Written Statement

Jonathan Turley,
Shapiro Professor of Public Interest Law
The George Washington University Law School

"*The Administrative State: An Examination of Federal Rulemaking*"

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I. INTRODUCTION

Chairman Johnson, Ranking Member Carper, and members of the Committee, my name is Jonathan Turley and I am a law professor at George Washington University where I hold the J.B. and Maurice C. Shapiro Chair of Public Interest Law. It is an honor to appear before you today to discuss the rise of the Administrative State within the American constitutional system.

I have long written about the rise of a "fourth branch" in our system and, while academics have good-faith disagreements over the implications of this trend, I believe that this rise of an Administrative State is neither benign nor inevitable. By dismissing the rising power of federal agencies as irreversible and inevitable, many academics portray the changes in our constitutional system as a *fait accompli*—a reality as fixed as the weather in our system. Conversely, critics are often portrayed as quixotic figures tilting at the windmills of federal agencies. There is a false association with the natural growth of the size of government and the emergence of an Administrative State. Clearly, the government has necessarily grown with the increasing size of our population and governmental function. That does not mean, however, that federal agencies must inevitably possess the type of insulated, independent power that they wield today. No one is seriously questioning the need for federal agencies and no one should deny the myriad of important and beneficial actions that agencies take in supporting our security, public health, economy, and environment. Citing the need for federal agencies therefore is hardly an answer to the criticism of the Administrative State—no more than recognizing the need for banks is an answer to a criticism of banking abuses. The fundamental issue raised in hearings like this is how to maintain a large system of federal agencies and offices, without altering the foundation of our constitutional system—particularly our system of separation of powers.

The unavoidable fact is that our system is changing in a fundamental way without a serious debate over the shifting of the center of governmental authority from the legislative process to an administrative process.[1] Indeed, the term "rulemaking" is

[1] This growth of agency power and independence is occurring at a time of greater unilateral executive power. The rise of the Administrative State combined with both the

something of a misnomer in suggesting that agencies create rules that simply implement the mandates set by the legislative and executive branches. These rules have every characteristic of legislation, indeed frequently involving sweeping changes that impact large parts of our economy.[2] As Chief Justice John Roberts noted recently, rulemaking is in all practical respects an exercise of legislative rather than executive powers.[3] While the Court continues to maintain that Congress cannot delegate legislative powers to agencies, the rhetoric behind decisions like *Whitman v. American Trucking Assn.* is difficult to square with reality.[4] Rulemaking has become a virtual euphemism for agency legislation: the substitution of the Administrative Procedure Act (APA) for the constitutional legislative process. That shift has taken a system designed to guarantee an open process of representative democracy and removed it to an opaque process of administrative decision-making. While some academics may believe that modern government demands the type of ministry system found in Europe, the APA was never intended to be the framework for a new bureaucratic government to replace representative democratic government. The APA was not created to achieve the transformative political process embodied in the tripartite system. Likewise, the Framers did not create a carefully balanced tripartite system with the understanding that the system could be made discretionary with the emergence of an agency alternative to resolve social, political, and economic questions. Most importantly, the public has been given little voice in the emergence of the Administrative State. They are little more than the subject—rather than the source—of the power exercised by federal agencies. My fear is that while there is still time to reverse this trend, we are fast approaching the constitutional fail-safe line where the Administrative State will become a fixed and unassailable reality of American government.

What is fascinating to me is how the rise of the Administrative State has secured what the Framers sought to deny—a new type of "royal prerogative." The Framers divided the powers of government against the backdrop of over 150 years of tension with the English monarchy.[5] They were specifically aware of the circumvention of the legislative and judicial branches by sovereigns like James I. The King insisted that the enactment of laws was merely the starting point of legislation and that he himself—not just legislators or judges—played a critical role in perfecting laws. He insisted that "I

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rise of an "uber presidency" and the decline of congressional power is a perfect storm for our constitutional system. *See generally* Jonathan Turley, *A Fox in the Hedges: Vermeule's Vision of Optimized Constitutionalism in a Suboptimal World*, 82 U. CHI. L. REV. 517 (2015).

[2] *See* Gary Lawson, Federal Administrative Law, (6th ed. 2013) ("When an agency engages in rulemaking, it does something that looks very much like a legislature passing a law.").

[3] *City of Arlington v. FCC,* 133 S. Ct. 1863, 1877 (2013) (Roberts, C.J., dissenting) ("as a practical matter . . . exercise legislative power, by promulgating regulations with the force of law.").

[4] 531 U.S. 457, 487-90 (2001).

[5] *See* Julius Goebel, Jr., *Ex Parte Clio*, 54 COLUM. L. REV. 450, 474 (1954); David Gray Adler, *The Steel Seizure Case And Inherent Presidential Power*, 19 CONST. COMMENT. 155, 164 (2002).

thought law was founded upon reason, and I and others have reason as well as the judges."[6] That was precisely the view rejected by the Framers. Thomas Jefferson wrote in 1783 with regard to the Virginia Constitution that "[b]y Executive powers, we mean no reference to the powers exercised under our former government by the Crown as of its prerogative . . . We give them these powers only, which are necessary to execute the laws (and administer the government)."[7] Likewise, James Wilson defended the model of an American president by assuring his colleagues that he "did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature."[8] While the Framers opposed this role in crafting the first three articles of the Constitution, a type of "agency prerogative" has arisen within the system that is founded on the very same premise articulated by James I. As with the use of unilateral executive power, agency decisions now claim to further the legislative process through administrative reasoning. Legislation is treated as merely the starting point of legislation with agencies "perfecting" the law through rulemaking. This prerogative is protected from meaningful judicial review by the *Chevron* doctrine and the administrative procedural system. In the last few years, we have seen such agency actions achieving the very legislative changes that the Administration failed to secure in Congress. Where the denial of such legislation was once considered the end of the matter, a failure in Congress is now treated as a prelude to seeking the same results by the alternative means of agency action. When signed by a president, congressional enactments were meant to be the completion, not the initiation, of the process of legislation.

Congress still possesses the authority to reclaim its defining role over the legislative process. As discussed below, Congress can move to counter claims of delegated authority and even limit the degree of deference afforded agency decision-making. If Congress is to rebalance the system, however, it will need to enhance its staff and enlist the public in checking agency authority. This does not mean the end of rulemaking or the elimination of federal agencies. Likewise, no one is suggesting the micromanagement of federal agencies, but rather the placement of checks on agencies to guarantee that the term "Administrative State" remains a warning rather than a reality in our system.

