

LIBERTY UNIVERSITY  
SCHOOL OF Government

**Administrative Rule and Constitutional Governance**

by

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February 10, 2022

Modern man has been confronted with many technical problems. Answers to how much lead is toxic in water, how to operate a nuclear reactor while minimizing risk, and various other problems with many more to arise in the future led many to doubt the ability of congress to have the scientific knowledge to effectively handle those problems. In response, administrative agencies were designed to operate outside of the regular means, intended to be independent, and contain the expert knowledge to address scientific problems. While this solution does solve for a lack of expert knowledge, unforeseen consequences have arisen. The rapid increase of bureaucratic rule has drastically increased the size and scope of the federal government, increased the regulatory burden on the general public, reduced civic responsibility, abandoned constitutional principles, reduced accountability in law-making, and allowed Congress to abdicate its duties. The solution to these problems lies primarily in education and passing the REINS Act.

Since FDR's New Deal, administrative agencies have been on the rise. The dominance of administrative agencies has been zero cost. Their nature of them makes the public more complicit in their proliferation. An agency that only deals with environmental protection, nuclear regulation, consumer product safety, or other siloed domains does not appear to be threatening, or only threatening to small slices of the population. The apparent insignificance of these agencies, when considered individually, has given rise to a massive and metastasizing bureaucracy. Estimates on the number of agencies range from 60 to over 300.<sup>1</sup> The volume of administrative state displaces large portions of the economy. Governmental policies are a major influence on the economy. However, many agencies did not consider their economic implications in the past. To ameliorate this oversight Executive Order 12,866 was issued that requires government agencies to report costs and benefits to major rules to incentivize efficiency. However, assuming that the agencies are accurate with their reporting, approximately 25% of all regulations and 40% of environmental policies fail to produce a net positive.<sup>2</sup> Also, administrative agencies have a large influence on the economy. The federal budget, mostly covering administrative agencies, is one-third of the national GDP. When the expenditure of the federal government is that large, its influence is exercised on the nation. One of the greatest innovations of the American republic was that the sovereign authority to rule and the ability to rule were separated. The sole repository of governing authority exists within the people yet they do not directly take part in that rule. The sheer size of administrative agencies threatens that delicate balance. Now, because the size of the part of society that takes part in governing is so large, the self-interested rule is much more disastrous. The size of the administrative agencies and their influence is not defined as an additive to the economy.

The gain of administrative agencies comes at the cost of the public not just from taxation but also from the regulatory burden they impose. Between 3,000 – 4,500 new rules and

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<sup>1</sup>Clyde Wayne Crews • 08/26/2015, Clyde Wayne Crews, Ryan Young, 01/12/2022, 12/31/2021, and 12/23/2021. "Nobody Knows How Many Federal Agencies Exist." *Competitive Enterprise Institute*. Accessed February 11, 2022. <https://cei.org/blog/nobody-knows-how-many-federal-agencies-exist/>.

<sup>2</sup> "Faculty Scholarship - University of Pennsylvania Carey Law ..." Accessed February 11, 2022. [https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1977&context=faculty\\_scholarship](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1977&context=faculty_scholarship).

regulations are created every year.<sup>3</sup> This swarm of regulations eats out the substance of businesses across the country. It is impossible for anyone to know all these laws. This makes them impossible to follow and turns whoever knows the laws into a master. Small businesses are routinely harassed and stressed because of the immense and unknowable regulatory burden. This necessarily increases the expense of running a business because efforts normally devoted to whatever the business would do are instead spent on meeting regulatory requirements. When businesses are regulated, people often separate the businesses from the people they serve but this is simply not the case. At least some of the cost of complying with regulatory mandates and passed onto consumers by increasing prices. Higher prices are disproportionately felt by lower- and working-class Americans. A 15% price increase in everyday items like food and gas does not affect wealthier Americans. However, lower- and working-class Americans living paycheck to paycheck may not be able to afford that increase. The influence and dominance of these regulations also impact future economies. People generally avoid taking unnecessary burdens and the burden regulatory agencies place on certain businesses chills the incentives future entrants would have to compete.

The ever-expanding scope and depth of the government by the intrusion of regulatory agencies changes how Americans view their responsibility as citizens. When the government takes the mantle of caring for the environment, regulating product safety, along with numerous other cares, the public abdicates its role in that process. Why should the average citizen care about the environment, care about the food they eat and the products they use, or care about taking care of the elderly when the EPA, FDA, CFPB, SSA are handling those issues. When the public becomes disinterested in the health of many different aspects of the country, their care will inevitably degrade. No matter how dedicated and well-intentioned governmental agencies are, they can never exceed that of a concerned populous. The effect is twofold. Take for example the environment. It is not just that when people care about the environment, they do not pollute, but they also make efforts to reduce pollution and hold their fellow citizens accountable for their environmental impacts. The same can be applied to whatever societal problem agencies attempt to solve.

