REINING IN THE ADMINISTRATIVE STATE: RECLAIMING CONGRESS'S LEGISLATIVE POWER

HEARING

BEFORE THE

SUBCOMMITTEE ON THE ADMINISTRATIVE STATE, REGULATORY REFORM, AND ANTITRUST

OF THE

COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTEENTH CONGRESS

FIRST SESSION

FRIDAY, MARCH 10, 2023

Serial No. 118–9

Printed for the use of the Committee on the Judiciary

Available via: *http://judiciary.house.gov*

U.S. GOVERNMENT PUBLISHING OFFICE
51–502 WASHINGTON : 2023

COMMITTEE ON THE JUDICIARY

JIM JORDAN, Ohio, *Chair*

DARRELL ISSA, California
KEN BUCK, Colorado
MATT GAETZ, Florida
MIKE JOHNSON, Louisiana
ANDY BIGGS, Arizona
TOM MCCLINTOCK, California
TOM TIFFANY, Wisconsin
THOMAS MASSIE, Kentucky
CHIP ROY, Texas
DAN BISHOP, North Carolina
VICTORIA SPARTZ, Indiana
SCOTT FITZGERALD, Wisconsin
CLIFF BENTZ, Oregon
BEN CLINE, Virginia
LANCE GOODEN, Texas
JEFF VAN DREW, New Jersey
TROY NEHLS, Texas
BARRY MOORE, Alabama
KEVIN KILEY, California
HARRIET HAGEMAN, Wyoming
NATHANIEL MORAN, Texas
LAUREL LEE, Florida
WESLEY HUNT, Texas
RUSSELL FRY, South Carolina

JERROLD NADLER, New York, *Ranking Member*
ZOE LOFGREN, California
SHEILA JACKSON LEE, Texas
STEVE COHEN, Tennessee
HENRY C. "HANK" JOHNSON, JR., Georgia
ADAM SCHIFF, California
DAVID N. CICILLINE, Rhode Island
ERIC SWALWELL, California
TED LIEU, California
PRAMILA JAYAPAL, Washington
J. LUIS CORREA, California
MARY GAY SCANLON, Pennsylvania
JOE NEGUSE, Colorado
LUCY MCBATH, Georgia
MADELEINE DEAN, Pennsylvania
VERONICA ESCOBAR, Texas
DEBORAH ROSS, North Carolina
CORI BUSH, Missouri
GLENN IVEY, Maryland

SUBCOMMITTEE ON THE ADMINISTRATIVE STATE, REGULATORY REFORM, AND ANTITRUST

THOMAS MASSIE, Kentucky, *Chair*

DARRELL ISSA, California
KEN BUCK, Colorado
MATT GAETZ, Florida
MIKE JOHNSON, Louisiana
DAN BISHOP, North Carolina
VICTORIA SPARTZ, Indiana
SCOTT FITZGERALD, Wisconsin
CLIFF BENTZ, Oregon
BEN CLINE, Virginia
LANCE GOODEN, Texas
JEFF VAN DREW, New Jersey
HARRIET HAGEMAN, Wyoming
NATHANIEL MORAN, Texas

DAVID N. CICILLINE, Rhode Island, *Ranking Member*
HENRY C. "HANK" JOHNSON, JR., Georgia
ERIC SWALWELL, California
TED LIEU, California
PRAMILA JAYAPAL, Washington
J. LUIS CORREA, California
MARY GAY SCANLON, Pennsylvania
JOE NEGUSE, Colorado
LUCY MCBATH, Georgia
ZOE LOFGREN, California
STEVE COHEN, Tennessee
GLENN IVEY, Maryland

CHRISTOPHER HIXON, *Majority Staff Director*
AMY RUTKIN, *Minority Staff Director & Chief of Staff*

C O N T E N T S

THURSDAY, MARCH 9, 2023

REINING IN THE ADMINISTRATIVE STATE: RECLAIMING CONGRESS'S LEGISLATIVE POWER

Friday, March 10, 2023

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON THE ADMINISTRATIVE STATE, REGULATORY REFORM, AND ANTITRUST

COMMITTEE ON THE JUDICIARY

Washington, DC

The Subcommittee met, pursuant to notice, at 9:04 a.m., in Room 2141, Rayburn House Office Building, Hon. Thomas Massie [Chair of the Subcommittee] presiding.

Present: Representatives Massie, Issa, Buck, Johnson of Louisiana, Bishop, Fitzgerald, Bentz, Cline, Hageman, Moran, Cicilline, Nadler, Johnson of Georgia, Jayapal, Correa, Scanlon, Lofgren, and Ivey.

Mr. MASSIE. The Subcommittee will come to order.

Without objection, the Chair is authorized to declare a recess at any time. I anticipate we're going to have to take a break for votes at some point in this hearing.

We welcome everyone to the first hearing of the Subcommittee on the Administrative State, Regulatory Reform, and Antitrust.

The Chair now recognizes himself for an opening statement.

In some ways, the importance of today's hearing goes back to the founding era. Even before America declared its independence, John Adams emphasized that a Republic is a government of laws, not of men. This hearing is about who makes the laws in our country. It's also about how Congress should reclaim its legislative power from the Administrative State. This is an important discussion.

By way of background, the U.S. Constitution separates the powers of government between the States and the Federal Government. It further separates the powers among the three branches of the Federal Government.

Importantly, Article I of the U.S. Constitution vests the Federal legislative power in Congress. In other words, the words of Chief Justice John Marshall: "Powers are separated with the intent that the legislature makes the law."

In the modern day, we have seen a troubling consolidation of powers in the Executive Branch. That is, in part, because of how many regulations, binding rules that affect the American people are coming from the Executive Branch. Indeed, in recent years, the

Administrative State has issued regulations carrying the force of law more than 20 times as frequently as America's elected Representatives have passed laws through the process the Constitution requires.

When Chair Jordan invited me to Chair this Subcommittee, I asked him what the topics were, what would be our jurisdiction, and he said, "that Administrative Law would be our jurisdiction." I said, "well, you've just given us jurisdiction over about 95 percent of the Federal Government," and I'd be happy to Chair that Committee.

What this means is that so much of the law is Administrative Law, unelected bureaucrats in the branch tasked with executing the laws are, instead, making many of those laws that bind the American people.

The modern Administrative State's violation of these fundamental principles is significant. In our country, lawmakers should be politically accountable to the electorate. As Professor Philip Hamburger wrote in his book, The Administrative Threat, quote:

> These are core civil liberty issues. Binding agency rules deny Americans their right under Article I to be subject to only Federal legislation as enacted by an elected Congress, and such rules thereby dilute the constitutional right to vote.

Today, Americans must routinely follow rules that come from a source other than Congress. In recent years, Federal agencies have more and more frequently imposed their will on the American people.

To name just a few examples, OSHA's vaccine mandate, the national eviction moratorium, the FTC's proposed noncompete rule, and ATF's recent rule on stabilizing pistol braces, not to mention Waters of the United States, which, incidentally, is like a ping pong match, every time we get another administration.

When we went from the Bush Administration to the Obama Administration, we got a new Waters of the U.S. law, a new interpretation of the Clean Water Act. Then when we went from Obama to Trump, we got a new interpretation of the Clean Water Act. Now, we've gone again to Biden's rules.

Each of these examples shows the Administrative State, not Congress, attempting to or actually imposing binding rules on the American people. Consider the ATF's pistol brace rule. It requires gun owners to use stabilizing braces, not bump stocks, Mr. Ranking Member, to register their braced pistols, modify their weapons, or risk potential felony charges.

In the words of James Madison, the accumulation of all powers. Legislative, Executive, and Judiciary, in the same hands may justly be pronounced the very definition of tyranny. That quotation by James Madison implicates an Administrative State that makes law.

Today's hearing is about exploring the need for Congress to reclaim its legislative authority and to discuss potential legislative responses. Some legislation, like the REINS Act and the Separation of Powers Restoration Act, are steps in the right direction. Ultimately, Congress needs to reestablish itself, not government agencies, as the main driver of Federal policy.

I'll end with this final point: Although some conflate this hearing's focus with deregulatory efforts, that need not be the case. We're not arguing that there don't need to be any regulations. Put simply, we can and should have a discussion today about where law should come from.

As set forth by our Constitution, binding rules should come from politically accountable elected representatives, not from the Administrative State. Reasonable minds may differ about certain policies, but we in this body should all be on the same page about who should be making our laws, and that is Congress.

Before I recognize the Ranking Member, I want to thank him for his service in Congress and tell him that we're going to miss him. I hear that he's leaving this session early, and I hope it's not because I am the Chair of this Committee.

Now, I recognize the gentleman from Rhode Island, Mr. Cicilline, for his opening statement.

Mr. CICILLINE. Thank you, Mr. Chair. I congratulate you on Chairing this Committee and for our first hearing and can assure you that your ascending to this Chairship did not contribute to my decision to leave early.

Mr. Chair, it's just over a month now that the Southern train derailed in East Palestine, Ohio, setting off a cascade of events that have put countless lives at risk. Crews are still cleaning up the highly toxic chemicals that were released into the water, ground, and air. We will not know the full effects of this environmental and safety disaster for decades.

This Subcommittee is charged with overseeing regulatory reform, which is clearly much needed. Yet, today, instead of using our first hearing to discuss what and how we must ensure that the government is acting to not only help those in need right now, but also to implement new safety and environmental regulations that would prevent a disaster like this from ever happening again, we're talking about, and I quote, "reclaiming Congress' legislative power." I, frankly, didn't know that this is a power that had been lost.

At the center of today's hearing is, of course, the Regulations from the Executive in Need of Scrutiny Act of 2023, or the REINS Act, which would not, in fact, make rulemaking more efficient or responsive to public concerns but instead, would hinder the most basic functions of our government to keep people safe.

By requiring that both the House and Senate pass and the President sign a joint resolution of approval before any major rule issued by an agency can take effect, we are effectively negating the authority we have already given these agencies.

Let me make it plain. Congress already has the power to oversee agency rulemaking, and agencies can only exercise authority that we grant them. What the REINS Act would do, in short, is prevent agencies from keeping dangerous products off the shelves and toxic chemicals from polluting our land, air, and water.

This is nothing more than a congressional power grab that will lead to even more deregulation that puts people at risk and will pave the way for reckless and powerful corporations to put their profits ahead of the health and well-being of the American people.

The REINS Act would prevent the Consumer Product Safety Commission from updating safety standards for infant walkers, like

they did in late 2022, responding to alarming news that these products had become a leading cause of death and injury for small children.

The REINS Act would prevent rules from the Food and Drug Administration, like their August 2020 rule to move to more quickly identify and remove potentially contaminated food from the market, resulting in fewer deaths and illnesses.

Finally, rules like the FDA's hearing aid regulation that will lower cost for millions of Americans and allow people to get hearing aids over-the-counter would be blocked under the REINS Act.

Deregulation led to last month's derailment in East Palestine and Norfolk Southern's recent derailment in Springfield, Ohio. Further deregulation will lead to even more tragedies in the future.

For years, at the behest of companies and special interests, the Federal Railroad Administration has engaged in deregulatory efforts despite workers' calls for necessary stronger safety measures. We cannot place companies' greed over public and worker safety and the cleanliness of our air, water, and land.

Railroad workers have a saying, that their safety regulations are written in blood, because it is only after disasters, up to and including the loss of life, that pro-safety changes are made. This is absolutely unacceptable.

Agencies are charged by the authority Congress grants to enforce our laws. They do that, in part, by issuing those rules. To that end, I hope my colleagues on both sides of the aisle will join me in supporting legislation that would make industry and our government more accountable by ensuring that all agency-issued rules are based on rigorous studies and free from bias, like the Stop Corporate Capture Act introduced by Representative Jayapal.

At a time when residents across three States are grappling with the highly toxic fallout of a culture of deregulation and lax safety standards of the Trump Administration, we need to be focusing on how to make rulemaking more effective and efficient, not gunking up the wheels.

I thank you, Mr. Chair. With that, I yield back.

Mr. MASSIE. Thank you, Mr. Cicilline.

I now recognize the Ranking Member of the Full Committee for his opening statement, if he has one.

Mr. NADLER. Thank you, Mr. Chair.

Mr. Chair, at a time when the Nation is reeling from multiple train derailments in Ohio alone as well as increasingly harsh storms due to climate change and an outbreak of Avian Flu that has led to the deaths of tens of millions of chickens in our food supply and experts tell us could conceivably jump into other species, including humans, and could conceivably cause another pandemic, I find it telling that we are using the first meeting of this Subcommittee not to discuss how we can better serve the needs of all Americans, but, rather, how we can remove public health and safety safeguards for the sake of higher company profits.

How do Republicans plan to advance their extreme agenda protecting profits over people? By trotting out the same old tired anti-health and safety legislation they have tried year after year whenever they control the House. We are only three months into the new majority, and I guess they are already out of fresh ideas.

One of the bills we are examining today, the Regulations from the Executive in Need of Scrutiny Act of 2023, or the REINS Act, has been considered in every Congress in which Republicans have held the majority since 2012.

The REINS Act would grind the gears of rulemaking to a halt by requiring all major rules to be affirmatively approved by both Chambers of Congress. A regulation would be blocked from being implemented if even one House declines to pass an approval resolution. The goal of this legislation, quite simply, is to stop the regulatory process in its tracks, regardless of its impact on public health and safety.

The bill purports to give Congress control of the rulemaking process, but Congress already has this power and exercises it in a number of ways. First, Congress can delegate authority to agencies with specificity, thus limiting the scope of the agency's authority. Second, it can impose restrictions on rulemaking through appropriations. Third, it can influence rulemaking through oversight activities.

If all these measures are insufficient, we also have the blunt tool of the Congressional Review Act, which allows Congress not only to overturn a rule, but also to bar the agency from ever passing a substantially similar rule.

The REINS Act is not only redundant, but it also creates insurmountable procedural hurdles that would stall the approval of rules of major impact, rules that would be highly beneficial to the public's health and safety.

It's important to remember why we have regulations in the first place. Congress sets broad policies, but we delegate authority to executive agencies because we do not have the expertise to craft technical regulations ourselves.

Who here knows how many parts per billion of arsenic should be allowed in our drinking water? Is 10 the proper amount? Should it be five or 15? None of us here knows the answer. The dedicated professionals at our Federal agencies, many of whom have decades of experience and vast technical expertise, undertake a careful process to protect our health and safety. This process ensures—this process I should say includes numerous procedural safeguards, including public notice and comment.