II. THE RISE OF A FOURTH BRANCH IN A TRIPARTITE SYSTEM.

I have previously written[9] and testified[10] about the rise of the Fourth Branch and

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[6] 7 Sir Edward Coke, Reports 65, quoted in ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 61 (1921).

[7] This quote is from Jefferson's Draft of a Fundamental Constitution for Virginia. Adler, *supra* note 5, at 164 (citing CHARLES WARREN, THE MAKING OF THE CONSTITUTION 177 (Harvard U. Press, 1947)).

[8] THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 62-70 (Max Farrand, ed 1911); Adler, *supra* note 5, at 165.

[9] *See, e.g.*, Jonathan Turley, *Madisonian Tectonics: How Form Follows Function in Constitutional and Architectural Interpretation*, 83 GEO. WASH. L. REV. 305 (2015); Jonathan Turley, *A Fox in the Hedges: Vermeule's Vision of Optimized Constitutionalism*

the growing imbalance in our governmental system. The American governmental system has obviously changed dramatically since the founding, when the vast majority of governmental decisions rested with state governments. In 1790, the federal government was smaller than most modern city governments, employing only about one thousand nonmilitary workers. By 1962, that number had grown to 2,515,000 federal employees. Notably the first regulatory federal agency, the Interstate Commerce Commission, was not established until 1887.[11] The rise of the Administrative State is generally traced to the New Deal; though its roots preceded the Great Depression, there was a clear shift in the view of government. Before the New Deal, the government was often viewed as a necessary evil: a centralized system that overcame the problems of the Articles of Confederation, but that also remained an ever-present threat to individual liberty. With the onset of the Great Depression, the government was seen as the transformative institution to rescue the public from economic and public health threats. The academic literature also shifted during this period. Frankly, academics have a certain affinity for agency experts who share educational backgrounds as well as a common commitment to public policy. Conversely, there is little identification with Congress, which academics

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in a Suboptimal World, 82 U. CHI. L. REV. 517 (2015); Jonathan Turley, *Recess Appointments in the Age of Regulation*, 93 B.U. L. REV. 1523 (2013); Jonathan Turley, *The Rise of the Fourth Branch of Government*, WASH. POST (May 24, 2013); *see also* Jonathan Turley, *Constitutional Adverse Possession: Recess Appointments and the Role of Historical Practice in Constitutional Interpretation*, 2013 WIS. L. REV. 965 (2013) (discussing the separation of powers consequences in the reduction of legislative authority).

[10] *See* "*The Chevron Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies*," United States House of Representatives, House Judiciary Committee, Regulatory Reform, Commercial and Antitrust Law, March 15, 2016; *Authorization to Initiate Litigation for Actions by the President Inconsistent with His Duties Under the Constitution of the United States: Hearing Before the H. Comm. on Rules*, 113th Cong. (2014) (prepared statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School), http://docs.house.gov/meetings/RU/RU00/20140716/102507/HMTG-113-RU00-Wstate-TurleyJ-20140716.pdf; *Enforcing The President's Constitutional Duty to Faithfully Execute the Laws: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 30–47 (2014) (testimony and prepared statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School) (discussing nonenforcement issues and the rise of the Fourth Branch); *Executive Overreach: The President's Unprecedented "Recess" Appointments: Hearing Before the H. Comm. on the Judiciary*, 112th Cong. 35–57 (2012) (prepared statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School); *see also Confirmation Hearing for Attorney General Nominee Loretta Lynch: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2015) (prepared statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School) (discussing the loss of legislative power and the role of confirmation hearings to address separation of powers issues).

[11] Interstate Commerce Act, ch. 104, 24 Stat. 445 (1887).

view as turning on persuasion rather than proof. Not surprisingly, academic work tends to view agencies as public policy experts equipped to deal with complex issues while dismissing Congress as a body with transient interests and limited expertise in given fields.

The New Deal brought young reformers to Washington with advanced degrees and unlimited optimism for the prospect that massive social problems could be eradicated through government intervention. In many areas, they were largely successful in correcting hazards in the workplace, cleaning up the environment, fighting poverty, and improving education. The role of federal agencies, however, began to change as Congress yielded more and more of its authority to agency decision-making, while courts removed themselves from meaningful review through the adoption of the *Chevron* doctrine and other rulings. The greatest barrier to this shift was the Separation of Powers doctrine. When Franklin Roosevelt proclaimed, "The day of enlightened administration has come,"[12] it represented the end of the day for the traditional or formalist view of the Separation of Powers. It was not simply the creation and expansion of federal agencies, but rather their increasingly *independent* role. Agencies sought "enlightened" approaches to social problems based on scientific and policy expertise while Congress was increasingly viewed as uninformed, untrained, and unreliable in dealing with such issues with any degree of specificity. Strangely, it was a view that many in Congress seemed to accept or at least yield to over the course of time.

As the scope and complexity of federal programs increased, Congress relinquished more and more authority over those programs. As discussed below, this trend led to the virtual evisceration of the "nondelegation doctrine"—the constitutional requirement that Congress cannot delegate its legislative authority to federal agencies. Active congressional control over agency actions became viewed as virtually anachronistic in the "Age of Regulation." Federal agencies—and many in the public and academia—viewed Congress as a choke point. Given the size of the federal government, the relatively small staff of Congress could do little to monitor, let alone direct, federal agencies. We now have roughly 2,840,000 federal workers in 15 departments, 69 agencies, and 383 nonmilitary sub-agencies.[13] This does not count the millions of contractors and subcontractors working for the government. These federal offices and workers largely follow rules that arose organically within the agency. The agencies now have the elements of microcosmic government systems in and of themselves. They even hold town halls to measure public sentiment and explain their actions to citizens. Thus,

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[12] Franklin D. Roosevelt, Campaign Address on Progressive Government at the Commonwealth Club, San Francisco, Cal. (Sept. 23, 1932), in 1 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, THE GENESIS OF THE NEW DEAL, 1928-32, at 752 (1938).

