

Episode 152: "The Administrative State vs Our Civil Liberties" with Phillip Hamburger and Jenin Younes

Speaker 1 ([00:04](#)):

Welcome to the Bill Walton Show, featuring conversations with leaders, entrepreneurs, artists, and thinkers. Fresh perspectives on money, culture, politics, and human flourishing. Interesting people, interesting things.

Bill Walton ([00:24](#)):

Welcome to the Bill Walton Show, I'm Bill Walton. Last week, Joe Biden mandated that businesses with more than 100 employees needed to force every worker to be vaccinated or face weekly testing. It's estimated this will impact roughly 180 million people or almost two thirds of the country's workforce. Setting aside his dictatorial and offensive tone, does Joe Biden really have the power to do this or is it that under the guise of "keeping us safe," federal state and local governments have trampled our constitutional law with draconian regulations and emergency orders with arbitrary executive decrees?

Bill Walton ([01:10](#)):

This points us towards even a bigger problem which is the enormous and growing administrative state and its threat to every American's constitutional freedoms. With me to explain these threats, Phillip Hamburger, who's the founder of the New Civil Liberties Alliance, a scholar of constitutional law whose contributions are unrivaled by any US legal scholar in driving the national debate on the first amendment, government administrative power, and the separation of church and state. Welcome.

Phillip Hamburger ([01:41](#)):

Thank you. Great to be here.

Bill Walton ([01:42](#)):

Also joining me is our favorite returning guests, Jenin Younes, who was on with Todd's Wiki last month. She's litigation counsel for the New Civil Liberties Alliance, and she's a former public defender, and after seeing governments throughout the nation violate human rights and civil liberties in her ostensible effort to mitigate the virus, she's now joined the fight against lockdowns and related policies. Jenin, welcome again.

Jenin Younes ([02:10](#)):

Thank you so much for having me back.

Bill Walton ([02:11](#)):

Look forward to hearing you some more. So, Philip, what is the New Civil Liberties Alliance?

Phillip Hamburger ([02:19](#)):

What are we? We're not the ACLU, we actually defend civil liberties. But more seriously, we're a response to the administrative state. A number of years ago, I realized that the administrative state, which is the antithesis of our constitutional mode of government, is the greatest threat to civil liberties in our era. We've had different sorts of threats to civil liberties in the past, but the current threat is

centrally in the administrative state, and so it seemed necessary to push back against that, others weren't doing it.

Phillip Hamburger ([02:55](#)):

And so I formed what was then just a tiny group. We're now are actually 20 people and a significant impact. We formed a litigation group to do pro bono litigation to fight the administrative state, and I must say one of our great pleasures this summer was to have Jenin join us, she's wonderful and so thank you. I want to take this opportunity to say thank you, Jenin, for not only joining our show, but joining the NCLA.

Jenin Younes ([03:23](#)):

Oh, well, thank you.

Bill Walton ([03:24](#)):

So, Jenin, you were up in New York City, defending criminals?

Jenin Younes ([03:26](#)):

Yes, I was an appellate public defender for quite some time.

Bill Walton ([03:30](#)):

So. What was the light that went off that said, "Look, we've got to protect everybody's civil liberties?"

Jenin Younes ([03:36](#)):

Well, it was really the COVID stuff. I was really shocked by the governmental responses across the nation. Well, really, across the world and the public's acceptance of it, and I thought, "Something's really wrong here, that people think it's okay for the government to say you can't leave your home, you can't see your family, you can't go to church." And so I started to become very active in fighting lockdown policies and I became involved with a group called AIER and they had some people there actually knew about NCLA. I was sort of doing that during the night.

Bill Walton ([04:09](#)):

That's the American Enterprise Institute-

Jenin Younes ([04:09](#)):

No, that's The American Institute for Economic Research, where the Great Barrington Declaration was.

Bill Walton ([04:13](#)):

That's up in Massachusetts, yeah.

Jenin Younes ([04:14](#)):

Yeah.

Bill Walton ([04:15](#)):

Yeah, they're great.

Jenin Younes ([04:16](#)):

Yeah. So I was doing my day job and my night job was fighting lockdowns and then I was like, "This is too much, I have to combine those two things."

Bill Walton ([04:26](#)):

Well, I'm glad you did. But, Phil, you went to Princeton and Yale Law School. I didn't really think of those as bastions of libertarian-

Phillip Hamburger ([04:33](#)):

No one's perfect.

Bill Walton ([04:35](#)):

Okay, you escaped.

Jenin Younes ([04:36](#)):

He's also currently a professor at Columbia so.

Phillip Hamburger ([04:45](#)):

Again, quite a direction.

Bill Walton ([04:45](#)):

So let's start with Biden. And then I really do want to get into the administrative state, first by defining it, and then understanding what we can do about it. So, Biden, people say he exercised his authority under OSHA. Is what he's doing constitutional? Is what OSHA's doing constitutional? I mean, what is it that he tells every American that you have to do this or that?

Phillip Hamburger ([05:11](#)):

Well, there are layers to the problem, it's not just one. First of all, at a statutory level, it's by no means clear that there is governmental authority to dictate to employers with more than 100 employees that they have to have their employees vaccinated. In fact, the statutory authorization for this is rather dubious. It looks not just like regulating the workplace, but actually regulating individuals in their everyday lives, which is not what OSHA is about.

Phillip Hamburger ([05:40](#)):

But beyond that, there are constitutional problems. This is an administrative edict that's being proposed. One, it's not a rule adopted by Congress elected by all of us, it's just some unelected person at the dictate of the president telling us what to do. That sounds awfully like Prussia, not the United States.

Bill Walton ([06:00](#)):

Well, Jenin you're handling litigation on behalf. What is the lawsuit that you are you're filing?