Regulations ensure that our air is safe to breathe, our water is safe to drink, our food is safe to eat, and the life-saving medications we depend on are safe and effective. It means that the cars we drive and the planes we fly have proper safety mechanisms, and that banks and credit card companies cannot take advantage of unsophisticated borrowers.

When we do not properly regulate, sometimes it means that trains carrying dangerous chemicals can derail in our communities, putting thousands of people at risk.

I feel much better about leaving regulatory decisions to the careful study of agency experts rather than to Members of Congress who want to substitute their judgment, subject to the whims of politics.

Republicans also want to eliminate the Chevron doctrine, which calls for courts to give deference to an agency's reasonable interpretation of its statutory authority. So, if it's not Members of Congress

regulating our health and safety, I guess it would be Federal judges.

Republicans have spent decades waging an all-out assault on the regulatory process, trying to add hurdle after hurdle on the ability of agencies to issue regulations that protect public health and safety, regulations whose benefits consistently outweigh their costs, often by many multiples.

If we want to improve the regulatory process, we would consider legislation such as the Stop Corporate Capture Act, which would bring more transparency and accountability to the rulemaking process. Instead, the Subcommittee has chosen to make their first order of business the dismantling and destruction of the regulatory process, regardless of the impact on public health and safety. This gives us a good idea of the priorities we should expect to see out of this new extreme majority. I hope they will reconsider this dangerous agenda.

I yield back the balance of my time.

Mr. MASSIE. Thank you, Ranking Member Nadler.

Without objection, all other opening statements will be included in the record. We will now introduce today's witnesses.

Allyson Ho is a partner and a Co-chair of the Appellate and Constitutional Law Practice Group at Gibson, Dunn & Crutcher. She has argued cases before the Supreme Court, States' Supreme Courts, and various State and Federal Appellate Courts. She previously served as Special Assistant to President George W. Bush, counselor to Attorney General John Ashcroft, and she clerked for justice Sandra Day O'Connor.

Jonathan Wolfson is the Chief Legal Officer and Policy Director at the Cicero Institute. His research at Cicero focuses on healthcare, regulatory reform, and employment policies. He previously led the Policy Office at the U.S. Department of Labor.

Ryan Cleckner is the Co-founder of Gun University LLC, and a former Army Ranger. He is an attorney and previously served as Vice President of Compliance at the Remington Outdoor Company and is a Manager of Government Relations at the National Shooting Sports Foundation.

Emily Hammond is the Vice Provost for Faculty Affairs and the Glen Earl Weston Research Professor at the George Washington University Law School. Professor Hammond's research focuses on energy law, environmental law, and administrative law.

We welcome our witnesses and thank them for appearing today. We will begin by swearing you in. Would you please rise and raise your right hand.

Do you swear or affirm, under penalty of perjury, that the testimony you are about to give is true and correct, to the best of your knowledge, information, and belief, so help you God?

The record will reflect that the witnesses have answered in the affirmative. Thank you. Please be seated.

Please know that your written testimony will be entered into the record in its entirety. Accordingly, we ask that you summarize your testimony in fivw minutes.

The microphone in front of you has a clock and a series of lights. When the light turns yellow, try to begin to conclude your remarks. When the light turns red, your time is expired.

Ms. Ho, you have the distinguished honor of going first.

STATEMENT OF ALLYSON N. HO

Ms. HO. Thank you. Chair Massie, Ranking Member Cicilline, thank you for inviting me here today to testify about reining in the Administrative State.

I am heartened to see this issue being debated in Congress. Our system of checks and balances can only work when Congress is active in its engagement with the other branches, including the Executive Branch. That's particularly important when we're talking about the modern Administrative State, where the Executive Branch regularly runs the risk of encroaching on the authority of the Legislative Branch.

So, regardless of what actions this Congress chooses to take in response to the rise of the Administrative State, I think this hearing alone serves an important function in Congress fulfilling its responsibilities under the Constitution.

In my remarks today, I want to discuss one specific issue that has coincided with, and likely accelerated the rise of the Administrative State: Doctrines that force courts to defer to administrative agencies.

The most well-known of these doctrines is Chevron deference, which originates from a 1984 Supreme Court decision, *Chevron U.S.A.* v. *Natural Resources Defense Council*. That case holds that when a court is reviewing an agency's interpretation of a statute that it administers, the court should defer to the agency's interpretation if the statute is ambiguous and the agency's interpretation is reasonable.

There are other types of judicial deference as well. For example, Auer deference holds that courts should give controlling weight to an agency's interpretation of its own regulation unless the interpretation is plainly erroneous or inconsistent with the regulation.

There are several significant flaws with judicial deference to agency interpretations, and I'd like to highlight just a few of them.

First, it flies in the face of the bedrock principle underlying the rule of law. A law means what it says. A statute or a regulation has a correct interpretation, and it is that correct interpretation which should govern our actions.

Deference to an agency's interpretation turns that fundamental principle on its head. Courts no longer care whether the agency has the correct interpretation, just whether the interpretation is reasonable. Suddenly, this reasonable interpretation, which may or may not be correct, becomes the law.

To enforce an agency's interpretation of the law, even though it is not the best interpretation, is inconsistent with the Judicial Branch's constitutional duty to say what the law is, contrary to Congress' directive in the Administrative Procedure Act, and harmful to confidence in our legal system.

Second, deference doctrines have become a tool for agencies to expand their power and influence, often at the expense of individual rights and freedoms. One of the biggest problems with deference is that it allows agencies to effectively write their own laws.

Because courts are required to defer to an agency's interpretation of a statute if its reasonable, agencies have an incredible amount

of discretion to interpret laws in a way that gives them more power and authority. This can result in regulations that are far more burdensome and restrictive than anything Congress intended when it passed the underlying law.

Third, these deference doctrines undermine very fundamentally the separation of powers that is so critical to our system of government. When agencies are given broad authority to essentially write the laws, write regulations that have the force of law, they are stepping into the role that Congress has, not the Executive.

Moreover, even though agencies are technically within the Executive Branch, the rise of the Civil Service and the vast expansion of the Federal bureaucracy has effectively made them a fourth branch of government, with the power to make laws and enforce them with little effective political oversight.

Elected officials are supposed to be held accountable to the people who elected them, but the Administrative State is often staffed by unelected bureaucrats who are difficult to hold accountable, even by the Executive. This can make it hard for the public to have a say in the laws and the regulations that affect their lives. The more you believe in democracy, the more you should be concerned about the rise of the Administrative State.

So, what can be done? There are many solutions, but part of the growth of the Administrative State comes from congressional neglect. When Congress passes laws that are open-ended, when Congress doesn't react to civil agencies that are acting outside the bounds of their authority, all that empowers agencies to continue expanding their influence.

So, to end where I began, I'm grateful for the Committee's invitation to testify today. I hope I can answer any questions you have and help in any way I can in your efforts to rein in the Administrative State. Thank you.

[The prepared statement of Ms. Ho follows:]

STATEMENT OF ALLYSON N. HO

Before the United States House of Representatives Judiciary Committee

Subcommittee on the Administrative State, Regulatory Reform, and Antitrust

March 10, 2023

Thank you for inviting me here today to testify about reining in the administrative state.

I'm heartened to see this issue being debated in Congress. Our system of checks and balances can only work when Congress is active in its engagement with the other branches, including the executive branch. That is particularly important when we're discussing the modern administrative state, where the executive branch regularly runs the risk of encroaching on the authority of the legislative branch.

So regardless of what actions this Congress chooses to take in response to the rise of the administrative state, I think this hearing alone serves an important function in Congress fulfilling its responsibilities under the Constitution.

In my remarks today, I want to discuss one specific issue that has coincided with—and likely accelerated—the rise of the administrative state: doctrines that force courts to defer to agency interpretations.

The most well-known of these doctrines is *Chevron* deference, which originates from a 1984 Supreme Court decision, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). That case holds that when a court is reviewing an agency's interpretation of a statute that it administers, the court should defer to the agency's interpretation if the statute is ambiguous and the agency's interpretation is reasonable.

There are other types of judicial deference to agencies as well. For example, *Auer* Deference holds that courts should give "controlling weight" to an agency's interpretation of its own regulation unless the interpretation is plainly erroneous or inconsistent with the regulation. *Auer v. Robbins*, 519 U.S. 452 (1997).

There are several significant flaws with judicial deference to agency interpretations.

First, it flies in the face of a bedrock principle underlying the rule of law: A law means what it says. A statute, or a regulation, has a correct interpretation and it is that *correct* interpretation which should govern our actions. Deference to an agency's interpretation turns that fundamental principle on its head. Courts no longer care whether the agency has the *correct* interpretation—just whether the interpretation

is reasonable. And suddenly this reasonable interpretation, which may or may not be correct, becomes law.

To enforce an agency's interpretation of the law, even though it is not the best interpretation, is inconsistent with the judicial branch's constitutional duty "to say what the law is," contrary to Congress's directive in the Administrative Procedure Act, and harmful to confidence in our legal system.

Second, deference doctrines have become a tool for agencies to expand their power and influence, often at the expense of individual rights and freedoms. One of the biggest problems with deference is that it allows agencies to effectively write their own laws.

Because courts are required to defer to an agency's interpretation of a statute if it's reasonable, agencies have an incredible amount of discretion to interpret laws in a way that gives them more power and authority. This can result in regulations that are far more burdensome and restrictive than anything Congress intended when it passed the underlying law.

Third, these deference doctrines encourage agency overreach and abuse of power. When agencies know their interpretations of laws or regulations will be given significant deference by courts, they may be more inclined to stretch their authority and push the boundaries of what's allowed under the law.

Finally, these deference doctrines undermine the separation of powers that is so critical to our system of government. When agencies are given broad authority to essentially write a regulation that has the force of law, they are stepping into the role that Congress has—not the executive.

Moreover, even though agencies are technically within the executive branch, the rise of the civil service and the vast expansion of the federal bureaucracy has effectively made them a fourth branch of government, with the power to make laws and enforce them with little political oversight.

Elected officials are supposed to be accountable to the people who elected them, but the administrative state is often staffed by unelected bureaucrats who are difficult to hold accountable—even by the executive. This can make it hard for the public to have a say in the laws and regulations that affect their lives. The more you believe in democracy, the more you should be concerned about the rise of the administrative state.

So what can be done? There are many solutions, but part of the growth of the administrative state comes from Congressional neglect. When Congress passes laws that are open-ended, when Congress doesn't react to cabin agencies that are acting

outside the bounds of their authority—all of that only empowers agencies to continue expanding their influence.

So, to end where I began, I'm grateful for the Committee's invitation to testify today. I hope I can answer any questions you all have and help in any way I can in your efforts to rein in the administrative state.

Mr. MASSIE. Thank you, Ms. Ho.
Mr. Wolfson, you may begin.

STATEMENT OF JONATHAN WOLFSON

Mr. WOLFSON. Chair Massie, Ranking Member Cicilline, Members of the Subcommittee, good morning and thank you for having me today. It's an honor to testify on Congress' role in creating law and oversight when Executive Branch agencies start to write laws instead of simply working to enforce the law that is already written.

My name is Jonathan Wolfson. I'm the Chief Legal Officer and Policy Director at the Cicero Institute, which is a nonprofit think tank focused on identifying, developing, and advancing entrepreneurial solutions to society's toughest public policy problems.

Previously, I had the honor of serving as the head of the Office of the Assistant Secretary for Policy at the U.S. Department of Labor, as well as the Regulatory Reform Officer at that Department.

Today's hearing centers on ways that Congress can bring additional accountability to Federal rulemaking, whether by limiting the power of the Executive Branch to act absent congressional authorization or requiring legislative approval of regulations.

Today, I will focus on four key points: First, the legislature should create laws, and the Executive Branch should encourage compliance and enforce those laws; second, the Legislative Branch is more accountable than the Administrative State; third, agencies have expertise in regulatory process, not necessarily on making legislative decisions; and fourth, the REINS Act appears to be a valuable step toward restoring Congress' and agencies' appropriate roles.

Before we dive in further, I'd like to clarify that while colloquially regulation often means government restrictions, regulations are actually agency rules that purport to effectuate statutes. This is important, because too often discussions of deregulation devolve into caricatures, where proponents of deregulation are asked to defend whether they care about clean air, safe food, or fair banking practices. Congress can pass laws to protect air, food, or finances through statute without subsequent agency-driven lawmaking.

So, let's talk about why agencies are not supposed to make new laws. Basic Schoolhouse Rock civics lessons teach us that Congress makes laws, and the President executes and enforces those laws, but Members of this Subcommittee know that this isn't really the reality. Unfortunately, the Executive Branch and independent Federal agencies regularly make new laws and fill intentional or unintentional gaps left by Congress. At times, regulatory agencies even act to make new laws without any congressional authority at all.

Now, Congress does bear some responsibility for this phenomenon. New laws are often vague. Sometimes this is out of neglect, sometimes it's out of convenience for the legislature, and sometimes it's out of apparent necessity. Often, this leaves vague and big questions for the regulated community. Regardless of the cause, I would argue that this is not the ideal that we should be aiming toward. As Ms. Ho just mentioned, this is not the ideal that the Constitution sets up for us.

Second, Congress is accountable and agencies are not.

Another key reason that agencies ought not legislate is that voters may hold legislators accountable for their action. Accountability is especially important where there are tradeoffs between different constituents and competing interests.

When a secretary supports a particular policy, the agency staff do as well. That policy is likely to prevail. Traditional deference principles mean reasonable regulations, stand even in the face of strong objection. Given the substantial burden and the limited ability of Congress to hold agencies accountable, Congress ought to write the laws.

Third, unique agency expertise often lies in regulatory process. Some proponents of the Administrative State contend that Congress lacks expertise on a range of issues that face our Nation and agencies have the depth of knowledge and experience necessary to write the laws. They argue that Congress could codify public sentiment and leave the regulatory details to the agency experts.

While regulators do bring specialized knowledge and years of experience in government to the table, it does not follow that this experience makes them better at making the rules than a Member of Congress would be if given the opportunity.

Even assuming that the typical Federal official writing regulations is a neutral, unbiased subject matter expert who leaves his or her own preferences aside, do they possess the right kind of expertise? Unfortunately, many agency staff have narrow expertise, often in creating and enforcing regulations rather than on important tradeoffs that occur in the real world.

