"Congress in a Post-*Chevron* World"

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Chairman Steil, Ranking Member Morelle, and Distinguished Members of the Committee:

Thank you for the opportunity to testify today regarding the vitally important topic of congressional responses to the Supreme Court's recent *Loper Bright* decision. My name is Josh Chafetz, and I am the Agnes Williams Sesquicentennial Professor of Law and Politics at Georgetown University Law Center and an Affiliated Faculty Member of both the Government Department and the McCourt School of Public Policy at Georgetown. My research and teaching focus on legislative procedure, the separation of powers, and the constitutional structuring of American national politics.

The *Loper Bright* decision purports to empower Congress, but in fact partakes of a larger program of judicial self-aggrandizement at the expense of both Congress and the agencies. Potential congressional responses include both changes to statutory drafting and increases in congressional capacity. These responses would be salutary, but they are not sufficient. At the end of the day, the Supreme Court's anti-administrativist bent is a major obstacle to public policymaking, and it will remain so until the Court either is reined in or changes its tune.

HOW WE GOT HERE: *CHEVRON* AND *LOPER BRIGHT*

In 1984, the Supreme Court unanimously decided *Chevron v. Natural Resources Defense Council*.[1] The Clean Air Act Amendments of 1977 had required certain states to establish a permitting program regulating "new or modified major stationary sources" of air pollution, with stringent requirements for issuing a permit. But what constituted a "stationary source"? Is each individual smokestack a stationary source, or is an entire manufacturing plant a stationary source? The statute didn't say, nor did the legislative history provide useful guidance. In 1981, the EPA, led by Administrator Anne Gorsuch, promulgated regulations allowing covered states to adopt a plant-wide definition of "stationary source," such that they could allow an existing plant to install or modify a piece of equipment without a permit, so long as the total emissions from the plant did not increase as a result. Was this EPA regulation a permissible interpretation of the 1977 statute?

Writing for the Court, Justice John Paul Stevens held that it was. In doing so, he set out what came to be known as the *Chevron* two-step framework. When an agency construes a statute that it

[1] 467 U.S. 837 (1984). The decision was unanimous, but three justices—Marshall, Rehnquist, and O'Connor—were recused.

administers, a reviewing court should ask two questions: (1) whether "Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." But, if the intent of Congress is unclear, the court should *not* "simply impose its own construction on the statute"; rather, (2) "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Put differently, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[2]

Chevron was of course a victory for the Reagan EPA and Justice Department, and it was initially criticized by liberal commentators.[3] Antonin Scalia was a big fan of the decision.[4]

Over time, as is common with judicial decisions laying out a broad framework, things got more complicated, with the development of doctrinal cycles and epicycles.[5] Moreover, the ideological valence of *Chevron* drifted,[6] with conservatives increasingly coming to dislike the framework and liberals increasingly embracing it.[7]

This all came to a head last month, when the Supreme Court, by a 6-3 vote, overruled *Chevron* in *Loper Bright Enterprises v. Raimondo*.[8] The majority, per Chief Justice John Roberts, held that *Chevron* deference was inconsistent with the 1946 Administrative Procedure Act's requirement that courts reviewing agency actions "shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[9] Roberts wrote that this provision requires that courts reviewing agency actions "must exercise independent judgment in determining the meaning of statutory provisions"—which is to say, there cannot be a rule of deference to agency legal interpretation.[10]

There are three caveats in Roberts's opinion that are worth noting here. First, the decline of (mandatory) *Chevron* deference does not mean the end of all deference: "In exercising [their] judgment, though, courts may—as they have from the start—seek aid from the interpretations of those responsible for implementing particular statutes. Such interpretations 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance' consistent with the APA."[11] Put differently, *Chevron* deference may be dead, but *Skidmore*

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[2] *Id*. at 842-43 (internal footnotes omitted).

[3] *See, e.g.*, Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 372-82 (1986); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989).

[4] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511.

[5] *See, e.g.*, Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833 (2001) (asking "[t]o what sorts of statutes and what sorts of agency interpretations should the mandatory deference doctrine of *Chevron* apply?"); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006) (noting that *Chevron* has a "step zero"—the question of whether its framework applies at all).

[6] *Cf.* J.M. Balkin, *Ideological Drift and the Struggle Over Meaning*, 25 CONN. L. REV. 869 (1993).

