The Heritage Foundation

Prepared Statement of Paul J. Ray

What's Wrong with the Administrative State?

Testimony Before the House Committee on Administration

July 23, 2024

Chairman Steil, Ranking Member Morelle, and distinguished members of the Committee, thank you for inviting me to testify today on Congress's role in a post-*Chevron* world. I am the director of The Heritage Foundation's Roe Institute for Economic Policy Studies, where we focus on research and education about economic and regulatory issues. From June 2018 through January 2021, I served in the Office of Information and Regulatory Affairs within the Office of Management and Budget; for the last year of that period, I had the honor to serve as Administrator of the office. Before that, I served as Counselor to the U.S. Labor Secretary and practiced administrative appellate law at Sidley Austin LLP here in Washington. The views I express in this testimony are my own and should not be construed as representing any official position of The Heritage Foundation.

To understand Congress's role vis-à-vis the administrative state in a *post*-Chevron world, we must begin with the British constitution so familiar to the American Founders. This constitution, explained William Blackstone, brought together all the qualities necessary for good governance.[1] These qualities, found together in God, are dispersed among human beings; the British constitution's genius was to bring together in government those people having each quality, forging an artificial ruler superior to the sum of its parts.[2] In England these parts were three distinct estates: king, lords, and commons.[3] But in America only the popular estate existed, and the American people were determined to found a government based on the people alone.[4] The Founders, then, needed a way to derive all the qualities necessary for governance from the people. The first state constitutions aimed to do so through the simple expedient of a popularly-elected legislature dominant over the other branches of government.[5] But experience soon convinced the Founders that such an arrangement could not provide good governance, among other reasons because the qualities of a popular legislative assembly were opposed to those necessary for the other branches.[6]

The Founders' solution was a constitution in which "the whole people of the United States are to be trebly represented … in three different modes of representation."[7] Each branch

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[1] I William Blackstone, *Commentaries on the Laws of England* 39-41 (Oxford ed. 2016).

[2] *Id.*

[3] *See, e.g.*, Gordon Wood, *The Creation of the American Republic* 18 (1969).

[4] *See, e.g.*, Alexander Hamilton, John Jay, & James Madison, *The Federalist* No. 39, 239 (Modern Library ed. 2000).

[5] *See* Wood, *supra* n. 3, at 162-73.

[6] *See, e.g.*, Letter from Thomas Jefferson to John Adams (Feb. 28, 1796) (describing the ineffectiveness of execution by legislative committee).

[7] John Dickinson, *Letters of Fabius* 21 (1797).

of the new government would represent the people in its own unique way. Congress was to channel the people's wisdom and justice, the President their energy, and the courts their judgment. The Constitution brings these three modes of representation together in an arrangement that obtains the qualities of each.

The main problem with the administrative state is often said to be that, unlike the three constitutional branches, it is unrepresentative. But more precisely, the administrative state errs in its *mode* of representation. Administrative agencies effectively make law, but they embody executive and judicial modes of representation that the Founders believed unsuitable for lawmaking.

In creating Congress, the Founders sought to gather up the wisdom and justice to be found among the people and give it legislative effect. The basic idea was to obtain a legislature that is "an exact portrait of the people at large" and that therefore should "think, feel, reason, and act like them."[8] Popular elections allow the people to choose qualified representatives who share their goals and sense of right and wrong, and re-elections (especially the House's frequent ones) create powerful incentives to legislate in ways that pursue those goals wisely and reflect that sense. But as the chronic mutability of early state legislation showed, legislative representatives could follow popular direction too closely, allowing fleeting popular passions to overcome the people's own settled judgments.[9] The Senate's long terms and staggered turnover were intended to ensure that federal legislation reflects the "cool and deliberate sense of the community" rather than temporary impulses.[10]

Elections are the primary means by which the Constitution ensures the people's wisdom and sense of justice flows into Congress, but it also adopts a number of "auxiliary precautions."[11] Among these are arrangements to encourage a "communion of interests and sympathy of sentiments" between members of Congress and the people and thus to encourage members to act as faithful agents of their electorate.[12] Members of Congress are subject to the laws they enact, and they can expect to return to the people and live among them under those laws; the Founders hoped they would thus have the same interests as the people in the enactment of wise and just laws.[13] Further, the separation of powers means the authorities Congress creates in statute

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[8] John Adams, *Thoughts on Government* (1776), IV *The Adams Papers* 86.

[9] *See, e.g.*, James Madison, "Vices of the Political System of the United States" (1787), in *Madison: Writings* 69, 75 (Library of America ed. 1999).

[10] *The Federalist*, *supra* n. 4, No. 63, 403.