Jenin Younes ([06:07](#)):

I'm currently filing a lawsuit against Michigan State University. There's actually going to be a hearing next week in Michigan on that, on the preliminary injunction there. So that's a vaccine mandate for employees and our plaintiff doesn't want to get the vaccine, she had COVID, she has natural immunity, very similar to this Wiki case. So that's a little different, and now that Biden's mandate has come down, I don't know if the university is going to try to claim that they have to do this.

Jenin Younes ([06:34](#)):

So the analysis could shift a little bit, but I think it's an important point to make in addition to what Philip was saying that this is sort of the government using private businesses to do what it can't, which we've seen a lot throughout this pandemic, and it's really problematic. Biden knows he can't make individuals go out and get the vaccine, but he's using private companies as an instrument of the government. Yeah.

Phillip Hamburger ([07:00](#)):

It's really in some ways even more dangerous than ordinary administrative power. They're using administrative edicts and also conditions on federal spending to draw private institutions into controlling us so that there's a uniformity, a connectedness, an alignment of government and large corporations and the universities all imposing the same policy. And in that sense, government and society get melded along government lines. So this is profoundly worrisome.

Bill Walton ([07:29](#)):

Well, the problem I have, not my problem, I think we have is that you look at the poll numbers from this and something like 58% of people polled. Now, we don't know who's doing the polling or what the question was, said they thought Biden was doing the right thing.

Phillip Hamburger ([07:46](#)):

Well, it depends on the questions asked, I suppose. When asked, "Is it worth giving up on the constitution, your constitutional rights and your privilege or your right to elect the people who make your laws?" I don't know if the result of the poll would come out the same way. But it is true, many Americans aren't fully attached to the Constitution in the way perhaps they should be.

Bill Walton ([08:08](#)):

Well also, I always imagine Jesse Waters. You know Jesse? You don't watch TV.

Phillip Hamburger ([08:12](#)):

No.

Bill Walton ([08:13](#)):

He's on Fox, and he made his reputation working for Bill O'Reilly sending out to interview people on the street and ask them questions about what they thought, and it turned out they didn't know very much, that's especially in colleges.

Jenin Younes ([08:28](#)):

Well, and I think that's one of the problems here is that the public is just very accepting of these measures. I'm not sure that the president would be responding this way if he didn't think that he could get away with it. And it's the same thing that we've seen throughout the pandemic.

Jenin Younes ([08:40](#)):

And I think the courts are also extremely reluctant to question what the government is doing in these situations, and we've seen some bad outcomes with the vaccine mandate cases so far, hopefully that'll change but...

Phillip Hamburger ([08:54](#)):

One of the dangers is that throughout history, emergencies are used to justify extraordinary power, unlawful power. This was the nature of absolutism, it was based on the sense of continuing emergencies, and this is the current ploy, right? We have to preserve this emergency so we can control people. That's quite frightening, and it just seems to me it leads to a distortion of science too, because in order to maintain the sense of necessity that justifies imposing all these controls through unlawful mechanisms, you have to concoct the story of an emergency.

Phillip Hamburger ([09:31](#)):

And in fact, although COVID is very serious, it doesn't mean we have to throw away our constitutional rights and our self government. And there's a real danger that the courts just defer to the government in times of emergency.

Bill Walton ([09:45](#)):

Well, I hope you're successful in bringing this to some sort of... Is this the kind of case that could get to the Supreme Court? I mean, to your case in Michigan, maybe not. I mean, are you ginning up a lawsuit against the president of the United States?

Phillip Hamburger ([10:01](#)):

You don't need to get to Supreme Court to win.

Bill Walton ([10:02](#)):

I'm in favor [inaudible 00:10:03] if you need some help.

Phillip Hamburger ([10:06](#)):

No, it's quite okay. So, first of all, the Supreme court these days is a little skiddish and perhaps because of threats of court packing. So, one doesn't necessarily need to get the Supreme Court or want to get there, one wants to prevail in ways that are substantive and lasting, and that can be done in circuit courts, that can be done in a host of different ways. So, in fact, one of the reasons the NCLA was started was too many people just wanted to get amicus briefs in the Supreme Court [crosstalk 00:10:31].

Bill Walton ([10:31](#)):

An amicus brief is...

Phillip Hamburger ([10:32](#)):

A friend of the court.

Bill Walton ([10:33](#)):

Okay.

Phillip Hamburger ([10:34](#)):

So there might be one lawyer for one client and 60 people crowd in and say, "We participated by filing amicus briefs." Some are very useful, some are not. But the point is that too many organizations were concerned about getting the Supreme Court without worrying about what's actually being accomplished. So our goal is to get things done in an effective strategic way, and these lawsuits are precisely about that.

Bill Walton ([10:58](#)):

So, tell me about your colleagues and who is the team that's fighting this fight?

Jenin Younes ([11:04](#)):

The vaccines?

Bill Walton ([11:05](#)):

Yeah. Well, [inaudible 00:11:06].

Jenin Younes ([11:05](#)):

NCLA.

Bill Walton ([11:08](#)):

I'm a basketball guy. I keep thinking, "Okay, it's NCL that you..."

Phillip Hamburger ([11:13](#)):

We should have a basketball team in our organization, that's right.

Bill Walton ([11:15](#)):

If you do, I'll help you coach. Anyway, so tell us about the team.

Phillip Hamburger ([11:20](#)):

Well, we have about 10 or 11 lawyers currently, and about 10 support staff. The support staff includes not only conventional communications, but engagement with the public. If I could just mention one example of that, our director of engagement, Clegg Ivy, who's a U of C law grad, by the way, he actually knows this law, went up to Cornell and arranged to have a young man dressed as a kangaroo. And so students arrived, he started urging them to submit to the kangaroo court. Of course, students loved this, and wherever they saw them on campus would shout, "Guilty. Guilty."

