Testimony on

Congress in a Post-*Chevron* World

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*The views expressed here are my own and not those of any employer.

Introduction

Chairman Steil, Ranking Member Morelle, and members of the committee, thank you for the opportunity to discuss the implications of the Supreme Court's decision in *Loper Bright*[1] which held that "*Chevron* is overruled."[2] In this testimony, I hope to briefly cover three basic ideas:

- The supply of policymaking may move but does not tend to decrease.
- The decision is not a nondelegation decision nor is it properly understood deregulatory.
- Congress should undertake the task of capacity-building.

Let me discuss each of these briefly in greater detail.

The First Law of (Policy) Thermodynamics

> *In all cases in which work is produced by the agency of heat, a quantity of heat is consumed which is proportional to the work done; and conversely, by the expenditure of an equal quantity of work an equal quantity of heat is produced.*[3]

Although it is both correct and essential to point out that, in formal terms, while the Constitution enshrines all lawmaking authority in the Article I branch of Congress, in practice lawmaking – or more properly put *policy*making – takes place across all three branches. That is, all three branches assert a prerogative (rightly or wrongly) in the federal policymaking production function.

This is important because failure, or just plain old disinterest, by one branch does not have the mechanistic effect of reducing the number and scope of policy decisions, but dynamically increases the opportunity for the others to displace that disengagement. Much like a sealed balloon, squeezing down on one area simply transfers gas to others. In this way policymaking exhibits something akin to a First Law of Thermodynamics, where energy in the system is never destroyed but only modified or transferred.

Much has been made by commentators that Congress has over time failed to assert its Article I prerogative, ceding authority to the other branches. And that may very well be true. But it is in the nature of our system of government that, yes, "[a]mbition must be made to counteract ambition"[4] but the implication is that a lack of ambition in one part of the system is not met with a symmetrical reaction elsewhere. More likely the inverse.

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[1] *Loper Bright Enterprises v. Raimondo*, 603 U.S. ___ (2024)

[2] *Id*, p. 1.

[3] Rudolf Clausius, *On the Moving Force of Heat* (1850), reprinted in *The Mechanical Theory of Heat* 1 (1867).

[4] James Madison, *Federalist No. 51*, in *The Federalist Papers* (Clinton Rossiter ed., New American Library 1961).

The overturning of the *Chevron* interpretative regime does not favor a particular policy aim. In fact it can properly be thought of as policy neutral. What it does is change the equilibrium of enabling the relative ambitions among the branches, toward whatever aims those ambitions may so incline. By reasserting statutory interpretative authority back to its pre-*Chevron* (indeed an 1803 vintage[5]) schema, the opinion *does* reduce the allowable "decision space" by agencies, but *does not* favor a particular course of action over another.

In our classical mechanics analogy, *Loper Bright* modifies the form of policymaking energy, from say agency kinetic energy, back into potential energy. Where that energy ends up, how it is distributed – well that's up to the members of this body.

What the decision isn't

Some commentary implies the decision's upshot is to end, or effectively curtail, administrative rulemaking. Could be. But that's for Congress to decide. Nothing in the decision prohibits Congress from delegating vast swaths of authority to the Executive Branch – it just has to say so explicitly. While academics (and judges) have debated for decades about the boundaries of the liminal space between intelligibility principles and nondelegation, to my reading, this decision does not speak to that. The tradeoff is not between "know-nothing" members of Congress and "career experts" at the agencies, but rather between explicit delegation of answering prudential questions and presumptions thereof.

In practice, I believe this renders moot the unachievable task of Congress drafting legislation with absolute specificity and foresight. Yes, both those aims are worthwhile and commendable (more on that below), but they are not necessary conditions to the proper executions of policymaking in the public interest. Those asserting otherwise are proposing a chimera in bad faith, in order to lead inexorably to only one conclusion as a result of the premise: that the decision was wrongly decided and harmful to the American people.

Putting aside intellectual debates about the validity of delegation,[6] in the world we are currently in, I believe the court's majority opinion continues to permit fairly unbounded delegations of legislative authority, unless otherwise explicitly prohibited by the Constitution, as long as it is done so explicitly. To wit: "That is not to say that Congress cannot or does not confer discretionary authority on agencies. Congress may do so, subject to constitutional limits, and it often has."[7]

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[5] Adam J. White, Loper Bright and the End of Administrative Exceptionalism, The Dispatch (July 10, 2024) ("Isn't the court's job, going all the way back to *Marbury v. Madison*, to interpret laws?").