[7] *See* Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 24-28, 31-33 (2017).

[8] 144 S. Ct. 2244 (2024).

[9] 5 U.S.C. § 706; *see Loper Bright*, 144 S. Ct. at 2261.

[10] *Loper Bright*, 144 S. Ct. at 2262.

[11] *Id*. at 2262 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

deference—that is, the use of the agency's views as one potentially persuasive factor among many in determining statutory meaning—lives.

Second, the decline of *Chevron* deference does not mean the end of discretion: "In a case involving an agency, of course, the statute's meaning may well be that the agency is authorized to exercise a degree of discretion. Congress has often enacted such statutes…. When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits."[12] Express delegations to agencies to give meaning to particular statutory terms, to fill in the details of a statutory scheme, or to regulate "appropriately" or "reasonably" must be respected.

Third, *Loper Bright*'s retrospective applications may be limited: "we do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory *stare decisis* despite our change in interpretive methodology. Mere reliance on *Chevron* cannot constitute a special justification for overruling such a holding."[13] The majority thereby disclaims any intention of reopening the last four decades of cases reviewing agency statutory interpretations.[14]

THE IMPLICATIONS OF *LOPER BRIGHT*

Roberts's reasoning in *Loper Bright* will be subject to a great deal of (justified) criticism over the coming months and years, in addition to that in Justice Elena Kagan's dissent. For purposes of this testimony, however, the persuasiveness of the opinion's internal logic is less important than the effects that the opinion will have in the world.

To begin with a dose of humility: we simply do not know exactly what the implications of *Loper Bright* will be. Just as it took years to understand what *Chevron* meant for administrative law and governance, it will take years to understand what *Chevron*'s demise means. In light of that, the reflections that follow are necessarily preliminary.

First, we know that *Chevron* was already a dead letter in the Supreme Court, which had not relied on it since 2016.[15] But we also know that lower courts had regularly applied *Chevron* and that its

[12] *Id*. at 2263.

[13] *Id*. at 2273 (internal quotation marks and citation omitted).

[14] Some skepticism of this disclaimer may be warranted in light of a decision handed down three days after *Loper Bright*. In *Corner Post v. Board of Governors of the Federal Reserve System*, 144 S. Ct. 2440 (2024), the same 6-3 majority held that the statutory statute of limitations for corporate challenges to agency rules begins when the rule is applied to the company challenging it, not when the agency issues the final rule. As a result, any rule, no matter how old, is always subject to challenge in court. *Corner Post* will thus give federal judges all the opportunities they would like—and possibly more than they can handle—to revisit agency statutory interpretations previously upheld under *Chevron*. While *Loper Bright* purports to promise that these decisions will not be overruled *merely because* they relied on *Chevron*, this will not be a bar to overruling those decisions for other reasons. (And that is, of course, assuming that future majorities adhere to *Loper Bright*'s admonition that cases relying on *Chevron* remain subject to statutory *stare decisis* in the first place.)

[15] Cuozzo Speed Technologies v. Commerce for Intellectual Property, 579 U.S. 261, 280 (2016); *see Loper Bright*, 144 S. Ct. at 2269 (noting that the Court had not deferred under *Chevron* since *Cuozzo*).

application seemed to make a difference in circuit-court cases, even when it did not at the Supreme Court.[16] Indeed, the largest study of agency statutory interpretation cases in the circuit courts found that use of *Chevron* deference significantly reduced ideological decisionmaking by judges. In cases where *Chevron* deference was not applied—which, after *Loper Bright*, will now be all cases—judges' political preferences played a much larger role in case outcomes.[17] So, one thing that we can say about *Loper Bright* is that it will very likely free the hands of lower-court judges to dispense with regulations that they dislike.[18] If the regulation is congenial, they can fall back on *Skidmore* deference; if it is uncongenial, they can read the statute *de novo* and conclude that its correct meaning is different from the one arrived at by the agency.