Phillip Hamburger ([12:01](#)):

So, this was against Title IX, to make vivid to parents and students the threat there. And so we want to act in sensible unconventional ways to draw people's attention to the problem. As for our lawyers, they range from relatively new lawyers to highly experienced ones. We have the full range as one would at any law firm, and I'd like to think they're all brilliant, hardworking, and dedicated, which I think is true.

Bill Walton ([12:28](#)):

You're watching the Bill Walton show, I'm here with Philip Hamburger and Jenin Younes and we're talking about the NCLA, New Civil Liberties Alliance, and all it's doing to protect our freedoms. The question also comes up, what rights do individuals have if you're vaccinated or unvaccinated? He's mandating employers, but if you're an unvaccinated employee and you say, "I don't want to get vaccinated," your employer can then fire you.

Jenin Younes ([13:04](#)):

Well, it's a little bit complicated. I mean, if it's a private employer and the private employer was doing this without government coercion or government order, that would be a different analysis. But when it's the government making edict, then constitutional rights kick in, and that's a different situation.

Jenin Younes ([13:24](#)):

So MSU like GMU is a public university and so it's subject, kind of has to abide by the constitutional requirements. And that's why we're bringing these cases against public universities and not private.

Bill Walton ([13:36](#)):

When you won your case in GMU, George Mason University, Todd's a Wiki professor there who had the virus and ended up with immunities.

Jenin Younes ([13:46](#)):

Yeah. Well, we reached a resolution that was satisfactory to everybody.

Bill Walton ([13:49](#)):

Yes, it was.

Phillip Hamburger ([13:50](#)):

If I could restate that, it was slightly they were so scared when Jenin turned up that they gave in before we could actually litigate, they just ran away.

Bill Walton ([14:01](#)):

Well, how much does this stand up to the sunlight of publicity? I mean, it seems like there's a lot of really kind of egregious behavior ordering people around, but if you shine a light on it, they tend to back down, that's what happened with GMU.

Jenin Younes ([14:15](#)):

Yeah. MSU is not backing down in the same way, and the what the tactic that all of these universities appear to be taking is to say that natural immunity doesn't exist because the natural immunity argument is huge, it affects millions. Tens of millions of Americans would be exempt from these mandates if natural immunity was recognized, but they're sort of trying to pretend it doesn't exist at all.

Phillip Hamburger ([14:38](#)):

Which is kind of funny because of course the whole idea of herd immunity is based on past experiences with natural immunity.

Jenin Younes ([14:44](#)):

Yeah.

Phillip Hamburger ([14:46](#)):

There's a funny disconnect here. So the administrative state, all this power exerted, not through one's representatives, but by unelected agencies, bureaucrats, is based on a theory of expertise. They have knowledge.

Jenin Younes ([14:58](#)):

Right.

Phillip Hamburger ([14:58](#)):

Their knowledge is solid, we should respect that and follow it in the courts too even if it's at the expense of our rights. Now, this is odd because solid knowledge things, which are certain, that means old science, real science, the cutting edge of science is all about questions, uncertainty, and I got into all of this really in defense of science against federal regulations that are actually killing people.

Phillip Hamburger ([15:24](#)):

And so I spent a lot of time worrying about this. Their claim of expertise is actually repudiation of cutting edge science, and here it's actually anti-scientific because of course, natural immunity is a real thing. We may not know enough about it, but we don't know enough about the immunity from vaccines either, and it's a reminder that the agencies actually don't know enough to be presuming to rise above law and no more than the legislature

Bill Walton ([15:51](#)):

Let's do a history lesson. You were a professor of history for a while.

Phillip Hamburger ([15:56](#)):

Professor of law, but I did a lot of history.

Bill Walton ([15:58](#)):

Okay, well power based on expertise, this was the Woodrow Wilson idea. You got it from the Germans. I'm simplifying-

Phillip Hamburger ([16:08](#)):

That's true.

Bill Walton ([16:09](#)):

... this but he thought that the constitution was wholly inadequate, then this idea of separation of power and a congresses, courts, the president, they lack the capacity, the capability of experts. And he was a former Princeton president, so you bear some responsibility.

Phillip Hamburger ([16:31](#)):

Guilty as charged.

Bill Walton ([16:33](#)):

And he came in with a roaring event. All the progressives thought the experts ought to be in charge of government, that the democratic process was inadequate to solve the big issues and so the rule by experts really got started in the '20s. And then this down through the years, what happened was the administrative state which we now call it, they kept delegating more and more power to these government agencies and congress is the biggest culprit there. They kept delegating this, that, and the other, and all of a sudden we ended up with this incredible bureaucracy is really too benign a word, the sort of a thing.

Phillip Hamburger ([17:08](#)):

So let me give you a less sanitary account of that.

Bill Walton ([17:11](#)):

Sanitary.

Phillip Hamburger ([17:12](#)):

A less sanitary account of it, the real account of it, which is-

Bill Walton ([17:15](#)):

I don't want sanitary, I want the recap,

Phillip Hamburger ([17:17](#)):

Right. You'll have to have a shower afterwards, it's so disgusting. So the people who demanded rule by experts, people like Woodrow Wilson, they were not just academics, they were members of a class. It's not a Marxist defined class in economic terms, it's a class defined by knowledge people like, well, all of us, have academic knowledge, went to school, so forth.

Bill Walton ([17:40](#)):

The elites.

Phillip Hamburger ([17:41](#)):

Yes, it's a knowledge elite rather than a moneyed elite. And the knowledge elite viewed with some disgust, how should I put it, the non-Anglo Saxon immigrants. They felt disgust towards lower-class Germans, towards Irishmen, towards blacks. And so even just saying-

Bill Walton ([18:03](#)):

Italians and...

