



Statement before the House of Representatives Committee on House Administration on Congress in a Post-Chevron World

# **The Demise of *Chevron* Deference Invites Congress to Revamp its Role in Regulation**

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Thank you, Chairman Bryan Steil, Ranking Member Joseph Morelle, and members of the committee for holding this hearing. I am honored to testify before Congress on this important subject.

There has been a great deal of commentary on the Supreme Court's decision to strike down *Chevron* deference.<sup>1</sup>

Whether it comes from the political right or the left the message is roughly the same: The Court has dealt a mighty blow to regulation. Some conservatives imagine this spells the end of the dreaded administrative state. Some liberals worry aloud that regulatory agencies have been neutered and the safety of planes, trains, automobiles and nearly everything else has been imperiled.

From where I sit, these claims look overstated.

The Court did not abolish any of the 439 executive and independent agencies.<sup>2</sup> Nor did it declare Congress could not delegate authority advertently or inadvertently. Nothing in the Court's decision forbids agencies from interpreting the law or curbs them from making rules that go beyond the explicit words of a statute. Agencies can and will continue to use their expertise and judgment to regulate.<sup>3</sup>

The decision in *Loper* and *Relentless* cases were important but essentially were about the judicial review of agency actions that are based upon ambiguous statutory provisions. In short, no longer will the courts defer to agency regulatory decisions so long as they are reasonable. Instead, courts must assess whether an agency has acted within its statutory authority.

Thus, the administrative state and regulation will live on.

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<sup>1</sup> *Loper Bright Enterprises v. Raimondo*; and *Relentless, Inc. v. Department of Commerce*, [https://www.supremecourt.gov/opinions/23pdf/22-451\\_7m58.pdf](https://www.supremecourt.gov/opinions/23pdf/22-451_7m58.pdf).

<sup>2</sup> Federal Register, "agencies," undated, <https://www.federalregister.gov/agencies>.

<sup>3</sup> Often we hear that we have a lot of regulations because Congress writes vague laws. Vague laws do invite the executive branch to issue rules to add specificity. But the real driver of regulation is the scope of the executive branch and the quantity of laws Congress enacts. More laws and agencies inevitably make for more regulations.

So what are the implications of the Court's decision?

Let me limit myself to two points. First, the demise of *Chevron* deference creates a choice for Congress: it can either allow this modest chunk of legislative power to flow from the executive branch to the judicial branch, or it can reclaim that legislative power.

Second, the end of *Chevron* deference prompts a more profound question: What should Congress's role in regulatory action be?

For my part, I would prefer that Congress answer both questions by upping its capacity to reclaim its legislative authority. I think the flow of legislative authority from the legislative branch has deformed all three branches, forcing them to do things they are not designed to do, which erodes the public's sense of the legitimacy of the federal government.<sup>4</sup>

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As Congress considers its role in regulation, I think it would be helpful to consider the fundamental relationship between the first and second branches of government. Article I, Section 1 of the U.S. Constitution states Congress possesses "all Legislative powers." Article II, Section 3 declares the president shall "take Care that the Laws be faithfully executed."

Together these foundational provisions of the Constitution imply that Congress must oversee executive branch implementation of the law. This duty includes overseeing regulatory actions.

Congress should be ensuring the law is being faithfully executed from the moment an agency considers proposing a new rule to the point when it adopts the rule and enforces it.

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<sup>4</sup> "Congress's broad grants of discretionary power to agencies, through poorly written statutes, made both the executive's and judiciary's jobs harder. Indeed, those delegations of power deformed the other branches. They caused the executive branch to spend less time enforcing laws and more time making laws in the first instance, through regulations clarifying (or ostensibly clarifying) vague statutes—tasks more befitting of a legislature than an executive. Similarly, broad delegations caused courts to spend less time interpreting the laws, and more time making much more nebulous judgments about whether laws were "ambiguous" and whether statutory interpretations were "reasonable"—prudential questions more befitting of an executive than a judge." Adam White, "Constitutional Government After Chevron?" *Law & Liberty*, May 1, 2024, <https://lawliberty.org/forum/constitutional-government-after-chevron/>.

Unfortunately, Congress rarely does that; it devotes its scarce resources to other matters.

But Congress could build oversight of the regulatory process into its workflow.

To be sure, fully engaging in oversight of regulatory actions would be a big job.

There are more than 180,000 pages of federal regulations already in force. Each year an additional 2,000 to 3,000 new regulations are proposed and 3,000 to 5,800 regulations are finalized.<sup>5</sup> This is to say nothing of the innumerable agency guidance documents and other explanatory and directive documents that affect policy.<sup>6</sup>

No discussion of the scope of oversight needed would be complete without mentioning the regulations themselves. Regulations are very complex.