Second, and relatedly, we have a pretty good sense that the *institutional* consequence of *Loper Bright* will be a more powerful judiciary. In recent years, justices have repeatedly described their decisions striking down agency actions as decisions to empower Congress. But, to borrow a term coined by Beau Baumann, this is little more than "congressional gaslighting."[19] We know that congressional drafters have in fact relied heavily on *Chevron* deference when drafting—the leading empirical study of congressional drafters found that, whether described by name or by the underlying concept, *Chevron* was the interpretive tool *most familiar* to drafters, far more so than canons relied on by the Supreme Court with some regularity.[20] Drafters were well aware that statutory ambiguity would be interpreted as a delegation of interpretive authority to the agency, and if they did not want the agency to have that authority, they attempted to draft with greater specificity.[21] Eliminating a doctrine in whose shadow Congress has drafted for years and replacing it with a regime that is significantly less certain in its operation is not congressional empowerment; it is judicial empowerment.[22]

In this regard, it helps to understand *Loper Bright* in the context of the broader universe of administrative law. In the personnel context, the Court has significantly reduced Congress's

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[16] *See* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1 (2017).

[17] Kent Barnett, Christina L. Boyd & Christopher J. Walker, *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463, 1494-1502 (2018).

[18] In this regard, it may be thought of as the latest entry in the canon of what Cass Sunstein and Adrian Vermeule called "libertarian administrative law." Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393 (2015).

[19] Beau J. Baumann, *Americana Administrative Law*, 111 GEO. L.J. 465, 470 (2023).

[20] Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 928 at fig. 2 (2013); *see id*. at 995-98 (noting that drafters "understood the consequences of *Chevron*"; that this knowledge "affects the degree of specificity they use while drafting"; and that statutory ambiguity results from a desire to delegate to agencies, lack of time, issue complexity, and the need for consensus).

[21] *Id*. at 996-97.

[22] It is therefore unsurprising that *Loper Bright* prominently—and repeatedly—cites *Marbury v. Madison*'s much-abused dictum that, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Loper Bright*, 144 S. Ct. at 2257, 2271, 2273, 2275 (Gorsuch, J., concurring), 2283 (Gorsuch, J., concurring), 2284-85 (Gorsuch, J., concurring). On the abuse of this line, see Josh Chafetz, *Nixon/Trump: Strategies of Judicial Aggrandizement*, 110 GEO. L.J. 125, 130-31 (2021) ("Perhaps no pronouncement in American constitutional law is more frequently, and more vacuously, cited than *Marbury*'s statement that, '[i]t is emphatically the province and duty of the judicial department to say what the law is' …. But [commentators routinely omit] the next two sentences: 'Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.' The *Marbury* Court was making a straightforward claim about conflict-of-laws principles to be applied to cases already before a court; [many later commentators have shorn] it of context and made it into a grandiose claim of judicial supremacy." (internal citations omitted)).

flexibility to structure agencies the way that it wants to.[23] In its "major questions doctrine" cases, the Court has imposed on Congress a clear-statement rule before Congress can delegate to an agency any authority that a majority of the justices consider to be "major."[24] The Court has struck down agencies' use of in-house adjudication when the agency seeks civil penalties.[25] It has allowed suits challenging the structure or existence of federal agencies to proceed directly to federal court, without having to exhaust agency process first.[26] And it has made it possible to challenge rules no matter how long ago those rules were promulgated.[27] What all of these lines of administrative law doctrine have in common is their judicial self-aggrandizement: they all reinforce the idea that the *judiciary*—not Congress, not the agencies, not any other political actor—has the final say as to how government should be structured and what policies it may enact.[28]

Third, to the extent that *Loper Bright* participates in this program of judicial self-empowerment, it is likely to have a chilling effect on agency rulemaking. Knowing that their interpretations will not be entitled to deference from the courts, agency officials are likely to trim their sails, issuing only regulations that they think will meet with judicial approval. This may, of course, mean pursuing the agency's congressionally mandated mission with less vigor than Congress intended.

Moreover, *Loper Bright* chills agency responsiveness by locking them in to past interpretations if they want even *Skidmore* deference. Roberts's opinion repeatedly emphasizes that mere "respect" for agency interpretations is conditioned on the agency's view "remain[ing] consistent over time."[29] As Antonin Scalia noted in 1989, one of *Chevron*'s "major advantages from the standpoint of governmental theory" is that it "permit[s] needed flexibility, and appropriate political participation, in the administrative process…. If Congress is to delegate broadly, … it seems to me desirable that the delegee be able to suit its actions to the times, and that continuing political accountability be assured, through direct political pressures upon the Executive and through the indirect political pressure of congressional oversight. All this is lost if 'new' or 'changing' agency

[23] Free Enterprise Fund v. Public Co. Accounting Oversight Board, 561 U.S. 477 (2010) (two layers of for-cause removal protection are unconstitutional); Seila Law LLC v. Consumer Financial Protection Bureau, 591 U.S. 197 (2020) (for-cause removal protection for an agency director who is not part of a multi-member board is unconstitutional); Collins v. Yellen, 594 U.S. 220 (2021) (same); United States v. Arthrex, 594 U.S. 1 (2021) (it is unconstitutional for Administrative Patent Judges to be appointed as inferior officers).