Phillip Hamburger ([18:04](#)):

Italians too, that's right. And so at the same time that constitutionally, they weren't trying to open up voting rights, they were trying to take legislative power out of the hands of the elected officials, the legislators. And Woodrow Wilson's quite candid about this. In 1887, he says, "Look, we progressives have great difficulty persuading the masses, the unwashed masses to adopt our views." And then he

says, "I'm particularly worried about..." and this is a quote, not my language, he talks about the Irishmen Germans in Negros, that's a quote, and how they cannot really be trusted.

Bill Walton ([18:37](#)):

Well, he was a notorious racist.

Phillip Hamburger ([18:38](#)):

He was, but this is the origins of administrative state, it has utterly racist beginnings. And that's not to say that the current administrative state is racist, but has racist origins. And it's still discriminatory in the sense that it takes legislative power and puts in the hands of a homogenized educated elite and thereby takes legislative power further away from a diverse majority.

Bill Walton ([19:01](#)):

Well, those are also the roots of planned parenthood.

Phillip Hamburger ([19:04](#)):

Don't want to get too far away from my own point.

Bill Walton ([19:06](#)):

Well, you're doing so well, we can get into that too, but we'll keep this [crosstalk 00:19:11].

Phillip Hamburger ([19:12](#)):

Based by the way you hit in Connecticut.

Bill Walton ([19:14](#)):

Okay.

Jenin Younes ([19:15](#)):

What we're seeing with this, I think, is profoundly anti-scientific. It's a lot that we don't even know how these policies are developed, the universities usually won't tell us, and they'll just refer to some CDC guidance which doesn't even appear to be often based on research. And I was speaking to Jay Bhattacharya recently, one of the great Barrington declaration coauthors.

Bill Walton ([19:37](#)):

He's at Stanford.

Jenin Younes ([19:38](#)):

And one of the best epidemiologists in the world, and he was saying, "There are a lot of things we don't know about these vaccines. They're new, we don't know how effective they are, safety, they appear to be safe, but it's just a syllogism that you can't know the long-term effects of something that hasn't been around longterm, and we don't know how long they last," and there should be a robust debate going on about it.

Jenin Younes ([20:01](#)):

But instead what's happening is silencing and censorship as we know firsthand. And this is exactly the opposite of what the scientific process is supposed to be about. So these people who say that following the science, Anthony Fauci, et cetera, are doing exactly the opposite

Phillip Hamburger ([20:17](#)):

Mob rule since [inaudible 00:20:19] is even undo acceptance of a majority views incompatible with scientific knowledge as Galileo could tell us if he were sitting here, and the danger is we're moving towards a situation in which if someone holds a deviant point of view on science, somehow they are a threat to the nation. And part of this comes, I think, because we've merged, science has become so much a government activity that policy and science merge. And so once the policy is decided, if the science goes another direction, it becomes not just descent but [crosstalk 00:20:53].

Bill Walton ([20:53](#)):

Try being a client scientist who doesn't agree with the consensus.

Phillip Hamburger ([20:58](#)):

Exactly.

Bill Walton ([20:59](#)):

You can't get a job.

Phillip Hamburger ([21:00](#)):

That's right.

Bill Walton ([21:00](#)):

You can't get funded. You can't get research money, it's a real issue. I mean, it's really scary, it's happening in environment now it's happening with viruses.

Jenin Younes ([21:12](#)):

Yeah. Actually, I heard that NCLA initially thought of using the word Galileo because they wanted to be-

Phillip Hamburger ([21:19](#)):

That's right, against institutional review boards which was the initial problem that got me into all of this, I thought of starting the Galileo Society, but then it merged into something a little bit bigger. That's right.

Bill Walton ([21:32](#)):

So I want to stick with the anti-science piece, but I also want to get back into the mechanisms through which this anti-science is being enforced and if you step back and look at the federal government and there are all these agencies, there's the EPA, there's labor, there's commerce, there's department of agriculture. There's the SCC, there's justice, all these, I'm not going to go to the whole list, but I ran a public company and it came to be clear to me that when you're regulated by the SCC and you get into a dispute with them, it's not like you go to an independent third party judge and litigate this, it's you've got the sec really becomes the judge, jury and executioner and there's really no other recourse, or at least there wasn't then. So that's true in all the agencies, isn't it?

Phillip Hamburger ([22:20](#)):

It's true, almost all of them, that's right.

Bill Walton ([22:23](#)):

So explain how the administrative state administers its law and how it's always inside the agency that's...

Phillip Hamburger ([22:32](#)):

Right. So normally Congress passes a statute saying, "Don't do this or do that." Nowadays. Congress says some agency SCC, "You take care of it," and then the SCC will adopt a rule which says, "Don't do this or that," and they're not elected and utterly unaccountable to the public. If they're not satisfied with the rule, then what they'll also do is add another rule, interpreting it for which they don't really have statutory authority. And then if they're not satisfied with that, they'll say, "Well, let me give you some guidance as to what our rule really means. This is our interpretation of it."

Phillip Hamburger ([23:07](#)):

Of course it's not binding, but woe betide someone who violates that interpretation and the courts will defer to the interpretations of agency. So there are layers of administrative edicts, rules, interpretive rules, guidance, and then sometimes just a wink and a nod from an agency and you have to listen to what they say.

Phillip Hamburger ([23:25](#)):

And if you violate any of these things, then they'll charge you in their own in-house courts, not real courts, but as part of an ALJ, an administrative law judge, who's utterly biased and favor of the agency, because even if they were utterly pure as individuals, and many of them are, their traditional decisions are reviewable by the commission, SCC's commission or other agency head. So if the agency doesn't like the adjudication by the little petty judge, the inquisitorial judge, they will just change it. So both on the lawmaking and adjudication, you're toast.

Bill Walton ([24:00](#)):

Well, and the thing that makes this political and important and vital is if you look at how the federal agency, if you look at how people vote, probably 90% voted for not Donald Trump. And so they also voted not George Bush, I mean, it's a very left oriented federal bureaucracy we have. So when they sit and they look at these laws that they're creating and also deciding what's fair, what's not fair, they've got a real bias.