The bureaucratic style of rule is not merely in contention with the public good but also in contention with the American Constitutional framework. Throughout the dark history of human events rulers who held too much power abused that power or were soon overtaken by those willing to do so. To mend this the framers of the country sought to separate the powers of government. Those powers we designed to be split among men without. The only thing that could justly wield the power to make, execute, and rule on laws in the eyes of the founders was God. God is mentioned 4 times in the Declaration of Independence. He is referred to as the “Supreme Judge of the world,” “Creator,” and “Divine providence.” These 3 statements define the judicial, legislative, and executive branches respectively. Throughout most of American history, these powers have remained separate. However, the recent drift to a bureaucratic rule has disrupted this tradition. In the status quo, administrative agencies have the authority to create rules with the force of law as delegated to them by congress. They also contain the means to

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<sup>3</sup> “Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the Federal Register.” Accessed February 11, 2022. <https://sgp.fas.org/crs/misc/R43056.pdf>.

enforce those laws. Lastly, if you are found guilty of law by enforcers employed by the body who made those laws, you are tried by a judge that is on the payroll of that body. This violates the constitutional separation of powers making it easier for a tyrannical rule to arise because it places the three powers of government in the hands of one body. The type of rule that concentration of power has is not liked by people.

Another violation that administrative rule commits against the Constitution is a loss of representative rule. Article I of the Constitution vested the power of creating federal law solely in the hands of congress. Because of this congress was designed to be most accountable to the people. However, Congress has delegated that power to administrative agencies. This was done because many felt the legislative branch lacked the technical knowledge to handle technical problems. Though the bureaucracy has that technical knowledge, it lacks representation. The officials who work at the EPA and make regulations concerning the environment are not responsible to the public. Those officials were appointed, not elected. Coupled with the sheer number of regulations created earlier the loss of representation in the law-making process has significantly eroded the foundation of the republic. When people do not feel that they have a voice in the creation of the laws that control them, they begin to lose trust in institutions and likely become hostile towards those institutions. After all, the absence of representative rule was one of the reasons America declared independence from the British Empire. Not only do rule-making bodies who are not accountable lose legitimacy in the eyes of those they rule, but they are also freed to create abusive laws without recourse. If the EPA creates a law that negatively impacts citizens, the citizens have no means to hold them accountable. When the people who make the laws are also the people who enforce and rule on them, the people are severely limited in the avenues they have to contest the law and receive a fair and independent trial.

Another problem that administrative agencies create within our constitutional system is the pacification effect it has on congress. When the legislative branch hands over its primary authority, that is to make laws, congressmen and congresswomen are not held accountable for the laws created by administrative bodies. The result of this is that Congress has transferred its responsibility to bureaucracies. When Congress is not held accountable for the laws that govern the country, they have to become responsible for something. If they are not responsible for the laws in general, they tend to select a special interest group to represent that garners them the most support in their district. They may not be responsible for laws in general so each one of them creates a fiefdom unto themselves. They may get elected on a one-dimensional platform like healthcare, environmental, or educational policies. With the advent of the bureaucratic form of government, gone are the days that congress has to appeal to many people. The results of this are evident. Laws created by Congress are no longer short, elegant, profound, and general. In the past laws were intended to be general rules created in advance that did not single people out. Now bills are hundreds of pages long, composed of impenetrable technical jargon, and almost always name the people harmed by the laws. When laws are constructed like this, they become so massive that no one knows what the law does completely which produces uncertainty in the country. People cannot know all of the laws they are supposed to comply with and as a result, they lose whatever respect they might have had for the law. At a certain point regulating so much of society is equivalent to having no regulations.

While it is easy to find problems associated with administrative agencies, finding solutions is not as easy. Because administrative agencies are not elected, they cannot be voted out of power. Additionally, congress benefits from delegating the harder, unpopular decisions onto the agencies making it likely that absent any change in public opinion on administrative

agencies, congress will not oppose administrative agencies. The ossification of the bureaucracy makes it difficult to reverse the trend towards its expansion. The long-term solution is to educate the public about the costs imposed by the administrative agencies on their lives. This would require electing officials who care about both education reform and restoring a Constitutional framework. A potential short-term solution is passing the REINS Act. The REINS Act would require that any administrative law that affects 100 million or more of the economy must be approved by Congress within 90 days or it sunsets.<sup>4</sup> It also requires previously made regulations to be vetted by congress. Though this law does not completely fix the problems that arise from the shift to administrative rule, it is a significant step in the right direction and signals a changing attitude in Washington.

While administrative rule has provided the scientific knowledge necessary to deal with technical problems, they have not been without faults. Over the course of their existence, administrative have been a burden on the American public. They have swelled the size of the federal government, over-regulated the public, reduced civic responsibility, abandoned Constitutional principles, and promoted congressional indifference. To solve that problem long-term promoting education on the effects of administrative rule, and a short-term solution is to pass the REINS Act to begin reasserting congressional legitimacy.

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<sup>4</sup> “Legislative Search Results | Congress.gov | Library of ...” Accessed February 11, 2022.  
<https://www.congress.gov/bill/115th-congress/house-bill/>.

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