Even when they have field-level expertise, their relative comparative advantage compared to academic or industry is knowledge and experience in how the government works, how to get something published in the **Federal Register**. So, they revert to regulation, even if regulation is not the best path forward, because regulators regulate. This knowledge of the rules also helps them impose new regulations via guidance, which doesn't have to go through all the Administrative Procedure Act hurdles. To limit this overreach, I was honored to sign the Department of Labor's Regulatory Openness through Good Guidance rulemaking.

Fourth, Congress can use the REINS Act to rein in regulatory excess. The REINS Act is a good proposal to restrict legislative activity by agencies and restore the proper relationship between the Legislative and Executive Branches. The REINS Act is the next in a series of laws to limit regulatory autonomy and require a particular regulatory process to ensure the constitutionally required balance of power.

Thank you again for the opportunity to testify and share my perspective. I look forward to answering any questions you all may have.

[The prepared statement of Mr. Wolfson follows:]

CICERO INSTITUTE

Testimony of Jonathan A. Wolfson before the United States House of Representatives Committee on the Judiciary; Subcommittee on the Administrative State, Regulatory Reform, and Antitrust

March 10, 2023

Chairman Massie, Ranking Member Cicilline, and members of the Subcommittee on the Administrative State, Regulatory Reform, and Antitrust, good morning and thank you for having me today. It is an honor to testify before this subcommittee on the important role Congress plays in creating our nation's laws and the need for Congressional oversight when executive branch agencies start to write law rather than simply working to enforce the laws already written.

My name is Jonathan Wolfson and I am the Chief Legal Officer & Policy Director for the Cicero Institute, a nonprofit think tank with a mission of identifying, developing, and advancing entrepreneurial solutions to society's toughest public policy problems. Previously I had the honor of serving as the head of the Office of the Assistant Secretary for Policy at the US Department of Labor (DOL) where I also served as the Regulatory Policy Officer, and Regulatory Reform Officer or chair of DOL's Regulatory Reform Task Force.

Today's hearing centers on ways Congress can bring additional accountability to federal rulemaking, whether by limiting the power of the Executive branch to act when Congress has not authorized the action or requiring legislative approval of regulations. This is an important topic given the growth in the administrative state, the burdens that growth has imposed on businesses and consumers, and the propensity of regulatory actors to test the limits of their authority as evidenced by recent Supreme Court precedents striking down various substantial administrative actions.

I will focus these remarks on four key points. First, the role of the legislature is to create laws and the role of the executive branch is to encourage compliance and enforce those laws, but many regulations look much more like legislation than simply interpretation of a vague clause in a statute. Second, while some claim that Congress ought to delegate complicated questions to agencies with expertise on a topic, experience tells us that agency expertise is often exaggerated and is frequently expertise in regulatory process, not on the complicated tradeoffs between competing priorities. Third, our constitutional republic relies on the legislative branch to balance interests and imposes accountability on legislators who make bad laws. Neither of these checks exist in a system where the agencies writing regulations may finalize regulations completely contrary to the legislators' intentions. Finally, the REINS Act is a valuable step toward restoring Congress' role as the lawmaking body and the agencies' role as the enforcer of the law.

Regulatory reform and good regulatory process matter not only to the regulated entities, but also to the workers who rely on jobs at those workplaces, the consumers who pay for products produced by regulated entities, and the innovators trying to create the next major breakthrough company that must navigate the web of complicated regulations to even have the opportunity to enter the market.

1. Agencies Are Not Supposed to Make New Laws

If your knowledge of separation of powers is based on reading the Constitution or watching Schoolhouse Rock classics like "I'm Just a Bill" and "Three-Ring Government," you could be forgiven for believing that Congress makes laws and the President executes those laws by enforcement and education. As members of this subcommittee know, the present reality is entirely different. Executive branch and independent federal agencies regularly make new laws to fill gaps left by the legislature, intentionally or unintentionally. And at times, regulatory agencies even act to make new laws despite a lack of any Congressional authority.

Every year regulatory agencies fill thousands of pages of the Federal Register, publish hundreds of regulations, and issue tens of thousands of opinions, interpretations, rulings, and other "guidance." And while a regulated party might prefer a world where Congress' laws are the only ones they must follow, they know the power a regulator has to disrupt or even shut down their businesses. And for this reason, generations of lawyers have supported their families by helping businesses to navigate both the federal and state administrative states.

We should admit that some responsibility for this phenomenon certainly falls on legislators who want to take the easy path, pass a bill, put out the press release, and move on without getting into the real hard work of parsing out specifics. It is a lot easier to pass a law to "keep kids safe from car accidents" and leave it to the Department of Transportation to develop detailed rules and guidance that regulate auto and car seat manufacturers than to include detailed requirements for vehicle safety ratings, the appropriate type of harness for infant seats, and the specific crash test a crash dummy in a car seat must be able to survive.

But responsibility also falls on legislative process and political gridlock that makes it very difficult to pass any kind of legislation. Every time a new requirement enters the bill, or every time a specification goes away, some legislators who may have been part of the supporting coalition might be less willing to remain supportive. And when Congress is divided like it is today, these narrow coalitions might be all the more precarious if bills start being weighted down with lots of detailed specifics. Legislators are thus incentivized to be less specific to increase the likelihood that a bill passes.

And in some circumstances, the legislative process may take shortcuts when there is an emergency and Congress feels like it must pass something right away so it leaves rulemaking to the agencies for speed and efficiency.[1]

[1] " H.R.6201 - 116th Congress (2019-2020): Families First Coronavirus Response Act." *Congress.gov*, Library of Congress, 18 March 2020, https://www.congress.gov/bill/116th-congress/house-bill/6201/text.

But none of these explanations justify Congress giving away its legislative authority to the executive branch, even if we might be able to explain why it happens all the time today. The Constitutional structure doesn't call for executive branch to write the laws, just enforce them. But we have been drifting from this ideal for years which is why we are here today.

Before we go on, I'd like to provide important caveat: colloquially, "regulation" often means "government restriction." In this sense, a statutory restriction on leaded gasoline is no different from an administrative rule that restricts leaded gasoline. But in this hearing, when we talk about regulation what we mean is "regulation" the way that the Supreme Court in *Chevron*[2] defined it: agency rules that purport to effectuate the laws that Congress passed.

This matters because too often discussions of "deregulation" devolve into a caricature where opponents of regulation are asked whether they care about clean air, safe food, or fair banking practices. The caricature relies on this colloquial phrasing. Nothing in current law or under the REINS Act or other proposals for regulatory reform stops Congress from passing protections of air, food, or financial instruments though statute. Congress could pass a clear law that bans fossil fuels to power electric power plants or lead paint from toys and while those laws would certainly have significant impact in the marketplace, they would not be regulations. In fact, Congress today could codify any section of the CFR it wished and no policy of deregulation or even policies governing regulatory procedure could undo that legislation.

2. Unique Agency Expertise Lies in Regulatory *Process*

Some proponents of the administrative state contend that Congress lacks expertise on the range of issues facing our nation and that agencies are better positioned to have the depth of knowledge and experience necessary for writing the law.[3] They argue that this expertise makes it best for Congress to identify public sentiment on a topic (e.g., let patients know the price of their healthcare before they buy the good/service) and leave the details to the experts at agencies to fill in through binding regulations. Since those regulators will ultimately be in charge of enforcement, it makes sense, they claim, for the agency to use the knowledge it gathers in the field to develop regulations that can be easily applied by the field agents.

These claims lead to additional questions: Should Congress regularly delegate to agencies to finish making the laws within the rough boundaries set by Congress? And if they should, would it make even more sense to have the legislature merely delegate to the executive all complicated legislation in the first place and limit itself to merely the most simple legislation? Or, taking this point to its logical conclusion, given the executive branch's knowledge and experience maybe Congress should have no role in writing laws. These conclusions have two major problems.

First, as already discussed, our constitutional republic does not empower the executive branch to write the law, but rather gives this power to Congress. Second, while regulators bring specialized knowledge and years of experience in government to the table, it is not entirely clear

[2] *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984)
[3] Nicholas Bagley, "Most of Government is Unconstitutional." *Nytimes.com*, 21 June, 2019.

that this experience makes them better at making the rules than members of Congress would be if given the opportunity.

The growth of the administrative state has its basis in the progressive era belief that a government of technocratic, unbiased experts could be the solution to excessive politicization and could make government most effective.[4] But there is only limited evidence that most federal regulators conform to the progressive era ideal of the government expert. And even assuming that the typical federal official writing regulations is indeed a neutral, unbiased subject matter expert who leave his or her own preferences aside, we still must consider whether that expert's expertise is the right kind of expertise. Does that expertise help the agency follow Congress' intentions, weigh competing interests, and ensure that the regulations will be more beneficial than the costs they impose? Or does the expertise simply make it easier for the enforcement arm of the agency to find violations of the law, make it less likely the regulation will be tied up in litigation, or make it more likely that the regulation will be approved by the necessary bureaucrats?

Unfortunately agencies often have narrow expertise, mainly focused on an expertise in "creating and enforcing regulations" rather than on the important trade-offs that occur in the real world. Regulatory staff at federal departments are excellent at navigating the requirements of the Administrative Procedures Act, the Paperwork Reduction Act, Regulatory Flexibility Act, Congressional Review Act, the required analyses under Executive Order 12866, and the myriad other rules and requirements federal agencies must follow to propose, finalize, and implement a regulation. They also know peers in other federal departments who will be involved in the interagency review process and how to shepherd regulations and other policy decisions through the process. And agency rulemaking staff have inside access to the department's enforcement agencies to know how certain regulations can increase the success of the department's enforcement.

While many agency staff do have expertise in particular fields or industries, that expertise is no greater than the expertise a business in that industry or an academic in that field might possess. However, knowledge and experience in how the government itself works absolutely does set agency staff apart from their peers outside of government. They uniquely understand how scientific, engineering, legal, and financial information can contribute to and be the basis for regulations and enforcement of those regulations. This comparative advantage makes agency staff more likely to revert to regulation when they confront a new challenge, even if regulation is not the best path forward.

Regulators regulate and look for opportunities to regulate all the more. Because regulatory process is their most unique expertise, regulatory agencies often turn to regulation when non-regulatory actions (including legislation) could better meet an objective. And because they have expertise in the regulatory process, regulatory agencies are most adept at labeling a regulatory action as non-regulatory in order to avoid jumping through the hoops full-blown regulation requires.

---

[4] Postell, J. (2021). "The ambiguity of expertise in the administrative state." *Social Philosophy and Policy, 38*(1), 85-108.

Teams of lawyers pour over the statutes looking for ambiguity or any delegation of authority, not because they want to produce helpful checklists to assist regulated entities staying out of trouble, but because they hope to be able to enact policies via regulation. This is not a "Republican" or "Democrat" phenomenon, but is now expected as executive agencies look to not only apply law, but also to make it too. And when this overreach occurs, the courts are forced to step in and clarify that the agency lacked authority to make laws absent express Congressional authorization or clear issues of interpretation[5,6].

Because regulations have no requisite time limit, regulatory agencies can change regulations months, years, or even decades after Congress passes a bill. This means that an agency could propose a regulation years after Congress passes the law and that the agency need not conform that proposal to Congress' intent and can, in some cases, propose regulations that may appear contrary to the. In fact, when the Secretary changes, or even when the assistant secretary changes, the agency may implement regulations that reverse the department's interpretation from only a few years prior.

To avoid scrutiny, sometimes agencies attempt to call their regulatory actions "guidance." Guidance ought to be compliance assistance – materials designed to help regulated businesses and individuals know what options they might have to comply with the law. But far too often, the agency will make a new rule and rather than subject it to the required process, simply call it "guidance." Guidance need not go through notice and comment under the Administrative Procedures Act, but can still influence how businesses operate in order to remain in compliance.

To remedy this overreach, and to ensure that the public knew what guidance exists, President Trump issued Executive Order 13891,[7] which required all agency guidance to be cataloged and stored on a searchable page on each department's website. It also required agencies to create an internal regulation which we called the "PRO Good Guidance" Regulation at DOL.[8] I had the privilege of overseeing DOL's review of all guidance materials, rescinding thousands of outdated or unhelpful pieces of guidance, and posting all remaining guidance on a searchable portal. I was also honored to sign the Promoting Regulatory Openness through Good Guidance rule in 2020 which clarified that guidance documents could not be independent legal authority, must undergo internal scrutiny, must be clearly marked as guidance, must be included in a searchable database on the Department's website, and, should they impose restrictions or otherwise restrict the economy, be subject to a modified notice and comment process to ensure public input. Unfortunately, the current administration rescinded the PRO Good Guidance rule. More unfortunate still, some agencies, such as the EPA,[9] have removed their guidance search tool so the public must now do a much more complicated search to identify the universe of EPA guidance.

3. Congress is Accountable, Agencies are Not

---

[5] *National Federation of Independent Business* v. *OSHA*, 595 U. S. ___ (2022)
[6] *State of New York v. United States Department of Labor, et al.* 20-CV-3020 (JPO)
[7] E.O. 13891 of Oct 9, 2019; 84 FR 55235
[8] 85 FR 53163
[9] 86 FR 26842

Another key reason that agencies ought not legislate is that voters may hold legislators accountable for their actions. If a Senator sponsors a bad bill, voters can vote him or her out in the next election. But if a regulator, even a senior official in a department, writes a bad regulation, there is little opportunity for the public to hold him or her accountable. Even if an agency acts counter to the wishes of the legislature, the agency as well as the individuals working on the regulation face little or no consequences. The unique accountability of elected representatives also makes Congress the preferable lawmaking body.

Accountability is especially important when there are trade-offs between different constituents and competing interests. When, for example, one group argues that minimum wages ought to increase, but another group claims an increase will result in layoffs, the legislature must weigh those claims and consider the practical and political implications of their votes. Buta regulatory agency need only "respond" to the concerns raised during formal notice and comment. If the Secretary supports a particular policy, and the agency staff do as well, that policy will likely prevail. If the policy turns out to harm thousands of workers who wind up laid off, the Secretary will face limited accountability, if any. This is further justification for Congress be the legislative body and not to delegate its responsibility to agencies.