Phillip Hamburger ([24:37](#)):

I confess. So at the NCLA we have a policy-

Bill Walton ([24:40](#)):

And you can give me the unsanitized version.

Phillip Hamburger ([24:42](#)):

No, I want to actually be very straight in this, we do not want to be harsh against any of the people we disagree with. We want to give them a great big hug and persuade them to do what's right. It's like the

Christian motto, hate the sin, love the sinner. And indeed, most of these people are highly principled, they're just following the wrong principles and they're exerting power, which they shouldn't have.

Phillip Hamburger ([25:05](#)):

And so we want to fight those types of power without any animus towards any individual, which is not to say some of them don't misbehave, but we don't want to get distracted by personal politics. We're not political at all, we just aim it unlawful behavior which is plenty to aim at, believe me, we don't need more to fight.

Bill Walton ([25:26](#)):

Well, you're watching The Bill Walton Show and I'm here with Philip Hamburger and Jenin Younes, and I'm getting a lesson from Phillip on how not to irritate your enemy.

Jenin Younes ([25:39](#)):

I should listen to that too.

Bill Walton ([25:40](#)):

We hate the sin, but not the sinner.

Phillip Hamburger ([25:44](#)):

They're nervous enough already, which is fine.

Bill Walton ([25:48](#)):

Well, that's one of the rules of management though, interestingly. I ran a lot of different things and it's like you don't say to the person, "You're a jerk," You say, "No, you're behaving like a jerk, you're not really. So don't behave that way."

Phillip Hamburger ([26:05](#)):

I propose that all federal bureaucrats have their pay doubled on the condition that they not act unlawfully, no one's accepted this.

Bill Walton ([26:17](#)):

What sort of agencies have you worked with so far? Are you still in the new litigator category?

Jenin Younes ([26:25](#)):

Yeah, I'm in the new litigator category. I haven't...

Bill Walton ([26:29](#)):

So what are some examples of the agencies where you've been.

Phillip Hamburger ([26:32](#)):

I was just saying, Jenin has a full cup of COVID in front of her [[crosstalk 00:26:35](#)] that's the issue of the day, yeah.

Jenin Younes ([26:34](#)):

Through a lot of vaccine, right?

Phillip Hamburger ([26:39](#)):

Yeah. Well, I'll give you an example, the securities exchange commission, we have argued for several years that their ALJs, their internal in-house tribunals are unconstitutional.

Bill Walton ([26:52](#)):

ALJ stands for...

Phillip Hamburger ([26:55](#)):

Administrative Law Judge.

Bill Walton ([26:55](#)):

Okay.

Phillip Hamburger ([26:56](#)):

Yeah. We all think in acronyms, it's terrible. And so they shouldn't proceed against you in front of their own in-house biased so-called judges, but for a real judge with a jury in a federal court with all the rules of procedure, we've gone so far in that litigation led mostly by Peggy Little, one of our fine lawyers, that as a result, they're now backing away from using their own in-house lawyer. They only have 16 cases in front of their ALJs and their internal courts at the moment, and they're shifting to the district, going to real district courts, which is great.

Phillip Hamburger ([27:30](#)):

But having chased them out of their internal tribunals, we're not fighting them in the district courts and in *Spartan Securities versus SCC* the summer, another of our lawyers, Caleb Crockenberg defended *Spartan Securities*, and the jury found them innocent on 13 out of 14 counts. Now this is in part because the SCC wants to enforce mere guidance, its interpretation as if it were law and of course the judge being a real judge rejected this.

Phillip Hamburger ([28:03](#)):

And so Caleb just trounced the SCC in this case. That means they can't fight in house, they tried unconscious procedures in a real court and they get bloodied. Let's see what they do next. And so this is just an example of how it's like chasing a mouse, chase him out of his home, goes into the public sphere, gets crushed and they need to find a lawful way to act. They can't act unlawful anymore.

Bill Walton ([28:31](#)):

Well, one of the things that I didn't understand until I really got into this administrative state is that Congress, when they write these laws, let's say the \$3.5 trillion monstrosity that Nancy's got cooked up for us, you read through it, it doesn't really say this, this or this, it says we're going to give this to this agency or that other thing to this other agency, that way they've got plausible deniability.

Bill Walton ([28:58](#)):

So you vote for something and then somebody comes back and one of their constituents says, "The law you just voted for is really crushing me," and you say, "Oh, well, that's not the law I passed, it's the way it's been interpreted by this agency." Is that a roughly accurate view of what's going on?

Phillip Hamburger ([29:13](#)):

Yes, it infantilizes Congress.

Bill Walton ([29:15](#)):

Say that again?

Phillip Hamburger ([29:17](#)):

It infantilizes Congress because the power, all the bad stuff can be done elsewhere and they can just say, "Oh, we're fixing a problem, we're passing a statute," with no content.

Bill Walton ([29:26](#)):

Right.

Jenin Younes ([29:27](#)):

The guidance issue also has come into play in the vaccine mandate cases because a lot of these mandates say that they're relying on the CDC guidance and so you can't really challenge the guidance because it's not a law, but then the university acts as though it's the final word. So they put us in this bind where we can't really bring a lawsuit against the CDC and say they're not relying on the science even though I think that's actually the case. But at the same time, everybody thinks that we should be taking their word for what they're saying so that's really a problem.

Bill Walton ([29:58](#)):

So you are a public defender, defending individuals, what if I come to you with somebody that's unvaccinated and said, "Look, my lawyer's being tough and they've just fired me." Is that a case you all would take?

Jenin Younes ([30:10](#)):

Well, it depends on the details.

Phillip Hamburger ([30:13](#)):

Let me just give you a sense of scale.

Bill Walton ([30:15](#)):

Spoken like a true lawyer.

