Bipartisan Policy Center

Honorable Allyson Y. Schwartz
Testimony before the U.S. Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on Border Management, Federal Workforce, and Regulatory Affairs

Hearing: "The Future is Loper Bright: Congress's Role in Regulatory Landscape"
July 30, 2025

Chairman Lankford, Ranking Member Fetterman, and members of the Subcommittee, thank you for convening this Hearing and your attention to the Supreme Court's *Loper Bright* decision and its implications for Congressional responsibilities.

I welcome the opportunity to discuss the **Bipartisan Policy Center**'s report, **"Legislating After *Loper*"** which provides practical actions to address the expectations set out by the Court for legislative process and legislative language.

The Working Group prepared the BPC Report with a deep shared respect for the authority and responsibility granted to Congress by the Constitution. We sought bipartisan ideas to address the implications of the Court's decision. We recognized that Congress must respond.

We saw this moment as both a challenge and an opportunity to address needed reforms to improve legislative processes and improve clarity and understanding of legislative language for regulatory agencies and the public.

As a former member of Congress, I understand the importance of getting the balance right between being too prescriptive or too vague, giving too much leeway or not enough authority to the agency regulators.

Legislators seek to provide specificity where they can, while granting flexibility to agencies to use their expertise to implement the law most effectively. Yet, the Court was clear: laws as currently drafted are often not specific enough.

Added to this discussion are subsequent Court decisions that recognize the necessary role of administrative agencies. The Supreme Court acknowledged that agencies bring special expertise to bear on technical subjects and should be allowed to apply that expertise.

The remedy for Congress starts with greater clarity in defining the purpose and intent of legislation and being more explicit in legislative language. Without improvements, courts

will disrupt Congress's constitutional obligation to write the laws for our nation. This is an unacceptable outcome for Congress and for our democracy.

Issues of process also need to be addressed. Congress has increasingly failed to operate according to "regular order." Instead, Congress uses continuing resolutions, omnibus bills, and fast-tracking of major bills that are too big and too rushed. This results in less scrutiny by Members and the public. It undermines a key tool for communicating Congressional purpose and guiding agency actions through hearings, committee debate, and public reaction. A robust legislative record guards against agencies misinterpreting the law.

Further recommendations include:

- Strengthen internal expertise by investing additional resources in committee staff.
- Improve clarity regarding the boundaries of delegation to agencies by further investing in the Offices of Legislative Counsel.
- Recognize and support the committee process by bolstering staff expertise, access to external experts, and ensuring committee review and debate.
- Improve how Congress works with regulatory agencies by recognizing the necessary interaction during the legislative and regulatory processes.

There is work ahead for Congress to ensure greater clarity for regulators and the courts. Done well, it will enhance the regulatory process and ensure implementation of purpose and intent of Congress. It will enhance public engagement and understanding of the impact of legislation. Most importantly, it will ensure the role of Congress as the constitutionally granted lawmaking branch of government.

I request that the full BPC report be entered into the record.

Please consider BPC a resource as you proceed. Thank you for your consideration.

Bipartisan Policy Center

Legislating After *Loper*: Practical Solutions for a Post-*Chevron* Congress

March 2025

WORKING GROUP MEMBERS

CO-CHAIRS

Sen. Heidi Heitkamp
Director, Institute of Politics, University of Chicago
U.S. Senator (D-ND), 2013-2019

Sen. Mel Martinez
Board, Edward M. Kennedy Institute for the United States Senate
U.S. Senator (R-FL), 2005-2009

Corey Astill
Vice President, Health & Retirement, Smart Regulation, Business Roundtable

Kurt Couchman
Senior Policy Fellow, Fiscal Policy, Americans for Prosperity

Jen Daulby
CEO, Congressional Management Foundation

Susan Dudley
Founder & Senior Scholar, Regulatory Studies Center, George Washington University

Allyson Schwartz
Executive Senior Advisor, Leavitt Partners
U.S. Rep (D-PA), 2005-2015

Howard Shelanski
Joseph and Madeline Sheehy Chair in Antitrust Law and Trade Regulation, Georgetown Law

Jared Thompson
Senior Attorney and Managing Litigator, Natural Resources Defense Council

Rob Walters
Senior Partner, Gibson Dunn & Crutcher LLP

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DISCLAIMER

Organizational affiliations of Working Group members are listed for identification purposes only. Participation on the Working Group does not imply any endorsement of subject matter or recommendations on the part of the organizations. Input and assistance from acknowledged individuals outside BPC and BPC Action does not imply endorsement of the Working Group's recommendations.

Table of Contents

I. Executive Summary

The Bipartisan Policy Center convened the Working Group on Congress, Courts, and Administrative Law in 2024 to examine the implications for Congress of a series of Supreme Court decisions in recent years. Those decisions concerned administrative law and the relationship between Congress and executive branch agencies.

During the Working Group's deliberations, new questions have been raised about lines of authority between the legislative and executive branches. The Supreme Court, too, granted review of additional cases relating to administrative law issues. At the time of writing, a good deal is in flux regarding debates and legal challenges concerning the roles of the different branches of government.

The Working Group focused on Congress, namely what actions the legislative branch might take in response to signals from the Supreme Court that it needs to do a better job of drafting legislation and delegating authority. No matter what transpires during the present political moment, the issues addressed here—delegation, interpretation, deference, congressional capacity—will not recede as priorities for Congress to improve itself.

Below is a summary of the Working Group's recommendations. Additional background and detail on our recommendations can be found in Section VI, Background and Key Issues.

1. Empower congressional committees in their essential role as sources of knowledge and deliberation.

Any effort to change the way Congress legislates and improves its deliberations must start with its committees. By a variety of indicators, the role of congressional committees has shifted over time, from policy development to executive branch oversight. The Working Group recommends enhancing the policy role of congressional committees by allocating additional resources to them and altering their operations.

2. Expand the resources available to Congress for drafting legislation, crafting clear language, and understanding constitutional and legal dynamics around proposed bills.

The Supreme Court expects greater clarity and precision from Congress in how it writes laws and delegates implementation authority to regulatory agencies.

Achieving this—and addressing other aspects of Court jurisprudence—will require additional resources to build capacity so legal and constitutional issues can be better addressed.

3. Strengthen the ability of Congress to provide guidance and direction regarding statutory interpretation and congressional purpose.

Interpretation of legislation passed by Congress will receive new emphasis following recent Supreme Court decisions. We recommend steps—such as clarification of definitions and new resources—that can bolster Congress' role in how statutes are interpreted by others, particularly agencies, courts, other government bodies, and the private sector.

4. Enhance the ability of Congress to work productively with regulatory agencies by updating laws, particularly agencies' authorizing statutes.

Congress frequently fails to reauthorize programs and agencies in a timely manner, leaving a vacuum of interpretation and implementation. We recommend actions—such as retrospective review by agencies—to enhance the learning process for Congress and agencies, so that the legislative process and subsequent implementation by the executive branch can be improved.

II. Preface

The Bipartisan Policy Center works with policymakers across the political spectrum to develop bipartisan policies that help address some of the most pressing issues facing America. We work closely with members of Congress and their staff to analyze issues, develop policy ideas, and, with our advocacy affiliate BPC Action, advance them through the U.S. House of Representatives and Senate. This work includes cultivating strong relationships with policymakers and identifying common ground, the precursors of policy collaboration.

Little can get done in Congress without bipartisanship—and bipartisanship requires a functioning Congress.

Unfortunately, "functioning" is not a word that most Americans associate with Congress. The Constitution's Article I branch is "broken," "dysfunctional," "overwhelmed"—pick your negative adjective. Browsing through the scholarly literature, it can seem as if Congress has been in "decline" for over a century.[1]

In October 2024, BPC established the Working Group on Congress, Courts, and Administrative Law in response to a recent series of Supreme Court rulings. As a whole, these decisions invite Congress to enhance its own capacity, strengthen its internal processes, and give itself the ability to tackle public challenges rather than delegating huge amounts of authority to the executive branch. Delegation is unavoidably essential. But over time, that delegation has led to more policymaking authority in the executive branch rather than Congress.

Many people aren't confident that Congress is up to the task. That's to be expected. Its legislative muscle may have atrophied after years of operating mainly through irregular procedures. Indeed, the new normal in Congress is that operating approaches once considered "unorthodox" are now used so frequently as to be standard. Large, omnibus bills that bypass committees and scarcely give members time to read them are common. Our *Schoolhouse Rock!* conception of the legislative process needs reimagining.

Investments in Congress' own capabilities—whether staff or technology or support entities like the Congressional Research Service (CRS)—have failed to keep pace with the growth of the executive branch and outside lobbying influences. No member of Congress ever won reelection by campaigning for more spending on his or her own branch. But failure to invest and the resulting migration of expertise—and power—to the executive and outside groups are corrosive.

At the time of this writing, Congress has narrowly avoided yet another (self-imposed) short-term government funding deadline while also dealing with urgent matters such as the debt ceiling, natural disasters, and competition with China, among many others. Low public approval ratings aren't surprising. In February 2025, according to Gallup, just 29% of Americans approved of "the way Congress is handling its job," while 65% disapproved.[2] Those figures, believe it or not, represent sharp improvement. In January 2024, 12% approved and 83%

disapproved. Congress has only cracked the 20% approval threshold a handful of times in the past two years. No place to go but up.

Some of the negativity is deserved. Congress has one major responsibility each year, which is to pass spending bills for the federal government. Yet it frequently fails to do so and, when it does pass a budget, usually waits until the deadline is upon it. Many programs and agencies go years without formal review and reauthorization by Congress, leading to outdated processes and laws.

Yet some share of public ire and disapproval is misplaced: Congress is not irredeemable. Members do come together to work on weighty issues. At the end of 2024, Congress passed bipartisan bills reforming Social Security and reauthorizing federal child welfare programs. Several bipartisan issues are poised to advance in the 119th Congress as well. In December 2024, after two years of work, the House Bipartisan Paid Family Leave Working Group released legislative text for external comment. In both chambers last year, bipartisan groups of lawmakers agreed on policy principles regarding artificial intelligence. Already this year, a bipartisan bill has been introduced in the Senate aimed at increasing housing affordability.

BPC has worked with members on both sides of the aisle on these and other topics. Bipartisan problem-solving in Congress is far from extinct—it needs more support from within. BPC staff work closely with members of Congress on not only substantive policy issues but also internal reforms that can increase congressional capacity. We're encouraged that the Modernization Subcommittee of the Committee on House Administration released a report at the end of 2024 highlighting areas of bipartisan commitment to improving congressional operations.

We believe in Congress. The executive branch—the White House, regulatory agencies, and independent agencies—has grown steadily more powerful and assertive over the past 30 years. This executive aggrandizement has been bipartisan. Our hope and expectation are that reinvigoration of Congress will also be bipartisan. This will not be done overnight, and we intend to help spearhead this effort, working closely with partners, over the long term. Our Working Group on Congress, Courts, and Administrative Law is just a first step.

We owe a huge debt of gratitude to our co-chairs, former Sens. Heidi Heitkamp and Mel Martinez, for leading the Working Group and keeping the group pointed toward meaningful recommendations that could gain bipartisan consensus. Thank you to all members of the Working Group for their time, energy, and insight. Thank you as well to BPC and BPC Action staff for their support of the Working Group and dedication to our long-term mission.