[13] Turley, *Recess Appointments in the Age of Regulation*, *supra* note 9, at 1533; WALTER E. VOLKOMER, AMERICAN GOVERNMENT 231 (11th ed. 2006) (citing Bruce D. Porter, *Parkinson's Law Revisited: War and the Growth of American Government*, 60 PUB. INT. 50, 50 (1980)). In 1816, the federal system employed 4,837 employees. Deanna Malatesta, *Evolution of the Federal Bureaucracy*, *in* 1 A HISTORY OF THE U.S. POLITICAL SYSTEM: IDEAS, INTERESTS, AND INSTITUTIONS 373, 380 tbl.1 (Richard A. Harris & Daniel J. Tichenor eds., 2010).

the term "fourth branch" itself may itself be something of a misnomer. The agencies do not truly operate in concert. Rather they represent insular and largely self-contained government systems—much like administrative versions of feudal estates. There is no true center to the current system with its thousands of independently moving parts and agendas. White the White House clearly can dictate changes or priorities (as it recently did in areas like health care and immigration), most rulemaking changes arise organically within these agencies. Absent a relatively rare intervention from Congress, these changes are largely crafted, debated, and promulgated within agency systems.

III. AGENCY LEGISLATION AND THE ADMINISTRATIVE STATE

The growth in the size of the federal government resulted in a shift in the center of gravity for the system as a whole. Massive federal agencies now promulgate regulations, adjudicate disputes, and apply rules in a system that affords relatively little transparency or accountability to the public. While subject to congressional review in theory, the reality is that Congress has relatively few staff members and little time for such reviews. As a result, it is the Administrative State, not Congress, that now functions as the dominant "law giver" in our system. The vast majority of "laws" governing the United States are not passed by Congress but are issued as regulations, crafted largely by thousands of unseen bureaucrats. For example, in 2007, Congress enacted 138 public laws, while federal agencies finalized 2,926 rules, including 61 major regulations.[14] Agencies now adjudicate most of the legal disputes in the federal system. A citizen is ten times more likely to be tried by an agency than by an actual court. In a given year, federal judges conduct roughly 95,000 adjudicatory proceedings, including trials, while federal agencies complete more than 939,000. This is not to imply that such regulations and adjudications are inherently tyrannical or that Congress has no influence over agencies. Rather, it states the obvious: this system is adopting new pathways and power centers that were never anticipated in the design of our system.

The nondelegation doctrine is based on the notion that our carefully balanced system of government cannot fully function if the legislative process left to Congress in the vesting clause (including such guarantees as presentment and bicameralism) can simply be circumvented. U.S. Const. art. I, §1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . ."). While the Supreme Court has long reaffirmed the need for Congress to exercise such powers, it created a fluid test that allowed agencies to "fill up the details" left by legislation in the execution of laws.[15] The Court allowed delegation of rulemaking powers if there is an "intelligible principle"[16]: a standard that has proven perfectly unintelligible in allowing any statutory reference—short of utter silence[17]—to suffice for delegation. This reality was expressly

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[14] Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 936 (2009).

[15] *United States v. Shreveport Grain & Elevator Co*., 287 U.S. 77, 85 (1932).

[16] *Loving v. United States*, 517 U.S. 748, 772 (1996).

[17] *Yakus v. United States*, 321 U.S. 414, 426 (1944) ("Only if ... there is an absence of standards ... would we be justified in overriding [the congressional] choice of means for effecting its declared purpose.").

acknowledged in the Court's decision in *Whitman v. American Trucking Ass'ns*.[18] In that case, the Court noted "we have found the requisite 'intelligible principle' lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" Thus, in *Yakus*, the Court upheld the Emergency Price Control Act (EPCA) when Congress gave to the Office of Price Administration (OPA) the power to set commodity prices that "in his judgment will be generally fair and equitable and will effectuate the purposes of the Act."[19] The Court had flipped the presumption and embraced the idea that Congress could pick the path of least resistance in yielding core legislative responsibilities to bureaucrats. The Court held that Congress "is free to avoid the rigidity of such a system, which might well result in serious hardship, and to choose instead the flexibility attainable by the use of less restrictive standards."[20] That "flexibility" is often driven more by political than policy realities. Given the opportunity to pass highly generalized (indeed even aspirational) bills, Congress can often avoid tough calls and decisions by passing the more difficult substantive policy decisions off to federal agencies. This is precisely what the Framers had sought to avoid in forcing policy disagreements into the legislative process. The transfer of power is more than transferring these problems to bureaucrats; robs the system of its essential role in forcing majoritarian compromise.

Madison believed that the separation of powers, as a structure, could defeat the natural tendency to aggrandize power that tended toward tyranny and oppression. In Madison's view, "the interior structure of the government"[21] distributed the pressures and destabilizing elements of nature in the form of factions[22] and unjust concentration of power.[23] He envisioned what he described as a "compound" rather than a "single" structure republic and suggested it was superior because it could bear the pressures of a large pluralistic state. Alexander Hamilton spoke in the same terms, noting that the superstructure of a tripartite system allowed for the "distribution of power into distinct departments" and for the republican government to function in a stable and optimal fashion.[24]

The structure of this system represents more than just the rigid lines defining inter-branch powers. The structure is meant to transform factional interests into majoritarian compromises. I have previously written about what I call a "conarchitectural" approach

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[18] Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 474 (2001) (citing *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)).

[19] *Id*. at 420.

[20] *Id*. at 425-26.

[21] THE FEDERALIST NO. 51, at 320 (James Madison).

[22] *See* THE FEDERALIST NO. 10, at 79 (James Madison) (noting that the "causes of faction" are "sown in the nature of man.").

[23] *See* THE FEDERALIST NO. 51, *supra* note 21, at 320 (James Madison); *see also* Douglass Adair, *"That Politics May Be Reduced to a Science": David Hume, James Madison, and the Tenth Federalist*, 20 HUNTINGTON LIBR. Q. 343, 348–57 (1957).