[11] *The Federalist*, *supra* n. 4, No. 51, 332.

[12] *The Federalist*, *supra* n. 4, No. 57, 367-68.

[13] *Id.*

redound not to its own benefit but to that of the President or the courts, preventing Congress from developing an interest in the scope and content of federal statutes different from the people's.[14]

These arrangements serve to channel the people's goals and views into legislation. But as the Founders discovered during the turbulent first years of independence, the people is no monolithic entity; it comprises a vast diversity of interest and opinion groups, many of which are all too willing to use state power to exploit their opponents if given the chance.[15] The Founders' solution to this problem of faction relied on these very diverse interest and opinion groups. This diversity means that, to garner a majority of votes, legislation must attract the support of many disparate factions; to do so, it must appeal either to interests most or all Americans share or to our common sense of justice.[16] And while it is also possible for legislation to achieve passage based on its appeal to a majority coalition of factions, the multi-polar legislative process was intended to make the transaction costs of forging such coalitions prohibitively high.[17]

The Founders took a very different approach to create a presidency that channels the people's energy. This quality, familiar to readers of *The Federalist* as the intelligent forcefulness exemplified by successful military commanders,[18] required an electoral proces designed to select one of the nation's pre-eminent characters,[19] with an outlook and ambitions more attuned to the possibilities of rule than the ordinary citizen's. Because the presidency is meant for action rather than deliberation, the Founders rejected a plural executive in favor of uniting all executive authority in a single person.[20] The Constitution does not build anti-faction protections into the exercise of presidential power; executive branch unity means that, if the President espouses a factionalistic measure, no checks exist within the executive branch to thwart its pursuit. Rather, the Founders depended on the separation of powers to curb presidential factionalism: presidents

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[14] *See* David F. Epstein, *The Political Theory of the Federalist* 129-30 (1984).

[15] *See* Wood, *supra* n. 3, at 403-13.

[16] *The Federalist*, *supra* n. 4, No. 10, 60-61.

[17] *Id.* at 60 (Article I process makes it "difficult for all who feel" a common factionalistic motive "to discover their own strength, and to act in unison with each other"); *see also* Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 U.C.L.A. L. REV. 1217, 1246-47 (2006).

[18] *The Federalist*, *supra* n. 4, No. 74, 475.

[19] *The Federalist*, *supra* n. 4, No. 68, 437.

[20] *The Federalist*, *supra* n. 4, No. 70, 447-56.

would not engage in factionalism because they would merely execute the laws enacted by a legislature subject to protections against faction.[21]

For the legislative process to channel the people's wisdom and justice successfully, the laws that issue from that process must be given effect in application to particular cases, that is, in adjudication. But neither the legislature nor the executive is suited to doing so, for both face powerful incentives to twist the meaning of the law to suit the political exigencies of particular cases or to employ adjudication to bring about policies they could not obtain through the Article I process. It was necessary to insulate adjudication from the political branches. But doing so raised the prospect of a judiciary that could impose its own policy predilections and thus deprive the people of self-governance.[22] The Founders thus needed a third mode of representation, one that would decide cases in accordance with the people's will yet free of the impulses that moved the political branches through which the people normally expressed that will.

The solution was a third branch of government designed to secure "a pure and independent administration of public justice" while maintaining "fidelity to the people."[23] The Founders achieved the first goal by making the judiciary a coordinate branch of government and by fortifying judges with tenure and salary protections, protections which freed them to apply the law as provided in statute rather than bowing to political pressures. They secured the second goal by removing judges' own policy preferences from the adjudicative process. "To avoid an arbitrary discretion in the courts," Hamilton tells us, "it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them."[24] Knowledge of these "rules and precedents," acquired over the course of "long and laborious study,"[25] constituted a kind of lawyerly skill that would, when applied, render its possessors "mere instruments of the law."[26] Lifetime tenure would serve to attract to the bench judges deeply immersed in lawyerly interpretive habits.[27] Nomination by a president responsible to the people for the quality of his appointments and

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[21] *Cf.* James Wilson, *Lectures on Law*, in I *Collected Works of James Wilson* 401, 700 (Liberty Fund 2007) (distinguishing between the "internal" restraints on congressional authority and the "external" restraints on executive power).

[22] *See, e.g.*, Letter of Brutus XI (New York Journal Jan. 31, 1788), in *The Anti-Federalists: Selected Writings & Speeches* 449-54 (2001) (Bruce Frohnen ed.).

[23] Joseph Story, III *Commentaries on the Constitution of the United States* 1629 (1833).

[24] *The Federalist*, *supra* n. 4, No. 78, 502-03.

