not have sufficient numbers of civil servants, nor the right kind (e.g., technology experts), the regulatory state is increasingly run by contractors, who often cost more and perform inherently governmental decisional roles that jeopardize constitutional values. Contractors can do many things for government if they are properly supervised by responsible and motivated career and political officials — but these are in short supply.

When the above steps are taken, the regulatory state will work better, cost less, and might even be smaller.

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By Philip Hamburger
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Administrative power is an evasion of the Constitution's paths of power and a profound assault on freedom. It is especially egregious because it is unnecessary and dangerous. The next president therefore should cut back on this power.

Evasion

Throughout history, all sorts of governments, whether monarchical or republican, have been frustrated by the need to govern through law and the courts. In response, they developed other pathways for binding their peoples — that is, for creating legal obligation. Whether called "absolute power," "prerogative power," or "administrative power," these other pathways constitute an evasion of governance through law and the courts.

This matters constitutionally because the U.S. Constitution establishes two avenues for binding Americans: legislatively, through acts of Congress (or treaties ratified by the Senate); or judicially, through acts of the courts. In contrast, administrative power binds

through agency rulemaking and adjudication, and it thereby evades the Constitution's channels for imposing legal obligation.

None of this is to deny the breadth of executive power. Of course, the executive can discretionarily distribute benefits authorized by Congress, can prosecute offenders in the courts, can control various types of unlawfully present aliens, and so forth. But the executive's administrative acts — its rules and adjudications that purport to create legal obligation — evade the Constitution's pathways of power.

A Civil Rights Issue

Although administrative power is often denounced for its economic burdens, it is more centrally a civil-rights problem. In specifying legal duties, administrative rules deny Americans their right to be subject only to such federal legislation as is enacted by Congress, which is elected. In imposing legal duties, administrative adjudications deprive Americans of their right to be subject only to such federal judicial decisions as come from a court, with a jury, an independent judge, and the due process of law (including discovery rights and the regular burdens of proof and persuasion).

To be sure, defendants can appeal from administrative agencies to the courts. But even there, because the courts give "deference" to administrative fact-finding and to administrative interpretation of federal statutes and administrative rules, defendants do not get a jury or a judge's independent judgment. Indeed, because of the deference, the courts tend to repeat most of the administrative violations of procedural rights.

The judicial injustice is most severe when the government is a party to a case. In such instances, judicial deference is a pre-commitment in favor of the government's version of

the facts and its position on the law. This is systematic judicial bias in favor of one of the parties — the most powerful of parties — and a gross denial of due process.

Administrative power thus eviscerates central freedoms established by the Constitution and the Bill of Rights. And, far from being cured by judicial review, the loss of rights gets repeated in the courts.

Unnecessary and Dangerous

Administrative power has long been justified as a practical necessity — as something inevitable in our complex and rapidly changing, modern society. But what if it is unnecessary and even dangerous?

Is administrative power the only means of rapid legislative change? Actually, when Congress wishes, it can act faster than most agencies, while relying on their expertise. Accordingly, popular complaints about Congressional "gridlock" do not usually reflect the realities of institutional impediments, but instead typically serve to justify circumventing the political obstacles inherent in representative politics.

Let's pretend, however, that gridlock really is an institutional rather than a political impediment. How much administrative power actually involves genuine emergencies — matters that simply cannot wait for Congress to act? In fact, most administrative power effectuates long-term policies, and most claims of emergency are merely excuses to shift power out of Congress.

Does complexity require administrative power? Leaving aside the question whether complex societies really need complex rules, federal statutes obviously can be just as

complex as agency rules. The only difference is that statutes are adopted by Congress rather than by agencies.

What about the value of impartial administrative expertise? Unfortunately, there is reason to fear that industry has much influence over agency regulation, especially where agency experts are so short of expertise that they rely on regulated industries to write the regulations. This happened, for example, with the 2010 net neutrality rules.

Those who assert the need to depart from the Constitution have the burden of proof, and the arguments about the necessity of administrative power are empirical. Nonetheless, they are rarely backed up with scientifically serious, empirical evidence. Instead, the alleged necessity of administrative power tends to be merely a conceptual point — an academic construct — rather than a matter of serious empirical evidence.

Meanwhile, the empirical evidence of the danger from administrative power is mounting. Not being directly accountable to the people — or even to judges who act without bias — administrative power crushes the life and livelihood out of entire classes of Americans, depriving them of work and even of lifesaving medicines. It therefore is difficult to avoid the conclusion that, overall, the administrative assault on basic freedoms is both unnecessary and dangerous.

What Is to Be Done?

What should a president do about administrative power? As a practical matter, he or she should recognize that there is no political advantage in having all of this power as it will eventually be in the hands of his or her political opponents. More generally, the president should recognize that by shifting power out of the legislature and the courts,

administrative power undermines Americans' attachment to government. Above all, he or she should hope to place America back on the Constitution's paths of governance. He thereby could peacefully accomplish for Americans the sort of reform that other peoples have struggled to achieve only through revolution and civil war.

To this end, the president, with the advice of his attorney general, could begin by doing the following seven things.

1. He or she could require some agencies to send their existing and proposed rules to Congress for enactment. Then, if the sky doesn't fall, he or she could require this of some other agencies, and so on and so forth. Agencies would still contribute their expertise and drafting. All that would change is that Congress, rather than agency heads, would have the final word on whether to adopt the rules.

2. The president could require agencies to refrain from asking courts for deference on any question, whether of fact or law. When the government is a party to a case, the judges who defer to agencies are engaging in systematic bias in favor of one of the parties, thereby denying the other party the due process of law. And the government lawyers who ask judges to do this are similarly denying due process. Again, the reform could be done cautiously, agency by agency, rather than in one fell swoop.

3. The president could bar agencies from violating the due process of law, thus requiring them to proceed before real judges. For example, many agencies can choose to proceed either administratively or in court. The president could gradually but firmly require them to go to court. Simultaneously, he or she could ask Congress to increase the number of federal judges, to enable the courts to handle the increased caseload.

4. The president could prohibit agencies from self-dealing — as when they keep the proceeds of their fees, taxes, forfeitures, or penalties — and in securing the proceeds for the Treasury, he or she could ask Congress to appropriate funds for the agencies.

5. He or she could bar agencies from issuing waivers and could ask Congress to adjust statutes that seem to depend on them.

6. The president could forbid agencies (such as the Department of Health and Human Services and the Federal Communications Commission) from using administrative power to license speech and the press in violation of the First Amendment.

7. He or she could ask Congress to remove officer immunity and thereby restore civil damages actions against federal officers — at least for officials who sit behind desks — so that Americans could enforce the constitutional and statutory limits on abuses of power.

Put simply, the next president could begin to dismantle administrative power, thereby restoring confidence in the Constitution, the Bill of Rights, and our government. None of this would be easy. But where Congress and the courts acquiesce in a dangerously unconstitutional mode of government, what remedy is left to the people? In these circumstances, one must hope for presidential action, before the problem and the remedy become worse.

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