The Tyranny of the Administrative State

Government by unelected experts isn't all that different from the 'royal prerogative' of 17th-century England, argues constitutional scholar Philip Hamburger.

John Tierney June 9, 2017 3:44 p.m. ET

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What's the greatest threat to liberty in America? Liberals rail at Donald Trump's executive orders on immigration and his hostility toward the press, while conservatives vow to reverse Barack Obama's regulatory assault on religion, education and business. Philip Hamburger says both sides are thinking too small.

Like the blind men in the fable who try to describe an elephant by feeling different parts of its body, they're not perceiving the whole problem: the enormous rogue beast known as the administrative state.

Sometimes called the regulatory state or the deep state, it is a government within the government, run by the president and the dozens of federal agencies that assume powers once claimed only by kings. In place of royal decrees, they issue rules and send out "guidance" letters like the one from an

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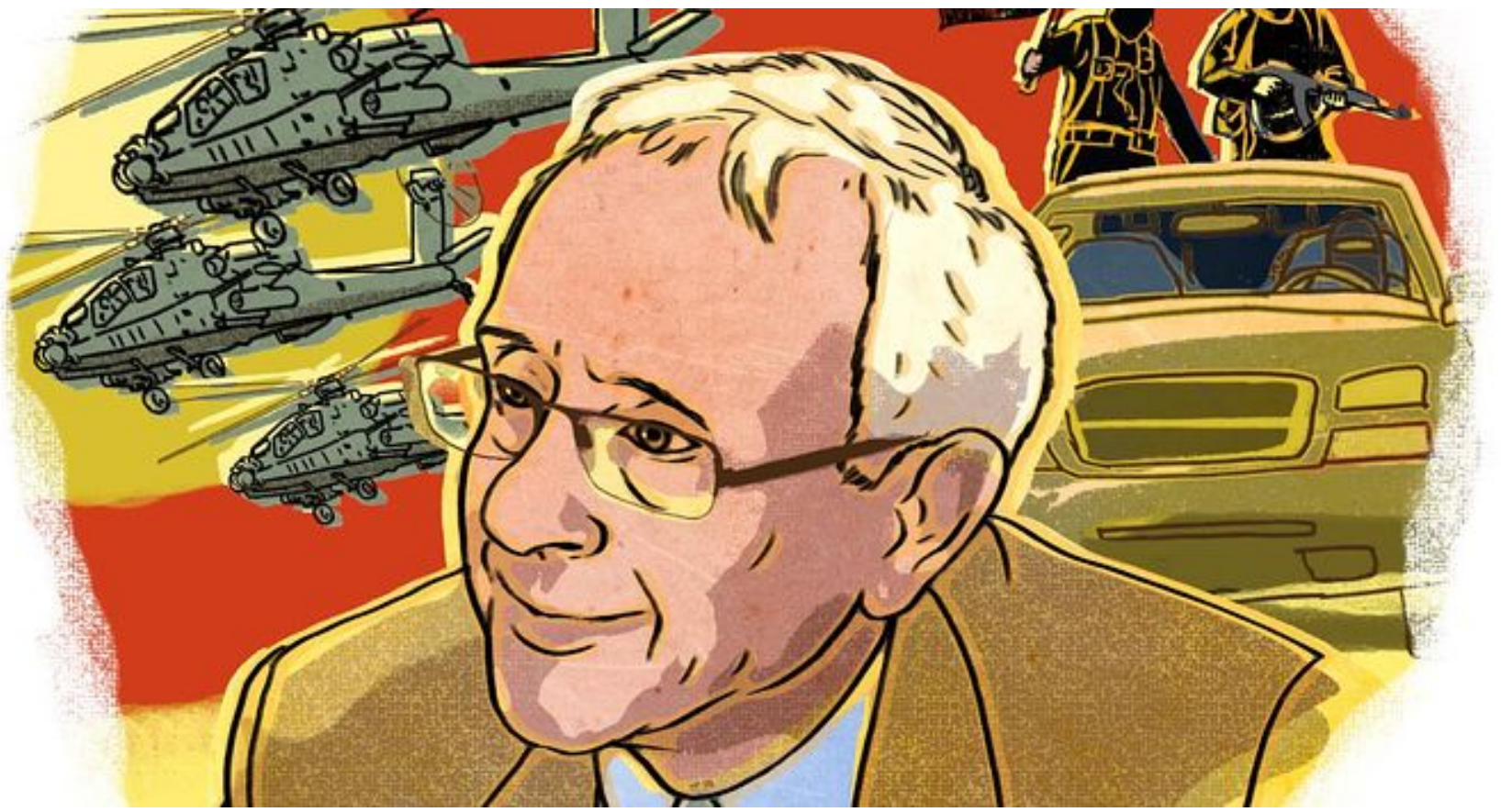

