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Discretionary and Rule-Making Authority

Explain how the federal bureaucracy uses delegated discretionary authority for rule making and implementation.

Bureaucratic agencies are given discretionary and rule-making authority to implement policy. Political science tells us,

Bureaucrats are powerful political actors because they have some flexibility as they interpret the law and implement public policy. For instance, police officers overlook some offenses during their shifts and welfare caseworkers decide the order and speed with which applicants receive their benefits. Of course, the actions of police officers and caseworkers, like all bureaucrats, are at least theoretically bound by the law. The point is not that bureaucrats are rogue actors but that they have some latitude as they make decisions.

Remember bureaucrats are those people empowered to carry out the will of the people as defined by public policy. Somebody has to do it. Yet discretionary authority can be dangerous. Rule-making without adequate checks can most certainly lead to corruption and abuse.

Put in real terms, the various Executive Departments of the federal government have broad discretion to act. Acting like legislators, chief executives and the courts; the U.S. Department of Agriculture can manage favorably controversial ethanol policies; the U.S. Department of Defense can modernize weapon systems; the U.S. Department of Homeland Security can initiate contentious meta data collections; the U.S. Department of Transportation can administer massive infrastructure improvement plans; the U.S. Department of State can direct clandestine foreign intelligence operations; the U.S. Department of Veteran Affairs can oversee vast health care networks; and the U.S. Department of Education can help to transform classrooms in remote villages and hamlets of America. The story of America can be told as the aggrandizement of the federal bureaucracy.

This potential danger has authorized what some have called an unlawful administrative state. Philip Hamburger has recently written,

After absolute power was defeated in England and America, it circled back from the continent through Germany, and especially through Prussia. There, what once had been the personal prerogative power of kings became the bureaucratic administrative power of the states. The Prussians were the leaders of this development in the 17th and 18th centuries. In the 19th century they became the primary theorists of

administrative power, and many of them celebrated its evasion of constitutional law and constitutional rights.

Yet when government is asked to do something somebody has to do it.

As our rights have expanded so too has the responsibility of our government to protect those rights. The aggrandizement of the federal government can be explained. "We the people" have grown more demanding. We expect more and more from our government. Therefore, our administrative state has expanded its authority.

Agencies of the executive branch write, issue, and enforce many kinds of rules under authority of statutes passed by Congress. Many rules concern the agencies' own operations, such as those governing civilian and military personnel, the procurement of goods and services, the management of parks and prisons, and the administration of border controls and immigration policies. Others set forth the terms of grants and other payments to state and local governments and to private business corporations, organizations, and individuals. The agencies operate their own programs for adjudicating disputes under these rules, from immigration to Social Security disability benefits, usually with rights of appeal to independent, Article III courts.

Our federal bureaucracy, at various times, serves as a surrogate for all three branches of government.

But to say our bureaucracy has wide discretionary power does not mean it acts arbitrarily. Nor does it go unchecked. Policies, standards and procedures are in place. Congressional oversight is constant. Investigative journalism also serves to hold our administrative state accountable. And certainly, the Courts have played their part.

The Supreme Court, in fact, has defended bureaucratic discretion in just about every case where it was challenged. And when Congress attempted to empower itself to veto bureaucratic decisions the Court ruled such authority unconstitutional. In the case *INS v. Chadha* (1983) the Court ruled the legislative veto unconstitutional. In doing so Chief Justice Burger provided an important civics lesson in his majority opinion:

The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.

The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often

seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided, either by the Congress or by the President. With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.

We hold that the congressional veto provision ...is severable from the Act and that it is unconstitutional.

The federal bureaucracy uses delegated discretionary authority for rule making and implementation. Some worry this invites abuse. Doesn't wide discretion challenge the ideal of a limited government? Then again, the Constitution demands government to provide certain protections. The executive branch has been delegated to enforce those laws passed by Congress. Somebody has got to do it...and our bureaucratic agencies are happy to.