Margaret Spellings, President and CEO, Bipartisan Policy Center

III. Introduction from the Working Group Co-Chairs

In June 2024, in *Loper Bright Enterprises v. Raimondo*, the Supreme Court overturned what was known as "*Chevron* deference." For 40 years, this judicial doctrine guided federal courts in granting significant leeway to regulatory agencies implementing bills passed by Congress.

Legislation always contains ambiguities and gaps. We each had the privilege of serving in the U.S. Senate. We know that bipartisan agreement is often easier to achieve when language is left vague—such purposeful ambiguity can be a means to reach compromise. We also know from experience that sometimes legislative ambiguity is inadvertent—maybe lawmakers simply didn't consider some element that later turns out to be important. And we know that sometimes Congress intentionally leaves room for interpretation because it wants regulatory agencies to use their expertise in applying the law to changing circumstances.

Congress can write detailed legislation. Statutes in areas such as finance and health care are often quite detailed and complex. But Congress created regulatory agencies so it could delegate implementation to them, embedded in the executive branch. In the course of implementation, agencies necessarily interpret ambiguous language and fill gaps in legislation. Often, delegation to agencies is unclear; they find themselves seeking out the boundaries of what they can and can't do.

The *Chevron* doctrine established a general presumption that statutory ambiguity represented an implied delegation from Congress to regulatory agencies. Even if, in law, Congress said nothing about a particular course of action or gave little guidance, an agency had room to operate. Courts would uphold agency interpretation if they deemed it reasonable. They gave agencies a wide berth to act. *Loper Bright* swept away that *Chevron* presumption. Agency interpretations of laws enacted by Congress will no longer be afforded deference.

Our reading of the decision is that it poses a direct challenge to Congress: Do a better job of fulfilling your constitutional responsibility of legislating. We are not sure Congress is up to the task. Congress, abetted by *Chevron*, has failed to adequately exercise its Article I responsibilities as a lawmaking body, giving away significant power to executive branch agencies.

As we experienced in our time in the Senate, Congress tried to rectify this by engaging in greater oversight of regulatory agencies. That is to be welcomed. Oversight is an essential task for lawmakers. But oversight takes time and resources away from legislating and, since it is inherently reactive, has limits on what effect it can have. Congress must revive its legislative muscles.

Diminishment of Article I legislative capabilities has been a bipartisan endeavor. Yet we're encouraged by the level of bipartisan interest in reclaiming that Article I role. In its 2020 report for the 116th Congress, the bipartisan Select Committee on the Modernization of Congress explicitly stated that its work "was motivated by what Members on both sides of the aisle viewed as … decreasing claim to constitutional powers vested in Article One, [and] the inability to pass essential legislation." The Select Committee developed bipartisan recommendations to "ensure that Congress can uphold its Article One obligations."[3]

In our conversations with former members of Congress and congressional staff, we found widespread agreement that *Loper Bright* and other rulings present an opportunity for reform. Our concern is that Congress, no matter the partisan balance, isn't ready to take advantage of that opportunity.

That's why we agreed to co-chair this Working Group: to help Congress navigate the shifting legal landscape and take advantage of the opportunity. Ultimately, the goal of this Working Group, the Bipartisan Policy Center, and other organizations is to make government work better. That means an empowered Congress that crafts clearly written legislation, agencies operating within the boundaries of statutory authority, and an avoidance of sharp oscillations in regulatory policy when presidential administrations change. We believe that the Working Group's recommendations advance these priorities and are actionable for Congress.

In these recommendations, the Working Group prioritized congressional capacity, especially the committee structure at the heart of Congress' legislative responsibilities. We highlighted ways for Congress to expand its capabilities in addressing the issues raised by the Supreme Court. We looked at ways Congress could increase its knowledge of and involvement in statutory interpretation and improve its legislative processes. And we sought to provide ways for Congress to improve how it works with regulatory agencies. We're grateful for the time, insights, and dedication of our fellow Working Group members—they demonstrated bipartisanship, professionalism, and collegiality.

As BPC President and CEO Margaret Spellings points out in her preface to this report, these recommendations are only the beginning of continuous efforts—by BPC and many other organizations—to help revitalize Congress. We look forward to working with our former colleagues on this important task.

Co-Chair Heidi Heitkamp

Co-Chair Mel Martinez

IV. Working Group Overview

A. OUR CHARGE

The Bipartisan Policy Center convened the Working Group on Congress, Courts, and Administrative Law in 2024 to examine the implications for Congress of a series of Supreme Court decisions in recent years. Those decisions relate primarily to administrative law and the relationship between Congress and executive branch agencies.

Over the past several years, disputes over administrative law have grown and intensified and resulted in Supreme Court rulings that have garnered attention beyond legal and scholarly circles. These disputes have also been increasingly pulled into broader debates regarding the separation of powers under the Constitution and the relationship between the legislative and executive branches. This was particularly true in the Court's October 2023 term, which ended in June 2024 with a handful of significant administrative law decisions. Those cases were:

- ***Corner Post, Inc. v. Board of Governors of the Federal Reserve System***[4]
  - The six-year statute of limitations begins running not at the date a regulation takes effect but the date when an alleged harm occurs.
- ***Securities and Exchange Commission (SEC) v. Jarkesy***[5]
  - When the SEC seeks to impose civil penalties on a regulated entity, the latter is entitled to a jury trial and cannot be forced to defend itself before in-house adjudicators.
- ***Ohio v. Environmental Protection Agency (EPA)***[6]
  - An EPA rule was put on hold because of the agency's failure to sufficiently respond to "significant" comments filed during the rulemaking process.
- ***Loper Bright Enterprises v. Raimondo***[7]
  - When reviewing agency interpretations of ambiguous statutes, courts should no longer defer to "permissible" or "reasonable" interpretations. Courts can still give weight to agency views and expertise but must use "the traditional tools of statutory construction" to determine the "single, best meaning" of a statute.

In other recent terms, the Court issued decisions concerning the major questions doctrine (Congress must clearly authorize agency action on significant policy issues), presidential removal of agency leaders (*Seila Law LLC v. Consumer Financial Protection Bureau* in 2020), and overall presidential power

(*Trump v. United States*, June 2024). These and other rulings address different issues but, read together, signal a clear shift in perspective regarding the separation of powers and, especially, the relationship between the legislative and executive branches.

The Working Group did not examine each of these cases in depth. Our primary concern, grounded in BPC's ongoing work, was to identify the decisions' implications for Congress. To that end, we focused on *Loper Bright* and cases involving the major questions doctrine. Our reading of these decisions is that the Supreme Court is sending a clear message to Congress about how it writes legislation and interacts with regulatory bodies.

In *Loper Bright*, the Court overturned what had been known as *Chevron* deference, a judicial doctrine dating to the 1980s that said that courts, when confronted with ambiguous language in laws passed by Congress, should defer to reasonable interpretations of that language by regulatory agencies, even if courts disagreed with them. Within days of the *Loper Bright* decision, debate raged over its consequences.[8] Some called it a "legal earthquake," echoing the dissenting justices' view that *Loper Bright* would "cause a massive shock to the legal system."[9] Others saw it in somewhat less dramatic terms.[10]

In cases concerning the major questions doctrine, such as *West Virginia v. EPA* in 2022, the Court declared that in certain circumstances, regulatory agencies could not address significant economic and political issues without clear authorization from Congress.[11] Reactions have been similarly mixed. Some see it as a novel doctrine that is "antidemocratic" and "unfounded."[12] Others view it as deeply rooted in American legal history.[13]

The Working Group did not dwell on the wisdom or correctness of these decisions.[14] Instead, we take the Supreme Court's rulings at face value. Our assessment is that Congress should pay attention to implications of the Court's decisions in three specific areas:

- **Delegation.** Congress delegates considerable authority to regulatory agencies. Such delegation is a necessary and unavoidable part of governing. The Court has highlighted certain boundaries and requirements regarding the way in which Congress constructs delegations in legislative language.
- **Statutory Interpretation.** Charged with implementing laws enacted by Congress, agencies necessarily interpret statutory language to do so. The *Loper Bright* majority emphasized that there is a single, best meaning of statutes, rather than multiple, permissible meanings. This underscores the importance of how Congress drafts laws and how its words are interpreted.
- **Deference.** By overturning *Chevron* deference, the Court removed a background presumption against which Congress has drafted laws for decades. This implicates large portions of the legislative process.

Our principal takeaway is that the Supreme Court has sent a clear message to Congress about how it operates, legislates, and relates to executive branch agencies. We are certainly not alone in this interpretation. Many observers agree that the Court has provided Congress an opportunity to improve the legislative process and how it delegates authority to regulatory agencies.

B. THE OPPORTUNITY FOR CONGRESS

Before the *Loper Bright* decision, congressional reformers had high hopes that the possible end of *Chevron* deference would jolt Congress (or maybe deliver a swift kick to it).[15] The ruling increased that expectation:

- "The termination of *Chevron* deference invites Congress to revamp its relationship with the executive branch's regulatory activities."[16]
- "Congress should consider *Loper Bright* as an opportunity, rather than an obstacle."[17]
- "Following the Court's decision in *Loper Bright*, Congress is going to have to reclaim a more active role in providing guidance to the executive and judicial branches regarding its intent."[18]
- "The Supreme Court did not 'return' power to Congress, but it did put the onus on an under-resourced legislative branch to be much more clear in writing laws. … As the 'first branch,' Congress must now reassess its ability to fulfill this increased responsibility effectively."[19]

We agree. The cases present an opportunity.[20] To understand that opportunity, the Working Group posed two questions:

- What is the Supreme Court saying to Congress?
- What actions might Congress take in response?

Regarding the first question, we see the Court raising concerns about Congress' institutional and governing role.[21] It is widely recognized that the executive branch has steadily increased its policymaking power and influence relative to Congress. The Select Committee on the Modernization of Congress asserted, "Over the past several decades, Congress' standing as a co-equal branch of government has softened."[22] To critics on both the right and left, Congress has acquiesced in and facilitated this executive branch aggrandizement in a largely bipartisan fashion.[23] By highlighting issues at the heart of the legislative process and its relationship with the executive branch—delegation, interpretation, and deference—the Court is inviting Congress to reassert itself and improve the legislative process.

Our second question raises more fundamental issues: *Can* Congress respond to the Court's decisions? Does Congress have the necessary tools and processes—the capacity—to take up the opportunity? Taking advantage of the opportunity offered by the Court will not happen automatically.

Members of Congress swiftly took note of the *Loper Bright* ruling. Republicans highlighted their previous efforts to reform the rulemaking process at regulatory agencies and to reinforce the separation of powers.[24] Democrats reintroduced legislation to codify the *Chevron* doctrine.[25] These immediate partisan reactions were not surprising, but they obscure the bipartisan interests beneath the surface.[26]

The plainest evidence of bipartisan interest in congressional assertiveness and capacity is the Select Committee on the Modernization of Congress, which worked from 2019-2022. The mantle has since been taken up by the Subcommittee on Modernization & Innovation of the Committee on House Administration. The Select Committee and the Modernization & Innovation Subcommittee have both put a spotlight on congressional capacity. Even if the bipartisan *will* existed to take up the opportunity presented by the Court, is the capacity there?