[24] Alabama Association of Realtors v. HHS, 594 U.S. 758 (2021) (allowing a district court's decision striking down CDC's eviction moratorium during the Covid-19 pandemic to go into effect); National Federation of Independent Businesses v. OSHA, 595 U.S. 109 (2022) (striking down OSHA's vaccinate-or-test mandate during the pandemic); Biden v. Missouri, 595 U.S. 87 (2022) (upholding CMS's vaccination mandate); West Virginia v. EPA, 597 U.S. 697 (2022) (striking down EPA's Affordable Clean Energy Rule); Biden v. Nebraska, 143 S. Ct. 2355 (2023) (striking down student loan forgiveness). On the doctrine generally, see Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009 (2023); Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022).

[25] SEC v. Jarkesy, 144 S. Ct. 2117 (2024).

[26] Axon Enterprise, Inc. v. FTC, 598 U.S. 175 (2023).

[27] Corner Post v. Board of Governors of the Federal Reserve System, 144 S. Ct. 2440 (2024).

[28] On judicial aggrandizement, see Baumann, *supra* note 19; Josh Chafetz, *The New Judicial Power Grab*, 67 ST. LOUIS U. L.J. 635 (2023); Allen C. Sumrall & Beau J. Baumann, *Clarifying Judicial Aggrandizement*, 172 U. PA. L. REV. ONLINE 24 (2023); Allen C. Sumrall, *Nondelegation and Judicial Aggrandizement*, 15 ELON L. REV. 1 (2023).

[29] *Loper Bright*, 144 S. Ct. at 2258; *see also id*. at 2259, 2264, 2265.

interpretations are somehow suspect."[30] *Loper Bright* sacrifices that "major advantage" of the *Chevron* regime.

CONGRESSIONAL RESPONSES

How should Congress respond to this doctrinal change? I'd like to make two broad, and interrelated, categories of suggestions—one dealing with bill drafting and the other with institutional capacity. But I want to emphasize that neither of these is sufficient. So long as we have a juristocratic political order with a judiciary that is, at its core, hostile to the administrative state, regulation will continue to face an uphill battle.

Bill Drafting

When it comes to drafting, there are several things Congress can do to try to take advantage of the caveats in Roberts's *Loper Bright* opinion mentioned above. First, statutory drafters can emphasize in clear statutory text when they want courts to defer to agencies' interpretations of the statute. *Loper Bright* is a *statutory* holding—it is based on a reading of the Administrative Procedure Act. A later statute supersedes an earlier one. So, if Congress wants to give agencies interpretive power, consistent with *Loper Bright*, it could append something like the following to any regulatory statute: "In any circumstances in which the application of this Act is ambiguous, the agency shall interpret the Act consistently with the Act's purpose and the agency's mission. Any court reviewing the agency's interpretation shall affirm that interpretation, so long as the interpretation is reasonable, and without regard to whether the agency has previously put forward a different interpretation of the Act." The Office of Legislative Counsel could even be directed to insert such language in drafts as a matter of policy, unless instructed otherwise.

Indeed, if Congress were so inclined, rather than inserting these *Chevron* clauses into individual regulatory statutes, it could pass statutized *Chevron* writ large. In other words, it could pass a single statute saying something like, "In any circumstances in which the application of any act is ambiguous, the agency statutorily charged with administering that act shall interpret the act consistently with the act's purpose and the agency's mission. Any court reviewing the agency's interpretation shall affirm the agency's interpretation, so long as the interpretation is reasonable, and without regard to whether the agency has previously put forward a different interpretation of the act." Because *Loper Bright* is a statutory decision, it can be reversed by statute.