Phillip Hamburger ([30:17](#)):

A well-trained lawyer, I want a good case here.

Jenin Younes ([30:20](#)):

We're getting, I would say 100. I can't keep track anymore, my inbox is I have to forward everything to the paralegal.

Phillip Hamburger ([30:27](#)):

We have hundreds and hundreds of requests.

Bill Walton ([30:28](#)):

You're getting [crosstalk 00:30:29] with requests to help people?

Jenin Younes ([30:30](#)):

Yeah, yeah.

Phillip Hamburger ([30:31](#)):

We can't handle them all, and this is the sad part about this, from the very beginning, people come to with their problems and people are in tears sometimes and you cannot say yes to all of them because we cannot defend every individual. Our goal, and I think it's the right goal, is to fight against the types of power so that in future, the government cannot do this to us. We can defend far more than just one's clients have an act strategically. So we take the cases which will defend not just our client, but all of them.

Bill Walton ([31:02](#)):

Sort of precedent and establish a rule for everybody else that follows.

Phillip Hamburger ([31:05](#)):

Right.

Jenin Younes ([31:06](#)):

Exactly.

Bill Walton ([31:07](#)):

Example of something like that?

Phillip Hamburger ([31:10](#)):

An example of that, so we, SCC is an example of that. There are types of power that you don't get in schoolhouse rock, for example, Congress delegates rulemaking power to agencies, right? And that's defended oddly enough under a doctrine called the non delegation doctrine, which actually means the opposite of what it says which it actually permits delegation of legislative power to agencies by some corrupt motive reasoning.

Phillip Hamburger ([31:37](#)):

So we fought this, for example, in the Gundy case, I think it was the summer of 2018, and did we get about four votes? We almost got the Supreme Court an amicus brief and Gorsuch wrote an opinion adopting our language which he said, "This isn't really a problem with delegation, actually, Congress has divested itself, its power and that's constitutional language vesting.

Phillip Hamburger ([32:01](#)):

So we're persuading the Supreme court increasingly, especially Gorsuch and Clarence Thomas and I think Alito to reconsider their doctrines. The same is true with deference doctrines. Deference is a doctrine of judicial deference to agency interpretations of their laws.

Bill Walton ([32:19](#)):

I've heard about the Chevron.

Phillip Hamburger ([32:21](#)):

Right, exactly.

Bill Walton ([32:22](#)):

We have to talk about chevron.

Phillip Hamburger ([32:23](#)):

Chevron.

Bill Walton ([32:24](#)):

Chevron always comes up. Explain Chevron in three pages or less.

Phillip Hamburger ([32:30](#)):

Yeah, three pages or less. There are more articles written on Chevron than I can count thousands of them and they're all tedious, including my own part of the play. The key point is that ordinarily, Congress will say, "We are expressly authorizing you to make a rule," but sometimes they just want more power than that. So they say, "Well, we don't have express authorization, but the statute's ambiguous and where it's ambiguous, we can fill in the gaps, we can make law in the gaps." And the courts say, "We'll defer to that in a case called Chevron," they established that as a clear rule, "We'll defer to what the agency says is its interpretation."

Phillip Hamburger ([33:11](#)):

Now the awkwardness with this is that suppose you're being challenged by the government in an agency tribunal or a court, a nation says, "Well, this is our interpretation. And the courts defer to it." That means they're being biased. The court is being biased against the defendant in favor of the government, and that pilot's the process of law. So this is all totally unconstitutional, and we want to fight these types of power as well as defend individuals.

Bill Walton ([33:38](#)):

So is this something the current Supreme court would likely overturn or is this a Roberts court that doesn't want to do anything controversial?

Phillip Hamburger ([33:45](#)):

Right, I don't like to get into the personalities of judges.

Bill Walton ([33:48](#)):

Okay, you've made a deal with them. I don't know.

Phillip Hamburger ([33:49](#)):

No, it's just a matter of courtesy, it's not my style. I do think they will eventually get to it, and in the meantime, we can go after it in lower courts, it doesn't really matter whether it's from court deals that immediately or later, they want to deal with it later. That's okay. We'll find other ways of getting to it. We're like commandos. I actually read military history to inspire myself. You see an obstacle, if you can't get around it, they don't want to study, you go to another court or mobile. And so I'm just not worried. Yes, the Supreme Court should decide this, but if they don't, we'll find another way.

Bill Walton ([34:25](#)):

Mm-hmm(affirmative). Are you defending mainly individuals or mainly companies?

Phillip Hamburger ([34:30](#)):

Both.

Bill Walton ([34:30](#)):

Both?

Phillip Hamburger ([34:31](#)):

Lots of individuals, as well as companies. The great defense amongst liberals of the administrative state was it only really affects corporations, don't worry, they're people. And the reality though, is that in that past 20 years, administrative law actually increasingly touches individuals and this is COVID, right? COVID seizes people, individuals, and tears their lives apart. Then the administrative state does this to you. And it's should I say COVID or the administrative state does this to you, I think. And I guess the ministry of state seizes individuals and that gets people's attention.

Bill Walton ([35:04](#)):

You're watching the Bill Walton show. I'm here, Philip Hamburger and Jenin Younes of the New Civil Liberties Alliance, and now I'm going to ask the big question which is how long is this COVID thing going to last? How long are we going to be locked down?

Jenin Younes ([35:20](#)):

Forever.

Phillip Hamburger ([35:20](#)):

As long as possible.

Bill Walton ([35:21](#)):

What can we do about it? I'm a CEO type, I like to think there's a line of action. And yet it seems like we had COVID then we had the Delta and then we had there's bound to be something new coming along, some new reason to keep us locked down, how do we knuckle this back?