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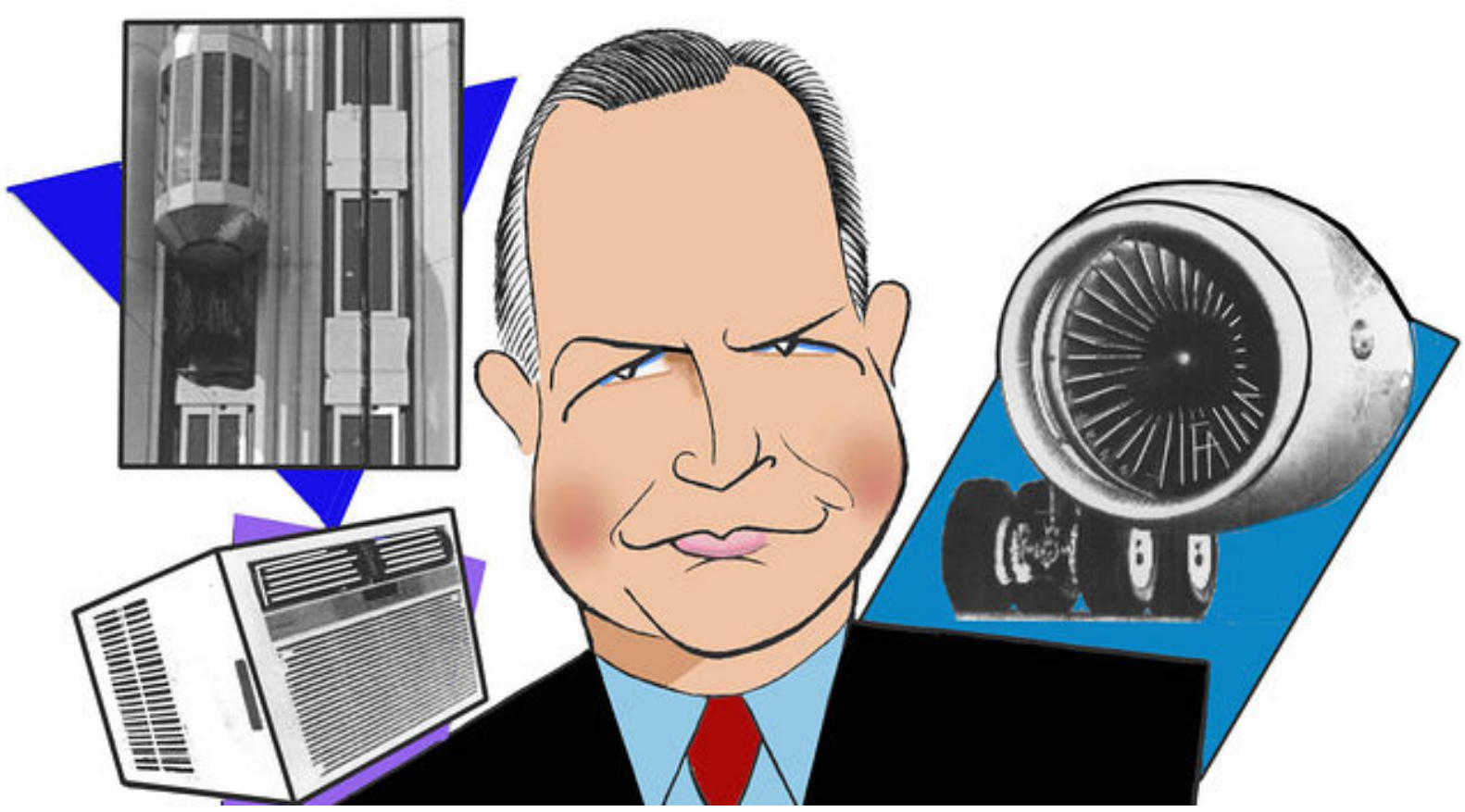

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Unelected bureaucrats not only write their own laws, they also interpret these laws and enforce them in their own courts with their own judges. All this is in blatant violation of the Constitution, says Mr. Hamburger, 60, a constitutional scholar and winner of the Manhattan Institute's Hayek Prize last year for his scholarly 2014 book, "Is Administrative Law Unlawful?" (Spoiler alert: Yes.)