[24] THE FEDERALIST NO. 9, at 72 (Alexander Hamilton).

to constitutional interpretation and understanding the separation of powers.[25] In architecture, the concept of structure has been developed to a far greater extent than in the law, despite our long-standing debate of form and functionalism. It is well understood that structure does not just protect those within but also directs their interrelationships. As Winston Churchill once said, "[t]here is no doubt whatever about the influence of architecture and structure upon human character and action. We make our buildings and afterwards they make us."[26] The design of the structure both reflects and directs the action within it. In both architectural and constitutional theory, form follows function. The separation of powers forces a greater array of participating actors, and therefore interests, to be considered in the shaping of laws. A conarchitectural approach treats the structure itself as the expression of the Framers' vision of human nature and the optimal space for political deliberations.[27]

As in architecture, constitutional structure plays a determinist role in shaping perspective and choice. The structural lines and spaces created by the Framers are best seen as a recognition of the need to frame not just the inherent powers but the perception of power within a system. By structuring political decision-making, constitutional structure funnels both the decision-making and political dialogue along particular pathways. The confines of the tripartite system serve much of the same function as "choice architecture" in funneling political energies and actions. By maintaining separation, the Framers likely sought to achieve stability even within the dynamic and divisive political environment. The guarantees of separation ideally discouraged dysfunctional choices that Congress or a President might make in an effort to circumvent one another or "go it alone" through unilateral action.[28] The structure was not only shaped by human realities, but would, in turn, even help shape those realities. The limitations on executive, legislative, and judicial powers were meant to limit the horizons of power; to influence the range of choices and expectations within the system. When viewed from this perspective, the rise of a system of federal agencies within the constitutional structure changed how those within it interact and react. The tripartite design of the Madisonian system is carefully calculated to resolve divisions in a pluralistic society.

Social and political divisions were never meant to be resolved through an array of federal agencies, which are insulated from the type of public participation and pressures that apply to the legislative branch. A recent example is the intervention of a small federal office to force a result in the long-simmering public debate over the name of the

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[25] *See, e.g.*, Turley, *Madisonian Tectonics*, *supra* note 9; Jonathan Turley, *A Fox in the Hedges*, *supra* note 9.

[26] Paul Goldberger, *Why Architecture Matters* 1 (Yale 2009) (quoting Churchill's address to the English Architectural Association in 1924).

[27] This notion of constitutional structure can present classic "soft variable" issues for theories incorporating economic or risk elements into the analysis. *See generally* Turley, *A Fox in the Hedges*, *supra* note 9.

[28] The controversy over the nonenforcement of federal law is a direct result of "bad choices" made in the absence of clear lines of separation as I have previously discussed before Congress. *See* Duty to Faithfully Execute Hearing, *supra* note 10, at 113–63; *see also* Jonathan Turley, *The President's Power Grab*, L.A. TIMES, Mar. 9, 2014, at A28.

Washington Redskins football team.[29] The Trademark Trial and Appeal Board voted to rescind federal trademark protections for the Redskins—a decision that could ultimately decide the controversy over the 80-year-old name. There are perfectly good reasons to be offended by this name, but the public remains deeply divided. Social and market pressures may still result in a name change but it should not come by some administrative edict of the little-known administrative body of a little-known board. The problem is that the board had at its disposal a ridiculously ambiguous standard which allows the denial of a trademark if it "may disparage" a "substantial composite" of a group at the time the trademark is registered. Congress should have addressed that ill-defined standard years ago, but the overreach of the board was breathtaking. We have seen other examples of agencies intervening in political or social controversies in ways that undermine the legislative process as the means for resolving such conflicts, as I have previously discussed.[30]

While the future of the Redskins name is hardly a threat to our system of government, the circumvention of political process in such controversies is such a theat. We are gravitating toward the de facto creation of an English ministry system. Academics often treat the rise (and dominance) of the Administrative State as an inevitability and, accordingly, view those of us who cling to the Madisonian model as hopelessly naïve and nostalgic. Until the American people decide to adopt a bureaucracy or technocracy as the principle form of government, however, Congress has a duty to act to preserve the essential components of our tripartite system. To do that, it must first deal with *Chevron*.

III. RESTORING THE TRIPARTITE SYSTEM THROUGH THE RECLAMATION OF LEGISLATIVE AUTHORITY.

What is particularly striking is how many academics treat the Administrative State as now an obvious and irreversible part of our constitutional system. Indeed, when I recently testified on the *Chevron* doctrine, I was struck by the critique of one of my colleagues of changes to the deference afforded to agencies as inimical to the Administrative State. It now seems that the Administrative State is so part of our governing system that it must be sustained like a symbiotic growth that is now essential to sustain the life of the host. While it is true that we practically cannot function without agencies, it is also true that agencies can function without sweeping deference or delegation. Yet, our system is fast approaching a point where this shift will become irreversible. Legislative authority is at its lowest point in the history of our Republic. If agencies are allowed to continue to solidify governing authority, our system will gradually lose any real functional meaning as a representative democracy (as opposed to a government run by EU-like directorates or ministries). This may be (in the view of some academics) a better system, but it is not the system that citizens of this country accepted and any departure from that original model should be left to the citizens who will have to live under the new model.

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[29] Jonathan Turley, *Another Federal Agency Goes Outside of Bounds Over Redskins Name*, WASH. POST (Sunday), June 22, 2014.

[30] Jonathan Turley, *Politics by Other Means,* USA TODAY, July 8, 2014.

A. *Returning To The Pre-Chevron Model Of The APA*.

The good news is that the Administrative State is a creation—by both congressional action and acquiescence—of Congress. What Congress created, Congress can remake. As the Supreme Court has made clear, "Agencies are creatures of Congress; 'an agency literally has no power to act . . . unless and until Congress confers power upon it.'"[31] Accordingly, this is an area where Congress can have a direct and pronounced impact. The question is not the authority but the desire of Congress to reassert its authority over agencies. Indeed, had Congress remained faithful to the original vision of the Administrative system (and had courts not removed themselves from this area through cases like *Chevron*), we would not be witnessing this unprecedented shift of governing authority to agencies. Congress expressly created a system of review to constrain agency abuses. Section 706(2) of the Administrative Procedure Act (APA) states that courts shall:

> hold unlawful and set aside agency action, findings, and conclusions found to be –
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity;
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> (D) without observance of procedure required by law . . . .

The statutory duty to decide whether an agency action is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" reflects a traditional judicial review standard. There is no license for yielding a substantial part of that duty to agencies as presumptively correct interpreters of the law. In the APA, Congress specifically instructed courts to decide "all relevant questions of law."[32] When read in combination with the APA, *Chevron* reads as much a delegation of judicial function as legislative function.