[25] *Id.*

[26] *Osborn v. Bank of the United States*, 22 U.S. 738 (1824).

[27] *See The Federalist*, *supra* n. 4, No. 78, 502-03.

subject to the need to justify them to an independent Senate would ensure appointees with both the requisite interpretive skills and the integrity to put them to good use.[28]

I have devoted much of my testimony to discussing the three distinct modes of representation employed by the Founders because, as I suggested earlier, one of the main problems with the administrative state is the confusion of these modes. Administrative agencies today issue regulations that are effectively indistinguishable, save on grounds of provenance, from legislation. Yet they embody modes of representation that the Founders reserved for execution and adjudication rather than legislation. This confusion means that agency regulations fail to channel the wisdom and sense of justice of the American people.

Early American advocates of administration analogized administrative agencies to courts: they argued that the "same reasons which demand an impartial and upright" justice system "call for an impartial and upright administration."[29] Secure tenure would make agency staff, like judges, free from the distorting influences of partisan politics.[30] Also like judges, agency staff's specialized skill would direct them toward their goals, though for agencies it was expertise in achieving particular policy outcomes rather than knowledge of "strict rules and precedents" that would "define and point out their duty."[31] Administrative agencies were asserted to be consistent with the republican genius of the United States for the same reasons that courts were: rather than deliberate about the best policies, independent expert agencies would merely employ their expertise to give effect to the policy decisions the people had already reached through the political branches.

The problem with the judicial analogy is that the statutes that confer authority on administrative agencies often do not in fact make policy decisions for agencies to implement; rather, they leave substantial policy discretion to the agencies. While *Loper Bright Enterprises v. Raimondo* has significantly constrained agency discretion to interpret ambiguous text, many thousands of statutes continue, in unambiguous text, to make broad delegations to agencies. Because these statutes do not in fact define policy goals for agencies to pursue, agencies must set policy. But their Article III-style mode of representation, buffered as it is from popular influence, is hopelessly ill-suited to channel the people's wisdom and sense of justice.

Agency staff are insulated from responsibility to the people: the people do not elect them, nor can they remove them. Nor are agency staff likely to live under the regulations they issue in the same way the people do. The Founders expected members of Congress, and especially of the House of Representatives, to return to live among the people, but an agency staffer's entire career may be spent in federal service. To be sure, the staff are not formally exempt from their

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[28] *See The Federalist*, *supra* n. 4, No. 76. 485.

[29] Frank Goodnow, *Politics and Administration* 82 (Transaction ed. 2003).

[30] *See id.* at 37.

[31] *The Federalist*, *supra* n. 4, No. 78, 502-03.

own regulations (someone who works at the Department of Labor and also happens to own a business must pay his employees as the Department's regulations require), but they are unlikely to engage in the activities they regulate, precisely because their line of work is regulating rather than working in regulated fields.

Further, because many agencies unite rulemaking to enforcement authority, agencies experience regulations as enhancing or restricting their own executive power, an experience that further separates the agencies' perspective from the people's. Indeed, too often agency staff's vantagepoint on regulations is just the opposite of the people's, for the former may experience as an enhancement of their power what the latter experience as a limitation, and vice versa. Moreover, agencies are effectively programmed to value their own specialized goals more highly than the people at large. The people's representatives in Congress, like the people themselves, trade off among a wide range of goods; that is why, as the Supreme Court has acknowledged, "no legislation pursues its purposes at all costs."[32] But each agency can be expected to value its own mission much more highly than does the public. Specialist agencies therefore cannot be expected to follow, or even discover, the trade-offs that the people would make. Instead they are likely to pursue their own specialized missions at the expense of objectives that matter just as much, or more, to the people.[33] All these factors make quite unlikely a "communion of interests and sympathy of sentiments" between agency staff and the people.[34]

Discomfort with agencies' lack of responsiveness to the people is nothing new; indeed, it dates back to the early days of the administrative experiment in the United States.[35] The most frequently and strongly advocated alternative to it is agency responsiveness to the President and, through him, to the people.[36] This alternative has much to be said for it. Presidents, unlike agencies, have access to the people's views and powerful reasons to care about them. They also have a "comprehensive governance portfolio,"[37] so they cannot avoid, as agencies are programmed to avoid, the essentially political task of weighing goods against each other. Presidential administration thus corrects many of the representational defects of bureaucratic administration.

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[32] *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987).

[33] Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1081 (1986).

[34] *The Federalist*, *supra* n. 4, No. 57, 367.

[35] *See, e.g.*, The President's Committee on Administrative Management, *Administrative Management in the Government of the United States* (Jan. 1937).

[36] *See id.* at 30-37.