Of course, that requires us to take the Supreme Court at its word that (a) it was merely interpreting the Administrative Procedure Act, and (b) it seeks to empower Congress. There is reason for skepticism on both counts. The *Loper Bright* majority's repeated references to *Marbury*[31] and to what it called "the Framers' understanding of the judicial function"[32] might be a clue that there is a constitutional claim underpinning the statutory claim.[33] If Congress forces the issue by statutizing *Chevron*, the Court majority may simply come back and declare it to be a violation of the

[30] Scalia, *supra* note 4, at 517-18.

[31] *See supra* note 22.

[32] *Loper Bright*, 144 S. Ct. at 2257.

[33] Two justices in the majority made clear their views that *Chevron* deference was incompatible, not just with the APA, but also with the Constitution. *See Loper Bright*, 144 S. Ct. at 2273, 2273-75 (Thomas, J., concurring); *id*. at 2275, 2277-79 (Gorsuch, J., concurring).

judiciary's Article III role.[34] Claims of congressional empowerment may suddenly disappear if Congress decides to assert itself.

Another related drafting strategy in light of *Loper Bright* would be to write in not deference but discretion. That is, instead of directing courts as a procedural matter to defer to reasonable agency interpretations, statutory language could make it clear that the substantive content of the regulation is to be filled in by the agency. So, for example, a statute directing EPA to "promulgate regulations forbidding any plant from releasing dangerous amounts of" some chemical is both relatively unambiguous and also leaves a great deal of discretion in EPA's hands to determine what level of that chemical is dangerous. An unambiguous delegation can use words like "harmful," "reasonable," or "appropriate" to signal a delegation of broad discretion.

Once again, however, this sort of drafting strategy is no guarantee of success with the courts. Five justices have explicitly stated their desire to reinvigorate the "nondelegation doctrine,"[35] a long-moribund restriction on how much authority Congress can delegate to agencies.[36] Moreover, the major questions doctrine[37] has required an unrealistic degree of both specificity and prescience from Congress whenever it seeks to delegate discretion in a manner that makes the Court's majority uncomfortable.[38] Even unambiguous attempts to confer broad discretion may therefore fall prey to a hostile judiciary.

Institutional Capacity

Another way Congress might react to *Loper Bright* is by investing more in its own institutional capacity. There are limits to how much this can help—it would be hard for Congress ever to have both the in-house technical expertise necessary to know exactly how many parts per billion of some pollutant are safe for us to breathe and the flexibility to be able to revise that determination when better scientific knowledge or technological advances becomes available. There is a reason that no modern democratic system that I'm aware of has its legislature making policy at that level of granularity. Moreover, many governance decisions in the executive branch are specific to

[34] This would not be a new phenomenon in the Roberts Court. *See* Richard M. Re, *The Doctrine of One Last Chance*, 17 GREEN BAG 2D 173 (2014).

[35] *See* Gundy v. United States, 588 U.S. 128, 148-49 (2019) (Alito, J., concurring); *id*. at 149 (Gorsuch, J., joined by Roberts, C.J., and Thomas, J., dissenting); Paul v. United States, 140 S. Ct. 342 (2019) (mem.) (statement of Kavanaugh, J., respecting the denial of certiorari).

[36] The Supreme Court has only struck down two statutes on nondelegation grounds in history—both in 1935. Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). As Cass Sunstein put it in 2000, " It is … misleading to suggest that the nondelegation doctrine was a well-entrenched aspect of constitutional doctrine, suddenly abandoned as part of some post-New Deal capitulation to the emerging administrative state. Indeed, it is more accurate, speaking purely descriptively, to see 1935 as the real anomaly. We might say that the conventional doctrine has had one good year, and 211 bad ones (and counting)." Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

[37] *See supra* note 24 and accompanying text.

[38] *See* Chafetz, *supra* note 28, at 650 ("[I]f five justices determine that eating an ice cream cone is a major question, then it is not enough that Congress has empowered the agency to 'eat any dessert it chooses.' It must legislate that the agency can 'eat any dessert it chooses, including ice cream cones.' But, of course, Congress has no way of knowing whether eating an ice cream cone is major or not until it sees what five justices have to say about it. (Indeed, the justices have deliberately built uncertainty into the doctrine by insisting that 'matter[s] of great political significance' or of 'earnest and profound debate across the country' can trigger the doctrine)." (internal footnotes omitted)).

circumstances that arise *after* implementation begins; asking Congress to resolve those issues *ex ante* is unlikely to succeed.