The Select Committee squarely addressed this question, finding that congressional capacity (what Congress "needs to fulfill its constitutional obligations") is broadly diminished.[27] Looking at trends in nearly every indicator of capacity—staff, budget, technology, and processes—the Select Committee concluded that "a decline in congressional capacity helped contribute to the increasing expansion of executive branch power."[28]

Some analysts and scholars see *Chevron* deference as largely to blame for this "legislative buck-passing."[29] According to the "*Chevron* abdication hypothesis," Congress gradually recognized that it did not need to make hard legislative choices and could broadly (and vaguely) delegate to agencies while claiming credit for passing a bill but avoiding blame for any unhappy outcomes.[30] There may be some truth to this theory: Empirical work has shown that congressional staff and legislative drafters, as well as agency staff, typically factored *Chevron* into their approach to bills.[31]

Yet that is far from the full picture. Our Working Group included former members of Congress, former Capitol Hill staffers, and individuals who have worked closely with lawmakers and staff in Congress. We acknowledge that some criticism of Congress is warranted and legitimate. The story, however, is not as simple as, "*Chevron* caused Congress to abandon its legislative responsibilities." By most accounts, Congress today operates in "irregular" or "unorthodox" ways, far removed from the old Schoolhouse Rock! song describing how bills were traditionally passed that, even if never quite accurate, has dominated popular notions of the legislative process.[32] Complex omnibus

bills roll together many different pieces of legislation and frequently bypass committees. Conference committees—intended to resolve differences between the House and Senate—have practically disappeared. Committee hearings serve more as venues of political theater than substantive deliberation.[33] What once seemed "unorthodox" is now the new normal and has multiple causes, not simply the 1984 *Chevron* decision.

We appreciate the opportunity presented by *Loper Bright* and other cases to tell a more nuanced story about Congress' constitutional role and how it might reinvigorate that role. Congress needs to understand the issues at stake and have at the ready a concrete set of bipartisan actions that it might take. That is what this Working Group sought to do.

C. OUR PROCESS

We looked at four main areas where Congress might act:

- **Delegation**
- **Statutory Interpretation**
- **Deference**
- **Congressional Capacity**

We reviewed Supreme Court jurisprudence, scholarly commentary, and corresponding capacity trends in Congress. We spoke with legal scholars, current and former congressional staff, legislative support entities, and others. Our examination of the above issues led us to four categories of recommendations. We suggest actions that:

- **Empower** congressional committees.
- **Expand** legislative resources available to Congress.
- **Strengthen** Congress' role in statutory interpretation.
- **Enhance** the ability of Congress to work productively with regulatory agencies.

The next section outlines our full set of recommendations for Congress. Please see the Background and Key Issues section for more information on the subject matter of the recommendations.

V. Recommendations

1. Empower congressional committees in their essential role as sources of knowledge and deliberation.

Background

- Committees hold primary responsibility for policymaking and oversight in Congress.
- Committees are underequipped to respond to post-*Loper Bright* lawmaking responsibilities:
  - — The number of House committee staff has fallen steeply since 1990.
  - — Fewer witnesses appear today at committee hearings; the number has fallen by roughly 60% since the early 1980s.
- Taking advantage of the opportunity presented by the Supreme Court to revitalize the legislative process will depend heavily on committees and the support they receive from the Congressional Research Service, Government Accountability Office (GAO), and other entities.
- See Section VI, Background and Key Issues, for more information.

Recommendations

a. Increase committee funding to expand committee policy and legal staff as well as temporary expert staff when needed on particular topics.

b. Expand committees' access to outside expertise and information, beyond hearing witnesses, on relevant topics.

   i. Attach a public participation form to each hearing announcement specifying how public testimony or letters can be submitted to committees.

   ii. Make the Science, Technology Assessment, and Analytics program at GAO permanent.

   iii. Direct legislative support entities to provide better information to members and staff on how they prioritize and manage members' requests for help.

c. Enhance the value of hearings.

   i. Test alternative hearing processes and formats. This might include dispensing with the five-minute question period for members, sitting in the round rather than on a dais, or using alternate seating rather than splitting sides by party.

ii. Hold members accountable to chamber-level rules of decorum during hearings and ensure that they treat witnesses professionally and respectfully.

d. Create a new "guaranteed regular order" procedure, empowering committees to advance bipartisan legislation—particularly reauthorizations—to the floor if they conduct a thorough, deliberative process through hearings and markups.

Considerations

- Investing in congressional committees will require higher spending by Congress on itself, which may present a political obstacle.
- Increasing the amount of expertise available to committees will add time to the legislative process, although this could be mitigated by hiring additional staff and shifting to proactive agenda-setting.

2. Expand the resources available to Congress for drafting legislation, crafting clear language, and understanding constitutional and legal dynamics around proposed bills.

Background

- The Supreme Court has made plain that it expects greater clarity and precision from Congress when it delegates authority to regulatory agencies.
- The burden of achieving greater clarity and precision will fall most heavily on the House and Senate Offices of Legislative Counsel. Staffing and experience in those offices have not kept pace with rising demand in recent years.
- Wrestling with the major questions doctrine and how agencies and courts might interpret statutory language to find the single "best" meaning will only further strain this capacity.
- Members, staff, and committees can play a larger role in addressing legal and constitutional issues, helping mitigate that strain.
- See Section VI, Background and Key Issues, for more information.

Recommendations

a. Ensure staffing in the House and Senate Offices of Legislative Counsel (HOLC and SOLC) keeps pace with demand.

b. Allocate new resources to enable HOLC and SOLC, working closely with committees, to review bill language for clear language about delegation and purpose.

c. Alleviate the burden on legislative counsel by enabling members and staff to preemptively identify constitutional and legal issues around proposed legislation.

    i. Create new liaison positions—filled by former committee counsels—and written guides to advise member offices on best practices before approaching legislative drafters.

d. Improve the ability of Congress and the public to see how draft bills and proposed amendments would change current law.

    i. Make public the Comparative Print Suite.

    ii. Consider passing the Readable Legislation Act.

Considerations

- Expanding resources along these lines may require more funding. That presents political challenges for lawmakers.
- Our recommendation regarding new liaison positions is modeled on the House Chief Administrative Office's Coach program, which by many accounts has successfully trained hundreds of Hill staff in management and efficiency.[34]

3. Strengthen the ability of Congress to provide guidance and direction regarding statutory interpretation and congressional purpose.

Background

- The *Loper Bright* ruling shone a spotlight on the importance of statutory interpretation, which is usually at the heart of disputes over agency discretion and legislative delegation.
- Charged with implementing statutes, agencies are the front-line interpreters of legislative language.
- Greater awareness of how agencies and courts interpret statutes could help Congress improve clarity and precision in the drafting process.
- Courts, agencies, and Congress differ in their approaches to statutory interpretation. Courts assume that Congress drafts laws with judicial tools of statutory interpretation in mind. Agencies approach interpretation from a different angle and sometimes have been closely involved in the legislative process.
- In addition to rules that carry the force of law, agencies promulgate guidance, principally in the form of policy statements and interpretive rules. These are forms of statutory interpretation, too.

— There is considerable confusion about the legal force of guidance and the extent to which these agency interpretations should guide conduct by regulated entities.

- Courts and Congress might disagree on how words and phrases should be defined.
- In some cases, Congress includes purposes and findings in statutes to help influence interpretation. The Office of Law Revision Counsel frequently removes those purposes and findings from the statute or downgrades them in the U.S. Code.
- Presidents have long required agencies to analyze the impact of alternative approaches, using cost-benefit analysis, when developing new regulations and to adopt policies where regulatory benefits justify costs.[35] Many statutes are silent on this subject, yet courts are increasingly asked to interpret whether statutory terms such as "appropriate" require or allow cost-benefit analysis.
- The Select Committee on Modernization lamented that regulatory agencies often interpret statutes in ways contrary to congressional purpose. It recommended that Congress enhance its own capacity to provide interpretive guidance to agencies.
- See Section VI, Background and Key Issues, for more information.

Recommendations

a. Include in statutes default principles of interpretation that agencies and courts can use.

b. Direct the Office of Law Revision Counsel to ensure that statutorily enacted findings and purposes are codified in the main text of the U.S. Code—and encourage agencies and courts to consult them.

c. Clarify that definitions explicitly included in bills should be the primary reference point in statutory interpretation.

d. Direct the Congressional Research Service's American Law Division to regularly summarize and disseminate to offices and committees, and to HOLC and SOLC, an overview of commonly used canons of construction by federal courts and how those might be accounted for in legislative drafting.

    i. Incorporate these summaries into periodic circuit court updates produced by CRS.

e. Consider codifying long-standing, and bipartisan, presidential consensus to make clear that agencies, unless proscribed by statute, have authority to analyze social benefits and costs when they consider regulatory alternatives.

f. Bring greater clarity and transparency to agencies' statutory interpretation expressed in guidance documents:

i. Prohibit the use of mandatory language, except where restating existing laws and rules.

ii. Require agencies to include disclaimers stating that guidance is not binding and enact clear definitions for agency guidance and other types of publications.

iii. Direct agencies to create a catalog for policy statements and interpretive rules, where all such guidance documents would be compiled and organized by agency and subject matter. This could perhaps be an appendix or addendum to the Code of Federal Regulations.[36]

Considerations

- A persistent complaint among legislative drafters and legal scholars is that courts inconsistently apply methods of statutory interpretation. Better understanding among lawmakers and staff about the dynamics of statutory interpretation—and input into subsequent interpretation—seems warranted.
- An outstanding question among courts and legal scholars is how far Congress could or should go in prescribing guidelines for interpretation across statutes. A more practical approach might be what we suggest here: default guidelines on a statute-by-statute basis.
- Many states have interpretive guidelines in their legal codes that provide instruction on interpretation.

4. Enhance the ability of Congress to work productively with regulatory agencies by updating laws, particularly agencies' authorizing statutes.

Background

- One reason that agencies may run up against the boundaries of delegated authority is that Congress frequently fails to reauthorize programs and agencies in a timely manner. Reauthorizations provide one way for Congress to update delegations and incorporate new information.
- Better information from agencies on implementation could help Congress update statutes and provide more clarity. One way to do that is through retrospective review of regulations and their impact.
- Congress occasionally requires, in statute, agencies to conduct retrospective reviews.
- Both Congress and agencies must learn more about the implications of the major questions doctrine and, potentially, the nondelegation doctrine. At the time of this writing, the Supreme Court has not addressed the major

questions doctrine since 2023. Commentators are split on how *Loper Bright* might affect courts' treatment of the major questions doctrine, and many expect continued attempts to revive the nondelegation doctrine. Lower courts continue to address, and decide cases on, these doctrines.

- See Section VI, Background and Key Issues, for more information.

Recommendations

a. Establish, in caucus and conference rules, clear expectations for committees and their jurisdictions that reviewing and updating statutory laws is a primary responsibility.

b. To support more timely reauthorizations, establish one-click access to a list of expired agencies and programs that need congressional attention.

    i. Direct the House Clerk to prioritize creation of this database.

    ii. Direct CBO to improve its outreach to members and staff when it releases its annual report on expired and expiring authorizations.

c. Direct agencies to conduct retrospective reviews of regulations.

    i. Require agencies to be clear about expected outcomes when they issue a rule.

    ii. Require agencies to evaluate the impact and effectiveness of rules according to those expected outcomes.

    iii. Require agencies to submit evaluation and outcome reports to Congress.

d. Direct the Congressional Research Service's American Law Division to create and publicize a list of final, nonappealable judicial decisions that find a violation of the major questions doctrine (or potentially nondelegation doctrine) to enable Congress to evaluate whether legislation is needed to clarify an agency's authority.