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.[33] addressed the question of how the Environmental Protection Agency (EPA) could treat "non-attainment" states that had failed to attain the air quality standards under the Clean Air Act. The Reagan Administration had liberalized preexisting rules requiring a permit for new or modified major stationary sources. The Natural Resources Defense Council challenged the EPA regulation and prevailed in court. With three justices not participating in the decision, the court voted 6-0 to reverse and order deference to the EPA's interpretation.[34]

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[31] *City of Arlington, 133 S. Ct. at 1880 (quoting Louisiana Pub. Serv. Comm'n v. FCC*, 476 U. S. 355, 374 (1986)).

[32] 5 U.S.C. § 706 (2016).

[33] *Chevron*, 467 U.S. 837 (1984).

[34] Chief Justice Rehnquist, Justice Thurgood Marshall, and Justice Sandra Day O'Connor recused themselves from the case.

The *Chevron* decision proved to be something of a Trojan horse doctrine that arrived in a benign form but soon took on a more aggressive, if not menacing, character for those concerned about the separation of powers. On its face, the doctrine is unremarkable and even commendable in a Court seeking to limit the ability of unelected judges to make arguably political decisions over governmental policy. As noted by Chief Justice John Roberts, "*Chevron* importantly guards against the Judiciary arrogating to itself policymaking properly left, under the separation of powers, to the Executive."[35] *Chevron* put forward a simple test for courts in first looking at whether the underlying statute clearly answers the question and, if not, whether the agency's decision is "permissible" or reasonable.[36] That highly permissive standard shifted the center of gravity of statutory interpretation from the courts to the agencies, contrary to the language of the APA. With sweeping deferential language, the Court practically insulated agencies from meaningful review. In a system based on checks and balances, the Court helped create an internal system that would flourish under a protective layer of agency deference. To be sure, the Court has repeatedly recognized the right of Congress to check federal agencies. In practice, however, *Chevron* has proven a windfall for agencies, advancing their priorities and policies in the execution of federal laws. It is the administrative equivalent of *Marbury v. Madison*. Rather than declaring courts as the final arbiter of what the law means in *Marbury*, *Chevron* practically resulted in the same thing for agencies, giving them the effective final word over most administrative matters. Even though Congress can override agency decisions, it is unrealistic to expect millions of insular corrections to be ordered over agencies decisions.

Before *Chevron*, there was not a period of utter confusion and judicial tyranny in the review of agency decisions. Courts simply applied traditional interpretive approaches that looked at whether there was an ambiguity or gap in a statute as opposed to clarity on a given question. If so, it then reviewed the agency decision to determine whether it was legal and proper. This analysis was later developed further by the decision in *Skidmore v. Swift & Co.*, where the Court articulated factors used to decide whether to overturn the particular agency's determinations.[37] Notably, without granting sweeping deference, the Court in *Skidmore* already recognized that agency determinations would carry weight, just not controlling weight:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Id. Justice Jackson referred to a historical treatment of agency interpretations with due

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35 *City of Arlington v. FCC*, 133 S. Ct. 1863, 1886 (2013) (Roberts, C.J., dissenting).

36 *Chevron,* 467 U.S. at 842-43.

37 *Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944).

"respect" and "considerable weight." *Id*. at 140. Thus, the courts did not have a hostile or counter-agency position in such cases, but a fairly accommodating standard. Courts in the United States also have a well-understood and respected tradition of avoiding political questions and limiting judicial discretion. *Chevron* could have resulted in the very same way under this prior case law, but the Court instead created a new deferential standard that proceeded to expand as soon as the Court gave it breath.

After decades of neglect during which the Court remained relatively passive in the face of the rising dominance of agencies in our system, the Court began to seek incremental limitations on the authority of agencies. While Justice Scalia called *Skidmore* "an anachronism"[38] the Court would rediscover the value of more serious judicial review in other cases. For example, in *Christensen v. Harris County*,[39] the Court suggested that the prior standard in *Skidmore* would apply to less formal agency decisions as opposed to those agency documents that carry "force of law." Justice Clarence Thomas drew a distinction of when an agency interprets a statute in a decision that has "the force of law" from more rudimentary decision. As noted by Professor Thomas Merrill,[40] Thomas' proposal tracked a recommendation by the Administrative Conference of the United States.[41] Thomas described the former category as including "formal adjudication or notice-and-comment rulemaking."[42] Thus, because this case involved a Department of Labor opinion letter that was merely advisory on the meaning of the Fair Labor Standards Act, there was no deference extended under *Chevron*. In applying the *Skidmore* standard, the Court rejected the interpretation. Differing minority opinions added to the confusion of the current meaning of Chevron, including the dissenting opinion of Justice Breyer, who insisted that Chevron did not create a new standard, and that *Skidmore* remains the only standard for deference.[43] *Chevron*, in his view, only extended the basis for deference on the basis that "Congress had delegated to the agency the legal authority to make those determinations."[44]

The evolving and conflicting view of *Chevron* was also captured in the decision of *United States v. Mead Corp*.[45] In that case of tariff classification rulings, the eight-justice majority opinion, recognized different deference tests under *Skidmore* and *Chevron*. Consistent with *Christensen*, the Court noted the application of *Chevron* for agency interpretations that have the "force of law."[46] The Court embraced the notion of delegated authority from Congress for "the agency generally to make rules carrying the

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38 Christensen v. Harris Cty., 529 U.S. 576, 589 (2000) (Scalia, J., concurring in part and concurring in the judgment).

39 *Christensen*, 529 U.S. 576 (2000).

40 *See generally* Thomas Merrill, Chevron *at 30: Looking Back and Looking Forward: Step Zero After* City of Arlington, 83 FORDHAM L. REV. 731 (2014).

41 OFFICE OF THE CHAIRMAN, ADMIN. CONFERENCE OF THE U.S., RECOMMENDATIONS AND REPORTS, RECOMMENDATION 89-5: ACHIEVING JUDICIAL ACCEPTANCE OF AGENCY STATUTORY INTERPRETATIONS 31-33 (1989).

42 Merrill, Chevron *at 30*, *supra* note 40, at 587.

43 *Id.* at 596 (Breyer, J., dissenting).

44 *Id.*

45 *Mead*, 533 U.S. 218 (2001).

46 *Id.* at 226-27.

force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[47] However, the condition of what is an action with the force of law remained undefined. Yet, the ruling became the basis for the concept of "Chevron Step Zero," the courts first inquires into whether Congress delegated the authority before applying *Chevron* deference. If not, the less favorable standard in cases like *Skidmore* would apply.

