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Thanks, EPA: Your New 'Navigable Waters' Rule Strengthens The Case Against Administrative Law

When Congress passed the Clean Water Act in 1972, it was exercising its power to regulate interstate commerce by prohibiting discharges into the nation's "navigable waters." If a body of water could be used to transport goods from one state to another, it was covered by the Act.

Like so many other statutes enacted over the last 80 years – that is, since the advent of the administrative state under FDR – the Clean Water Act (CWA) depends on bureaucratic interpretation and enforcement.

The two entities involved with the CWA are the Environmental Protection Agency and the Army Corps of Engineers. Both have tried to expand the scope of their regulatory power by issuing rules that defined "navigable waters" so broadly that they have (or at least claim to have) authority over many bodies of water that couldn't possibly be used to transport so much as a paper clip between states.

Twice, the Supreme Court has slapped down rules that amounted to a rewriting of the law to suit the zealous regulators.

First, in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers* (2001), the Court ruled that the Army Corps had no authority to assert control over isolated bodies of water – in that particular instance, an abandoned sand and gravel pit.

You might think that the lesson would have sunk in, but in 2006 the Court had to deal again with another creative interpretation of the CWA in *Rapanos v. United States.* The EPA had asserted that it could prevent a landowner from doing anything with a wetland that was near a ditch that eventually drained into navigable water. The Court again ruled that the agency had overstepped its bounds.

A crucial point here: When regulators lose court cases, it does not hurt them. Sure, they're probably angry at being told "no" but that's it. There are no penalties for grabbing unwarranted power and mistreating citizens. An adverse court decision, or even a series of them, has no deterrent effect.

So it is not surprising that the EPA and Army Corps recently proposed a new rule defining "navigable waters" that, amazingly, actually goes far beyond its previous misbegotten efforts.

This new interpretation would, write Pacific Legal Foundation attorneys M. Reed Hopper and Todd Gaziano in a *Wall Street Journal* op-ed published last December, "redefine 'waters of the United States' so broadly that it covers virtually any wet spot – or occasionally wet spot – in the country, including ditches, drains, seasonal puddle-like depressions, intermittent streams, ponds, impoundments, prairie potholes, and large 'buffer areas' of land adjacent to every waterway."

In short, these federal agencies want to give themselves almost boundless power over a vast amount of private property.

On Wednesday, February 4, a rare joint hearing was held in Washington before the House Transportation and Infrastructure Committee and the Senate Environmental and Public Works Committee. In a press release issued beforehand, Mr. Gaziano stated that

the committee members should consider that the rule "is not just costly and destructive for farmers, ranchers, and rural residents," but also that "urban and suburban citizens and their local governments will be subject to increasing federal micromanagement and costly mandates."

Based on the testimony, Congress might suggest that the EPA and the Corps reconsider the rule; it's also possible that Congress could block its enforcement.

But there is a point here more fundamental than the pros and cons of this, or any, administrative regulation. Do we really want our laws to be made by unelected, unaccountable bureaucrats?

With the constant expansion of the regulatory state since the 1930s, Americans have gotten used to having to obey (although sometimes battle) rules decreed by those bureaucrats. It is a bad habit that we should break, argues Columbia Law School professor Philip Hamburger in his powerful book *Is Administrative Law Unlawful?*

His unequivocal answer is that it is unlawful.

The Founders had very good reasons for writing in Article I that *all legislative powers* were vested in Congress. The executive branch was not to have any legislative power; no authority to dictate the kinds of rules exemplified by the EPA/Army Corps rule in question.

Professor Hamburger argues that our "administrative law" is a throwback to the days of royal prerogative, when monarchs and their minions acted as lawmaker, enforcer, and judge all in one. Over the centuries, Englishmen battled to escape from royal prerogative by putting limits on royal power and dividing it. The American Founders knew that and were determined to make sure that prerogative did not resurface in the United States.

Toward that end, they cabined the legislative, executive, and judicial powers of the federal government in separate branches. Administrative law undoes their handiwork.

Holding a congressional hearing to examine the implications of an administrative rule and then possibly asking the agencies involved to reconsider it is constitutionally ridiculous. It could make sense for the bureaucrats to suggest that a law be amended by Congress, but makes no sense for bureaucrats to rewrite or decree a law, which stands unless the legislators decide they don't like it.

Both Congress and the Supreme Court are complicit in this. Congress likes to write vague laws that leave the hard part to bureaucrats who don't have to worry about being voted out of office if their rules do a lot of harm. It could stop doing that. Better still, go back to existing statutes, sunset all regulations, and either approve or reject them as they expire.

For its part, the Supreme Court should breathe life back into the once-formidable doctrine that Congress may not delegate its authority. It upheld that doctrine until the mid-30s and has never overruled non-delegation precedents like *Carter v. Carter Coal.*

Some people will undoubtedly say that we can't "turn the clock back," but it's administrative law that turns the clock back, back to the era of centralized government power. Restoring our constitutional principles would be an advance.