Considerations

- Existing resources on expiring authorizations, such as those produced by CBO and the House and Senate Appropriations committees, are the best current sources but also illustrate the difficulty of tracking this information. Their compilations are sometimes incomplete, and it is not always clear how to identify expired authorizations.
- The House Clerk has raised logistical difficulties with tracking and classifying expired authorizations.[37]
- Retrospective review, or variations of it, has been a bipartisan priority for many years. The Administrative Conference of the United States (ACUS), an independent federal agency tasked with overseeing rulemaking and administrative processes in the executive branch, has recommended some

version of it for 30 years. The American Bar Association has also supported retrospective review, as have separate pieces of bipartisan legislation in Congress.

- Challenges with retrospective review concern its frequency (one-off or periodic), its utility (how to use the findings), and the resources required. Determining the right standard of review and the purposes to which results will be put are other areas of disagreement.
- Agencies already spend considerable amounts of time and effort on prospective review of proposed rules.
- One goal of retrospective review, of course, is to enhance the learning process for Congress and agencies, presumably making future rulemaking and prospective analysis more efficient. Any greater use of retrospective review needs to be directed toward improving statutory design—the purpose is learning, not necessarily curtailment of regulatory activity.
- The Access to Congressionally Mandated Reports Act, passed in December 2022, requires all reports that agencies submit to Congress to be collected and published by the Government Publishing Office (GPO) in a central repository. Requiring agencies to submit evaluation and outcome reports to Congress would ensure they are organized by GPO and made accessible.
- A new collection of judicial decisions maintained by CRS should help Congress understand how courts are interpreting statutes and whether changes are required.

VI. Background and Key Issues

The Working Group focused on four issues that have consistently recurred in recent Supreme Court decisions: delegation, statutory interpretation, deference, and congressional capacity. The bottom line for our examination of the first three was: What should Congress know, why should Congress care, and how might Congress need to change? Underlying each of these is the question of congressional capacity. Even when bipartisan agreement on the issues and implications exists, Congress needs the ability to take bipartisan action.

Each of these is a significant topic that has consumed pages and pages of academic articles, court decisions, and other work. Their complexity cannot be given justice in this report. Here, we summarize our understanding of the issues, debates surrounding them, and implications for Congress. This review provides the background and grounding for the Working Group's recommendations.

A. DELEGATION

Overview

Delegation happens. The *Loper Bright* ruling acknowledged this reality, noting that courts "police the outer statutory boundaries of those delegations."[38] What and how Congress delegates, however, does have limits, but those limits remain fluid. The major questions doctrine, most recently articulated in a series of cases in 2021-2022, provides one possible boundary.

Questions Presented

What can Congress delegate? What can't Congress delegate? How must those delegations be structured to align with constitutional lines drawn by the Court?

Delegation Abounds

Congress delegates to regulatory agencies. That is a deep-seated and uncontroversial element of governing. Nevertheless, disputes arise over what Congress can and should delegate, how it should structure delegations of authority, and where the lines of permissibility might be drawn. Congress, the Supreme Court has repeatedly affirmed, "simply cannot do its job absent an ability to delegate power" to agencies, "dependent as Congress is on the need to give discretion to executive officials to implement its programs."[39]

Loper Bright does not prevent Congress from delegating authority and discretion to regulatory agencies.[40] The majority opinion acknowledged that Congress can explicitly direct an agency to interpret or define a statutory term, even providing specific examples. Congress can also give agencies a certain amount of "flexibility" to make policy (not law) if agencies stay within "the boundaries of the delegated authority."[41] And Congress can delegate authority to agencies to "fill up the details" of a statutory framework.

After *Loper Bright*, and with renewed focus from the executive branch, an important question becomes whether Congress delegated authority to an agency and, if it did, whether the delegation was proper.[42] Here, the *Loper Bright* ruling runs into the major questions doctrine, which was a significant theme running through several Court rulings in 2021 and 2022. Some commentators have treated the major questions doctrine as a tool of statutory interpretation, a "clear statement rule" guiding how judges will read statutes.[43] We address it here as an issue concerning congressional delegation to agencies.

What Is the Major Questions Doctrine?

According to the Supreme Court, in matters of "vast economic and political significance," regulatory agencies must have "clear congressional authorization" for the actions they take: "We expect Congress to speak clearly if it wishes

to assign an agency decisions of vast economic and political significance."[44] Congress can grant agencies the ability and authority to take on "major" issues, but it must do so expressly, clearly, and without reservation.

The idea is that Congress, and not regulatory agencies, is the place to address, if not solve, major questions, or to at least provide some legal and policy framework for solving the issue.[45]

The Major Questions Quintet[46]

In its October 2021 term (ending in June 2022), the Supreme Court relied on the major questions doctrine to decide four cases.

- *Alabama Association of Realtors v. Department of Health and Human Services*[47]
  - **Issue:** A national eviction moratorium imposed by the Centers for Disease Control and Prevention (CDC) during the COVID-19 pandemic.
  - **Decision:** In the 1944 statute relied upon by the CDC for legal authority, Congress did not "speak clearly" about a national eviction moratorium. Because the issue at hand was plainly "significant," the CDC needed a clear statement from Congress.
- *National Federation of Independent Business v. Occupational Safety and Health Administration (OSHA)*[48]
  - **Issue:** The vaccine mandate imposed by OSHA during the pandemic.
  - **Decision:** The issue at hand was definitely "significant," requiring a clear statement from Congress. Yet the 1970 Occupational Safety and Health Act, on which OSHA relied for the mandate, did not contain a clear statement authorizing it.
- *West Virginia v. Environmental Protection Agency*[49]
  - **Issue:** The Clean Power Plan (CPP) promulgated by EPA under President Barack Obama.
  - **Decision:** The CPP involved a significant economic and political issue and therefore was a major question. EPA lacked clear congressional authorization for to act.
- *Biden v. Missouri*[50]
  - **Issue:** The mandate by the Centers for Medicare & Medicaid Services (CMS) that facilities receiving federal Medicaid and Medicare funding must require staff to be vaccinated against COVID-19.
  - **Decision:** The Court allowed the mandate to remain in effect based on statutory authorization and long-standing agency practice; it ruled CMS can put conditions on funding that are necessary for health and safety in the facilities.

A fifth major questions ruling was issued in 2023, concerning the Biden administration's student loan debt cancellation program.

- *Biden v. Nebraska*[51]
  - **Issue:** Student loan debt cancellation.
  - **Decision:** The scale of the program was an issue of economic significance and therefore presented a major question. The statute relied upon by the administration, the HEROES Act, did not contain clear authorization for cancellation.

The net result of these decisions is that a regulatory agency "must point to clear congressional authorization for the authority it claims" when it addresses an issue of "vast economic and political significance."[52]

In February 2025, President Trump issued an executive order that instructed federal agencies to, among other things, identify regulations "that implicate matters of social, political, or economic significance that are not authorized by clear statutory authority."[53] The executive order included other issues also addressed by the Working Group, including statutory interpretation. It remains to be seen how the president's directive will affect agency rulemaking, but the executive order underscores the importance of these issues for Congress.

Why Is the Major Questions Doctrine Controversial?

Legal commentators say the Court has been less than clear in articulating the need for clarity from Congress.[54] Although the Court in *West Virginia* outlined standards of "majorness" or "significance," observers note inconsistency in how the doctrine has been applied in lower courts that have interpreted the doctrine.[55] It also seems apparent that the justices themselves disagree, with Neil Gorsuch and Amy Coney Barrett making different arguments about what the doctrine is or is not.

Congressional members, staff, and legislative drafters will need to keep close tabs on how the major questions doctrine evolves in federal court and how it relates to the forms of delegation highlighted by the *Loper Bright* majority.

What about the Nondelegation Doctrine?

Rooted in the separation of powers principle, the nondelegation doctrine is intended to "prevent Congress from delegating or transferring its legislative responsibilities to the president or the agencies of the executive branch."[56] Article I vests the legislative power in Congress; Congress cannot grant other branches that power.

The nondelegation doctrine is currently not "live" in the sense of being actively used by the Supreme Court to strike down acts of Congress.[57] Litigants and some of the justices invoke it, but the Court has not found a violation of the nondelegation doctrine since 1935. That decision helped prompt President

Franklin D. Roosevelt's Court-packing plan. Nevertheless, congressional members and staff should be aware that the doctrine could be revived. Five sitting justices have indicated a willingness to resuscitate it.

For a century, the Supreme Court has followed a rough test when appraising the nondelegation doctrine's application: As long as Congress, in statute, laid down an "intelligible principle" to guide an agency in implementing a law, it would not be crossing the constitutional line. In any case involving a nondelegation claim since 1935, the Court has always found such an intelligible principle. In a 2019 dissenting opinion, Justice Gorsuch advocated reviving the nondelegation doctrine and outlined a framework for its application.[58]

President Trump's February 2025 executive order, in addition to invoking the major questions doctrine, also referenced nondelegation. It directed agencies to identify regulations "that are based on unlawful delegations of legislative power."[59]

Why Should Congress Care? Reauthorizations and Statutory Updating

The major questions doctrine is directed primarily at agencies, instructing them not to stretch the boundaries of old authorizing statutes too far. But the doctrine holds clear implications for Congress, too: It must update statutory authority granted to agencies.

In an ideal model of policymaking, Congress would learn alongside regulatory agencies as to what did and did not work when a certain law was implemented and what might need to be revised.[60] Authorizing statutes for agencies and programs need updating: Circumstances change and, presumably, policymakers gather information about the effects of those statutes.[61] One interpretation of the joint implication of *Loper Bright* and the major questions doctrine is that "novel [agency] decisions rendered long after the authorizing statute was enacted [will] be viewed skeptically."[62]

That is sensible, but it puts the onus squarely on Congress, which persistently fails to reauthorize expired or expiring appropriations for programs and agencies in a timely manner. Reauthorization provides—or is intended to provide—a mechanism for Congress to update statutory authorities and language, incorporate new information into law, and ensure that agencies have what they need to do their jobs. Lapsed authorization does not mean an entire agency ceases to exist—it has been over two decades, for example, since the State Department and Small Business Administration were formally and comprehensively reauthorized.

Congress relies on temporary rather than permanent authorizations for good reason: It is a way to manage priorities and "regularly reevaluate and clarify legislative intent in light of new information and changing conditions."[63]

Again, in an ideal model of policymaking, regulatory agencies would evaluate the effects of their implementing rules, and congressional committees would absorb that and other information to update program and agency authorizations. Yet such evaluation by agencies—retrospective review—is not standard practice. And, as discussed below regarding congressional capacity, committees' traditional role of gathering and processing such information for Congress has declined.

If the Supreme Court—based on *Loper Bright* and the major questions doctrine—is going to more actively "police" delegations to agencies, one response might be for Congress to more periodically revisit those delegations. Reauthorizations provide one vehicle to do so. Clarity, precision, and constitutional boundaries—as indicated by the Court—must be the watchwords. And in revisiting those statutory delegations, Congress should be clear not only in its statement of purpose but also its desire for evaluation and reporting on outcomes.