One of the more alarming applications of *Chevron* came in *City of Arlington v. FCC*.[48] The case concerned a 1996 amendment to the Federal Communications Act mandating that local land use agencies process applications for the construction or modification of wireless transmission towers "within a reasonable period of time."[49] The statute provided an avenue with a "court of competent jurisdiction" for relief to parties who did not receive action on requests. The case perfectly captured the fluid authority and utter flexibility of agencies in exercising their interpretive powers post-*Chevron*. The Federal Communications Commission (FCC) initially disclaimed the authority under the statute, but then reversed itself and issued an order setting a 90-day limit for any tower expansion or 150-day limit for new construction under the rule. The jurisdictional authority of the FCC was challenged. For many years, it was generally thought that, no matter how expansively *Chevron* was read, the one area where an agency could not claim deference would be in the interpretation of its own jurisdictional powers. After all, as discussed above, the APA specifically leaves to the court to determine if an agency has acted "in excess of statutory jurisdiction." Nevertheless, the Fifth Circuit held that *Chevron* would apply in an agency defining its own jurisdiction. The Supreme Court agreed in a 5-4 decision with Justice Scalia joining the majority. Chief Justice Roberts (with Justices Kennedy and Alito) dissented. Five Justices found no way to distinguish jurisdictional and non-jurisdictional questions. Indeed, in his separate decision, Justice Scalia called such distinctions little more than a "mirage."[50]

Chief Justice Roberts, joined by Justices Kennedy and Alito, dissented, and expressed the view that such expanded authority raised transformative challenges for the federal system. Roberts decried the court for evading its core responsibility in drawing lines of authority within that system: "Our duty to police the boundary between the Legislature and the Executive is as critical as our duty to respect that between the Judiciary and the Executive . . . We do not leave it to the agency to decide when it is in charge."[51] In a chilling warning, Roberts further notes that "[i]t would be a bit much to describe the result as 'the very definition of tyranny,' but the danger posed by the growing power of the Administrative State cannot be dismissed."

City of Arlington fulfilled many of our worst fears of the trajectory of *Chevron*. Despite tailoring in cases like *Christensen* and *Mead*, *City of Arlington* gave agencies a

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47 *Id.* at 27.

48 City of Arlington v. FCC, 133 S. Ct. 1863, 1886 (2013).

49 47 U.S.C. § 332(c)(7)(B)(ii) (2012).

50 Justice Scalia saw the distinction as another attack on *Chevron* that would be exploited in future cases. *City of Arlington*, 133 S. Ct. at 1873 (Scalia, J., concurring) ("Make no mistake—the ultimate target here is *Chevron* itself. Savvy challengers of agency action would play the 'jurisdictional' card in every case.")

51 *Id.* at 1886 (Roberts, C.J., dissenting).

critical and expansive power to define their own jurisdiction under the protection of a heavy *Chevron* deference standard. For that reason, the avoidance of *Chevron* analysis in the recent decision in *King v. Burwell* only deepened the uncertainty over the scope and meaning of the doctrine. The case would seem ripe for *Chevron* analysis in the interpretation of an agency of the meaning of state and federal exchanges within the overall scheme of the Affordable Care Act (ACA). Writing for a six-justice majority, Chief Justice Roberts, wrote:

> When analyzing an agency's interpretation of a statute, we often apply the two-step framework announced in *Chevron*. Under that framework, we ask whether the statute is ambiguous and, if so, whether the agency's interpretation is reasonable. This approach is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.[52]

It is the type of fluid, undefined standard that has characterized not just the post-*Chevron* cases but many other areas of jurisprudence from the Court. The Court appears to believe that it will be self-evident when a court is dealing with a "question of deep economic and political significance."[53] Of course, many, if not most, federal agency decisions have significant impacts. While *King v. Burwell* may reflect a degree of belated buyer's remorse, it will hardly correct an ambiguous standard by grafting on an equally ambiguous limitation on that standard. Indeed, the Court appears convinced that adding layers of ambiguity will somehow produce clarity under *Chevron*. Congress can introduce the very clarity that seems to escape the Court by expressly limiting or disavowing delegation in statutes, as discussed below.

B. Restoring Legislative Control Over Agency Lawmaking.

If Congress is to reassert its authority over agency lawmaking it will have to develop new pathways for information and limit areas of claimed delegation. The first priority is to reduce the informational costs and barriers for members in monitoring agency actions. I have strongly encouraged Congress to expand legislative staff to allow greater monitoring and correction measures vis-à-vis agency actions. While Congress required independent evaluation by the GAO under the Truth in Regulating Act of 2000,[54] there has not been sufficient funding of this function. Congress should reconsider the establishment of an office that is fully equipped to track and review federal rules and regulations, as proposed under the Strengthening Congressional Oversight of Regulatory Actions for Efficiency Act.[55] The first line of defense for Congress remains its ability to act to check agencies. The very size and complicity of federal regulations, however, make such monitoring sporadic and uncertain without an office with the expertise to

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52 *King v. Burwell*, 135 S. Ct. 2480, 2488-89 (2015) (citations omitted).

53 *Id.* at 2489.

54 Pub. L. No. 106-312, 114 Stat. 1248-50 (2000).

55 S. 1472, 113th Cong. (2013).

facilitate this function. Notably, the Office of Management and Budget (OMB) has a budget of roughly $100 million annually and a staff of hundreds to monitor executive agencies and programs. The OMB is supported by thousands of agency employees who feed it information on new rulemaking as well as carry out directives on such programs. In comparison, the branch tasked with actually creating and changing the laws under which these agencies operate remains understaffed and overwhelmed. There is no way to do this on the cheap. Either Congress will maintain a staff capable of meaningful monitoring of rulemaking or it will retain a largely pedestrian role with regard to the Administrative State. Obviously, Committee staff serves as the eyes of Congress in different areas of the law. However, those staff members are tasked with other duties from drafting laws to holding hearings to addressing budgets. What is needed is a specialized staff within the legislative branch who can reassert congressional authority over agency law-making.

Congress also needs to create new pathways for checking rulemaking. It has tried to do so in the past with little success. The Congressional Review Act (CRA)[56] allowed Congress to block significant regulations. Yet, both houses had to pass resolutions of disapproval and the president had to sign the law. Not surprisingly, the law had little impact. Another compelling approach would be to classify rulemaking to focus enhanced procedures on the most impactful and substantial forms of rulemaking. That was the case with the proposed amending of the APA with the Regulatory Accountability Act (RAA).[57] Classifying regulations into three categories, "high impact" rules (with estimated effects of $1 billion or more in a year) would be subject to greater scrutiny and public proceedings. The creation of such formal procedures can not only create greater transparency, but (as discussed below) enlist the public and outside groups in evaluating agency rulemaking.