If there were only a handful of regulations and if those regulations had minimal effect on the businesses and others who must comply, this entire conversation might be merely academic. But regulations are burdensome and impose costs on the entire economy. Businesses must spend money to comply; workers must take time to ensure their behavior meets regulatory standards; consumers pay higher prices for the goods and services they buy; and the entire economy is less efficient. The Mercatus Center at George Mason University estimates that federal regulations impose a $2T annual cost on the American economy.[10]

And the number of regulations is rising. According to the Regulatory Studies Center at George Washington University, with only two exceptions, federal agencies finalized at least 150 significant final rules each year since at least 1994.[11] That means for 28 of the last 30 years agencies have proposed, and ultimately finalized, more than 150 regulations that each will have an economic effect over $100 million. And these counts ignore the costs imposed on businesses that conform their behavior when agencies change non-significant regulations, guidance documents, and interpretations, or otherwise make public statements that can imply that businesses need to alter their behavior to be in compliance with the regulations.

Given the substantial burden of regulation, and the inability to hold agencies accountable when that burden or when the harms from a failure to regulate are too high leaves Congress as the body best equipped to write laws. Agencies, on the other hand, should focus on implementation of the laws and ensure that they are capable of faithfully executing their enforcement responsibilities.

4. Congress Can Rein In Regulatory Excess

---

[10] McLaughlin, et. al. "Regulatory Accumulation and its Costs." *Mercatus Center.* 14 Nov, 2018.
[11] Febrizio, Mark. *Federal Agencies Are Publishing Fewer but Larger Regulations*, Regulatory Studies Center Columbian College of Arts & Sciences, 20 Dec. 2021, https://regulatorystudies.columbian.gwu.edu/federal-agencies-are-publishing-fewer-larger-regulations. Accessed 7 Mar. 2023.

Congress' role is to write the laws and Congress should take this responsibility seriously. Laws that restrict administrative agency legislative activity are one way to restore the proper relationship between the legislative and executive branches. The REINS Act is a good proposal to do just that: it can restore constitutional order and rebalance legislative authority into the legislative branch.

Congress has on multiple occasions restricted the ability of regulatory agencies to create regulations. The Administrative Procedures Act sets forth required processes an executive agency must follow to enact a new regulation. The Congressional Review Act permits Congress to claw back regulations and blocks agencies from regulating in the same way again. The REINS Act is the latest proposal in this line of Congressional action to rebalance legislative and executive authority.

Based on my testimony, it should come as no surprise that I support legislation like the REINS Act[12] to restore Congress to its required and necessary legislative role. It will require agencies to look carefully at statutes, regulate only where Congress clearly delegates authority, and coordinate with Congress on the final regulations since Congress has authority to stop any regulation before it can be enforced.

I am grateful for the opportunity to share my perspective and look forward to your questions.

[12] "Text - H.R.277 - 118th Congress (2023-2024): Regulations from the Executive in Need of Scrutiny Act of 2023." *Congress.gov*, Library of Congress, 11 January 2023, https://www.congress.gov/bill/118th-congress/house-bill/277/text.

Mr. MASSIE. Thank you, Mr. Wolfson.
Mr. Cleckner, you may go now.

STATEMENT OF RYAN M. CLECKNER

Mr. CLECKNER. Good morning, Chair Massie, Ranking Member Cicilline, and Members of the Subcommittee.

I am Ryan Cleckner. I am a former special operations sniper, and I'm a firearms attorney that specializes in Federal firearms law and ATF compliance, among many other projects in the firearms industry.

I am concerned with Federal administrative agency overreach with respect to rulemaking. I believe that power in the government should be limited, and it should only be in the hands of those accountable to the people, and decisions and debates on matters in legislation should be open and transparent to the public.

Allowing nonelected and nonrepresentative government bureaucrats in Federal agencies to exercise power that should be limited to Congress and to do so behind closed doors without accountability nor transparency, is destructive to America, its citizens, and Congress. I implore you to not let these Federal agencies under the Executive Branch continue to steal power that has been entrusted to you by us.

A recent example of agency overreach where laws are being changed by unelected bureaucrats with decisions being made behind these closed doors is ATF's latest rule 2021R–O8F, its Factoring Criteria for Firearms with attached Stabilizing Braces. It was published in the **Federal Register** on January 31st of this year.

This latest rule that the ATF has made, it redefines laws that have been passed by Congress, and it criminalizes the possession of firearms with certain accessories that the ATF itself had previously specifically approved. This rule by fiat effectively gives the ATF the power to determine who is a felon by the stroke of a bureaucrat's pen.

This is not an appropriate enforcement of law. It is tyranny. It's unfair for the ATF to expect the average citizen to not only be aware of these changes, especially since the ATF itself has waffled back and forth over the years on pistol braces alone, but expects citizens to make these determinations about these objects themselves without clear direction about what the ATF considers to be legal. However, even with clear instructions, these changes to legal definitions within law are not appropriate for the ATF to make.

If Congress doesn't rein in Federal agencies and these agencies are permitted to continue to change laws and provide this conflicting guidance to citizens, I believe that chaos ensues.

Thank you for the opportunity to speak here today, and I'm willing to answer any questions you may have.

[The prepared statement of Mr. Cleckner follows:]

TESTIMONY OF RYAN M. CLECKNER

BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON THE ADMINISTRATIVE STATE, REGULATORY REFORM, AND ANTITRUST

MARCH 10, 2023

"REINING IN THE ADMINISTRATIVE STATE: RECLAIMING CONGRESS'S LEGISLATIVE POWER"

Good morning Chairman Massie, Ranking Member Cicilline, and members of the Subcommittee. I am Ryan Cleckner, an attorney specializing in federal firearms law and Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) compliance, co-founder of Mayday Safety, a software company dedicated to helping respond to emergencies, co-owner of GunUniversity.com, a website dedicated to educating people about firearms, their use, and laws, owner of RocketFFL, an online training platform to help Federal Firearm Licensees (FFLs) stay complaint with ATF rules and regulations, and other firearm industry related ventures. I am also a former university lecturer, special operations sniper with combat deployments, and a sniper instructor.

I am concerned with Federal Administrative Agency overreach with respect to rule making. I believe that power in the government should be limited, it should only be in the hands of those accountable to the people, and decisions and debates on matters and legislation should be open and transparent to the public.

Each branch of our government, with clearly defined areas of authority in our Constitution, is limited in its power through a series of checks and balances. You each, as members of Congress, have been given power to make laws as representatives of the citizens of your districts. If you do not represent the wishes of your constituents, or if you attempt to do something outside of Congress's authority, you can be held accountable for your decisions and actions.

When you consider legislation or hold hearings on matters, it is open to the public. This transparency is fundamental to our Government. Debates on legislation and hearing such as this one, allow for differing opinions to be heard and considered before legislation is passed.

Allowing non-elected and non-representative government bureaucrats in Federal Agencies to exercise power that should be limited to Congress, and to do so behind closed doors without accountability nor transparency, is destructive to America, its citizens, and to Congress.

I implore you to not let these federal agencies under the Executive branch continue to steal power that has been entrusted to you by us.

A recent example of agency overreach where laws are being changed by unelected bureaucrats with decisions being made behind closed doors is the ATF's latest rule 2021R-08F "Factoring Criteria for Firearms with Attached 'Stabilizing Braces'" published in the Federal Register on January 31, 2023.

This latest rule that the ATF has made redefines laws passed by Congress and criminalizes the possession of firearms with certain accessories that the ATF itself had previously specifically approved. This rule, by fiat, effectively gives the ATF the power to determine who is a felon by the stroke of a bureaucrat's pen. This is not an appropriate enforcement of law - it is tyranny.

Worse yet, the ATF's opinion and position on this matter has shifted multiple times over the past ten years leaving citizens confused about what is lawful. Pistol stabilizing braces were approved by the ATF in 2012 to be used on firearms without converting handguns, standard firearms under the Gun Control Act of 1968, into highly regulated Short Barreled Rifles (SBRs) under the National Firearms Act of 1934 which require special registration, ATF approval, and the payment of transfer taxes.

In a 2021 report by the Congressional Research Service[1], it is estimated that somewhere between 10 and 40 million of these pistol braces are in civilian hands. It is common for manufacturers of these braces to display the ATF approval on their websites and/or include copies of ATF approval with the items. This means that at least 10 million of these products were purchased with the assurance that they were legal to possess and use.

Three years after their approval, the ATF determined that the pistol stabilizing braces were still lawful on handguns as longs the shooter did not place the brace into their shoulder when firing. Then, two years later, the ATF rescinded their "shouldering" opinion. In 2020, the ATF sought to reclassify these braced pistols as SBRs with a shortened 14-day comment period. The ATF then decided to retract their position until last year where a new rule was proposed with a scorecard of ambiguous features where it was left to citizens to determine if what they possessed was legal. Earlier this year, the ATF has yet again changed their position and has most recently published a list of ambiguous characteristics which, if they apply to a particular object, would change the status of a firearm and make the possessor of such a configured firearm a felon if not registered with the government or surrendered or destroyed.

---

[1] https://crsreports.congress.gov/product/pdf/IF/IF11763

The crux of this issue concerns the rewriting of law. Federal law currently says that a firearm is a rifle if it is "…designed and intended to be fired from the shoulder . . .[2]" The ATF is currently changing that definition in their regulations to include firearms with accessories that meet certain factors. These factors include ambiguous things such as an undefined amount of rear surface area, a firearm weight or length similar to other rifles, the manufacturer's promotional materials, information demonstrating the likely use of a firearm, among others.

It is unfair for the ATF to expect average citizens to not only be aware of these changes but also to expect them to make these determinations themselves without clear directions about what the ATF considers to be legal. However, even with clear instructions, these changes to legal definitions within the law are not appropriate for the ATF to make.

The ATF is rewriting the law, effectively creating shifting criminal statutes, is also rewriting tax law concerning the registration of these firearms, and is turning otherwise law-abiding citizens, who have relied upon previous ATF guidance, into felons. We can not have a Republic when unelected bureaucrats are allowed to determine who is a criminal day by day.

If Congress doesn't rein in Federal Agencies and these agencies are permitted to continue to change laws and provide conflicting guidance to citizens, chaos ensues.

Thank you for the opportunity to speak here today and I'm willing to answer any questions you may have,

Ryan Cleckner

---

[2] 18 USC 921(a)(7)

Mr. MASSIE. Thank you, Mr. Cleckner.
Mr. MASSIE. Professor Hammond, you may begin.

STATEMENT OF EMILY HAMMOND

Ms. HAMMOND. Thank you, Chair Massie, Ranking Member Cicilline, and distinguished Members of the Subcommittee, for the opportunity to testify today.

I'm a professor of law at the George Washington University Law School, where I do, indeed, specialize in administrative energy and environmental law. I have previously served in Federal agencies, both as legal counsel and in my previous career as an engineer, where I coauthored several scientific publications.

I am deeply concerned about the REINS Act. It's impractical. It's harmful to the people of this country. It eviscerates two cores of government legitimacy, participation and reasonableness, and it is likely unconstitutional.

Congress has long recognized that among the branches of government, agencies within the Executive Branch are best positioned to leverage specialized expertise to tackle the most challenging issues that we face as a society.

Whether protecting the functioning of our markets, keeping workers safe, or protecting the air we breathe, these challenges are incredibly complex and difficult to address solely in the legislative arena. So, in its wisdom, Congress establishes the statutory basis for action, but tasks the Executive Branch with the duty to bring that legislative vision to life.

Congress has put a number of guardrails in place. For rulemaking, these include the participation, deliberation, and reason-giving requirements that stem from the Administrative Procedure Act.

Notably, these features of rulemaking are fundamental to the democratic decisionmaking. They guard against arbitrariness, and they promote oversight through transparency. In particular, that reason-giving requirement ensures that Congress and the public can both understand the basis for the decision and see whether the agency has maintained fidelity to statute.

Now, there is always room for improvement in agency decisionmaking, and Representative Jayapal's Stop Corporate Capture Act, for example, offers several upgrades. These are aimed at empowering the public, ending corporate manipulation, attending to social equity, and minimizing the dysfunction that OIRA review can engender.

By contrast, the REINS Act would replace scientific informed participatory government decisionmaking with an utterly impractical system. Congress is neither designed nor staffed to deeply evaluate every single agency's major rules, especially within such short timeframes.

The suggestion that the REINS Act is meant to promote legislative transparency is baffling. It permits only one or two hours of debate on the joint resolutions and otherwise sets such tight timeframes that it is difficult to understand how legislators could give careful review to each regulation.

This scenario promotes opacity and heightens the risk that votes will be based on naked political preferences that would not be permissible in the agencies themselves.

Right now, America needs more protections, not fewer. We know from the East Palestine disaster what an antiregulatory culture can do, and we have seen these lessons across our history. We know as well that weak regulatory protections mean fewer people make it home to their families after work. More people die too soon, and we hasten and intensify climate disasters. This is not idle speculation. It's backed up by the cost-benefit analyses that the REINS Act asks for, but that are already available for review by Congress and the public.

Finally, the REINS Act is concerning because it blurs separation of powers beyond what the Constitution can bear. On one hand, if the joint resolution process is a legislative act, it must meet constitutional requirements for doing so. On the alternative, it would violate separation of powers for Congress to exercise the executive function of finalizing regulations.

To conclude, the unconstitutional REINS Act would fail to achieve what it promises and would, instead, harm our economy, our safety, our health, and our environment.

Thank you again for the opportunity to testify today, and I look forward to your questions.

[The prepared statement of Ms. Hammond follows:]

TESTIMONY OF EMILY HAMMOND
GLEN EARL WESTON RESEARCH PROFESSOR OF LAW
THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

BEFORE THE HOUSE COMMITTEE ON JUDICIARY
SUBCOMMITTEE ON THE ADMINISTRATIVE STATE, REGULATORY REFORM, AND ANTITRUST

MARCH 10, 2023

Thank you, Chairman Massie, Ranking Member Cicilline, and distinguished Members of the Subcommittee, for the opportunity to testify today concerning the REINS Act and the importance of regulatory protections.