B. STATUTORY INTERPRETATION

Overview

Congress should be aware of different methods of statutory interpretation. Statutes are a principal legislative output, and courts, agencies, businesses, advocates, and others spend a good deal of time and energy parsing statutory meaning. After *Loper Bright*, there are no longer multiple "permissible" or "reasonable" readings of statutory language; there is only one "best" interpretation.[64] That puts a large burden on legislative words and phrases.

This change has several implications for Congress on how plain and precise its statutory language should be, whether and how it should provide guidance on interpreting statutes, and how agencies and courts should account for the legislative process and record in their statutory interpretation.

Questions Presented

How should agencies and courts read and understand statutes passed by Congress? What does Congress need to know about how its language is read and interpreted? Should courts account for how Congress works when trying to identify statutory meaning? What should staff and drafters in Congress bear in mind regarding debates over statutory interpretation?

Congress and Statutory Interpretation

Congress enacts laws, or statutes. Others interpret them. Regulatory agencies are typically the front-line interpreters because they bear responsibility for implementation and application. They must often determine what "reasonable" or "necessary" means, as the Court in *Loper Bright* acknowledged. Agencies need to identify how far to go in effectuating congressional purposes—and what those purposes are.

Courts, too, play a significant role because disputes over statutory interpretation consume a significant portion of the federal judiciary's caseload. A regulated entity, such as a company, says the meaning of a word or phrase is X; an agency says the meaning is Y. Judges use a variety of methods to discern statutory meaning; these methods have been shown to influence legislative drafters on Capitol Hill and those interpreting statutes within agencies.[65]

Even if Congress were to draft laws in the plainest, most precise, and most ordinary language possible, interpretive differences would persist. The meaning of words and phrases can vary across different readers and contexts. A regulatory agency might read a sentence one way, while a court may read the same sentence in a different light—and both readings could differ from what Congress intended.

Terms of Debate

Over the past 30 years, academics and judges have engaged in intense debate over how statutes should be read. Should courts confine themselves to the text itself or seek guidance from sources and materials that might help illuminate statutory purpose? Roughly speaking, two main schools of thought exist today:

- **Textualism:** Only the statutory text should be considered. The final text reflects agreements and settlements (usually bipartisan) among members of Congress, and no one should disturb those by trying to go beyond the text.
- **Purposivism:** Determining statutory purpose should be the goal of interpretation, assisted by materials generated during the legislative process, such as committee reports.

Each approach claims to be faithful to Article I's "legislative supremacy" mandate.[66] Textualists do that by staying true to the enacted statutory text—that's what Congress passed, that's the law, and trying to wade through legislative debates and reports that preceded passage will only muddle interpretation. The most recent variation of textualism stresses the "ordinary meaning" of statutory language. With increasing frequency, courts turn to dictionaries to identify ordinary meaning.[67]

Purposivists say they put Congress first by focusing on the purposes of statutes. A recent variation of purposivism emphasizes the process by which Congress makes laws—even, or especially, messy and "unorthodox" processes. This theory asserts that interpretation should account for how Congress drafted a bill and what lawmakers sought to achieve.

Agencies and Statutory Interpretation

Regulatory agencies are the "primary interpreters of statutes Congress has empowered them to administer."[68] Nearly every action an agency takes—such as rulemaking, adjudication, or enforcement—includes some element of interpretation. Studies have found that in engaging in statutory interpretation, agency staff utilize some judicial methods (see below), as well as legislative history materials, especially committee reports.[69] In many cases, agency staff may have participated directly in the legislative process—providing technical assistance or substantive input—and thus may have personal insight into what Congress expects to see in implementation.[70]

One gray area regarding agency interpretation of statutes is the broad category known as "guidance." Officially, according to the Administrative Procedure Act (APA) of 1946, guidance includes interpretive rules, policy statements, and rules regarding internal agency practice.[71] Policy statements describe how an agency "proposes to exercise a discretionary power," while interpretive rules "advise the public of the agency's construction of the statutes and rules which it administers."[72] Guidance is an assertion of statutory interpretation.

The APA exempts policy statements and interpretive rules from the notice-and-comment requirements that pertain to legislative rules. Legislative rules are those made pursuant to statutory implementation and have the force and effect of law. They are legally binding in the same way as statutes passed by Congress. Agency guidance is generally not legally binding in similar fashion. It might be practically binding in the sense that regulated entities feel that they have little choice but to follow an agency's interpretive rule or have no opportunity to disagree.

The Administrative Conference of the United States has recommended multiple times that agencies should clarify that policy statements and interpretive rules are not legally binding.[73] It is unclear how many regulatory agencies have adopted these recommendations but, in the last several years, agency guidance has become a political football. In 2019, President Trump issued an executive order directing agencies to develop regulations regarding guidance and its nonbinding nature and to create databases to ensure transparent access to guidance documents. In 2021, President Joe Biden revoked this order as part of a broader effort at modernizing regulatory review. In January 2025, in turn, President Trump revoked that revocation.

Agency guidance is clearly a politically fraught area. It seems evident, however, especially based on nonpartisan ACUS research, that greater clarity and transparency are warranted.[74] The goal is not to punish agencies or reduce rulemaking but to give Congress greater insight into how its statutes are interpreted and implemented by agencies.

Judicial Methods of Statutory Interpretation

Legal challenges to agency actions often turn on different views of statutory meaning. Courts have developed a variety of methods to determine that meaning: "The very point of the traditional tools of statutory construction—the tools courts use every day—is to resolve statutory ambiguities."[75] As outlined by the Congressional Research Service, these tools fall into five main categories.[76]

- **Ordinary Meaning:** How a word is used and understood in everyday language.
- **Statutory Context:** Surrounding phrases, the overall statutory structure, and how words are used in different places in a statute.
- **Canons of Construction:** "Presumptions" regarding how laws are drafted and how courts read them; "semantic canons" concern the text and grammar, while "substantive canons" deal with values and outcomes.
- **Legislative History:** Examining congressional debates, deliberations, and materials to discern textual meaning. Textualists generally disfavor this approach.
- **Statutory Implementation:** Judges might look at how a law has been or could be applied.[77]

Use of these tools will vary according to a judge's overall orientation to statutory interpretation, whether textualist or purposivist or somewhere in between.

Insider, Outsider, Reader, Drafter

Everyone agrees that Congress does not operate in the linear *Schoolhouse Rock!* fashion in which a member of Congress responds to constituent demands by writing a bill, the bill is debated in committee, and it then moves from one chamber to the other for passage.[78] If it ever did. It is broadly recognized that Congress today works in "unorthodox" or irregular ways. Should that matter for statutory interpretation? This is one of the fiercest debates in statutory interpretation, and it centers squarely on what happens on Capitol Hill.

The debate is over the perspective that a court (or agency) should use when interpreting statutes. An "insider" perspective would focus on the mechanics of the legislative process and how Congress arrives at final statutory text—accounting for this will improve how we interpret laws.[79] By contrast, an "outsider" perspective would be that of the "ordinary English speaker."[80]

- **Insiders and Drafters.** Because, for example, the Office of Law Revision Counsel often removes statements of congressional purpose and findings from the actual U.S. Code, statutory interpreters need to account for these omissions and proactively seek the purposes and findings of the codified statute.[81]
- **Outsiders and Readers.** Trying to account for the vagaries of the legislative process when interpreting statutory language would undermine the compromises inevitably entailed in crafting legislation. What matters is not the process by which Congress developed statutory text but how that text is received by those who must follow it: American citizens.[82]

What Should Congress Know or Care about Regarding Statutory Interpretation?

The Select Committee on Modernization worried that Congress would be unable to reassert its Article I prerogatives without a greater grasp of legal and constitutional issues in legislation and how agencies, courts, and others would treat those issues as they interpret laws.

Debates over statutory meaning and constitutional questions largely play out in agencies, courts, and the pages of law review articles. The Select Committee stressed that enhancing the legal and constitutional information available to members and staff in Congress would help them better understand and perhaps resolve questions of statutory meaning during the legislative process.

The Offices of Legislative Counsel do wrestle with judicial tools of statutory interpretation, and congressional staff have demonstrated their awareness of those tools. Studies have shown that they all account for agency and judicial interpretation when they are drafting laws.

Yet, given persistent congressional staff turnover, declines in the number of committee staff (see Congressional Capacity section below), and other constraints, it is unclear whether the principal participants in the legislative process have what they need to stay apprised of how their statutes are being interpreted and implemented. The upshot is that staff and drafters, and even members of Congress, can be surprised at the uses to which their legislative language might be put.

A lot happens between the policy idea that a member of Congress or committee wants to pursue and the implementation or interpretation of the final statutory result. Members of Congress may treat a committee report as being nearly as authoritative as enacted text (and may read the former not the latter), but interpretive emphasis might be the reverse in a reviewing court. Participants in the legislative process need a deeper understanding of how statutes fare outside of Congress and how they might alter that process accordingly.

C. DEFERENCE

Overview

The Supreme Court in *Loper Bright* altered how federal judges should review agency interpretations of statutory language. This change has implications for how Congress drafts legislation and the guidance it provides to agencies regarding statutory implementation.

Questions Presented

What did it mean for the Supreme Court in *Loper Bright* to overturn *Chevron* deference? What replaces it? What existed before *Chevron* deference, and how might that factor into what comes next?

Why Does Deference Matter?

In the most basic sense of our constitutional government, Congress passes bills, the president signs them into law, and the executive branch implements them according to the statutory terms outlined by Congress.

Congress often leaves gaps and ambiguities, sometime large ones, in the legislation it passes. Those could be intentional. Perhaps Congress wanted to leave something up to the implementing agency: Facts might need to be collected before a law can be applied. Maybe Congress was purposefully vague because it could not reach bipartisan support on a term or provision, leaving it up to agencies to figure things out. Statutory ambiguities thus leave room for agency discretion.

Congress might be direct and narrow regarding that discretion: The regulatory agency should define "hazard," for example. Discretion could also be wide and open-ended: The agency should take actions in "the public interest." Discretion in executive enforcement of laws is neither new nor uncommon—in criminal law, prosecutors have a good deal of discretion in determining whether and how to charge someone. In the administrative law context, agency discretion can be problematic if an agency strays too far from the letter of the law or swings wildly between different interpretations. In those cases, when presented with a valid legal challenge against a regulatory action, courts must evaluate the agency's exercise of discretion.

Such evaluations often come down to a matter of interpretation: Whose reading of the statute is better? In answering that question, courts must necessarily decide how much to defer to an agency's interpretation of statutory language. After all, agencies have substantive expertise and experience, are the front-line interpreters of statutes, and, in theory, are politically accountable through their reporting relationship to the president. At the same time, agency expertise

and experience might bias their interpretations; favoring those interpretations could tilt the scales unfairly toward or against regulated entities, and lines of political accountability might be attenuated.

What Was *Chevron* Deference?

In 1984, the Supreme Court decided *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[83] In that holding, the Court announced a new two-step framework for courts reviewing agency interpretations of statutes. Courts should look first at whether the statute in question was clear regarding agency action. If the language was clear and the agency's action was consistent with it, no problem. If the agency's action was inconsistent with clear statutory language, the action was out of bounds.