The current notice and comment provisions under the APA are often criticized as largely cosmetic for agencies, which have already set upon an intended course. While creating highly limited procedural rights and the appearance of participatory systems, agencies have to do relatively little in considering such views before promulgating final rules. Moreover, the process of administrative lawmaking is intransparent except for the perfunctory public comment period. Before and after such notice and comment, agencies are allowed to engage in ex parte communications in the crafting of their policies and programs. As Justice Kagan noted during her academic career, most of the agency deliberations are carried out without a record or public review.[58]

As shown in the current immigration case heard this week by the Supreme Court, the government can implement sweeping changes even without such notice and comment. *United States v. Texas* is a chilling example of how agencies today operate independently from both Congress and the public in dictating changes affecting our society and economy in fundamental ways. While the APA's notice-and-comment requirements set forth at 5 U.S.C. § 553(b) have been repeatedly enforced by the courts as a precondition

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56 5 U.S.C. § 801, et seq.

57 S. 1029, 113th Cong. (2013); H.R. 2122, 113th Cong. (2013).

58 Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2280 n.142 (2001) (noting that "[t]he APA contains no prohibitions on ex parte contacts between agency personnel and outside persons in notice-and-comment rulemaking").

for rules to have the force of law, the Department of Homeland Security simply chose to issue a November 20, 2014, directive setting forth the provisions of DAPA (Deferred Action for Parents of Americans and Lawful Permanent Residents). There was no advance notice or comment – a violation found by the district court in the case.[59] When challenged over the circumvention of the notice and comment requirements, the Administration simply declared that the enormous program affecting the status of millions of undocumented person fell within an exception for "general statements of policy." In other words, DAPA was merely treated as an exercise of discretionary policy where neither Congress nor the public would play a meaningful role. It is a striking example of how far we have strayed from the original model of our constitutional system. DAPA represents a type of government by memoranda where agencies simply issue new laws by executive fiat. The objection is not to the merits of the program, but the method chosen by the Administration (or any future administration). With the President in DAPA openly admitting that he is unilaterally ordering the very reforms that he was denied in Congress, the need for new procedural safeguards on agency action should be obvious. Regardless who may be the next president, federal legislative authority cannot be allowed to slip away into the mist of agency decision-making.

New APA procedures would help combat dangers of unilateral agency action as seen in *United States v. Texas*. However, that case showed how an agency can simply ignore relatively clear procedural requirements. A more robust and promising effort is found in reforms requiring legislative consent—an approach that I favor. Such an approach is found in the "Regulations from the Executive in Need of Scrutiny Act" or REINS.[60] REINS would require regulations to secure congressional approval in order to take effect. It would flip the dynamic of CRA from allowing congressional intervention to requiring congressional approval for major new rules. The law, however, has a default against new rule: if Congress does not act on a major rule within 70 days, it would be deemed "not approved" unless the president makes a determination that failure to enact the rule would harm the health, safety, or national security or cause conflicts with criminal law or treaty obligations. While there are good-faith objections to REINS as possibly curtailing executive authority and running afoul of cases like *Chadha*, I believe that the premise of the law is sound and compelling in asserting legislative authority over the law-making functions of agencies. I believe that a congressional approval law would be constitutional.[61] There are aspects of REINS that should be reexamined but the

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[59] *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015); see also *Texas v. United States*, 787 F.3d 733 (5th Cir. 2015).

[60] *See* Regulations from the Executive in Need of Scrutiny ("REINS") Act of 2011, H.R. 10, 112th Cong.; *see also* Regulatory Accountability Act of 2011, S. 1606, 112th Cong. (requiring regulators to adopt the "least costly" rule and imposing formal rulemaking procedures); Regulatory Accountability Act of 2011, H.R. 3010, 112th Cong. (same).

[61] *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), dealt with the one-house legislative veto. Obviously REINS avoids the bicameralism problem of a one-house veto and there is no reason why such a law cannot be crafted to avoid Presentment Clause problems. Notably, both Justice Stephen Breyer and Professor

categorical objection to such a law is fascinating. Indeed, the arguments from critics that the law would alter our constitutional structure only highlights how engrained the Administrative State has become in our assumptions about government. A REINS approach would be both constitutional and, if properly written, beneficial in reestablishing legislative authority.

Obviously, the easiest ways to prevent delegation rulings would be to expressly bar delegation or to impose clear limits. While distinguishing "strictly and exclusively legislative powers," Chief Justice John Marshall, in *Wayman v. Southard*,[62] wrote for a unanimous Court in holding that Congress "may certainly delegate to others, powers which the legislature may rightfully execute itself." The issue remained one of line drawing, for courts to isolate that point "which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions, to fill up the details."[63] This issue was in the forefront of the conflict between the Supreme Court and the White House during the 1930s, though admittedly the Court has routinely rejected nondelegation claims.[64] Yet, in 1928 in *J.W. Hampton, Jr. & Co. v. United States*, the Court upheld a statute that allowed the president to set tariffs because it contained an "intelligible principle" for implementing the statute.[65] Then, in 1935 in *A. L. A. Schechter Poultry Corp. v. United States*,[66] the Court struck down a provision of the National Industrial Recovery Act under the nondelegation doctrine for lacking such a principle. Likewise, *Panama Refining Co. v. Ryan*,[67] the Court held that no such principle was articulated when Congress gave the President authority to regulate the transportation of petroleum products.

In part, the association with the anti-New Deal cases contributed to the demise of the doctrine.[68] However, there was also a growing view that Congress could never practically address the myriad issues routinely addressed by agencies in the interpretation and enforcement of so many federal laws. The enactment in 1945 of the Administrative Procedure Act reflected this view by creating a quasi-legislative process for notice and comment on new federal rules. Past cases reaffirm that there is no inherent authority of agencies to carry out such actions and, as my colleague Dick Pierce noted, "an agency has the power to issue binding legislative rules only if and to the extent Congress has

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Lawrence Tribe have previously indicated that they also believed that such a law could be crafted to pass constitutional muster. *See* Stephen Breyer, *The Legislative Veto After Chadha*, 72 Geo. L.J. 785, 793-97 (1984); Laurence H. Tribe, *The Legislative Veto Decision: A Law by Any Other Name?*, 21 Harv. J. on Legis. 1, 19 (1984).