Jenin Younes ([35:44](#)):

Well, that's why I can't sleep because, I mean, what we're seeing, it's really incredible. I mean, in a place like, so this is just one example of many, but DC reinstated on indoor mask mandate. Why? I mean the Delta variant. Were there increased hospitalizations and deaths? No they're at around zero, they've been at around zero, but it's, in my opinion, a fake problem, we're implementing a fake solution. Everybody knows that masks, well, everybody who's actually looked at the science knows the masks can still work.

Bill Walton ([36:17](#)):

We're about to get banned by YouTube.

Jenin Younes ([36:17](#)):

I know, sorry. I should stop with my mask, right?

Bill Walton ([36:20](#)):

Stop watching masks don't work. Actually, you don't have to.

Jenin Younes ([36:23](#)):

The governments are implementing these measures in response to something that's not really a problem. I'm not saying that Delta isn't a problem anywhere, but in most parts of the country there's some breakthrough cases, some people have a cold.

Phillip Hamburger ([36:40](#)):

Right. And I was telling you the thing about the current executive orders and the like is that they're utterly undifferentiated. They're trying to lump as many people as possible into one group, and that's a sign that this has nothing to do with science and more to do with politics. And if it's not this emergency it will be another. What we really need is to have judges realize they shouldn't should not respond to excited claims of emergency or necessity. We have a whole series of doctrines, such as the compelling government interest test.

Phillip Hamburger ([37:12](#)):

We have a right, but it will trumped at this compelling government interest test and of course an emergency is always compelling, right? So we have doctrines that invite this sort of behavior, so the real fault lies in the courts. Once they abandon their doctrines that encourage these sort of misstatements about emergency, we will all calm down.

Jenin Younes ([37:32](#)):

And they're not requiring any showing of what an emergency is, all these governors and mayors, they're just saying it's an emergency. I mean, the Delta variant existing is not necessarily an emergency if it's only causing flu or cold like results.

Bill Walton ([37:50](#)):

Well, yeah. This may be outside our topic here, but has social media made all these civil liberties issues worse or better?

Phillip Hamburger ([38:02](#)):

Who knows?

Jenin Younes ([38:03](#)):

Yeah

Bill Walton ([38:03](#)):

Okay

Phillip Hamburger ([38:03](#)):

I can argue both sides of that.

Jenin Younes ([38:06](#)):

Yeah.

Phillip Hamburger ([38:07](#)):

But it's all very worrisome.

Bill Walton ([38:09](#)):

It just seems like any little thing gets magnified.

Phillip Hamburger ([38:12](#)):

This ties into the structure of administrative power. If you think what administrative power is, it's a cascade of evasions of law. You have eight constitutional governance to have rules who evade rule-making by having informal rulemaking, you evade informal rulemaking, by going to guidance, you evade guidance through third party boycotts like operation choke point. Cascade towards ever greater lawlessness, sort of degradation of law.

Phillip Hamburger ([38:36](#)):

And various ways along that you have to justify it and emergencies expertise, false claims about science, these are all the justifications that are made for abandoning law in this cascade towards just mere power. And what we have to do is repair all of that to remind the judges, they're there to follow law, not the latest hysteria and nor ideas about emergency power that associate actually with continental Europe, not the United States.

Jenin Younes ([39:06](#)):

In response with respect to the social media thing. I mean, I think there's a case to be made that a lot of the expert voices that were elevated were actually just people who are Twitter personalities, like the most popular epidemiologists on Twitter and not actually the most qualified scientists. I read an article that sort of convinced me of that. But on the other hand, I'm very active on Twitter and I have a huge following of people who pay attention to what I say about this so I think I've probably-

Bill Walton ([39:31](#)):

What's your handle?

Jenin Younes ([39:32](#)):

It's actually Leftylockdowns1 which is...

Bill Walton ([39:35](#)):

Leftylockdowns1?

Jenin Younes ([39:36](#)):

I didn't know what I was doing when I created the Twitter account last year, because I didn't understand Twitter, so it was Leftylockdownskeptic, but then it cut it off. It sounds like I'm pro locked.

Bill Walton ([39:49](#)):

So you being Leftylockdownskeptic and it ended up being interpreted as Leftylockdown1?

Jenin Younes ([39:54](#)):

Yeah. And then I've tried to change it, but I have a lot of followers now I'm worried if I change the handle, something will go right, so I always have to explain.

Bill Walton ([40:06](#)):

Well, Twitter is pretty powerful. How do you develop a drum beat? Also, you're probably tweeting a lot of things that Twitter doesn't like.

Jenin Younes ([40:12](#)):

I get censored at a reasonable amount. Not a reasonable, an unreasonable amount but a decent-

Bill Walton ([40:18](#)):

An unreasonable amount.

Jenin Younes ([40:19](#)):

Yeah. Yeah. I mean, I think I have 25,000 followers right now, just not a ton, but it's a lot. So every time I say something and then a lot of people don't follow because they don't want to be associated with it. So if I look at a tweet, I think I had one that has 7,000 likes that actually had 500,000 views. So the reach is quite crazy.

Bill Walton ([40:41](#)):

What does the tweet say?

Jenin Younes ([40:44](#)):

Oh, I can't even remember that one.

Bill Walton ([40:46](#)):

It was good though. So how do we win this war against the administrative state? Clearly, it seems very, very tough. If you could sort of enlist people in this cause, why would you say let's get involved with NCLA?

Phillip Hamburger ([41:06](#)):

Well, I think the key to all of it is simply telling the truth, candor, and I'm with social nets on this, live not by lies. Just telling the truth goes a long way to making untruthful apart. And that's true in a programs such as this, that's why I wrote my book is administrative law, unlawful and it ends with a plea just for candor.

Phillip Hamburger ([41:26](#)):

Most of our legal doctrines, they hide the truth. Like non delegation doctrine really means the delegation doctrine, and so what we really need to do is just use accurate legal language, use, accurate political language, just tell the truth, and this is what we do in litigating when we write briefs from court. If it's not a conventional brief, and we know that these briefs are carefully read because what they do is they say you're using this light vocabulary. This is not the constitution vocabulary, use the correct language. And once you use the correct language, you'll see the law correctly.