If the statutory language was ambiguous, the reviewing court moved on to the second step, examining the agency's interpretation of that ambiguity. Importantly, this rested on the assumption that statutory ambiguity was "an implicit delegation of interpretive authority to an agency."[84] In other words, Congress did not need to explicitly *say* that the agency had authority; silence or vagueness was a delegation. If, pursuant to that implicit delegation, the agency's interpretation was permissible or reasonable, the court should defer to it and uphold the action in question—even if the court differed in how it might interpret the statute.

Later, the Court added what became known as *Chevron* "step zero." *Chevron* deference would be granted only when agencies acted with the force of law—through, for example, notice-and-comment rulemaking.[85] For other types of agency action, such as guidance documents like policy statements and interpretive rules, less deferential standards of review would apply.

What Did *Loper Bright* Do?

The Court overturned *Chevron* for three main reasons.[86] First, the justices ruled *Chevron* was incompatible with, even in violation of, the Administrative Procedure Act. Section 706 of the APA says courts "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."[87] Directing courts to defer to agency interpretations, as *Chevron* did, contravened the APA.

Second, according to the Court, the *Chevron* doctrine had become "unworkable." It had never been clear how exactly a court should determine whether a statute was ambiguous. In practice, *Chevron* evolved into a "hydra" with exceptions, limitations, and qualifications.[88] An analysis in 2001 found 14 different splits among circuit courts regarding use and application of *Chevron*.[89] All the qualifications added over the years had "transform[ed] the original two-step into a dizzying breakdance."[90]

Third, rather than stability, *Chevron* created instability and inconsistency in law and regulation. Default deference to agency interpretations of statutory ambiguity was "a license authorizing an agency to change positions as much as it likes."[91] In the absence of *Chevron*, ambiguity in statutory language can no longer be interpreted as an implied delegation of authority to agencies.

Now What?

Before *Chevron*, a "hodgepodge of factors" characterized judicial review of agencies' interpretations of statutes.[92] Judicial doctrines were "fragmented and unpredictable."[93] The Court in *Loper Bright* placed particular emphasis on three features of pre-*Chevron*, and even pre-APA, approaches:

- **Contemporaneity:** Weight should be given to agency interpretations that were contemporaneous with the statute's enactment.
- **Long-standing:** Weight should also be given to agency interpretations that have been long-standing and consistent over time.[94]
- **Persuasion:** An agency's interpretation might be found "persuasive" according to factors such as the thoroughness of an agency's process, validity of its reasoning, and substantive expertise.

The factors determining persuasiveness come from a 1944 case, *Skidmore v. Swift & Co*. The *Skidmore* standard of review has generally been seen as less deferential toward agencies than *Chevron*.[95] If *Skidmore* is the new standard for courts, lawmakers and staff in Congress should familiarize themselves with its factors.[96]

The primary implication of *Loper Bright* is that courts should exercise "independent judgment" in determining the "best" statutory meaning.[97]

Why Should Congress Care about Judicial Deference Doctrines?

The Court in *Loper Bright* did not invalidate a federal agency; it did not say regulatory agencies could not interpret statutes; it did not say Congress could not delegate, even broadly, to agencies.[98] By the time a challenge to a regulation makes its way through the judicial system and the court actually rules on the merits, several years may have passed since the agency acted and even longer since Congress wrote the statute. So, does Congress really need to care about judicial deference doctrines? Yes, for three reasons.

First, Congress has a keen interest in how its laws are interpreted and implemented. That interest is plainly evident in the volume of Congress-agency interactions during the legislative drafting process, oversight by congressional committees, and postenactment engagement of lawmakers with agencies.[99] Congress enacts laws for a reason, and agencies are typically the first interpreters of those laws and what they seek to accomplish. Members of Congress care deeply about that interpretation and implementation.

Second, judicial doctrines influence Congress' legislative process. In a survey of staff and legislative drafters conducted in 2011-2012, 90% of respondents said they relied on the assumptions of *Chevron*. Those assumptions—including the need for agencies to fill in details, desire for subject matter input from agencies, and "the need for consensus"—shaped how legislation was written.[100] *Chevron*'s prior role in the legislative process means that staff and drafters will need to closely monitor what comes next.

Third, Congress should understand why a court invalidates agency actions taken under statutory authority. This understanding should inform how Congress designs statutory schemes and, especially, how it updates those programs and agencies that need periodic reauthorization.

Does Congress Need to Abandon Ambiguity? Can It?

Congress is unlikely to abandon ambiguous language. Ambiguity can help obtain bipartisan consensus. It might mean that Congress could not or did not want to decide a particular question. It might indicate that Congress wants the agency to engage in fact-finding before it applies a broad legal directive. The ambiguity could be unintentional.

For its part, the Supreme Court in *Loper Bright* indicated that statutory ambiguity does not exist. Even when Congress uses ambiguous language, said the Court, it is not an obstacle to determining statutory meaning: "[S]tatutes, no matter how impenetrable, do—in fact, must—have a single best meaning. That is the whole point of having written statutes; every statute's meaning is fixed at the time of enactment."[101]

After *Loper Bright*, courts should no longer accept that ambiguity implies a gap in meaning for agencies to fill. That was one of the central *Chevron* pillars done away by *Loper Bright*.[102]

This treatment of ambiguity, an essential tool of language relied upon by Congress for decades, underscores how important it is for lawmakers, staff, drafters, and others on Capitol Hill to have an understanding of the Court's rulings. A deeper understanding of delegation, statutory interpretation, and deference should enable Congress to take actions—including those we recommend. The next critical step is for Congress to endow itself with the capacity to take action.

D. CONGRESSIONAL CAPACITY

Overview

For Congress to change how it operates—whether through clearer language in bills, deeper understanding of judicial doctrines, or anything else—it needs the ability to do so. Congressional capacity refers to "personnel, financial resources, and expertise and information. Together, they provide the foundation necessary for Congress to carry out its varied responsibilities."[103] Recent trends in capacity may not have adequately positioned the institution to take full advantage of the opportunities we have identified in this report.

If Congress attempts to write clearer legislation, the burden will fall on staff, committees, and legislative counsel. If Congress is expected to exercise greater oversight of agencies after expressly delegating certain authorities, the responsibility will fall on committees. If Congress seeks more information and expertise to inform both the legislative process and oversight, it will need more from committees and support entities.

Question Presented

Does Congress have what it needs to fulfill its constitutional duties? Although it has made progress on congressional modernization, more work remains to be done.

The Working Group, drawing especially on the efforts of the Select Committee on the Modernization of Congress, looked at three dimensions of capacity most relevant to the issues discussed above: legislative process, committees, and support entities.

Legislative Process

Many different individuals and organizations help move a bill from conception to passage. Members of Congress, staff, and committees provide the initial impetus as well as subject matter expertise. Regulatory agencies provide technical assistance.[104] Outside interest groups—lobbyists, trade associations, and advocacy groups—offer comments and information. Legislative support entities—namely, the Congressional Research Service, Congressional Budget Office, and Government Accountability Office—provide essential information and explanation.[105] The House and Senate Offices of Legislative Counsel bear responsibility for turning policy ideas and goals into legislative text.

The burden of greater clarity and precision in legislative language—accompanied by a higher volume of information, as we recommend here—will fall across most of these groups, particularly the Offices of Legislative Counsel. These professional and nonpartisan offices play a critical role in turning policy ideas into legislative text.

Yet the human capacity involved in the legislative process within Congress has not kept pace with growing demand. Consider staffing trends across the congressional apparatus:

- **Congressional Staff**
  - Since 1990:
    - House: number of staff **fell 3%**.
    - Senate: number of staff **rose 17%**.[106]
  - The distribution of staff roles has changed, with more staff hired for communications and constituency service positions relative to substantive policy roles.
- **Committees**
  - Since 1990:
    - House: number of staff positions **fell 44%**.
    - Senate: number of staff positions **rose 2%**.[107]
  - Funding levels for committee staff have steadily fallen since the late 2000s.[108]
- **Offices of Legislative Counsel**
  - Between the 115th Congress (2017-2019) and the first session of the 118th Congress (2023-2024):
    - Average number of member requests to HOLC **rose 76%**.
    - Number of bills, amendments, resolutions drafted **rose 38%**.
    - Number of HOLC attorneys **rose 24%**.[109]
    - Average experience of HOLC attorneys **fell 23%**.[110]

Those numbers paint a mixed picture. The Senate has maintained its staffing capacity more steadily than the House. This raises the possibility that decisions such as *Loper Bright* could have a greater impact on one chamber than the other. Capacity has also declined in the areas discussed in this report and highlighted in our recommendations.

Congressional Committees

Congress, perhaps facilitated by *Chevron* deference, has broadly delegated authority over time to agencies to make rules and regulations. As the administrative state grew, Congress found itself needing to engage in more oversight of this regulatory activity. Lawmakers' time is not unlimited; more oversight by committees meant less time for legislation. At the same time, institutional changes in the House and Senate have centralized policymaking in leadership rather than through committees.[111]

The irony should be clear. Congress helped grow the size of the administrative state, leading its committees to spend more time on oversight. Now, with the Supreme Court signaling that Congress should revive its legislative muscle, the central entity by which Congress can do that—committees—lacks the capacity and even incentive to respond.

Committees are an essential component of congressional capacity and effectiveness: "Congress's agenda-setting capacity lies within its committee system, which acts as a specialized division of labor."[112] Committees serve as vehicles to examine problems, develop policy, and follow through in the form of oversight of the executive branch. Committees permit members of Congress to develop expertise and represent their constituents on issues important to them.

In addition to declines in staff and funding and a stronger orientation toward oversight, committees have lost their "primacy in the legislative process."[113] Committees were intended to be the principal means by which Congress gathered information from the outside world and turned it into legislation. Today, however, committees hear from fewer witnesses at hearings—in particular, fewer executive branch witnesses. Such "reduced information capacity" translates into "loss of policymaking capacity."[114]

Reforms that reempower committees' legislative role are central to any effort to increase capacity in Congress and take advantage of the opportunity presented by the Supreme Court rulings.

Legislative Support Entities

Congress has a bureaucracy. This bureaucracy exists to provide nonpartisan analysis, information, and evaluation.[115] It includes the Offices of Legislative Counsel and the Office of Law Revision Counsel, as discussed above. We focus here on CBO, CRS, and GAO, as they play key roles in providing information to Congress and analysis.

Even as Congress has reduced its capacity in some areas, these three entities have helped fill gaps as best they can, even as they faced adverse staffing trends. For example, in 1995, Congress defunded the Office of Technology Assessment (OTA), which had provided scientific and technological analyses. Calls to revive OTA have gone unheeded. Yet in 2019, GAO created a Science, Technology Assessment, and Analytics (STAA) department to provide Congress with analysis of science and technology issues. The STAA team has expanded since then and, by many accounts, has demonstrated its value to Congress.[116]

Similarly, even as fewer witnesses appear at committee hearings, members of Congress and their staff have not reduced their reliance on CRS for information.[117] Each year, CRS responds to tens of thousands of congressional requests and prepares thousands of new and updated products.[118]

As with legislative counsel, however, staffing at CBO, CRS, and GAO has generally not risen commensurately with demand. Staffing levels since 1990 at these three support entities:

- CBO: **Rose 19%**.
- CRS: **Fell 20%**.
- GAO: **Fell 33%**.