I am a Professor of Law at The George Washington University Law School. I also serve as Vice Provost for Faculty Affairs for the University, and am a member-scholar of the not-for-profit regulatory think-tank, the Center for Progressive Reform. I am testifying today, however, on the basis of my expertise and not as a partisan or representative of any organization. As a professor and scholar of administrative law, energy law, and environmental law, I specialize in the way agency expertise and science-informed decisionmaking effectuate congressional intent in bringing the benefits of regulatory protections to the public. My work is published in the country's top scholarly journals as well as in many books and shorter works, and I regularly speak on topics related to my expertise. Early in my career, I practiced as a civil and environmental engineer; that experience and training particularly inform my assessment of the legal framework within which agencies make decisions involving scientific or technical complexity.

I am deeply concerned about the REINS Act. It is impractical and harmful to the people of this country. It is poor governance that eviscerates a core of government legitimacy—reasonableness. And it is likely unconstitutional. In my testimony today, I will first provide a general overview of the role of agency expertise and administrative procedures in developing regulatory protections, paying special attention to the guardrails that Congress has in place to ensure fidelity to statute and democratic accountability. Next, I will explain why the REINS Act would fail to achieve what it promises and would instead harm our economy, our safety, our health, and our environment. I will conclude with commentary on its constitutional flaws.

I. The Role of Agency Expertise and Administrative Procedures in Carrying Out Congressional Intent

Congress has long recognized that among the branches of government, agencies—within the executive branch—are best positioned to leverage specialized expertise to tackle the most challenging issues we face as a society. Early expressions of this congressional intent, for example, were designed to protect the functioning of our economy,[1] to begin to offer some

[1] *See, e.g.*, Federal Power Comm'n v. Hope Natural Gas, 320 U.S. 591 (1944) (regarding Federal Power Commission's rate order, "It is the product of expert judgment which carries a presumption of validity."); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 Stan. L. Rev. 1189, 1266-67 (1986) (describing faith in "ability of experts to develop effective solutions to the economic disruptions created by a market system").

protection against inhumane working conditions,[2] and to harness the power of the atom for peaceful purposes.[3] In the 1960s and 1970s, it became clear that more protections were desperately needed—for health, safety, and the environment—and this institution further entrusted agencies to bring their deep expertise to bear on matters involving "significant scientific uncertainties, where the stakes were potentially life-and-death."[4]

For nearly a century, therefore, Congress has recognized that agencies are in the best position to gather technical and scientific information, conduct studies, and leverage the professional judgment of doctors and veterinarians, epidemiologists and pathologists, food and crop scientists, geologists, biologists, and hydrologists, engineers, economists… the list is long. The point is that the challenges of today are incredibly complex and difficult to address solely in the legislative arena; thus, Congress establishes the statutory basis for action but tasks the Executive Branch with the duty to bring that legislative vision to life.

To be sure, Congress has put a number of guardrails in place to promote transparency and accountability and to enable its oversight of the agencies. The Administrative Procedure Act, for example, requires agencies engaged in rulemaking to "give interested persons an opportunity to participate," consider "the relevant matter presented," and explain their ultimate decisions in a "concise . . . statement of basis and purpose."[5] As my co-author and I have described, these requirements and their corollaries "reinforce notions of legitimacy":

> First, they are consistent with participation and voice—attributes considered fundamental to democratic decisionmaking as well as to the perceived legitimacy of the process. Second, they encourage and reward deliberation and responsiveness. The former furthers neutrality and protects against arbitrariness and extreme outcomes by slowing the pace of decisionmaking and bringing the benefits of dialog to bear on proposed agency actions. The latter fosters trust and demonstrates that participants were treated with respect. Finally, these procedural rules are important building blocks for one of administrative law's ultimate legitimizers: reasoned decisionmaking.[6]

As suggested above, the reason-giving requirement serves several purposes relevant to this hearing's topic. First, it alleviates concerns about legislative delegations of rulemaking authority. This is because agencies, unlike Congress, are not afforded a presumption of lawfulness—they are reviewed on the basis of their reasoning at the time they made the decision.[7] This principle

---

[2] *E.g.*, The Fair Labor Standards Act, 29 U.S.C. § 203(l) (assigning Secretary of Labor responsibility in defining prohibited "oppressive child labor"); National Labor Relations Act, 29 U.S.C. § 160 (assigning National Labor Relations Board responsibility to prevent unfair labor practices).

[3] *E.g.*, Atomic Energy Act of 1954, 42 U.S.C. § 2011.

[4] Emily Hammond, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 Mich. L. Rev. 733, 757 (2011); *see, e.g.*, Consumer Product Safety Act of 1972; Federal Water Pollution Control Act Amendments of 1972; Clean Air Act Amendments of 1970; The Occupational Safety and Health Act of 1970; National Environmental Policy Act of 1969.

[5] 5 U.S.C. § 553(c).

[6] Emily Hammond & David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 Harv. Env't L. Rev. 313, 323 (2013) (footnotes omitted).

[7] *See* SEC v. Chenery Corp., 332 U.S. 194, 196 (1947); Emily Hammond, *Deference and Dialog in Administrative Law*, 111 Colum. L. Rev. 1722, 1736-37 (2011) (elaborating on this point).

ensures that they transparently explain the basis for their actions, provide a reasonable explanation, and maintain fidelity to statute. To emphasize the point, the final rule must be within the bounds Congress has authorized.[8]

> Thus, reason-giving . . . facilitates oversight ... because it permits other stakeholders—Congress, the executive, regulated entities, and regulatory beneficiaries—to understand the agency's justifications and hold it accountable for its decisions. In this way, the transparency of reason-giving enables democratic oversight, helping ensure agencies' legitimacy in the democratic scheme.[9]

Of course, many other checks on agency action are at play during rulemaking. Among these are the reviews conducted by the Office of Information and Regulatory Affairs (OIRA) for executive agencies' rules, other statutory restrictions, like the Unfunded Mandates Reform Act, and the ongoing dialogue that occurs between the legislative and executive branches.

In addition, judicial review can reinforce statutory boundaries and provide signals to Congress about agencies' fidelity to statute. This is true regardless of which standard of review applies because agencies are always expected to act within their statutory bounds. One doctrine, of course, that garners much attention is that of *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*[10] The test provides that when a court reviews an agency's interpretation of a statute it administers, the court must ask first whether Congress has spoken clearly; if so, the clear language controls.[11] If not, the court will uphold the agency's permissible—that is, reasonable—construction of the statute.[12]

With almost forty years' experience with *Chevron*, moreover, Congress can craft substantive statutory language more tightly if it wants to cabin an agency's discretion in carrying out its mandate. The *Chevron* doctrine also facilitates Congress's ability to monitor agencies by incentivizing agencies to use procedures that are more transparent; this is a key function of *United States v. Mead Corp.*[13] Agencies' procedural choices matter because they impact the level of deference that will be afforded on judicial review.[14]

The topic of judicial review deserves a large caveat, however. What this institution should really be concerned about is the current dysfunction in the courts, which is straining separation of powers, and disrupting agencies in carrying out the mandates that Congress has given them to protect the people of this country and our environment. Although a full explication is beyond the scope of this hearing, one especially pernicious doctrine is the Major Questions Doctrine,[15]

---

[8] *E.g.*, Massachusetts v. EPA, 549 U.S. 497, 534 (2008).
[9] Hammond & Markell, *supra* n.6, at 325.
[10] 467 U.S. 837 (1984).
[11] *Id.* at 842-43 (1984).
[12] *Id.*
[13] 533 U.S. 218 (2001).
[14] This point is eloquently made in Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 Colum. L. Rev. 1749 (2007).
[15] *See* West Virginia v. EPA, 142 S. Ct. 2587 (2022).

which is unprincipled,[16] results in a weakening of regulatory protections,[17] and amounts to a "power grab" in the Supreme Court.[18]

II. Room for Improvement – But REINS Act Would Harm

I emphasize that there is always room for improvement in agency decisionmaking; Representative Jayapal's Stop Corporate Capture Act, for example, offers several upgrades aimed at empowering the public, ending corporate manipulation, prioritizing social justice and equity, and minimizing the dysfunction that OIRA review engenders. By contrast, the REINS Act is utterly impractical, unwise, and ultimately threatening to the most basic notions of health, safety, and welfare that our nation needs to thrive.

The REINS Act would replace science-informed, participatory government decisionmaking with an utterly impractical system. Congress is neither designed nor staffed to deeply evaluate every single agency's major rules, particularly within seventy days (and with committee consideration within only fifteen days).[19] For all agencies' major rules to suddenly flood the halls of Congress would overwhelm the Comptroller General, inundate the committees, and distract the Houses from all their legislative priorities. And to suggest that the entire record of even one agency's considered effort in creating a rule—which may have been years in the making—could be thoughtfully approved or rejected in such a short time is a fallacy meant to obscure the real aims of the Act.

Indeed, the REINS Act's suggestion that it is meant to promote legislative transparency is baffling. It permits only one or two hours of debate on the joint resolutions and otherwise sets such tight timeframes that it is difficult to understand how legislators could give a careful review to each regulation. This scenario promotes opacity and heightens the risk that votes will be based on naked political preferences that would not be permissible in the agencies themselves.

What is more, the wellbeing of our people and our planet hangs in the balance. The REINS Act is transparent in one thing: its intent to take away the basic protections agencies offer for the safety of our workers, food, water, and cars; the efficacy of our medicines; the equity and dignity to which all people are entitled; and the health of our planet on which we all rely. Right now, America needs more protections—not fewer. We know from the East Palestine disaster what an anti-regulatory culture can do, and we have seen these lessons across our history; think back to the 2008 Wall Street Collapse, for example. We know as well that weak regulatory protections mean fewer people make it home to their families after work, more people die too soon, and we hasten and intensify the climate disasters that are only increasing in frequency. This isn't idle speculation; it is backed up by the cost-benefit analyses that the REINS Act asks for but that are already available for review by Congress and the public.[20]

---

[16] *E.g.*, Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded*, -- Cal. L. Rev. – (forthcoming 2023).
[17] *E.g.* Thomas McGarity, *The Major Questions Doctrine Wrecking Ball*, -- Va. Env't L.J. – (forthcoming 2023).
[18] *E.g.* Lisa Heinzerling, *The Supreme Court's Clean-Power Power Grab*, 28 Georgetown Env't L. Rev. 425 (2016).
[19] Although the Act asks the Comptroller General to produce a report about the number of regulations on the books, of course this institution already has a sense of agencies' workloads because this institution created those workloads.
[20] Much of this information is easily available at regulations.gov. For plain-language examples, see DOE, Press Release, *DOE Finalizes Two New Rules for General Service Lamps That Will Conserve Energy, Save Consumers*

The REINS Act also claims that it will result in more carefully drafted and detailed legislation, but this institution knows how to do that. The examples span the U.S. Code, but consider two. Congress made very clear in its 1990 Clean Air Act amendments that indeed, this institution intends for EPA to provide protections against air toxics. The Infrastructure Investment and Jobs Act is also quite precise in the many programs it established, like the Joint Office of Energy and Transportation that is working toward a zero-emission transportation infrastructure.

III. The REINS Act is Constitutionally Suspect

Finally, the REINS Act is concerning because it blurs separation of powers beyond what the Constitution can bear. First, in establishing the joint resolution process, the Act seems to insist that the agency rule remains an action of the Executive Branch. But because Congress means to prevent agency rules from becoming binding law in the absence of a joint resolution, it is exercising its legislative power. And in *INS v. Chadha*, the Supreme Court held that legislative acts are subject to the bicameralism and presentment requirements of the Constitution.[21] Alternatively, it would also violate separation of powers for Congress to exercise the executive function of finalizing regulations.[22]

Thank you again for the opportunity to testify today. I look forward to your questions.

Money, Apr. 26, 2022 (announcing rule that will save consumers over $3 billion and avoid 222 million metric tons of greenhouse gas emissions over thirty years); EPA, News Release, *EPA Proposes to Strengthen Air Quality Standards to Protect the Public from Harmful Effects of Soot*, Jan. 6, 2023 (announcing proposed rule that would prevent up to 4200 premature deaths per year, 270,000 lost work days per year, and result in as much as $43 billion in net health benefits in 2032); *see also* Sidney Shapiro et al., Saving Lives, Preserving the Environment, Growing the Economy: The Truth About Regulation (2011), at https://cpr-assets.s3.amazonaws.com/documents/RegBenefits_1109.pdf.

[21] 462 U.S. 919 (1983).

[22] *Cf.* Bowsher v. Synar, 478 U.S. 714, 736 (1986) (emphasizing the constitutional command that "Congress play no direct role in the execution of the laws.").

Mr. MASSIE. Thank you, Professor Hammond.

We'll now proceed under the five-minute rule with questions. I recognize the gentleman from California, the Chair of the IP Subcommittee, Mr. Issa, for five minutes.

Mr. ISSA. Thank you, Mr. Chair.

It's always interesting to be told something is unconstitutional in this body by a professor who just doesn't like how Congress might rule.

So, I'm going to start with Mr. Cleckner, since you fought to defend our country and her right to be wrong.

Let me ask you a question: Do you think for a moment that a body that regulates one way and then regulates another way is consistently meeting the congressional mandate that they interpret but not make laws?

Mr. CLECKNER. Of course, it would depend on the situation, but the way it's happening now, no.

Mr. ISSA. Right. In your case, they fully executed, knowing what the devices did, regulations and categories. Now, they're changing them, based on a political, Oh, these are too dangerous, these are this, these are that. Whatever their reason is, they're making a political decision to make a change that is not supported by a change in the hardware or the change in the statute. Is that correct?

Mr. CLECKNER. I believe so. I do not think this is a regulation that is promulgating current law. They are specifically in the ruling calling out what the current law is and then saying, we are redefining that to be this instead. They're actually changing the language of the law in the definitions.

Mr. ISSA. Mr. Wolfson, you looked a little uneasy as the last witness spoke. The unconstitutional claim that we just heard, is it correct—and I'll ask both the other witnesses. Is it correct that we could strip every single statute by a rule, by simply the House and the Senate voting to do so, and eliminate all statutes since the beginning of time and start over if we chose to, and that would be constitutional?

Mr. WOLFSON. My understanding of the Constitution is that yes, if Congress passed a law to strip all current statutes, that they would be allowed to do that.

Mr. ISSA. So, unless it is within the 27 amendments and the original Constitution, which we cannot strip by congressional fiat, everything else, by a two-thirds majority over the objection of a President, can be eliminated to zero. Is that correct?

Mr. WOLFSON. That's my understanding.