Consider the legislator or committee staffer who wants to consider the propriety and wisdom of a proposed regulation. For example, in November 2022, the Centers for Medicare & Medicaid Services proposed a major rule to modify the “Health Insurance Portability and Accountability Act National Council for Prescription Drug Programs Retail Pharmacy Standards.” The document runs 27 pages, and understanding it would require significant knowledge of a range of federal health programs and the analytical capacity to second guess the rule’s \$386.3 million cost to pharmacies, pharmacy benefit plans, and chain drug stores.<sup>7</sup> It also would require a thorough knowledge of the statute’s applicable provisions.

With legislators and staff already swamped with responsibilities, Congress

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<sup>5</sup> Kevin R. Kosar, *Staffing Congress to Strengthen Oversight of the Administrative State*, policy brief 24-01, Boyden Gray Center, March 2024, pp. 5-6, <https://www.understandingcongress.org/2024/03/11/staffing-congress-to-strengthen-oversight-of-the-administrative-state/>.

<sup>6</sup> U.S. Congress, House of Representatives, Committee on Oversight and Government Reform, *Shining Light on Regulatory Dark Matter*, majority staff report, 115th Congress, second session, March 2018, <https://www2.ed.gov/policy/gen/reg/retrospective-analysis/guidance-report.pdf>.

<sup>7</sup> Office of the Federal Register, *Code of Federal Regulations*, 45 CFR Part 162, November 9, 2022, <https://www.govinfo.gov/content/pkg/FR-2022-11-09/pdf/2022-24114.pdf>.

must invest in its capacity if it wants to have any chance of ensuring the executive branch is faithfully executing the law when it issues regulations.

While a variety of reforms are advisable, one institutional fix strikes me as essential: Congress should hire nonpartisan legal and issue area experts and assign them the duty of supporting Congress's oversight of regulations. And by my take, Congress would be most efficiently and effectively served by housing those individuals in a Congressional Regulation Office (CRO).<sup>8</sup>

The CRO could be modeled on the Congressional Budget Office, which Congress built to counterbalance the president's Office of Management and Budget.<sup>9</sup> The CRO would have two main functions.<sup>10</sup>

First, it would perform benefit-cost analyses of agencies' significant rules in order to provide a disinterested check on agencies' self-interested math. These CRO scores should be posted online, delivered to the committees of jurisdiction, and submitted as public comments. Doing these things would increase the political salience of agency rulemaking, thereby fostering congressional oversight and encouraging policy entrepreneurs in the legislature to take up the subject.

Second, this new regulatory office should study existing regulations informed by data collected since their enactment. These "look-back" assessments could identify regulations that proved more burdensome than beneficial. The CRO also could issue reports that analyze policy areas in which multiple agencies regulate the same activities. In food safety, for example, the Environmental Protection Agency, the Food and Drug Administration, and the Department of Agriculture's Food Safety and

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<sup>8</sup> This recommendation does not preclude adding staff to committees. But for systemic oversight support a legislative branch support agency is the best option for housing staff. See Kosar, *Staffing Congress to Strengthen Oversight of the Administrative State*, pp. 9-11.

<sup>9</sup> The discussion herein draws upon Philip Wallach and Kevin R. Kosar, "The case for a Congressional Regulation Office," *National Affairs*, fall 2016,

<https://www.nationalaffairs.com/publications/detail/the-case-for-a-congressional-regulation-office>.

<sup>10</sup> The CRO could also be given lesser tasks, such as creating a repository of all regulatory dark matter. The Trump administration mandated that agencies post all guidance documents on their website, but the Biden administration subsequently withdrew this requirement. Executive Office of the President, "Executive Order 13891, Promoting the Rule of Law Through Improved Agency Guidance Documents, October 15, 2019," 84 *Federal Register* 55235-55238, <https://www.govinfo.gov/content/pkg/FR-2019-10-15/pdf/2019-22623.pdf>; and Executive Office of the President, "Executive Order 13992, Revocation of Certain Executive Orders Concerning Federal Regulation, January 20, 2021," 86 *Federal Register* 7049-7050, <https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01767.pdf>.

Inspection Service all wield regulatory power. Such reports would greatly benefit Congress by mapping out the overall structures and total positive and negative effects of particular regulatory regimes. Both types of CRO studies would educate legislators and staff and they would empower committees to correct wayward regulatory actions with legislation. It goes without saying that a CRO would prove very helpful to Congress if it enacted regulatory budgeting or the REINS Act (requiring votes on major rules).

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The Supreme Court's majority opinion in *Loper Bright* and *Relentless* reminds us all that executive agencies exist to execute the law, but sometimes they go beyond its scope. The termination of *Chevron* deference invites Congress to revamp its relationship with the executive branch's regulatory activities.

This transformation will require Congress to grapple with the size of the executive branch and the quantity of regulation, which have grown immensely over the past 75 years. Congress's capacity to ensure regulatory actions faithfully execute the law have not kept up with this growth. I hope Congress will keep in mind this institutional imbalance as it enacts reforms.

Thank you for the opportunity to testify, and I am happy to answer any of your questions here or in questions for the record.