"Essentially, much of the Bill of Rights has been gutted," he says, sitting in his office at Columbia Law School. "The government can choose to proceed against you in a trial in court with constitutional processes, or it can use an administrative proceeding where you don't have the right to be heard by a real judge or a jury and you don't have the full due process of law. Our fundamental procedural freedoms, which once were guarantees, have become mere options."

In volume and complexity, the edicts from federal agencies exceed the laws passed by Congress by orders of magnitude. “The administrative state has become the government’s predominant mode of contact with citizens,” Mr. Hamburger says. “Ultimately this is not about the politics of left or right. Unlawful government power should worry everybody.”

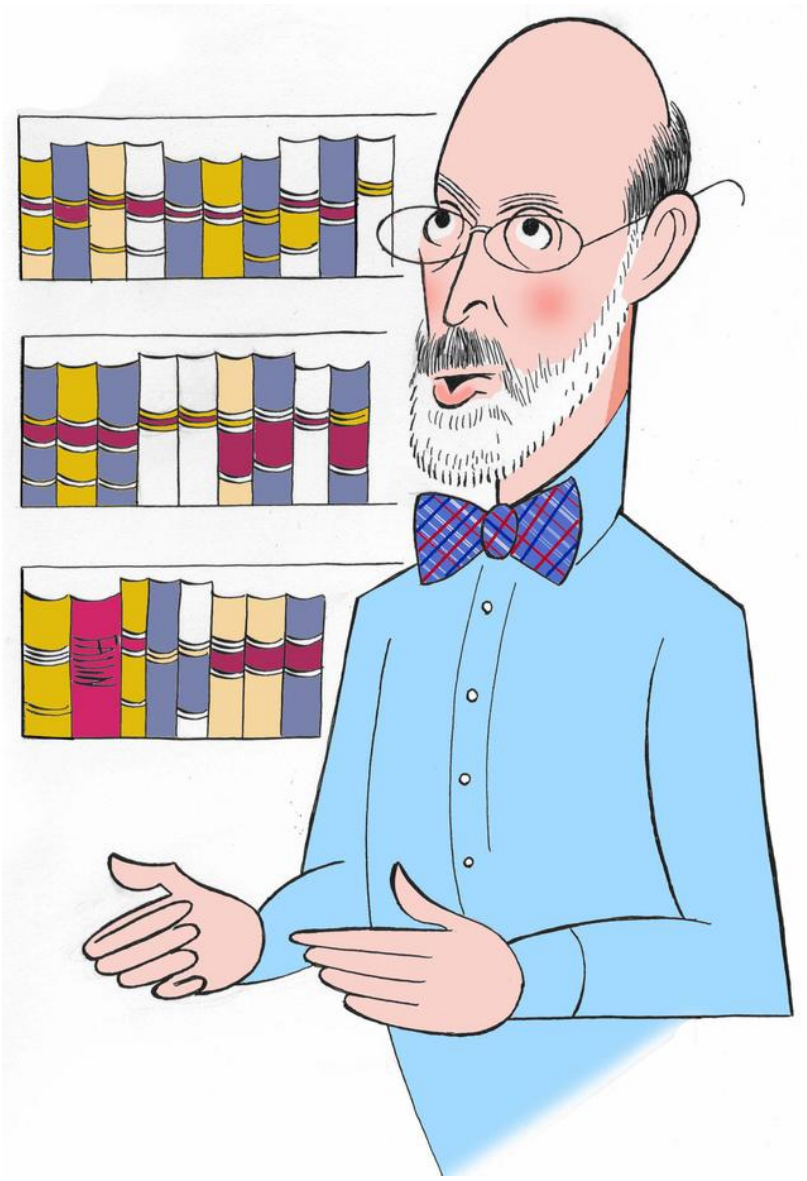

Illustration: Ken Fallin

Defenders of agencies like the Securities and Exchange Commission or the Environmental Protection Agency often describe them as the only practical way to regulate today’s complex world. The Founding Fathers, they argue, could not have imagined the challenges that face a large and technologically advanced society, so Congress and the judiciary have wisely delegated their duties by giving new powers to experts in executive-branch agencies.