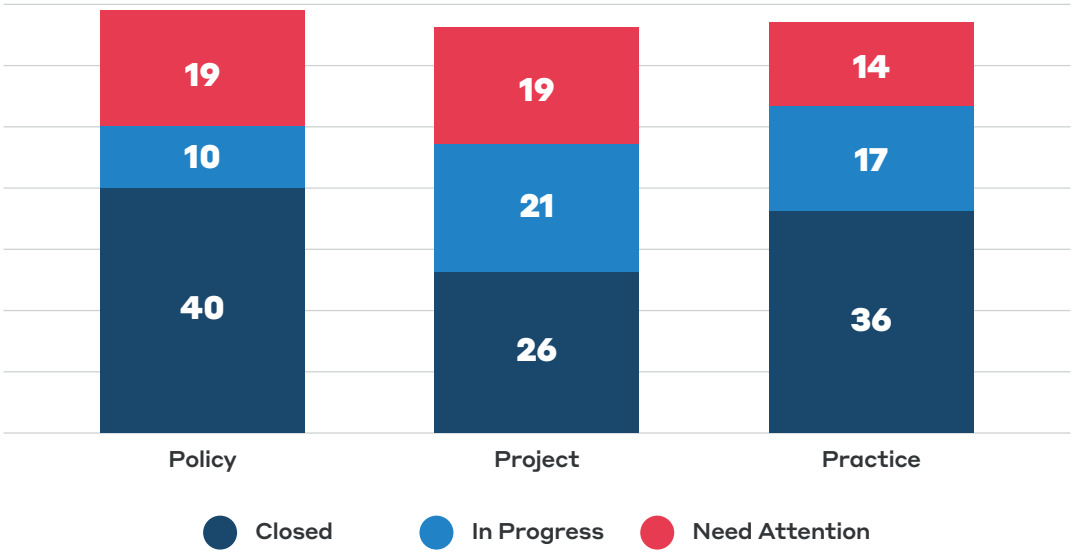
Adjusted for inflation, funding for these three entities has also fallen since the 1980s.[119]

We recommend that legislative support entities play a greater role in helping Congress navigate legal and constitutional issues in legislation. We also suggest enhancing the role that CRS and GAO already play in supporting Congress.

Modernizing Congress

Many of the Working Group's recommendations can fairly be characterized as falling under the banner of congressional modernization. Indeed, several ideas in this report are drawn from or inspired by the House Select Committee on the Modernization of Congress, which from 2019-2022 engaged in deep examination of the institution's operating modes. It sought ways to increase efficiency, effectiveness, and transparency in Congress. On a fully bipartisan and often unanimous basis, the Select Committee adopted over 200 recommendations to improve how Congress works. BPC supported the Select Committee's work and has tracked the progress of its recommendations.[120]

Figure 1: Recommendation implementation Status by Recommendation Type



As of January 28,2025. For live updates and methodology visit: https://bipartisanpolicy.org/modernizing-congress/

The Subcommittee on Modernization & Innovation has carried on the Select Committee's work. In December 2024, the subcommittee released a report on modernization efforts and next steps.[121] Relevant to this Working Group and some of our recommendations, the report included the following highlights:

- A study will be commissioned of the legislative drafting process "to identify pain points and propose potential solutions." The goals are to reduce drafting timelines, eliminate duplicative processes, and improve collaboration.
- Subcommittee members are working with CRS, CBO, and GAO to improve outreach to offices and the "customer experience" they provide members and staff.

One of the most intriguing instances of congressional modernization in recent years was the development and deployment of the Comparative Print Suite. This software tool allows comparisons of how proposed legislation or amendments would alter existing law. Beginning in 2017, the Office of the House Clerk, House Office of Legislative Counsel, and a contractor worked to develop the software. Fully rolled out in 2022, the Comparative Print Suite "is designed to display legislative changes in context by generating reports that illustrate changes in versions of a bill or how a bill would change current law."[122] Feedback from staff has been positive.[123] At the time of this writing, the tool is available to the House and is in early stages of Senate deployment. It is not available to the public.

It may sound obvious that Congress should know how its bills might change current law. Yet anyone who has reviewed a bill's draft and attempted to understand its effects knows this is not straightforward. Language such as, "in § U.S.C. XYZ, 'the' is changed to 'that'" might be plain, but its potential impact is not readily clear. In an environment where Congress operates in "unorthodox" ways, many members do not fully understand what they are voting on and have not had time to read the legislative text. Members of Congress recognize the need for change: Versions of the bipartisan Readable Legislation Act have been introduced five times over the past decade. The act would require draft legislation to display proposed changes in the context of existing law, a practice already in use by many state legislatures.

To the extent Congress will need to write clearer legislation, members, staff, and drafters will need greater insight into what their proposed changes, in bills and amendments, will actually mean. According to early indications, the Comparative Print Suite helps achieve this. Such clarity and insight will presumably be useful for Congress to understand how agencies might interpret its bills and where greater precision and clarity might be warranted.

Congress and Incentives

Discussion of congressional capacity elides a critical question: Are there any incentives for Congress to change how it operates, irrespective of what the Supreme Court might say?[124] Reams of political science literature have explored elected officials' behavior and motivations; fully discussing their findings is beyond the scope of this report. External incentives—such as elections and party pressures—exert powerful pressure on members of Congress. Still, we make three brief points.

First, *Loper Bright* will likely catalyze a good deal of lobbying and advocacy directed at Congress to clarify laws and provide guidance regarding interpretation. This could push Congress to act.

Second, President Trump has incorporated the major questions doctrine, the nondelegation doctrine, and *Loper Bright*'s "best" reading conclusion into a directive to regulatory agencies. If and when agencies identify rules that might run afoul of those, their decisions may spark congressional interest, questioning, and action.

Last, members of Congress take an intense interest in how agencies implement statutes. They seek agency input into draft legislation and engage in constant communication with agencies after bills become law. Agencies, in turn, depend on Congress for their existence, design, and funding: "An agency literally has no power to act … unless and until Congress confers power upon it."[125] To the extent the Supreme Court puts new pressures and constraints on agencies, Congress may have an incentive to act if those pressures and constraints interfere with its practical and constitutional authority regarding agencies.[126]

VII. Conclusion

In *Congress's Constitution*, Josh Chafetz reminds us that "in practice there almost never arise questions of *pure* constitutional politics. Rather, questions about the distribution of authority generally arise in the context of some dispute in the domain of normal politics."[127] Even the foundational case of judicial review, *Marbury v. Madison*, was politically situated, a function of a "normal" partisan dispute.

While the definition of "normal" can be debated, Chafetz's point is that many struggles over constitutional matters in American history are, one way or another, political contests rooted in contemporary issues.

During the Working Group's deliberations, from late 2024 into early 2025, new debates broke out in the United States about the separation of powers and the lines of authority between Congress and the executive branch. Congress can often seem backfooted in these debates because, as Margaret Spellings points out in her preface, congressional disapproval has become second nature to most Americans. Members may be reluctant to be seen in conflict with a more popular president. Some scholars have famously observed, too, that we have "separation of parties, not powers," making it difficult for Congress to assert itself as an institution depending on the political context.[128] After all, Congress "is a 'they,' not an 'it.' "[129]

These issues are not new. Congress has evolved as it passed through different periods of effectiveness and relative strength.[130] In the second half of the 19th century, Congress—especially the speaker of the House—was extraordinarily powerful relative to the executive branch. In the mid-20th century, Congress passed two Legislative Reorganization Acts making changes to committees and chamber rules. The Select Committee on Modernization pointed to eight different efforts between 1946 and 2018 to reform and modernize Congress.[131]

This does not mean that change is automatic—it takes years of work and political navigation to bring congressional reform to fruition. The Working Group's supposition is that moves by the Supreme Court—drawing lines around delegation, putting Congress on notice that there is only one "best" reading of statutes, eliminating a key legislative drafting tool (*Chevron* deference)—will serve as nudges to the next episode of reform.

We offer the ideas and recommendations in this report to address what we see as the most pressing areas of congressional attention today in terms of institutional health. Several members of the Working Group have worked on Capitol Hill in various capacities and have witnessed firsthand the issues our recommendations are meant to address. We recognize these ideas may not rise to the top of the congressional priority list and do not necessarily make for

catchy campaign rhetoric. Yet the history of Congress and its back and forth with executive branch agencies and courts—as well as the hard work of many people working to improve congressional functioning—give us confidence that another round of change will come. We hope our ideas add some value to that effort.

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49 *West Virginia v. Environmental Protection Agency*, 597 U.S. 697 (2022). Available at: https://www.supremecourt.gov/opinions/21pdf/597us2r65_5iel.pdf.

50 *Biden v. Missouri*, 595 U.S. 87 (2022). Available at: https://www.supremecourt.gov/opinions/21pdf/595us1r7_4315.pdf.

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74 The Supreme Court has also affirmed and reaffirmed the "longstanding recognition that interpretive rules do not have the force and effect of law." See *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92 (2015). Available at: https://supreme.justia.com/cases/federal/us/575/92/.

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80 Ibid., Coney Barrett.

81 Jesse M. Cross and Abbe R. Gluck, "The Congressional Bureaucracy," *University of Pennsylvania Law Review*, 168(6): 1541-1683, 2020. Available at: https://scholarship.law.upenn.edu/penn_law_review/vol168/iss6/3/.

82 John F. Manning, "Inside Congress's Mind," *Columbia Law Review*, 115(7): 1911, 1919, 2015. Available at: https://www.columbialawreview.org/content/inside-congresss-mind-2/.

83 *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Available at: https://supreme.justia.com/cases/federal/us/467/837/.

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85 *United States v. Mead Corp.*, 533 U.S. 218 (2001). Available at: https://tile.loc.gov/storage-services/service/ll/usrep/usrep533/usrep533218/usrep533218.pdf.

86 *Loper Bright Enterprises v. Raimondo* 603 U.S. 369 (2024). Available at: https://www.supremecourt.gov/opinions/23pdf/603us1r54_o7jp.pdf. See also Thomas W. Merrill, "The Demise of Deference—And the Rise of Delegation to Interpret?" *Harvard Law Review*, 138(1): 227, 2024. Available at: https://harvardlawreview.org/print/vol-138/the-demise-of-deference-and-the-rise-of-delegation-to-interpret/.

87 5 U.S.C. § 706. Available at: https://www.law.cornell.edu/uscode/text/5/706.

88 Isaiah McKinney, "The Many Heads of the *Chevron* Hydra: *Chevron*'s Revolutionary Evolution Between 1984 and 2023," *North Dakota Law Review*, 99(2): 253-326, 2024. Available at: https://law.und.edu/_files/docs/ndlr/pdf/issues/99/2/99ndlr253.pdf.

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90 *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 409 (2024). Available at: https://www.supremecourt.gov/opinions/23pdf/603us1r54_o7jp.pdf. See also Cary Coglianese, "Chevron's *Interstitial Steps*, *George Washington Law Review*, 85: 1339-1391, 2017. Available at: https://scholarship.law.upenn.edu/faculty_scholarship/1948/.

91 *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 410-411 (2024). Available at: https://www.supremecourt.gov/opinions/23pdf/603us1r54_o7jp.pdf.

92 Thomas W. Merrill, *The Chevron Doctrine: Its Rise and Fall, and the Future of the Administrative State* (Cambridge, MA: Harvard University Press, 2022).

