Is Administrative Law Unlawful?
Guest: Philip Hamburger
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Philip Hamburger is a professor at Columbia Law School and the author, most recently, of Is Administrative Law Unlawful?.

WOODS: Can you start off by explaining to us what administrative law is?

HAMBURGER: There are all sorts of possible definitions of administrative law. For my purposes, an historical definition is useful. I think of it as binding extralegal power, binding in the sense that it involves some sort of edict that constrains and extralegal in the sense that it is not an act or edict of Congress, law, nor is it an act of a court, judgment of a court. Instead, it's another means of binding Americans, and typically that's an executive or independent agency rule, regulation, interpretation, or adjudication. So it's government other than through acts of Congress and acts of courts but rather through other means, and that's why I think of it as an extralegal edict.

WOODS: Just so this doesn't seem too abstract to people, give us an example or two of something today that would be classified as administrative law.

HAMBURGER: Sure, in fact, there are so many examples it takes thousands of pages of the Federal Register each year to type them. So any rule or regulation adopted by an agency is not an attempt to govern us through an act of Congress but through some other mechanism, and any adjudication that tries to enforce such a rule or regulation that is not done in the court but comes in an agency, again is an example of this attempt at extralegal power. So for example, if not Congress, but the Securities and Exchange Commission or not Congress, but the FDA passes a rule, that's an example of administrative power, and if the SEC or, let's say, the EPA adjudicates one of these rules, then again, they are not acting through the courts but by other mechanisms. So it's really an alternative mode of government. I think of it as off-road driving. The Constitution sets up very clear avenues for binding people or for controlling people. You can have an act of Congress. You can have a decision of a court enforcing that act of Congress. But the folks who govern us are not satisfied with that, and perhaps I don't blame them since it's much more exciting to drive off road, but it's a little scary for the rest of us, and that's what I mean by administrative law.

WOODS: Given that the U.S. Congress has quite elevated ambitions in terms of what it wants to accomplish in American society and given that frankly most Americans seem to endorse most of the major activities of the federal government—or otherwise our country would look quite different from how it looks today—it seems to me that one response would be that it would be inefficient to run society any other way. We have to delegate some of these rule-making powers to institutions like this because we can't expect the Congress to micromanage every possible contingency with regard to the physical environment, for example.

HAMBURGER: Right, well, it's not as if Congress can't pass statutes. It's really rather good at passing statutes very efficiently, and some of its statutes, as we all know, are thousands of pages long, right? And nothing I'm arguing cuts against, for example, the welfare state. One may have doubts about the welfare state, but that's not what this book is about. So it's not a criticism of any distribution of benefits, and that's actually not the sort of administrative authority or executive authority, actually, that this book takes aim at, but rather simply those rules and regulations and those adjudications and agencies that bind. And most regulations could be simply proposed to Congress by the relevant agency. The agencies claim they have expertise. They can use their expertise to propose regulations and simply pass them along to Congress to enact. And, you know, Congress actually has more expertise than the head of an agency. Very few heads of agencies are deeply knowledgeable in their field. So they can't compete with all the expertise of Congress. So why not leave it to Congress? Congress can handle that. And let me give you an example of just about how practical this is. Take the FDA. We think the FDA really matters to protect us. Actually, over the first decade of the 21st century, the EPA on average received 30 applications for new drugs, and it approved 23 on average each year of that first decade. That's not an overwhelming amount, and the FDA could simply accumulate information, make its judgment about what ought to happen, and recommend that Congress authorize the commerce in those 23 drugs. At which point Congress just passes a statute, very briefly, and that's it. I think that's actually quite practical. It's not as difficult as people think.

WOODS: Another common response is to say that the drafters of the Constitution couldn't have anticipated the need for administrative law. We live in a much more complicated society. So it has evolved organically out of, well, perhaps an implied logic of the Constitution. But what is impressive, one of the many things that's impressive about your unbelievably thorough book, is that what you're saying is that there's nothing modern about this. This is actually a throwback to ideas that our political forbears spent their lives fighting against.