Nevertheless, to the extent that agencies will be given less room for making policy, it makes a significant amount of sense for Congress to beef up its own policy-making capacity. To a large extent, this builds on the excellent work done in the 116th and 117th Congresses by the House Select Committee on the Modernization of Congress, which is now a subcommittee of this Committee.[39]

Most central to this effort is staff. Congressional staff are incredibly hardworking and dedicated, but they have neither the numbers, nor the resources, nor the expertise to make policy at a level of detail that could even begin to substitute for agency discretion. Congress has taken some small, but important, steps toward increasing the number of staffers,[40] their compensation,[41] and their training and collaboration.[42] But a great many of the Modernization Committee's recommendations when it comes to staff have not been acted upon. This is especially concerning given that the number of member and committee staff, the number of staff at nonpartisan institutions like the Congressional Budget Office, Government Accountability Office, and Congressional Research Service, staff tenure in office, and staff pay have all been in decline for decades.[43]

If Congress is truly going to give less discretion to the agencies, it will need to not only markedly increase both member and committee staff numbers and compensation (so that staffers are willing and able to stay in the job long enough to develop subject-matter expertise); it will also have to increasingly bring in new kinds of staffers. It will need scientists, social scientists, and others with graduate training to understand the complexities of the areas it intends to regulate. Some of this expertise could be situated in GAO, CRS, and other support agencies, but much of it would need to be situated in the committees.

Moreover, these staff would need access to the resources to make policy at a granular level. This means access to sophisticated information technology and databases and, in some cases, laboratories, but it also means more staffers with security clearances to make policy in areas touching on national security.

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[39] The Modernization Committee's final report for the 117th Congress contains a list of all of its recommendations as well as the status of each as of December 2022. FINAL REPORT OF THE SELECT COMMITTEE ON THE MODERNIZATION OF CONGRESS, H.R. REP. NO. 117-646, at 229-77 (2022). The Bipartisan Policy Center has continued to update the status of the recommendations. Bipartisan Policy Ctr., *Monitoring the Implementation of Congressional Modernization Recommendations*, https://bipartisanpolicy.org/modernizing-congress/.

[40] *See, e.g.*, Recommendation 11, Bipartisan Policy Ctr., *supra* note 39.

[41] *See, e.g.*, Recommendations 67, 69, 70, 99, 168, Bipartisan Policy Ctr., *supra* note 39.

[42] *See, e.g.*, Recommendations 32, 33, 64, 102, 130, Bipartisan Policy Ctr., *supra* note 39.

[43] *See* Josh Chafetz, *Delegation and Time … And Staff*, REGULATORY REV. (Mar. 4, 2020), https://www.theregreview.org/2020/03/04/chafetz-delegation-time-staff/; Josh McCrain, *Congressional Staff Salaries Over Time* (May 31, 2017), http://joshuamccrain.com/index.php/2017/05/31/congressional-staff-salaries-over-time/; R. ERIC PETERSON & SARAH J. ECKMAN, CONG. RESEARCH SERV., R44682, STAFF TENURE IN SELECTED POSITIONS IN HOUSE MEMBER OFFICES, 2006-2016 (2016); R. ERIC PETERSON & SARAH J. ECKMAN, CONG. RESEARCH SERV., R44688, CONGRESSIONAL STAFF: CRS PRODUCTS ON SIZE, PAY, AND JOB TENURE (2016); MOLLY REYNOLDS ET AL., BROOKINGS INST., VITAL STATISTICS ON CONGRESS ch. 5 (Nov. 2022), *available at* https://www.brookings.edu/wp-content/uploads/2019/03/Chpt-5.pdf.

In short, the more that Congress will be expected to take over policymaking from the agencies, the more Congress will have to build an internal infrastructure mirroring that which currently exists at the agencies. This still would not be anything like a full replacement for agency discretion, but it would be a start.

CONCLUSION

In summary, the Supreme Court—in *Loper Bright*, but also more broadly across Roberts Court administrative law decisions—has made it harder and harder for agencies to pursue the missions that Congress has assigned them. These decisions taking power away from agencies do not, the claims of their authors notwithstanding, empower Congress. Rather, they empower the courts at the expense of both Congress and the agencies. There are strategies available for Congress to respond, including both bill drafting techniques and institutional capacity building, and these are worth pursuing. But at the end of the day, their impact will be limited. As long as the judiciary has an anti-administrativist bent, making pro-regulatory public policy will remain very much an uphill climb.

Thank you.