[37] Mila Sohoni, *On Dollars and Deference: Agencies, Spending, and Economic Rights*, 66 DUKE L.J. 1677, 1720 (2017).

Yet presidential administration suffers from grave representational defects of its own, for it lacks protections against factionalism. The Founders' choice for presidential unity means that the presidency relies on Article I's anti-faction protections: presidents were thought to be protected from factionalism because they would execute laws enacted through Article I's faction-purging legislative process. But to the extent presidents influence agencies that effectively make law, they resolve precisely the sorts of policy questions that the Founders would have believed present an acute risk of factionalism. The result is that presidentially-influenced agency action often favors some interest and opinion groups at the expense of others, in a way Article I was designed to prevent.

This explains a common occurrence: the issuance of regulations that impose policies congressional blocs previously tried and failed to pass. Consider the case of greenhouse gas emissions trading legislation. Democrats repeatedly tried to pass cap-and-trade legislation, including a high-profile attempt in 2009[38]; these efforts failed because the bills' supporters failed to persuade a critical mass of their colleagues. So proponents of cap-and-trade turned to administrative action; they were able to obtain President Obama's support, which took the form of the Clean Power Plan's effective creation of a cap-and-trade system.[39] The Clean Power Plan illustrates my point particularly clearly, but the same dynamic is at work in many of the hundreds of new major regulations each administration issues. The proponents of such regulations would of course prefer legislative action due to its permanence in the face of changes in White House control; they settle for regulations because they do not have the votes to get what they want from Congress.

While exposure to factionalism is perhaps the gravest defect of presidential administration, there are others. For one, because presidents tend to be pre-eminent characters used to command and because achieving their policy priorities depends on robust presidential powers, we may expect presidents to be biased in favor of their own authorities, a bias that shapes the rulemakings they influence. For another, presidential administration destabilizes regulations and undercuts reliance interests on them. After all, each presidential candidate seeks to distinguish himself from the incumbent on the basis of the sweeping regulatory changes he would make if elected, and successful candidates feel immense pressure to deliver swiftly on these campaign promises.

Of course, none of this is not to condemn presidential influence over agencies. As we have seen, such influence offers a number of important benefits. But we should not delude

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[38] *See* American Clean Energy and Security Act of 2009, H.R. 2454 (111th Cong.); *see also* Liberman-Warner Climate Security Act of 2008, S. 3036 (110th Cong.); Clean Energy Jobs and American Power Act, S. 1733 (111th Cong.).

[39] *See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 80 Fed. Reg. 64662, 64675 (2015).

ourselves that it is an adequate subsitute for the kind of representation that the Founders intended to embody in Congress.

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The foregoing reflections suggest a role for Congress vis-à-vis the administrative state. That role is to embody the particularly legislative mode of representation that the Founders intended Congress to provide and that the administrative state fails to provide.

Of currently pending legislative measures, the Regulations from the Executive in Need of Scrutiny (REINS) Act[40] would go furthest toward reviving legislative representation in the context of the administrative state. By requiring affirmative congressional authorization of the most important regulations, the REINS Act would to a large degree subject such regulations to the Article I process with its electoral responsiveness, separation of powers, anti-faction protections, and stability-promoting features—protections that bureaucratic and presidential administration lack in varying degrees.

But while the REINS Act is the most promising pending measure, it is hardly the only one. Other pieces of pending legislation would promote the kinds of protections that legislative representation was intended to afford. For instance, the Renewing Efficiency in Government by Budgeting (REG Budgeting) Act,[41] which would direct the OMB Director to set an annual regulatory budget for the federal government as a whole and for each agency, would encourage agencies to regulate with a view toward all the goods that their regulations affect rather than just their specialized goals. The Unfunded Mandates Accountability and Transparency Act,[42] by bolstering cost-benefit analysis, would promote the same objective. And the All Regulations Are Transparent (ALERT) Act,[43] which would require periodic notifications of agency progress on rulemakings, would help regulated parties predict regulatory changes and thus diminish the harms of regulatory mutability.

More broadly, Congress's role with respect to the administrative agencies should be to inject into the regulatory process those qualities that legislative representation was intended to provide but that bureaucratic and presidential administration cannot offer. Doing so is perhaps slightly easier after *Loper Bright*, which seems to have lowered the transaction costs for Congress to limit agency discretion. But it is important to be clear that neither *Loper Bright* nor the other important developments in administrative law in the last few years can serve as a substitute for Congress's own action in ensuring that the American people are represented in the formulation of regulations.

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[40] H.R. 277 (2023).

[41] H.R. 7867 (2024).

[42] H.R. 3230 (2023).

[43] H.R. 262 (2023).

APPENDIX

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