Mr. ISSA. OK. So, any administrate—so any failure in the REINS Act to meet some sort of a constitutional test as written would simply be that we probably didn't write the REINS Act quite specific enough to assert the powers that Congress clearly has. Is that correct?

Mr. WOLFSON. I would assume that would be the argument. It would be that the language of the REINS Act, as currently drafted, may have some sort of constitutional defect.

The concept of the legislature being able to say, we're going to create a rule that says all the regulations have to come back to Congress, considering Congress theoretically gave the agency the authorization to write them, that would be—

Mr. ISSA. Right. So, now in the case of the Federal Trade Commission, which you opined on, clearly they are now asserting areas that they never asserted for their first decades of existence. Is that correct?

Mr. WOLFSON. That is correct. There are certain regulations that are being proposed by the Federal Trade Commission, specifically the noncompete clause regulation, which it does not appear that the FTC was ever given authority to do that sort of regulation, regardless of whether that is good or bad policy.

Mr. ISSA. Right. So, Ms. Ho, I don't want to leave you out of this. The Chevron deference that ultimately creates the ability for if you challenge in court the assumption that somehow the Congress has simply had ambiguity, do you see—in the ATF, or in the FTC, do you see ambiguity in the original law that would cause decades after one precedent was set to be changed simply by a change in who happens to occupy the Chairship and, of course, the White House?

Ms. HO. Thank you for that question. I wouldn't presume to comment on the details of any specific legislation, but I would go back—

Mr. ISSA. Well, Chevron isn't legislation. Chevron is a Supreme Court decision that essentially says the court is going to assume that these agencies act in good faith and that it's simply ambiguity in the law.

Do you believe there is ambiguity in either of these two decisions, or are you unwilling to comment on them?

Ms. HO. I'm not in a position to comment on either of them, but I do underscore the significant flaw in the Chevron approach, which essentially takes away this body's ability to make law, and also the judiciary's constitutional responsibility to say what that law is.

Mr. ISSA. So, in my remaining few seconds, for all the witnesses, including Ms. Hammond, is it fair to say that instead of working on the REINS Act, perhaps we should be working on explicitly eliminating Chevron and putting the deference back to you must return to Congress if there's ambiguity? Any comments?

Mr. MASSIE. The gentleman's time is expired, but I'll allow one witness to respond to that. Mr. Wolfson.

Mr. WOLFSON. I guess I'll take it. I think that eliminating Chevron deference or curtailing it significantly would be an action that Congress could take, which would have an even bigger effect than something like the REINS Act. Because the REINS Act, it was only prospective, whereas the—eliminating Chevron deference affects all regulation that are currently on the books.

Mr. ISSA. Thank you, Mr. Chair. I yield back.

Mr. MASSIE. The gentleman yields back.

The Chair now recognizes the gentleman from Rhode Island, Ranking Member Mr. Cicilline, for five minutes.

Mr. CICILLINE. Thank you, Mr. Chair.

I want to quickly dispense with one thing, Mr. Wolfson. You said in your testimony here just now, and in your written testimony, that agency expertise is really expertise in the regulatory process, not on the complicated tradeoffs between competing priorities.

You're not suggesting, I hope, that the thousands of scientists who work at the FDA or the thousands of engineers and products experts that work at the Consumer Product Safety Division are only experts in the regulatory process and not the underlying science or engineering that they were trained to do, are you?

Mr. WOLFSON. Thank you for the question. No, I'm not suggesting that they—

Mr. CICILLINE. OK. Thank you. So, reclaiming my—so my point is regulators have expertise, not just in the understanding of the regulatory process, but they're hired in these agencies of the Federal Government because they bring with them life-saving training and science and expertise that we don't have as Members of Congress.

So, the notion of like all they know about is the regulatory process, which is what you say here, that's exaggerated. It's actually the underlying substance of their expertise that is saving the lives of the American people. So, I just wanted to make sure that you weren't making a claim to the contrary.

Professor Hammond, what I want to ask you about is, would the response to environmental calamities, like the one that was caused by Norfolk Southern train derailment East Palestine, be better or worse off if the EPA were subjected to the REINS Act that is being offered by my colleagues on the other side of the aisle?

Ms. HAMMOND. Thank you for that question. Very much worse off. Agencies need those regulations to then carry out their work, whether that's investigatory work or enforcement work.

Plus, one of the things I want to emphasize is that regulations protect people in the first place. They help keep disasters like East Palestine from happening. So, we can back it up a minute and just think about let's prevent harms instead of waiting for disasters.

Mr. CICILLINE. Would requiring Congress rather than agencies that are equipped with both expertise and professionals who do this work, a body of Congress, those of us that are elected members, who are not scientists or experts on public health or environmental protection, worker protection, safety provisions, would it endanger the lives of the American people if we were to second-guess agency decisionmaking that is, in fact, intended to keep Americans safe?

How much longer would it take for these regulations which, in fact, are saving people's lives to go into effect, if they would ever go into effect, if the REINS Act became law?

Ms. HAMMOND. I think the concern is that they would never go into effect, and we'd be left with huge gaps in protection across every field of our economy. So, although we might envision a system where Congress tried to legislate every regulatory detail, as you mentioned, there's a matter of comparative institutional expertise here.

Agencies really have the expertise to bring that kind of scientific informed judgment to those regulatory protections.

Mr. CICILLINE. Let me just end with a very specific example. During the Trump Administration, the Federal Railroad Administration withdrew an Obama-era Notice of Proposed Rulemaking mandating two qualified crew members on most freight locomotives. Workers have strongly supported a crew size mandate like

this one, as they believe it's integral to rail safety. Although the Biden Administration has reproposed this rule, railroads have staunchly opposed this safeguard.

Under the REINS Act, railroads would have even more leeway to influence rules like this one, through lobbying Members to use an unconstitutional one-Chamber veto of such a rule.

So, my question is, would the REINS Act provide more protection for workers and people who use the rails and sometimes less protection for hazardous materials that they transport or less? In other words, would worker safety be impacted in any positive way or a negative way if the REINS Act were in place?

Ms. HAMMOND. Certainly, in a negative way. We should be listening to those workers.

Mr. CICILLINE. With respect to the notion that the regulatory process is difficult to follow and doesn't have the voices of the American people embedded in that process, would you respond to that argument, Professor?

Ms. HAMMOND. Sure. Under the Administrative Procedure Act, all agencies are required to have a period of notice and comment. Anyone, any person can offer comments. Although there is room to bring even more voices to that process, agencies are required to respond to the significant comments that are raised and incorporate that understanding into their final rules.

So, there's very much a sense of participation and democratic accountability embedded in the process.

Mr. CICILLINE. Thank you, Professor.

I yield back, Mr. Chair.

Mr. MASSIE. The Ranking Member yields back.

Then I'll recognize the gentleman from Colorado, Mr. Buck, for five minutes.

Mr. BUCK. I thank the Chair.

Ms. Ho, I want to direct these questions to you, and I guess my comments also. We have a situation in Congress where we have a large number of programs that are unauthorized. The programs were originally set up with a sunset provision, typically five years.

The five years has expired, and I want to just—there are actually 1,200 programs that have now expired, and Congress refuses to do its job and review those programs.

When Congress pretended that it cared about spending, it set up a two-step process. The first step was to authorize a program, and the second step was to appropriate to the authorized program.

The rules of Congress for the last 50 years have included a provision that requires Congress not to appropriate to an unauthorized program. What's so interesting about that is Congress waives its own rules for each appropriations bill so that it can bypass the responsibility of actually appropriating only to authorized programs.

The purpose of this, obviously, is that Congress, as responsible to the American people, should be reviewing these programs, determining if these programs need to be expanded, contracted, amended in some way so that they are more responsible.

My question has to do with the interaction or interplay of the Chevron doctrine with the concept of Congress' responsibility in overseeing these particular programs.

Ms. HO. Yes, thank you for that thoughtful question.

I agree that the scenario that you lay out highlights I think one of the critical aspects. Why I think it's so important that we're here today having this discussion is as important and salutary for Congress to exert its lawful authority under the system that our Founders designed, and that when Congress doesn't, we shouldn't be surprised to see other branches sort of exploiting that lack of action.

So, I think your question really highlights the important role that Congress has to play in ensuring that our system of separation of powers that the Founders bequeathed to us remains vibrant and effective in safeguarding individual rights and liberties.

Thank you for that question.

Mr. BUCK. I have to say I think you are far too kind. You understand that you are testifying in Congress, and you are a gentlelady from the great State of Texas. I respect all those things, but the reality is Congress has failed to do its job.

Part of the problem and the reason for these administrative agencies overstepping their bounds and the one that gets under my skin—and I'm sure my good friend from Wyoming, Ms. Hageman, would agree with me on this—is the WOTUS rule. It comes up every time the Democrats get into the White House, the Waters of the U.S.

Everytime my district actually touches, borders the State of Wyoming, and we share water. If the Democrats get to regulate ditch water in my district and every puddle in my district, we're going to have problems. So, the idea that these agencies can expand their authority is, really, they are filling a vacuum that Congress has created.

My point—and I'm hoping to get your comment on this. My point is that without Congress' neglect, without Congress' failure to act, we wouldn't be dealing with the REINS Act right now, because we would actually be doing our job every day of overseeing the functions in the Executive Branch.

Ms. HO. Yes, Your Honor. I think the Founders well understood and anticipated the very dysfunction you describe, which is it creates real problems in our system of separation of powers when one branch does not exert its lawful authority, does not do its job.

So, for this branch, as you highlight, this branch's role in our constitutional form of government is to make law. So, when Congress does not—when Congress passes, say, vague laws or when Congress does not act at all, it upsets the system of checks and balances.

Mr. BUCK. I yield back. Thank you.

Mr. MASSIE. The gentleman yields back.

The Chair now recognizes the Ranking Member of the Full Committee, Mr. Nadler, for five minutes.

Mr. NADLER. Thank you, Mr. Chair.

Mr. Buck's discussion of the fact that Congress can't find the time to reauthorize all the programs leads me to wonder how Congress would ever find the time to go over thousands and thousands of detailed regulations.

My understanding is that under the REINS Act, many industries would be expected to self-govern.

Professor Hammond, do you think the railroad industry will do this effectively, putting health and safety above profits?

Ms. HAMMOND. No. There's a long and well-documented history of a concerted effort by the entire industry to resist any safety requirements. The REINS Act only makes it more difficult to actually put those protections into place.

Mr. NADLER. In addition to the dangerous REINS Act, which we've discussed, Members of the Subcommittee also support the Separation of Powers Restoration Act, which would eliminate Chevron deference, that is, deferring to expert agencies on their interpretation of statute so long as it's not unreasonable.

Professor Hammond, do you think public health and safety would be improved or hindered if agencies lacked this deference and had constantly to go to court over their authorizing statute?

Ms. HAMMOND. It would be much more difficult to protect the public.

I would like to just point out that I'm hearing the words "Chevron deference," but the Chevron doctrine itself has a key component that this discussion so far has overlooked, which is the first step. If the statute is clear, the analysis stops. There is no deference to the agency, because the clear language of the statute controls.

It's only if there's ambiguity that as a matter of comparative institutional competence as between the courts and the agencies that a court should not be substituting its own policy preference for the way the agency exerted its expertise and did so with political accountability.

So, the Chevron doctrine itself has quite a bit more nuance and does recognize the expertise of agencies, but certainly has guardrails in place for congressional oversight.

Mr. NADLER. Thank you. I assume that if an agency abused its authority under the Chevron doctrine, that's subject to challenge in court?

Ms. HAMMOND. Certainly.

Mr. NADLER. Thank you.

Supporters of the REINS Act argue that this bill would help tame inflation, despite the fact that the bill could, in fact, result in blocking any major rule contemplated by our expert agencies, even if they're designed to address inflation.

Professor Hammond, how do you think the REINS Act, if passed, would affect the economy and inflation?

Ms. HAMMOND. Well, we know—are we OK there? All right.

We know that regulatory protections actually help the economy. I collected several examples in my written testimony, but just to give you one, EPA's proposed soot rule that was proposed earlier this year would save 270,000 lost workdays. It would also provide $43 billion in net health benefits. That's good for the economy.

If the REINS Act would cutoff all these protections at the knees, we'd see a lot of detrimental economic impact.

Mr. NADLER. Thank you. The National Transportation Safety Board recently launched an investigation into Norfolk Southern following the derailment in East Palestine. The investigation is rare, because it will consider Norfolk Southern as a whole rather than the East Palestine incident in particular.

Professor Hammond, do you think Norfolk Southern is the only railroad company that needs more regulatory oversight, and do you think that regulatory oversight would be improved under the REINS Act?

Ms. HAMMOND. No. Indeed, as I said previously, this is an entire industrywide effort. I should mention that self-regulation tends to be a euphemism for putting profits over health, safety, and the environment. We've seen that not just in the railroad industry, but, for example, in the extractive energy industries.

The REINS Act, once again, would only undercut the protections that we need.

Mr. NADLER. Do you think this applies basically to every area in the economy?

Ms. HAMMOND. Everyone that I've seen, including even the markets.

Mr. NADLER. Thank you very much.

Mr. Chair, I yield back.

Mr. MASSIE. The gentleman yields back.

We're going to—I'm going to allow one more of our Members to take five minutes, and then we will vote. So, if people want to go ahead and vote right now, we're going to recess immediately after Mr. Cline.

I now recognize Mr. Cline for five minutes.

Mr. CLINE. Thank you, Mr. Chair.

I want to thank the witnesses for being here.

I'm concerned by something that Professor Hammond said, that there's already a certain degree of accountability in the rulemaking process when, according to a recent study of the Department of Health and Human Services' rulemaking practices from 2001–2017 revealed that 1,860 FDA final rules, 98 percent of their total, had been issued illegally, and that other agencies had similar problems, in violation of *Buckley* v. *Valeo*, where the Supreme Court held that rulemaking is a significant government power that may be exercised only by officers appointed in accordance with the Constitution's appointment clause.

So, what we have are unappointed, unelected bureaucrats issuing rules against the law, against the Constitution, and against courts' rulings.

That's why I've introduced legislation called the Ensuring Accountability in Agency Rulemaking Act. It's a bipartisan bill. It says that all rules, except in limited circumstances, have to be signed and issued by an individual appointed by the President and confirmed by the Senate. It's common sense, it's compliant with the Supreme Court precedent, and it would ensure the accountability that the professor claims exist, but really does not at this point.