Mr. Hamburger doesn’t buy it. In his view, not only is such delegation unconstitutional, it’s nothing new. The founders, far from being naive about the need for expert guidance, limited executive powers precisely because of the abuses of 17th-century kings like James I.

James, who reigned in England from 1603 through 1625, claimed that divinely granted “absolute power” authorized him to suspend laws enacted by Parliament or dispense with them for any favored person. Mr. Hamburger likens this royal “dispensing” power to modern agency “waivers,” like the ones from the Obama administration exempting McDonald’s and other corporations from complying with provisions of the Affordable Care Act.

James also made his own laws, bypassing Parliament and the courts by issuing proclamations and using his "royal prerogative" to establish commissions and tribunals. He exploited the infamous Star Chamber, a court that got its name from the gilded stars on its ceiling.

"The Hollywood version of the Star Chamber is a torture chamber where the walls were speckled with blood," Mr. Hamburger says. "But torture was a very minor part of its business. It was very bureaucratic. Like modern administrative agencies, it commissioned expert reports, issued decrees and enforced them. It had regulations controlling the press, and it issued rules for urban development, environmental matters and various industries."

James's claims were rebuffed by England's chief justice, Edward Coke, who in 1610 declared that the king "by his proclamation cannot create any offense which was not an offense before." The king eventually dismissed Coke, and expansive royal powers continued to be exercised by James and his successor, Charles I. The angry backlash ultimately prompted Parliament to abolish the Star Chamber and helped provoke a civil war that ended with the beheading of Charles in 1649.

A subsequent king, James II, took the throne in 1685 and tried to reassert the prerogative power. But he was dethroned in the Glorious Revolution in 1688, which was followed by Parliament's adoption of a bill of rights limiting the monarch and reasserting the primacy of Parliament and the courts. That history inspired the American Constitution's limits on the executive branch, which James Madison explained as a protection against "the danger to liberty from the overgrown and all-grasping prerogative of an hereditary magistrate."

"The framers of the Constitution were very clear about this," Mr. Hamburger says, rummaging in a drawer for a pocket edition. He opens to the first page, featuring the Preamble and Article 1, which begins: "All legislative Powers herein granted shall be vested in a Congress."

“That first word is crucial,” he says. “The very first substantive word of the Constitution is ‘all.’ That makes it an exclusive vesting of the legislative powers in an elected legislature. Congress cannot delegate the legislative powers to an agency, just as judges cannot delegate their power to an agency.”

Those restrictions on executive power have been disappearing since the late 19th century, starting with the creation of the Interstate Commerce Commission in 1887. Centralized power appealed to big business—railroads found commissioners easier to manipulate than legislators—as well as to American intellectuals who’d studied public policy at German universities. Unlike Britain, Germany had rejected constitutional restraints in favor of a Prussian model that gave administrative agencies the prerogative powers of the king.

Mr. Hamburger believes it’s no coincidence that the growth of America’s administrative state coincided with the addition to the electorate of Catholic immigrants, blacks and other minorities. WASP progressives like Woodrow Wilson considered these groups an obstacle to reform.

“The bulk of mankind is rigidly unphilosophical, and nowadays the bulk of mankind votes,” Wilson complained, noting in particular the difficulty of winning over the minds “of Irishmen, of Germans, of Negroes.” His solution was to push his agenda using federal agencies staffed by experts of his own caste—what Mr. Hamburger calls the “knowledge class.” Wilson was the only president ever to hold a doctorate.

“There’s been something of a bait and switch,” Mr. Hamburger says. “We talk about the importance of expanding voting rights, but behind the scenes there’s been a transfer of power from voters to members of the knowledge class. A large part of the knowledge class, Republicans as well as Democrats, went out of their way to make the administrative state work.”

Mr. Hamburger was born into the knowledge class. He grew up in a book-filled house near New Haven, Conn. His father was a Yale law professor and

his mother a researcher in economics and intellectual history. During his father's sabbaticals in London, Philip acquired a passion for 17th-century English history and spent long hours studying manuscripts at the British Museum. That's where he learned about the royal prerogative.

