"Restoring Congressional Power over VA after *Loper Bright Enterprises v. Raimondo*"

Hearing Before the House Committee on Veterans' Affairs

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Chairman Bost, Ranking Member Takano, and Distinguished Members of the Committee:

Thank you for inviting me here today, to discuss how Congress and the Department of Veterans Affairs ("VA") can serve veterans after *Loper Bright*.[1] My name is Chad Squitieri. I am a law professor at the Catholic University of America, where I focus on administrative and constitutional law. In connection with my work as a law professor, I also serve as a Managing Director of the Center for the Constitution and the Catholic Intellectual Tradition, and as a Fellow and Director for a project within the Separation of Powers Institute.[2]

The Supreme Court's decision in *Loper Bright* brought about a welcome change to federal administrative law, and the decision should be celebrated for at least two reasons. First, because of the decision's impact on federal courts. And second, because of the decision's potential impact on Congress.

As to the courts, *Loper Bright* frees judges to give legal effect to a statute's best reading. Prior to *Loper Bright*, courts were often required to adopt a less-than-best reading of a statute simply because that less-than-best reading was offered by an administrative agency. This required courts to place a thumb on the scale in favor of one class of litigants (*i.e.*, federal agencies), and thus disfavor other types of litigants—such as veterans who might argue that a federal agency acted unlawfully. Federal judges, however, should not give undue preference to any litigant that comes before them—including federal agencies.

There is more that could be said of *Loper Bright's* impact on federal courts. But today I'd like to focus on the second reason why *Loper Bright* should be celebrated: the decision's potential impact on Congress.

Past Congresses have delegated far too much power to unelected bureaucrats. The reasons past Congresses had for doing so were no doubt varied. But I suspect many legislators came to the

[1] *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024).
[2] I offer this written testimony, as well as my intended oral testimony, in my personal capacity. Affiliations are provided for identification and biographical purposes.

conclusion that it was often politically costly to take clear and bold stances in federal statutes. What's more, a legislator might have concluded that it was politically safer to draft broadly worded statutes, and hope that—depending on who wins an election—politically friendly agencies will interpret those statutes in a way the legislator preferred.

The *Loper Bright* decision gives Congress an opportunity to recognize that the political calculus has changed. No longer should legislators simply hope that a broadly worded statute will be routinely interpreted by a politically friendly agency. That is because, after *Loper Bright*, statutes should be interpreted by politically independent judges. This should give Congress an incentive to retake the reins from federal agencies, and to begin to take bolder, clearer stances in federal legislation.

Thankfully, this Committee—under the leadership of the Chairman and the Ranking Member—has already demonstrated, through this hearing, the sort of legislative initiative that one hopes *Loper Bright* would inspire. The question then is how can Congressional power be restored in the wake of *Loper Bright*. I will conclude by respectfully offering three suggestions.

First, Congress should see *Loper Bright* as an opportunity, rather than an obstacle. There has been some talk of Congress seeking to override *Loper Bright* by enacting legislation that would purport to require courts to again defer to agencies in a way similar to the old *Chevron* regime.[3] But that sort of legislation should be approached with caution. In *Loper Bright*, at least two justices signaled that *Chevron* deference presented constitutional problems of the sort that would have to be overcome by constitutional amendment, rather than ordinary legislation.[4]

Second, Congress should consider how courts, working within the *Loper Bright* framework, might assess legislation. The *Loper Bright* framework recognizes that statutes may still empower agencies to exercise flexibility.[5] For example, statutory terms "such as 'appropriate' or 'reasonable'"[6] can afford an agency broad policy discretion. Sometimes legislators may wish to grant such discretion. But legislators should only grant that discretion intentionally and with due circumspection. Moreover, legislators should consider how they can narrow grants of discretion by requiring agencies to exercise discretion in certain ways.

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[3] *See, e.g.*, Lawrence Hurley, *Democratic senators seek to reverse Supreme Court ruling that restricts federal agency power*, NBC News (July 23, 2024, 7:00 AM), https://www.nbcnews.com/politics/congress/democratic-bill-seeks-reverse-supreme-court-ruling-federal-agency-powe-rcna163120.

[4] *Loper Bright*, 144 S. Ct. at 2274 (Thomas, J., concurring) ("I write separately to underscore a more fundamental problem: *Chevron* deference also violates our Constitution's separation of powers . . . ."); *id.* at 2281 (Gorsuch, J., concurring) (stating that "*Chevron* deference runs against mainstream currents in our law regarding the separation of powers, due process, and centuries-old interpretive rules that fortify those constitutional commitments"). The majority opinion, which rested on the Administrative Procedure Act, also stated that "[t]he Framers . . . envisioned that the final interpretation of the laws would be the proper and peculiar province of the courts," and that "[t]o ensure the steady, upright and impartial administration of the laws, the Framers structured the Constitution to allow judges to exercise that judgment independent of influence from the political branches." *Id.* at 2257 (majority op.) (internal citations and quotations omitted).

[5] *See id.* at 2263.

[6] *Id.*

For example, this Committee might not know *now* how it wants the VA to exercise policy discretion in unknown, future contexts. But the Committee might know that certain considerations—such as a desire to specially consider regulatory impacts on Gold Star spouses—should be relevant regardless of what the future holds. Simply requiring the VA to consider evergreen factors can help narrow the discretion afforded to the VA, while still leaving the VA flexibility to adapt to future contexts.[7]

Finally, Congress should recognize the limits of *Loper Bright*, and use the case as inspiration to go even further. Of particular note is a distinctive form of deference, called *Kisor* deference.[8] *Kisor* deference, which concerns agency interpretations of their own regulations, was arguably undisturbed by *Loper Bright*.[9] But the *Kisor* case actually involved the VA, and members of this Committee might find that it is often the VA's interpretations of the VA's own *regulations* (rather than the VA's interpretations of *statutes*) that are most objectionable. This Committee could rectify that situation by closely scrutinizing the VA's interpretations of its own regulations, and considering legislative overrides when appropriate. More boldly, this Committee could consider legislation that would prohibit courts from offering *Kisor* deference to the VA.

In conclusion, thank you for your invitation to allow me to address how Congress might serve the veterans who have already served us all.

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[7] *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.").

[8] *See Kisor v. Wilkie*, 588 U.S. 558 (2019).

[9] *See* Chad Squitieri, Auer *after* Loper Bright, Yale J. Reg. Notice & Comment (Oct. 15, 2024), available at https://www.yalejreg.com/nc/auer-after-loper-bright-by-chad-squitieri/.