We have a situation where the Biden Administration have—the regulatory burden totals greatly exceed those of its immediate two predecessors. The 517 rules have been issued, costing $318 billion in total and requiring more than 218 million hours of paperwork, not by bureaucrats but by American taxpayers and businesses, to comply with these regulations.

So, as the AAF put it in their research, the overarching conclusions drawn from this data are hardly surprising. The Obama and Biden Administrations imposed regulatory burdens in the hun-

dreds of billions of dollars, while the Trump Administration was nominally deregulatory.

So, in addition to cosponsoring the REINS Act, we need to take action legislatively to regain the rulemaking power of the Congress.

I would go to ask Ms. Ho, let's go to another agency. The FTC, under Chair Lina Khan, recently announced a proposed rule that would purport to prohibit noncompete agreements nationally. This comes on the heels of California weakening or eliminating the enforceability of noncompete agreements, which China has capitalized on and is another method in their arsenal to steal U.S. intellectual property, specifically trade secrets.

Do you believe that the proposed rule exceeds the FTC's statutory authority?

Ms. HO. Thank you for the question.

Without commenting on particular rules, I will underscore that one thing your question highlights is that one way that we know, or we can tell or suspect that an agency is exceeding its authority, is when it acts in an area that it has not typically acted in before. That's one of the aspects of the major questions doctrine that has been I think a topic of interest lately.

So, I think one clue, perhaps, that an agency may be acting outside of its authority is when it is acting in an area that it has not acted in and also an area where, in our system of federalism, States have typically acted.

Mr. CLINE. What's your position on the constitutionality of rules issued by nonconfirmed individuals, essentially violating *Buckley* v. *Valeo*?

Ms. HO. I think that's an excellent question. I think I would need to know sort of more facts and circumstances to opine definitively, but I do think, again, your question highlights issues of accountability, accountability to voters.

Mr. CLINE. Mr. Cleckner, I believe you spoke to Ms. Khan and the FTC a little bit earlier. Did you? OK. Can you speak to that?

All right. Mr. Wolfson.

Mr. WOLFSON. I think that for the FTC to step into an area that they have never previously found authority in the FTC statute to then say, we now have the authority to bar particular behaviors, again, regardless of whether that is a good or bad law—there are a lot of States, red and blue, that are addressing noncompete clauses.

So, regardless of whether or not that is a good thing, it's kind of like if Health and Human Services said, "We're going to regulate minimum wage requirements." It's not their bailiwick and having them do it creates all sorts of problems.

Regardless of the level of expertise of the people inside the agencies, it doesn't ever seem to be the case that the people who are at FTC would be the ones in the best position to evaluate those kinds of questions.

Mr. CLINE. Thank you.

I yield back, Mr. Chair.

Mr. MASSIE. I thank the gentleman for his questions.

We're going to take a short recess to vote. This is a special circumstance where there's only one vote, so Members can go vote and come back quickly.

So, the recess I anticipate will probably be about 15 or 20 minutes, and we'll convene as soon as the Ranking Member and myself return, or his designee, and somebody to ask questions.

So, I encourage the witnesses to take a break, a short break. Thank you.

The Subcommittee now stands in recess.

[Recess.]

Mr. MASSIE. The Committee is now back in order, and we'll start where we left off with Mr. Johnson from Georgia. I now recognize him for five minutes.

Mr. JOHNSON of Georgia. Thank you, Mr. Chair.

Republicans favor low taxes on the wealthy and less government. So, low taxes, less government has been their campaign mantra since Ronald Reagan. To accomplish less government, just about every Republican, including those on this dais, have signed on to the Grover Norquist "No New Tax" pledge. In a 2001 radio interview, Grover Norquist revealed his true intention. He said, famously, it's not—"I'm not in favor of abolishing the government; I just want to shrink it down to the size where we can drown it in the bathtub," end quote.

When Republicans are not cutting taxes, they are cutting the ability of Federal agencies to protect the public health, safety, and the ability to enjoy freedom and prosperity. The REINS Act, which if passed, would prevent agency rulemaking from protecting the American public from corporate greed that jeopardizes the health and safety of the American people is a move toward strangling the Federal Government. In short, what the REINS Act does is put profits over people.

Now, Ms. Ho, you, like the rest of the America, observe the congressional dysfunction in its inability to elect a Speaker. It took 15 rounds over a five-day period. You witness that had spectacle, did you not?

Ms. HO. Yes, sir.

Mr. JOHNSON of Georgia. The REINS Act would act as a chokehold on Federal agencies' ability to promulgate rules that protect the health, safety, and welfare of the American people like those in East Palestine, Ohio. Isn't that correct?

Ms. HO. Yes, that's my understanding, your honor.

Mr. JOHNSON of Georgia. Now, there is some people in America who trust the Federal Government to make sure that our water is safe, our air is safe to breathe. We rely on the regulatory system to improve our lives every day, whether that's by protecting working families from getting ripped off by banks or by ensuring that we have fewer car-related deaths.

In recent years, we've seen the devastation that comes from deregulation. Look no further than the disaster in East Palestine or the water crisis in east—in Flint, Michigan. Congress can pass laws with broad outlines, but we need agencies to translate those laws into actionable policy. Using input from scientists, stakeholders, and the public, these issues are complicated, and we need experts working on them, not Members of Congress who get caught up in congressional gridlock and can't even elect a Speaker.

So, Professor Hammond, we're still discovering the fallout from the Norfolk Southern derailment in East Palestine, but we under-

stand that residents are already affected by toxic chemicals that were released into the surrounding air, water, and land. Professor Hammond, will the ability of the Federal Government to create stronger environmental safeguards be helped or hurt by the passage of the REINS Act?

Ms. HAMMOND. Thank you for that question. I believe it will be severely hurt. We need those environmental safeguards.

Mr. JOHNSON of Georgia. Why is that? Why will the REINS Act hurt?

Ms. HAMMOND. It's because all the effort that the agencies have brought to bear, as you mentioned, with scientific and technical expertise, on actually evaluating how toxins do impact people's health and the environment, and then actually putting restrictions in place to prevent people's exposure to those, all that kind of effort, which of course is also informed by a participatory rulemaking process, all that would be simply extinguished were the REINS Act to be in effect.

Mr. JOHNSON of Georgia. So, you said in your testimony that we should really be looking at the dysfunction in the courts, which you say is straining separation of powers and disrupting agencies and carrying out the mandates that Congress has given them to protect the people of this country. Can you elaborate on that?

Ms. HO. Yes. I was referring to the major questions doctrine, which picked up some traction in the recent *West Virginia* v. *EPA* decision. The problem with that doctrine is, as I quoted in there, it's a real power grab by the Supreme Court to be able to substitute its own policy preferences for that of either of the accountable branches.

Mr. JOHNSON of Georgia. That's from a right-wing extremist Supreme Court?

Ms. HAMMOND. Indeed.

Mr. JOHNSON of Georgia. I yield back.

Mr. MASSIE. The gentleman yields back.

I now recognize Mr. Bentz from Oregon for five minutes.

Mr. BENTZ. Thank you, Mr. Chair, and congratulations on your Chairship, and thank you for selecting this most interesting topic for today.

Back in the small State of Oregon, for eight years, I was the Water and Resource Commission, the last two years of which I was Chair, and I had many opportunities to review Administrative Rules because we wrote the rules for everything having to do with water in that State.

I just have to comment on that because of the remarks made earlier about how, if you simply go through the rulemaking process, the rule will hue to the statute, because I guarantee you, that's not necessarily what happens. It's a totally political activity, and it's amazing how much damage can be done by the agency as it writes rules. I know because I rewrote them personally myself many times and then was overruled because of the number of votes I didn't have on the Commission.

So, let's just say, I don't view the APA as a device through which you can place rules and suddenly have them hue to the statute. It isn't. The question I would have, I want to go back to this *West Virginia* v. *EPA* discussion. The way I understood it is that case says,

quote, "more than merely plausible, textual basis for the agency action."

So, Ms. Ho, can you tell us, has the problem been solved that we're talking about here today by virtue of that Supreme Court opinion? The problem being overreach by agencies. I should first—my assumption is that there is overreach. I've observed it myself. In your opinion, first, is there overreach; and second, has it been resolved by virtue of *West Virginia* v. *EPA*?

Ms. HO. Thank you for that question. I think the way that I would put it is I think *West Virginia* v. *EPA* is a step toward restoring the proper checks and balances and separation of powers but certainly isn't and doesn't purport to be a complete solution to the problem that this Committee is discussing today.

Mr. BENTZ. It also would appear, the more—if we wanted less regulations, we would have less laws. We would have fewer laws to write regulations regarding. There seems to be a massive disconnect between my friends on the other side of the aisle and reality. They seem to be saying that we want to do away with all statutes and all rules, but that's not the case, is it? What we're trying to do is get it right. What would your definition of "right" be here when it comes to what these agencies should be doing?

Ms. HO. Well, I think your question highlights—and to get back to bringing up *West Virginia* v. *EPA*, I think what the court said there is a very—it created a rule that has a long tradition in this body. There are lots of other clear statement rules. It's just saying if we see an agency acting acting in an area that it hasn't before in highly politically or socially charged circumstances, we want to make sure that Congress has clearly authorized that agency to act in that way.

So, we're going to look for a clear statement, just like courts do in sovereign immunity, looks to make sure that Congress has waived sovereign immunity, or in the area of retroactivity, because our tradition is not to have retroactive laws. Courts want to make sure that Congress has done so clearly.

So, I think West Virginia's rule is just one in a series, in a tradition of rules where the courts have said, "Look, this is within Congress' authority, and if Congress wants to give that authority to an agency, we want to make very sure that it has done so clearly."

Mr. BENTZ. Thank you for that.

Mr. Wolfson, there has been some assertion that this attempt to reign in agencies is unconstitutional, and that somehow Congress, by stepping into this space of Administrative Rule, is stomping on executive privilege or the executive space. What's your thought?

Mr. WOLFSON. So, my understanding has always been that the legislature's job is to issue the laws, and the regulatory agencies are not really supposed to be writing laws, but they're supposed to be enforcing those laws as Congress wrote them.

So, if Congress were to decide that they wanted to pass a law that's super vague, then there become challenges for implementation and that's where the regulatory State has stepped in, but that's not how the Framers designed our Constitution. That's shouldn't be the goal. That is kind of where we are.

The fact that we have resulted in a spot where regulations have to be written by regulatory agencies, regardless of how much exper-

tise those people have, they don't have more expertise than the professors at some universities who are talking about these topics who you could bring in and speak to as Members of Congress to write really clear laws that talk about the problems that might be faced.

Mr. BENTZ. Thank you.

With that, Mr. Chair, I yield back.

Mr. MASSIE. The gentleman yields back.

I now recognize Mr. Ivey from—

Mr. CICILLINE. Unanimous consent?

Mr. MASSIE. I'm sorry? Oh, I recognize the Ranking Member for a unanimous consent request.

Mr. CICILLINE. Thank you, Mr. Chair. I ask unanimous consent to introduce into the record a statement from the United Steel Workers; written testimony of Elizabeth Skerry from the Regulatory Policy Associate at Public Citizen; a letter from the Center for Progressive Reform; a letter from the Coalition for Sensible Safeguards, an alliance of over 150 labor, scientific, research, good government, faith, community, health, environmental, and public interest groups; and an article from *The Hill* entitled, "Buttigieg Calls on Trump to Back Reversing Deregulation in Wake of Train Derailment."

Mr. MASSIE. Although these may be unanimous consent requests in need of scrutiny, I hear no objection, and so ordered.

Mr. MASSIE. Who would the Ranking Member prefer I—OK.

I now recognize Ms. Jayapal for five minutes from Washington.

Ms. JAYAPAL. Thank you, Mr. Chair.

On February 3rd, 50 freight train cars carrying hazardous material derailed, as we know, in a fiery crash on the borders of East Palestine, Ohio, sending toxic chemicals into the surrounding air, soil, and creeks. This incident, in my mind, highlighted the influence of corporate lobbying on railway safety. I have a bill that you've heard about, called the Stop Corporate Capture Act, that would lessen corporate influence in the rulemaking process and clear a path for increased public participation.

Listening to these comments today, I think the problem is not that regulatory agencies don't have the expertise or should not have a role in regulation; it's that the leg branch and the rulemaking branch both are too often controlled by special interests, by big corporate lobbying money. I've got a bill to address that larger issue as well on the legislative side. It's called the Anticorruption and Public Integrity Act, and it addresses the legislative side.

So, Professor Hammond, I just want to dive into this a little bit and see if we can understand exactly what's happened here in the railway industry as an example. Powerful railway lobbyists have spent over $700 million in the past 25 years to cut costs, weaken safety regulations, and strengthen their bottom line. This is at the same time they've been making record profits, by the way.

Just as an example, Norfolk Southern paid out $18 billion in stock buybacks and dividends, and at the same time, we've got this weakening of regulation. I wanted to talk about the Obama-era safety rail regulations as an example that arose from a 2008 southern California train wreck that killed 25 people and injured 135 others.

Can you give us some insight into how frequently lobbyists successfully encourage the administration to scale back or delay implementation?

Ms. HAMMOND. I don't have an exact number for you, but certainly, the evidence is extensive that this is a constant effort by the railroad industry in this particular example, and then, of course, by other industries with respect to agency rulemakings.

Ms. JAYAPAL. Talk to me about the PTC, the automated braking technology and the PTC, which debuted in 1990. In fact, I think it was on the kind of most-wanted list of things to do back in 1990 when that technology emerged, but it took 30 years to actually implement. Can you give us some understanding of what happened in that process?

Ms. HAMMOND. Just briefly, what I understand is that there was an initial support from the railroad industry, but once it became apparent that this would be actually a requirement, there was a decades-long effort to resist it.

Ms. JAYAPAL. So, in 2014, Obama also proposed stricter rules for trains that transport petroleum and other hazardous materials. In 2015, he issued a requirement, a regulation that required trains carrying highly flammable liquids to be regulated. That met with opposition from whom?

Ms. HAMMOND. The railroad industry.

Ms. JAYAPAL. The railroad industry. In fact, Norfolk Southern, among others, said that requiring these brakes was, quote, "not in the public interest." Do you know, Professor Hammond, what happened next in 2015 when the Republicans came in?