93 Kristin E. Hickman, "Anticipating a New Modern *Skidmore* Standard," Minnesota Legal Studies Research Paper No. 24-37, SSRN, September 2024. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4941144.

94 Benjamin M. Barczewski, "*Loper Bright Enterprises v. Raimondo* and the Future of Agency Interpretations of Law," Congressional Research Service, R48320, December 31, 2024. Available at: https://www.congress.gov/crs-product/R48320.

95 *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Available at: https://tile.loc.gov/storage-services/service/ll/usrep/usrep323/usrep323134/usrep323134.pdf. See also Benjamin M. Barczewski, "*Loper Bright Enterprises v. Raimondo* and the Future of Agency Interpretations of Law," Congressional Research Service, R48320, December 31, 2024. Available at: https://www.congress.gov/crs-product/R48320. *Skidmore* was decided two years before adoption of the Administrative Procedure Act, which calls for courts to reject agency actions that are "arbitrary and capricious." In *Ohio v. EPA*, decided in June 2024, the Court found that EPA had not sufficiently taken public comments into account in its rulemaking process, undermining its approach and failing to meet APA requirements. 603 U.S. 279 (2024). Available at: https://www.supremecourt.gov/opinions/23pdf/603us1r52_d18f.pdf.

96 For example, one analysis of how *Skidmore* has been utilized by federal courts found two versions. One, the "independent judgment model," treats *Skidmore* factors as nothing warranting greater weight than any other factors courts might consider. This "effectively denies any deference to agencies." A second version, the "sliding-scale model," gives greater weight to the *Skidmore* factors. See Kristin E. Hickman and Matthew D. Krueger, "In Search of the Modern *Skidmore* Standard," *Columbia Law Review*, 107: 1235-1320, 2007. Available at: https://scholarship.law.umn.edu/faculty_articles/390/. Note that this study is 18 years old.

97 President Trump's February 2025 executive order also directed agencies to identify regulations that "are based on anything other than the best reading of the underlying statutory authority or prohibition." President Donald J. Trump, "Ensuring Lawful Governance and Implementing the President's 'Department of Government Efficiency' Deregulatory Initiative," February 19, 2025. Available at: https://www.whitehouse.gov/presidential-actions/2025/02/ensuring-lawful-governance-and-implementing-the-presidents-department-of-government-efficiency-regulatory-initiative/.

98 Kevin Kosar, "The Demise of *Chevron* Deference Invites Congress to Revamp its Role in Regulation," Statement Before the Committee on House Administration, July 23, 2024. Available at: https://docs.house.gov/meetings/HA/HA00/20240723/117531/HHRG-118-HA00-Wstate-KosarK-20240723.pdf; Satya Thallam, "Testimony on Congress in a Post-*Chevron* World," Statement Before the Committee on House Administration, July 23, 2024. Available at: https://docs.house.gov/meetings/HA/HA00/20240723/117531/HHRG-118-HA00-Wstate-ThallmanS-20240723.pdf.

99 See, e.g., Christopher J. Walker, "Federal Agencies in the Legislative Process: Technical Assistance in Statutory Drafting," Final Report to the Administrative Conference of the United States, November 2015. Available at: https://www.acus.gov/document/final-report-technical-assistance; Jonathan Lewallen, *Committees and the Decline of Lawmaking in Congress* (Ann Arbor: University of Michigan Press, 2020); Melinda Ritchie, *Backdoor Lawmaking: Evading Obstacles in the US Congress* (Oxford: Oxford University Press, 2023).

100 Abbe R. Gluck and Lisa Schultz Bressman, "Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons, Part I," *Stanford Law Review*, 65(5): 901-1025, 2013. Available at: https://www.stanfordlawreview.org/print/article/statutory-interpretation-from-the-inside-an-empirical-study-of-congressional-drafting-delegation-and-the-canons-part-i/. Given that this survey was fielded more than a dozen years ago—and since the Court stopped citing *Chevron* in 2016—it's possible that the results would be quite different today.

101 *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 400 (2024) (citing *Wisconsin Central Ltd. v. United States*, 585 U.S. 274 (2018). Available at: https://www.supremecourt.gov/opinions/23pdf/603us1r54_o7jp.pdf. In the years before *Loper Bright*, the Court was moving slowly in this direction. In some cases, it had engaged in the first *Chevron* step and used the tools of statutory construction to wipe away any ambiguity. Resulting decisions found either that an agency's action exceeded the statute or was required by the "correct" reading of the statute. See Daniel T. Deacon and Leah M. Litman, "The New Major Questions Doctrine," *Virginia Law Review*, 109: 1009, 1020, 2023. ("What's more striking is the frequency with which the Supreme Court in particular has found statutes to have only a single, unambiguous meaning in recent terms … the Court has held that the agency may only treat the statutory language in one particular way.") Available at: https://virginialawreview.org/articles/the-new-major-questions-doctrine/.

102 Benjamin M. Barczewski, "*Loper Bright Enterprises v. Raimondo* and the Future of Agency Interpretations of Law," Congressional Research Service, R48320, December 31, 2024. Available at: https://www.congress.gov/crs-product/R48320.

103 Molly E. Reynolds, "The Decline in *Congressional Capacity," in Congress Overwhelmed: The Decline in Congressional Capacity and Prospects for Reform*, eds. Timothy M. LaPira, Lee Drutman, and Kevin R. Kosar (Chicago: University of Chicago Press, 2020).

104 Christopher J. Walker, "Federal Agencies in the Legislative Process: Technical Assistance in Statutory Drafting," Final Report to the Administrative Conference of the United States, November 2015. Available at: https://www.acus.gov/document/final-report-technical-assistance. See also Melinda Ritchie, *Backdoor Lawmaking: Evading Obstacles in the US Congress* (Oxford: Oxford University Press, 2023), 79.

105 These are also known as legislative branch support agencies. We use the term "entities" here to avoid confusion with the use of "agency" throughout this report in reference to regulatory agencies.

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108 Molly E. Reynolds, "The Decline in Congressional Capacity," in *Congress Overwhelmed: The Decline in Congressional Capacity and Prospects for Reform*, eds. Timothy M. LaPira, Lee Drutman, and Kevin R. Kosar (Chicago: University of Chicago Press, 2020).

109 This increase reflects efforts to reverse what had been a downward trend.

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111 Jonathan Lewallen, *Committees and the Decline of Lawmaking in Congress* (Ann Arbor: University of Michigan Press, 2020); John D. Rackey and Lauren C. Bell, "Government by Committee: (Re)centering Congressional Committees in the Policy Process," prepared for "Congress after *Chevron*: Legislative Responses to Changing Deference Doctrines," Foundation for American Innovation and C. Boyden Gray Center, November 2024. Available at: https://www.thefai.org/posts/government-by-committee-re-centering-congressional-committees-in-the-policy-process.

112 Jonathan Lewallen, *Committees and the Decline of Lawmaking in Congress* (Ann Arbor: University of Michigan Press, 2020).

113 John D. Rackey and Lauren C. Bell, "Government by Committee: (Re)centering Congressional Committees in the Policy Process," prepared for "Congress after *Chevron*: Legislative Responses to Changing Deference Doctrines," Foundation for American Innovation and C. Boyden Gray Center, November 2024. Available at: https://www.thefai.org/posts/government-by-committee-re-centering-congressional-committees-in-the-policy-process.

114 Ibid.

115 Jesse M. Cross and Abbe R. Gluck, "The Congressional Bureaucracy," *University of Pennsylvania Law Review*, 168(6): 1541-1683, 2020. Available at: https://scholarship.law.upenn.edu/penn_law_review/vol168/iss6/3/.

116 Maya Kornberg, "Creating a Science and Technology Hub in Congress," Federation of American Scientists, December 16, 2024. Available at: https://fas.org/publication/creating-a-science-and-technology-hub-in-congress/. Kornberg cites *Loper Bright* as creating "a new sense of urgency" around the need for additional science and technology support for Congress.

117 E. J. Fagan and Zachary A. McGee, "Problem Solving and the Demand for Expert Information in Congress," *Legislative Studies Quarterly*, 47(1): 53-77, 2022). Available at: https://onlinelibrary.wiley.com/doi/abs/10.1111/lsq.12323.

118 Robert Randolph Newlen, Statement Before the Subcommittee on Legislative Branch Appropriations," Budget Hearing—Fiscal Year 2025 Request for the United States House of Representatives, Committee on Appropriations, April 16, 2024. Available at: https://docs.house.gov/meetings/AP/AP24/20240416/117120/HHRG-118-AP24-Wstate-NewlenR-20240416.pdf.

119 Kevin Kosar, "Staffing Congress to Strengthen Oversight of the Administrative State," Policy Brief 24-01, C. Boyden Gray Center for the Study of the Administrative State, March 2024. Available at: https://administrativestate.gmu.edu/wp-content/uploads/2024/03/PB24_01-Kosar-.pdf. Kevin R. Kosar, "Legislative Branch Support Agencies: What They Are, What They Do, and Their Uneasy Position in Our System of Government," in *Congress Overwhelmed: The Decline in Congressional Capacity and Prospects for Reform*, eds. Timothy M. LaPira, Lee Drutman, and Kevin R. Kosar (Chicago: University of Chicago Press, 2020).

120 J. D. Rackey, "Modernizing Congress: A New Era for Institutional Capacity Building," Bipartisan Policy Center, January 29, 2025. Available at: https://bipartisanpolicy.org/blog/modernizing-congress-a-new-era-for-institutional-capacity-building/.

121 *Modernization Efforts in the House of Representatives*, A Subcommittee on Modernization Report for the 118th Congress, Committee on House Administration, December 2024. Available at: https://www.govinfo.gov/content/pkg/CPRT-118HPRT57715/pdf/CPRT-118HPRT57715.pdf.

122 POPVOX Foundation, "The Comparative Print Suite," February 2024. Available at: https://www.popvox.org/legitech/comparative-print-suite.

123 Kevin F. McCumber, Letter to the Committee on House Administration, April 2024. Available at: https://cha.house.gov/_cache/files/b/5/b5f74525-7067-4ace-9574-6c9dc4941871/6634771634381FAFEB43146DAE896B9A.clerk-qr13-comparative-print.pdf.

124 We're grateful to two of our external reviewers, James Goodwin and Kevin Kosar, for highlighting this issue.

125 *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 374 (1986). Available at: https://supreme.justia.com/cases/federal/us/476/355/. See also Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.") Available at: https://supreme.justia.com/cases/federal/us/488/204/.

126 From one perspective, too, a possible outcome of *Loper Bright* and other cases is a shift in authority and influence over agencies to courts.

127 Josh Chafetz, *Congress's Constitution: Legislative Authority and the Separation of Powers* (New Haven, CT: Yale University Press, 2017), 16; emphasis is in the original.

128 Daryl J. Levinson and Richard H. Pildes, "Separation of Parties, Not Powers," *Harvard Law Review* 119(8): 2311-2386, 2006. Available at: https://www.jstor.org/stable/4093509.

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130 Philip A. Wallach, *Why Congress* (Oxford: Oxford University Press, 2023).

131 Select Committee on the Modernization of Congress, Final Report for the 116th Congress, October 2020. Available at: https://webharvest.gov/congress117th/20221224173400/https://modernizecongress.house.gov/final-report-116th.

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