HAMBURGER: When I began this project I had some discomfort with administrative law. I knew there was something problematic about it, but as I dug in, I got actually all the more concerned. Administrative power is defended as a modern necessity, and it's said that the Constitution couldn't have anticipated because it's really so modern and unique in that sense in history. In fact, this mode of governance, we call it administrative, in the past they called it prerogative power. This extralegal power is actually quite old, and it's in fact what constitutional law

developed in order to prohibit, at which point the constitutional argument takes on a different coloration. This is actually not really something the Constitution didn't anticipate, it's something that constitutional law developed precisely in order to preclude. And far from being necessary, it actually looks like simply a temptation of power to rule not through law, but outside it.

And the question of necessity, actually, is somewhat amusing. For 100 years, advocates of administrative power have said that it's necessary, and in that they're just echoing people like James I, who said that his power was necessary, but it's always an abstract necessity. After 100 years plus of administrative power at the federal level, one would have thought there'd be some scientifically serious empirical evidence of necessity. Necessity isn't just the diktat of some king or president. If there's necessity, that's something we can measure: the academics, the scientists, the lawyers, courts are very good at looking at empirical evidence. So why is there no serious evidence that administrative power is really necessary? And I don't just mean administrative power writ large. There should be evidence of the necessity of each type of regulation. So for example, if you think it's necessary for the FDA to license drugs, well, let's see some evidence of that, and not just drugs in the 1990s or drugs in the 1930s or even 10 years ago, but today, and let's see some evidence as to bigger classes of drugs. There may be some drugs where it's necessary to have administrative power, in which case show it, but if you're going to violate the Constitution, you should have some detailed evidence. And there may be many drugs for which it is not necessary to violate the Constitution. At any rate, the proponents of administrative power really ought to put some evidence on the table. Thus far it's not been forthcoming, which again, is curious, isn't it?

WOODS: Well, here's an objection I can anticipate from my libertarian listeners, which would be: why should we be so concerned about the formal procedure by which government carries out its activities? Why would should we care so much about the how rather than the what? The what seems to be what matters—how they exploit and take advantage of me seems to be secondary to what it is that they're doing. Why are both of these valid concerns?

HAMBURGER: Right, so I suppose if you were being charged with some sort of offense, you'd care about the form, right? You'd want full due process. You'd want to go to a court. You'd want to have a jury, because the form, the process, really matters. It limits what's to be done substantively, but more to the point it makes sure that's what's done substantively has been thought through, whether it's regulation thought through by Congress rather than just by some administrator's hidden agency or whether it's an adjudication forcing you to pay a fine, let's say. You'd want to have a jury for that. You'd want to have the right to present your evidence and get witnesses, the right to have a judge, to decide things fairly. But all of this gets lost in administrative power. So the process, I think, matters profoundly, and that's true both on the lawmaking side, where we get the input of people from across the country, Congress, a representative body to which there's been consent, not just an executive official hidden away somewhere or sometimes just a non-executive official in an independent agency, and it also

matters for one, of course, in administrative hearings where often one's substantive concerns gets very slight attention precisely because there is so little process. The process seems essential, and the substantive rules don't matter, but the entire foundation of our government is a process in which laws are made with consent and at which adjudication is made by independent judges and juries. That entirely is evaded, I am sorry to say, by administrative power.

WOODS: This problem of administrative law is not a recent one, but yet, would you say that it has gotten worse, and would you say in particular the present administration has more to answer for than perhaps some of its predecessors?

HAMBURGER: Maybe. I hesitate to personalize this simply because I'm interested in the structural development. It does seem that over the past century administrative power has systematically increased. That's true under both Democratic and Republican administrations, and that continues to be true. So, yes, the current administration has taken things further and has sometimes been quite brazen in its use of administrative power. But I wouldn't want to pick just on this administration, because it strikes me the guilt is spread far and wide here. So, yes, this administration in some sense has been worse, and certainly it's applying administrative power to individuals, which wakes people up, where they begin to pay attention to what this danger is, but the problem is systemic, and that's worth keeping in mind because that means that there's a lot of support for administrative power in both parties. This is not just a party issue. It cuts across parties.

WOODS: Absolutely, in fact, on this program, this is episode number 201. I bet if you added up all the time we've spent talking about the present administration, it would maybe be 10 minutes, just because I assume that my listeners already see the problems of the present administration, and there's so much demonization of the current president already that I don't see any need to pile on. What I think there's a need to do is to alert people to the structural problem that transcends any one individual who happens to be in power. There is so much fixation on Obama. I remember seeing a woman on, heaven help me, I check my Twitter account once in a while, and there is somebody who just tweets all day long, all day long, tweet, tweet, tweet, and in 2012 she kept counting down to the day we're going to take back America, and that was the day Mitt Romney was going to be elected—as if administrative law would have been dismantled under Mitt Romney. I raised the present administration only because it's fresh in everybody's minds. So could you give us examples from the present administration, from the headlines, of the use of administrative law?