Phillip Hamburger ([42:00](#)):

And so the way we litigate is by asking the judges just to be truthful. And I think it goes a long way. Look, we've only been in existence for four years and now it's an open... Five years ago, there was no question, the administrative state was legitimate and in place and it wasn't going to move. Now it's all up for grabs, and even the SCC, which is one of the oldest, most reputable of agencies can't even bring cases in its own unconstitutional internal tribunals, and it's losing to the district courts. We're making real progress and so we'll just test to litigate, steadfastly put another way. I sometimes like to tell people you give to politicians, but lawyers are more reliable because we stick to it, and in this case we just like telling the truth and I think it works.

Bill Walton ([42:49](#)):

I think the thing that I'm interested in is how the administrative fate would interact with some sort of civil service reform because it seems like you've got also a problem, we're highly ossified, everybody in the federal government's been there, they're not going anywhere, but has got protections. Are you...?

Phillip Hamburger ([43:09](#)):

Let me answer you, it's central right. So there's some ancillary questions here. One of them is qualified immunity. Another is the tenure of civil servants. Civil servants are protected from being fired. They're also protected by qualified immunity from being sued for damages. This was not the way it was in the past.

Bill Walton ([43:26](#)):

Amplify that, some people don't know that. Few people know that.

Phillip Hamburger ([43:30](#)):

Right. If you've got a job in the federal bureaucracy, it's essentially a job for life. I know somebody who worked in a federal office, a very distinguished federal office and her office mate spent the whole day looking at pornography on a federal computer. Did he get fired? No, he got advanced just to get him out of her office.

Bill Walton ([43:51](#)):

They could transfer him to some other office.

Phillip Hamburger ([43:52](#)):

Probably is moving up this way. I think. And this is-

Bill Walton ([44:03](#)):

Meteoric rise through the ranks.

Phillip Hamburger ([44:05](#)):

A mediocrity had a meteoric rise, that's right.

Bill Walton ([44:07](#)):

Exactly [crosstalk 00:44:08].

Phillip Hamburger ([44:09](#)):

Right. So the president constitutionally should be able to hire and fire all these people. He has to take care of duty, the duty to care of the loss of faith being enforced. He has to be able to fire these people and he can't, and this makes the bureaucracy and interests separate from the elected part of the government, which we saw under the Trump administration.

Phillip Hamburger ([44:31](#)):

You may like or dislike Trump, that's not really the point, it's just that we have an unresponsive representative system of government and it's threatened by the unelected portion. So the tenure is profoundly dangerous, and in many instances, I think unconstitutional.

Bill Walton ([44:47](#)):

So this really interrelates with the growth of the administrative state and so we really need to think of those two things together. People rail against Congress. Congress is obviously a problem in their own way, but Congress really isn't doing all the bad stuff most people complain about it, right?

Phillip Hamburger ([45:03](#)):

You can think of it in terms of all the kids who get corrupted in college, they want to do good and make policy. This is very dangerous ambition and where are they going to get employed? Most of them are not qualified really to teach in universities, so how would they be employed? And the answer is they need some sort of monopolized profession. Some of them become teachers and can't be fired and others find cushy jobs in the state and federal bureaucracies. It's the ideal place for people who don't want to actually engage with the life, well or bigger?

Bill Walton ([45:35](#)):

Well, somebody was saying that a lot of the people implementing the CDC or the local state lock down laws are sort of the people who were hall monitors in high school. They weren't the movers and shakers.

Phillip Hamburger ([45:53](#)):

Right. It's puritanism without the morals.

Jenin Younes ([45:55](#)):

Yeah.

Bill Walton ([46:00](#)):

Let's wrap, that's good. Thank you. I think we've got a lot of one liners out of these. We do these things in clips and we're going to have fun with clips.

Phillip Hamburger ([46:08](#)):

Last thought, we don't live in Russia. We're not the Soviet Union. We're not in socialist and issues, none of us have been threatened with the camps. People like parents' generation who fought in World War II had a much tougher time. This is nothing so we shouldn't get feared of it. What we should do though is stand up and put aside our petty fears and fight back lawfully, courteously, and vigorously. And that means telling the truth out of court and in court and I think we then will prevail. We're already in four years gone very far.

Bill Walton ([46:41](#)):

And so you can be found on the internet obviously at the new civil liberties Alliance website, where I think all the cases are your back end is there. Do we have your Twitter handle on the website?

Jenin Younes ([46:52](#)):

No actually.

Bill Walton ([46:53](#)):

Okay.

Jenin Younes ([46:54](#)):

I think I did that on purpose because...

Bill Walton ([46:58](#)):

Well anyway guys, thanks for being here.

Jenin Younes ([47:00](#)):

Thank you so much for having us.

Phillip Hamburger ([47:00](#)):

Thank you so much.

Bill Walton ([47:01](#)):

This is [crosstalk 00:47:01] and I'm encouraging everybody to support this. This is kind of the unknown and misunderstood problem and I think if we get at the kind of things that this group is getting at, we're going to see a lot of progress in advance of our Liberty. So thanks for watching the Bill Walton show. You can find us on thebillwaltonshow.com on all the major podcast platforms on rumble and hopefully YouTube. So thanks for joining. Talk to you again soon.

Bill Walton ([47:34](#)):

I hope you enjoyed the conversation. Want more? Click the subscribe button or head over to thebillwaltonshow.com to choose from over 100 episodes. You can also learn more about our guests on our interesting people page and send us your comments. We read everyone and your thoughts help us guide the show. If it's easier for you to listen, check out our podcast page and subscribe there. In return, we'll keep you informed about what's true, what's right and what's next. Thanks for joining.