62 23 U.S. 1, 43 (1825).

63 *Id.*

64 Justice William Rehnquist invoked this doctrine in his opinion in *Industrial Union Department, AFL-CIO v. American Petroleum Institute (Benzene*), 448 U.S. 607, 686 (1980) (Rehnquist, J., concurring). No other justice joined him in that position.

65 J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).

66 A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

67 *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

68 JOHN HART ELY, DEMOCRACY AND DISTRUST 133 (1980).

authorized it to do so."[69] Thus, even in carrying out the takeover of the steel mills during wartime, Justice Hugo Black demanded evidence of such congressional intent. Thus in *Youngstown Sheet & Tube Co. v. Sawyer*, he wrote:

> The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied. Indeed, we do not understand the Government to rely on statutory authorization for this seizure.[70]

Professor Merrill has tried to thread this jurisprudential needle by moving beyond a nondelegation doctrine toward an "exclusive delegation doctrine" that states that "the President and executive branch agencies can subdelegate only if and to the extent Congress has authorized subdelegation. The exclusive delegation understanding tells us the Executive has no inherent authority to exercise legislative power."

Whatever perspective is applied, the legislative functions of agencies are based either loosely or directly on a delegation theory. As a result, Congress could alter Section 706 of the APA[71] to expressly reject any presumption of delegation for such interpretations, particularly with regard to the jurisdiction of a federal office or agency. The section currently authorizes judicial review of agency actions to determine if the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* The APA could be altered to expressly reject any claimed presumption of delegation and to reject the application of the *Chevron* standard absent an express standard of deference given to an agency. Section 701 already limits judicial review "(1) if a statute expressly precludes review or provides another form of review under the APA, that statute governs; or (2) the 'agency action is committed to agency discretion by law.'" Id. § 701(a). Congress can change the APA to address the standard for review. Clearly if Congress can deny review, it can structure review under the belief that the lesser is contained in the greater in such use of congressional authority.

Putting aside the APA, Congress could also use a standard provision to add to statutes that expressly denies any delegation of authority to agencies to determine their jurisdiction. Such provisions could also deny any intended delegation over force of law interpretations while recognizing that provisions can be subject to a *Skidmore*-like standard of interpretation. Such standard clauses are already used for such legal issues as severability issues for judicial review. Courts could still evade such provisions but they will have to dispense with the pretense that the sweeping deference under *Chevron* is Congress' doing or delegated intent. Such an affirmative denial of delegation should not be necessary. As the court in *United States v. Texas* noted, Congress "knows how to

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69 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.3, at 234 (3d ed. 1994)); *See also* Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2109 (2004).

70 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952).

71 5 U.S.C. § 706 (2012).

delegate discretionary authority" and courts should not presume such delegation.[72] However, an affirmative statement on nondelegation will reinforce such points in limiting the scope of agency action.

Finally, there is little question that Congress lacks the personnel and the time to directly monitor all of the decisions made in all of the federal agencies. As previously noted, congressional committees (and staff) should be significantly expanded to allow for greater monitoring of agency decisions. Our federal government is simply too large for Congress to act with regard to more than a relatively small fraction of agency actions. When Congress has faced areas with such limited ability to monitor or identify governmental abuse, it has used private attorneys general or citizen lawsuits. Congress should continue to ally itself with the public in monitoring agencies by creating such provisions to allow citizens to more easily pursue nondisclosures and noncompliance in court. It can further reinforce this system by examining new limitations placed on what constitutes a "prevailing party" for the purposes of recovery of fees and costs in such actions. It should also pursue amendments of laws that are information forcing, like the Freedom of Information Act, by addressing the long delays and expansive privileges imposed by agencies. In so doing, the public can help monitor and deter agency abuse.

IV. CONCLUSION

The notion of an Administrative State should be troubling to all members regardless of one's party affiliation. The concern is not that we live in an "Age of Regulation," which is and will remain an inevitable feature of modern government. Rather, it is the notion of a "state" unto itself that troubles some of us in watching the increasing independence and insularity of the agency system. As shown in the DAPA controversy, Congress has become merely one option for legislative changes in this new system. While the merits of a change like DAPA often obscures the constitutional implications of the method, the fact is the Congress is rapidly losing its relevance in such areas. While Madison hoped in *Federalist No. 51* that "ambition must . . . counteract ambition," personal ambition can prevail over institutional interests in modern politics, as members become agents of their own obsolescence. I happen to agree with much of what these agencies are seeking to achieve and I will admit an academic identification with agency expertise. However, our system is premised on the notion that how we reach decisions is as important as what we decide. It is the process of resolution in the legislative process that brings stability to our system. It is often frustrating and, when the nation is divided, less gets done. However, the convenience of handing governing authority to federal agencies is no answer to our political divisions.

The separation of powers was intended first and foremost as a protection of individual liberty from the concentration of authority. It is easy to create a system that allows decisions to be made by an elite body. The Framers were all too aware of such a system in the form of a monarchy. They chose a system that was more difficult but more democratic in character. The accumulation of power in an agency rather than an individual is certainly different in character. It is more diffused and more difficult to discern. However, both forms of concentrated authority threaten the protections of

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[72] Texas v. United States, 86 F. Supp. at 658.

individual liberty. Indeed, the agency aggrandizement of power may be more dangerous in that it is more difficult to track and to challenge for individual citizens. Where the accumulation of power in an individual is called tyranny, the accumulation of power in agencies can become a type of technocracy where experts rule as benign lawgivers. This is not to suggest evil purpose or design. The motivations behind agency actions are generally positive. However, the Framers like Madison expressly rejected systems based on a presumption of good motivations. Indeed, some of the worst actions taken in our country have been justified by the best of motivations. As the great Louis Brandeis warned in his dissent in *Olmstead v. United States*,[73] where he warned that the "greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding."

Thank you again for the honor of addressing the Committee today. I am happy to answer any questions that you may have.

Jonathan Turley,
Shapiro Professor of Public Interest Law
The George Washington University Law School
2000 H St., N.W.
Washington, D.C. 20052
202-994-7001
jturley@law.gwu.edu

[73] 277 U.S. 438 (1928).