HAMBURGER: So perhaps we should be grateful of the current administration for clarifying some of these issues. The current administration has vigorously used waivers to dispense with legal obligations. For example, the so-called mini-med waivers under Obamacare authorized companies in private letters sent to select companies to authorize them to avoid their obligations under the Obamacare statute. This is a revival of what used to be called the dispensing power. The dispensing power dates back in England at least to the 13th century,

when kings would issue private letters to individuals excusing them from complying with the law. There's really nothing that's as lawless as this. Even at the time the chief justice of England complained bitterly about it. He thought it was the destruction of law. And for centuries the English fought over the lawfulness of this dispensing power. Finally, in the late 17th century the English Bill of Rights did away with most of the dispensing power. And American constitutions authorize, again, no dispensing power. Nonetheless, we see administrative agencies, especially under the current administration, freely using what really, again, is the dispensing power waivers as they called them, letters, to relieve individuals of their obligation under law. It's quite unclear how a private letter from any executive officer can relieve any of us, be it an individual or a corporation, from our legal obligations, and this raises profound problems for due process and the equal protection of the law. And that's what the current administration has been doing, and the vigor with which it's done it is very worrisome.

WOODS: I guess I would be more up in arms about that if it were a case of the president picking people out to impose additional burdens on them, but if the president is picking people out to relieve them of burdens, of burdens that some of us listening to this show might consider to be unjust, it's hard to excite our outrage about this, but I guess this gets back to the question about why procedure matters.

HAMBURGER: Yeah, well, I'm not sure this really makes a difference. One could just single out individuals for burdens and administrative laws used to do this. One also can impose a general rule by statute and then have the executive release some of us from these burdens and leave others subject to them, and that in effect has the same result as selecting those who don't get waivers for the burden. So in fact, inequalities and the focusing on some of us and not others of us for burdens is the same. It's just that the administration gets to look good. In fact, there's a danger that the existence of waivers has actually structurally the effect of increasing the burden of laws, because Congress passes the statutes and is confident even when it passes overly broad duties because it knows it can avoid the political heat by having the administration issue waivers. So we end up with overly severe laws because Congress simply assumes the existence of waivers. So there's a cascade of results here that are actually very, very bad. It also encourages all sorts of corruption, because you have to wonder who is it that gets these waivers, and it may be those are friends of the administration for people who can be useful politically.

WOODS: All right, as we wrap up, let me ask you something that I bet most interviewers won't ask you. Given that administrative law is de facto the norm, is in every nook and cranny of the way Washington, D.C. operates these days, and yet, as you argue, it is not anticipated in the Constitution, is this not a failure of the Constitution? Is it perhaps a bit lame to say, oh, the Constitution hasn't failed, it's just not being enforced? Well, that's a form of failure. Are you in fact saying the Constitution has in a major sense fallen short?

HAMBURGER: In my view the Constitution does anticipate administrative power. Everyone was very well aware of prerogative power and extralegal government, and they thought they had

drafted a constitution that prevented this. Indeed, Madison complains it's the only thing that's been on the mind of many of his colleagues, and he thought that that distracted them from other issues. The problem, and I am not sure whether we should blame the Founders for this, is that all of this has been forgotten, that a constitution really can limit government only when we make an effort to understand what it was meant to do. And it's not just a matter of differences over interpretation. It's not about original intent or whatever mode of interpretation you want. It gets back to the very fundamental problem of lawless government that constitutional law as a whole is meant to defeat. And when we forget the dangers that give rise to constitutional law, then we're apt to forget what the constitutional law really does. So I'd blame us rather than the Framers. Of course, perhaps they could have been more explicit, but they were pretty clear about what they tried to do, and unfortunately, there's been great indifference to that as also to the danger of extralegal power.

WOODS: And I think one related problem that we struggle with in this show is that some people get interested in this topic when their political party is on the outs, and suddenly, everybody is abusing power, and it's an outrage, and then all of those outrages fall by the wayside as soon as they've got the levers of power, so that's a big issue, but that's another program.