He went to Princeton and then Yale Law School, where he avoided courses on administrative law, which struck him as "tedious beyond belief." He became slightly more interested during a stint as a corporate lawyer specializing in taxes—he could see the sweeping powers wielded by the Internal Revenue Service—but the topic didn't engage him until midway through his academic career.

While at the University of Chicago, he heard of a colleague's inability to publish a research paper because the study had not been approved ahead of time by a federally mandated institutional review board. That sounded like an unconstitutional suppression of free speech, and it reminded Mr. Hamburger of those manuscripts at the British Museum.

Why the return of the royal prerogative? "The answer rests ultimately on human nature," Mr. Hamburger writes in "The Administrative Threat," a new short book aimed at a general readership. "Ever tempted to exert more power with less effort, rulers are rarely content to govern merely through the law."

Instead, presidents govern by interpreting statutes in ways lawmakers never imagined. Barack Obama openly boasted of his intention to bypass Congress: "I've got a pen and I've got a phone." Unable to persuade a Congress controlled by his own party to regulate carbon dioxide, Mr. Obama did it himself in 2009 by having the EPA declare it a pollutant covered by a decades-old law. (In 2007 the Supreme Court had affirmed the EPA's authority to do so.)

Similarly, the Title IX legislation passed in 1972 was intended mainly to protect women in higher education from employment discrimination. Under Mr. Obama, Education Department bureaucrats used it to issue orders about

bathrooms for transgender students at public schools and to mandate campus tribunals to adjudicate sexual misconduct—including "verbal misconduct," or speech—that are in many ways less fair to the accused than the Star Chamber.

At this point, the idea of restraining the executive branch may seem quixotic, but Mr. Hamburger says there are practical ways to do so. One would be to make government officials financially accountable for their excesses, as they were in the 18th and 19th centuries, when they could be sued individually for damages. Today they're protected thanks to "qualified immunity," a doctrine Mr. Hamburger thinks should be narrowed.

"One does have to worry about frivolous lawsuits against government officers who have to make quick decisions in the field, like police officers," he says. "But someone sitting behind a desk at the EPA or the SEC has plenty of time to consult lawyers before acting. There's no reason to give them qualified immunity. They'll be more careful not to exceed their constitutional authority if they have to weigh the risk of losing their own money."

Another way of restraining agencies—one President Trump could adopt on his own—would be to require them to submit new rules to Congress for approval instead of imposing them by fiat. The president could also order at least some agencies to resolve disputes in regular courts instead of using administrative judges, who are departmental employees. Meanwhile, Congress could reclaim its legislative power by going through regulations, agency by agency, and deciding which ones to enact into law.

Mr. Hamburger's chief hope for reform lies in the courts, which in earlier eras rebuffed the executive branch's power grabs. Those rulings so frustrated both Theodore Roosevelt and Franklin D. Roosevelt that they threatened retaliation—such as FDR's plan to pack the Supreme Court by expanding its size. Eventually judges surrendered and validated sweeping executive powers. Mr. Hamburger calls it "one of the most shameful episodes in the history of the federal judiciary."

The Supreme Court capitulated further in decisions like *Chevron* v. *Natural Resources Defense Council* (1984), which requires judges to defer to any "reasonable interpretation" of an ambiguous statute by a federal agency. "*Chevron* deference should be called *Chevron* bias," Mr. Hamburger says. "It requires judges to abandon due process and independent judgment. The courts have corrupted their processes by saying that when the government is a party in case, they will be systematically biased—they will favor the more powerful party."

Mr. Hamburger sees a good chance that the high court will limit and eventually abandon the *Chevron* doctrine, and he expects other litigation giving the judiciary a chance to reassert its powers and protect constitutional rights. "Slowly, step by step, we can persuade judges to recognize the risks of what they've done so far and to grapple with this very dangerous type of power," he says. The judiciary, like academia, has many liberals who have been sympathetic to the growth of executive power, but their perspective may be changing.

"Administrative power is like off-road driving," Mr. Hamburger continues. "It's exhilarating to operate off-road when you're in the driver's seat, but it's a little unnerving for everyone else."

He says he observed this effect during a recent conversation with a prominent legal scholar. The colleague, a longtime defender of administrative law, was discussing the topic shortly after Mr. Trump's inauguration.

The colleague told Mr. Hamburger: "I am beginning to see the merit of your ideas."

Mr. Tierney is a contributing editor of the Manhattan Institute's City Journal.

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