[6] Philip Hamburger, Is Administrative Law Unlawful? (University of Chicago Press 2014).

[7] *Loper Bright*, p. 26.

Remember that the Administrative Procedure Act (APA)[8] is the result of a "fierce compromise"[9] based on the conceit that if *de facto* lawmaking is to be done beyond the Article I branch, then it should be subject to a predictable process, but go no further than Congress's delegation. And so it is logical that when questions arise about the nature of those delegations, courts are appropriately tasked with answering them. Indeed as the APA states quite clearly: "the reviewing court 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."[10]

Also keep in mind that the APA does not contemplate "deregulation" or "repeal" of a nonlegislative rule as something distinct to be subject to a different procedure or standard of review. All changes in the *Code of Federal Regulations* are treated as similarly situated; no one type or kind, at least as far as the APA is concerned, is favored over another.[11] Therefore the overturning of *Chevron* is not, in itself, deregulatory as properly understood.

Pre-*Chevron*

As the committee considers potential responses to entering a "post-*Chevron* world," it's perhaps more appropriate to reconsider trying to return to a "pre-*Chevron* world." In 1984, the year that case was decided, the total number of House of Representatives staff was 9,556 – it's now actually down by three percent (9,247).[12] Does anyone on the committee believe Congress's work has become slightly *less* complicated, confusing, and therefore easier since then?

The number of staff working at House committees has declined even more significantly in recent decades: there were 1,947 House committee staffers in 1994; today, there are only 1,170, a decline of 40 percent.[13]

Members of Congress may be wary of the self-aggrandizing appearance of accumulating more staff, but human capital is embodied in people, and this kind of a decrease in intellectual capacity has only one result in terms of productivity and effectiveness.

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[8] 5 U.S.C. §§ 551-559 (1946).

[9] George Shepherd, Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics, 90 Nw. U. L. Rev. 1557, 1558 (1996).

[10] 5 U.S.C. § 706.

[11] And for most significant rules, defining them as purely "regulatory" or "deregulatory" is illusory, because they often contain many individual elements some of which may make constraints more permissive, others may make them more stringent, and others are effectively "lateral" in that they result in an ambiguous change.

[12] R. Erik Petersen, R43947, House of Representatives Staff Levels, 1977 - 2023, Congressional Research Service, 2023, https://crsreports.congress.gov/product/pdf/R/R43947.

[13] *Id*.

In my own experience, I found that ambiguity is the handmaiden of compromise—the less defined a proposition is, the easier it is for us to agree to it. So there may be no amount of expertise that can achieve the perfect specificity and foresight referenced earlier, further compounded by this political incentive, but lacking the wherewithal to understand better the vast complexity of the modern administrative state certainly doesn't get Congress any closer. In the absence of Congress's ability reassert its Article I prerogative through expertise and capacity, policymaking will not stand still, but simply transfer more and more to the judiciary, whereas before it was the regulatory agencies.

Congress has the opportunity to build back up its policymaking muscle through:

- Additional personal office and committee staff
- Specialized administrative law and regulatory experts
- A dedicated regulatory oversight and analysis function[14]

This decision was not, as some would have you believe, "a massive power grab" by the Supreme Court.[15] It was a rerouting of legislative authority (including the power to delegate) on behalf of Congress. But it is not self-executing, and whether deliberately or not, if Congress fails to exercise its policymaking muscle, the energy will flow elsewhere in the system.

[14] See, for example, Philip Wallach and Kevin R. Kosar, The Case for a Congressional Regulation Office, *Nat'l Affairs* (Summer 2024), https://www.nationalaffairs.com/publications/detail/the-case-for-a-congressional-regulation-office; Satya Thallam and Dan Lips, Why Congress Needs to Improve Its Regulatory Oversight, National Review (Dec. 15, 2022), https://www.nationalreview.com/2022/12/why-congress-needs-to-improve-its-regulatory-oversight/; and Satya Thallam, *Empowering Regulatory Oversight: How Congress Can Hold the Administrative State Accountable*, The Foundation for American Innovation (June 14, 2023), https://www.thefai.org/posts/empowering-regulatory-oversight-how-congress-can-hold-the-administrative-state-accountable.

[15] For example, see Ian Millhiser, How a Supreme Court case could reshape federal power, Vox (June 28, 2024).