Ms. HAMMOND. I believe that the rule did not go into effect.

Ms. JAYAPAL. Correct. The Republicans introduced the FAST Act, and it simply proposed a cost-benefit analysis of these electronic braking systems that had been out there for more than 20 years, but had killed a lot of people, apparently we wanted to do a cost-benefit analysis. Then in 2018, the rule was repealed by the Trump Administration, and they issued a rule to remove the advance braking system. In fact, in the House, the new GOP Chair of the Transportation Committee was the Chamber's top recipient of industries—or is the top—Chamber's top recipient of industry's campaign cash.

Norfolk Southern's general counsel, do you know what his background was?

Ms. HAMMOND. I don't.

Ms. JAYAPAL. OK. Let me tell you. He was the person who pressed for safety waivers, and he is the former Executive Director of the National Transportation Safety Board. Tell us what the National Transportation Safety Board does.

Ms. HAMMOND. It, indeed, regulates the safety.

Ms. JAYAPAL. It regulates the safety of these trains. So, it's actually the current body that's investigating the company.

So, I guess I want to take this in our last minutes to the Stop Corporate Capture Act and ask you, in my bill, we enhance the public's notice and comment influence through the Office of the Public Advocate. How would an increase in public participation improve the rulemaking process?

Ms. HAMMOND. Well, it would bring more voices that could be counteracting this extensive, very expensive, consistent effort by industry to capture the process.

Ms. JAYAPAL. Bring us the voices of the people on the ground that we are sworn to protect.

Mr. MASSIE. The gentlelady's—

Ms. JAYAPAL. Thank you, madam.

Mr. Chair. Also, Mr. Chair, may I ask unanimous consent to enter into the record a number of items? The first is a letter of support for the Stop Corporate Capture Act; the second is an oil and gas—an article on how oil and gas lobby buries the findings of negative impacts of fossil fuels; the third is a letter from All Board Ohio on Norfolk Southern's influence on safety regulations; and the fourth is a study on the presence and influence in lobbying on SEC rulemaking that shows that the influence of lobby groups outweighs public comments.

Mr. MASSIE. Without objection.

Ms. JAYAPAL. Thank you, Mr. Chair. I yield back.

Mr. MASSIE. The gentlelady yields back.

The gentleman from North Carolina is now recognized for five minutes.

Mr. BISHOP. So, Professor Hammond, I've listened with interest to the number of times that the East Palestine derailment has been invoked. Do I understand that this existing regime of rulemaking under the Administrative Procedure Act through the administration is susceptible to influence from special interests?

Ms. HAMMOND. Yes. That's why I think that Representative Jayapal's approach is a good one.

Mr. BISHOP. So, the conclusion that she draws is it would be a bad idea to reinvigorate Congress' participation in the making of the necessary rules because there would be political influence in Congress. There's political influence in the rulemaking process under the APA. Isn't that right?

Ms. JAYAPAL. Would the gentleman yield? Because you are speaking about me.

Mr. BISHOP. No, thank you. No, I won't.

Ms. JAYAPAL. Well, you're implying things that I did not say.

Mr. BISHOP. No, I'm talking about your question. I'm talking about your question which stands for—I'm not arguing with you. It's my time.

Ms. JAYAPAL. OK. Please don't say—

Mr. BISHOP. It's my time. Would you respect the order of the Committee, please?

Mr. MASSIE. The gentleman from North Carolina is recognized. It's his time.

Ms. JAYAPAL. Mr. Chair—

Mr. MASSIE. He has not impugned the other Member or her motives.

Mr. BISHOP. Can I have time back on my—I've been interrupted about 30 seconds of time by disorder from the other side of the aisle, Mr. Chair. Could I have my time back?

Mr. MASSIE. The gentleman will receive an additional 30 seconds.

Ms. JAYAPAL. Mr. Chair, procedural question?

Mr. BISHOP. The Committee is not in order, Mr. Chair.

Mr. CICILLINE. Well, I raise a point of order, Mr. Chair. I would raise a point of order. Does a Member of a Committee have a right to correct—

Mr. MASSIE. What rule?

Mr. CICILLINE. I'm raising a point—I'm asking you to rule on a point of order. Does a Member of the Committee—or point of parliamentary inquiry. Does a Member of the Committee have the ability to correct a misstatement of a question that was posed by one Member? Because without the ability to correct that, a witness is then going to be invited to respond to something she didn't say, which seems sort of Alice in Wonderland-ish and maybe not a great practice. So, is she permitted to seek clarity that this be corrected before the witness answers?

Mr. MASSIE. The Member may ask for the other Member to yield, but the Member is not required to yield. If a written statement wants to be submitted, we'll accept that.

Mr. CICILLINE. OK. Thank you.

Mr. MASSIE. The gentleman from North Carolina is now recognized again, and he'll have an additional 30 seconds.

Mr. BISHOP. Thank you, Mr. Chair.

So, I'm not sure how it stands to reason if allegedly, the administrative process has been susceptible to political influence that this would be a distinct or different set of circumstances if Congress instead were making the laws. Can you explain why that's—one—it would be present in one and not the other, given what you have talked about East Palestine and the Federal regulations on transportation?

Ms. HAMMOND. Sir, I have not said that corporate influence is present in one and not the other, and I very much am of the mind that there can be improvement in both branches. One of the differences in the Administrative Branch is that at least we have more transparency, which becomes opaque were the REINS Act to go into effect.

Mr. BISHOP. Is it possible that the East Palestine derailment occurred because of enforcement—because of administrative incompetence? That is to say, let's say the administration—let's say the Mayor Pete is more interested in talking about whether highways are racist and diversity, equity, and inclusion then focusing on the nuts and bolts of transportation, so you see things like this crop up? Is that possible?

Ms. HAMMOND. Sir, I'm not aware of facts that support that assertion.

Mr. BISHOP. I didn't ask if you were aware of—I asked if it's a possible reason contributing. In fact, do you have any evidence that it was caused by the lack of a particular regulation rather than the administrative distraction?

Ms. HAMMOND. I do understand that one of the possible failures in that wreck, and I believe the investigation is still underway, is equipment that appears to be completely unregulated.

Mr. BISHOP. OK. So, it's possible. Either one seems possible to me.

I pulled up quickly the Administrative Procedure Act has been enforced since 1946. The five volumes of regulations on transpor-

tation in part 49 of CFR totals 4,634 pages. If that's the case, I mean, that is the state of affairs. What I understand is they're arguing that East Palestine is an example of why we need to maintain that. How many pages of regulations would be necessary in the transportation part so that we wouldn't have things like East Palestine?

Ms. HAMMOND. I can't give you a page number, but from having been involved in writing regulations, it just takes a little bit of work to set forth all those technical details that are important to clearly understand what is expected and to clearly present the protections that are necessary.

Mr. BISHOP. You testified—as I was going back and forth and listening on audio remotely, at some point you testified that if we had fewer regulations, it would do harm to the economy, right?

Ms. HAMMOND.

[Nonverbal response.]

Mr. BISHOP. Are you an economist?

Ms. HAMMOND. I'm not an economist, but I read the cost-benefit analyses that agencies prepare for their OIA review, and in those you can see the extraordinary benefits to the economy of many protective regulations.

Mr. BISHOP. So, you haven't felt it an impediment to your forming that conclusion or that opinion based on reviewing the expertise of others? You haven't found it to be an impediment that you lack a specific expertise in the area, right?

Ms. HAMMOND. It's written reasonably well so that most educated people can understand.

Mr. BISHOP. All of this expertise that exists in all these magnificent agencies can be drawn upon by Congress, by committees just like this, to be advised upon whether a particular rule ought to be made a law, isn't that true, in the same way you formed your conclusion from inputs by experts?

Ms. HAMMOND. I'm not sure I understand the question, sir.

Mr. BISHOP. OK. Do you understand the question, Mr. Wolfson? Do you have a thought about it?

Mr. WOLFSON. I believe that this body or any other body of Congress would be able to call experts from across industry, from the academy, others who are experts who have worked on these areas for a long time, whether they are in the government or outside of the government, and could gain the expertise in the same way that the regulatory agencies attempt to do through the notice and comment process.

Mr. BISHOP. All right. My time is expired. Thanks.

Mr. MASSIE. The gentleman yields back.

The gentleman from California, Mr. Correa, is recognized for five minutes.

Mr. CORREA. Thank you, Mr. Chair. I just wanted it noted that I returned to the Committee.

Mr. MASSIE. It's very much appreciated.

Mr. CORREA. Thank you, sir.

Mr. MASSIE. My lobbying was successful.

Mr. CORREA. Yes, it was.

Mr. CICILLINE. Luis, do you want like a formal welcome from the Democratic side as well?

Mr. CORREA. I got it from them, Mr. Ranking Member.

I just want to take my first 30 seconds and yield to my colleague, Ms. Jayapal.

Ms. JAYAPAL. Thank you so much. I am very happy you're back on the Committee.

I just wanted to correct the record because my colleague across the aisle was saying things I didn't say. What I have said consistently, and the legislation I have introduced consistently, is both to implement reforms so that the legislative process works for the people that we represent and not for big corporate interests, and to propose regulation that would help the regulatory side—or legislation that would help the regulatory side to do the same thing.

Thank you, Mr. Correa, for yielding.

Mr. CORREA. Thank you very much.

I just wanted to thank the witnesses today for your testimony. It reminds me of a law school constitutional class. Very interesting.

Ms. Ho, I wanted to, if I can, ask you and discuss with you a little bit of the Chevron doctrine, which is essentially the deference doctrine. Did you say something about congressional neglect? Was that some of your words, or was that another witness that said something to the effect?

Ms. HO. I think one of the points that I made in my opening, Your Honor, is that when this body, when Congress does not act, when it does not exert its role as the maker of laws, it sort of leaves a vacuum where other branches, particularly the Executive, can step into that void.

Mr. CORREA. Thank you. I ask this because you've got what appears to be a conflict challenge here between the Executive and our body, rulemaking, and you have a third, which is roughly the third branch of our government, U.S. Supreme Court, that ruled in the Chevron doctrine. Today we have, as always, the Supreme Court changes, new members and new justices. So, is there a possibility that in the future, there may be a new decision on the Chevron doctrine that maybe affirm it or maybe not affirm it?

Ms. HO. You know, that's a great question. I know just enough about the Supreme Court to know never to try to predict what it will do. I do think it's interesting that in a decision recently by the court, Justice Kagan authored a decision called Kisor, which trimmed back our deference, which involves agencies—courts dealing with agencies' interpretations of their own regulations.

The Chief Justice wrote separately in that case to say that because the court actually did not overrule Auer in that case, that decision should not be understood as closing down requests for the court to revisit the Chevron decision sometime in the future.

Mr. CORREA. I ask that because I have the highest respect for our Supreme Court, our third branch of government, and their decisionmaking. In thinking about—we're essentially talking about the REINS Act, trying to correct something that some of us view as a flawed decision, and that given the case, I think it's important to see where the Supreme Court may be going in the future.

Thank you.

Professor Hammond, I just wanted to ask you, do regulations supersede congressional authority?

Ms. HAMMOND. No, they don't.

Mr. CORREA. If they do?

Ms. HAMMOND. Then a court can strike it down, and, of course, Congress can also correct the agency.

Mr. CORREA. What is the Administrative Procedure Act?

Ms. HAMMOND. It is the fundamental procedural statute that Congress passed, indeed in 1946, to ensure that agencies follow various procedural rules to ensure participatory and reasoned decisionmaking.

Mr. CORREA. "Participatory" meaning transparency—

Ms. HAMMOND. That's right.

Mr. CORREA. —input by the public, those that may be interested are not in the decisionmaking. All this though always being consistent with congressional authority, congressional essentially view—go ahead. Go ahead.

Ms. HAMMOND. Yes, that's right. The Administrative Procedure Act also has provisions for judicial review, and it provides that one of the reasons a court can strike down what an agency has done is failure to attend to the statutory mandate.

Mr. CORREA. Thank you very much.

Mr. Chair, I yield.

Mr. MASSIE. The gentleman yields back.

Mr. Fitzgerald from Wisconsin is now recognized for five minutes.

Mr. FITZPATRICK. Mr. Chair, I'm going to yield some time to Mr. Bishop.

Mr. BISHOP. I thank the gentleman. I'm sorry, Mr. Fitzgerald, could you yield to me at the end of your time?

Mr. FITZPATRICK. Very good. Very good.

Both this Congress and last Congress, I introduced the Separation of Powers Restoration Act, or SOPRA, which would displace precedent established in Chevron, the case you're talking about, NRDC. As you know, in this case Supreme Court required judicial deference to government agency interpretations of ambiguous statutes. This bill, I believe, would tip the scale back in favor of listening to what Congress has to say in its statutes rather than how an agency interprets them.

Ms. Ho, what's your interpretation of the Chevron precedent, and do you believe it's worthwhile for Congress to try to reclaim some of its power that for years has gone through the Executive Branch through agency interpretation of statutes and regulations?

Ms. HO. Thank you. Let me begin with the last part of your question. I certainly agree that it's critical in our system of checks and balances and separation of powers for Congress, for this body, to exert its lawful authority as the maker of laws in our land.

As to Chevron and somewhat relatedly, I think, one thing that is interesting about that case is even though, as it has come to be sort of a decision involving administrative agencies, that decision nowhere cites the Administrative Procedure Act. So, I think a decision that sort of sets forth this notion of deference is entirely outside the bounds of what this court set out, what some have referred to as the constitution of the Administrative State, the Administrative Procedure Act. That decision nowhere cites or even engages with what this court set into law in the Administrative Procedure Act.

Mr. FITZPATRICK. Very good. Thank you.

Mr. Chair, I also just wanted to just spotlight an example of the politicization of—that's occurring at the Biden Administration's FTC right now, that you're well aware. Last week, it was reported that Fight Corporate Monopolies, a 501(c)(4) arm of the American Economic Liberties Project, intended to air attack ads on prime-time TV against myself and you, the Chair of this Subcommittee, and other colleagues. In fact, this organization hired a mobile billboard truck to drive through my district due to my opposition to the FTC noncompete rule that we've been discussing today.

Certain groups coming after Members of Congress with misleading information isn't particularly new. I was disturbed to learn that Ms. Sarah Miller, the executive director of the very group I just mentioned, as of Monday, is now working for Chair Khan as a senior adviser and is likely to work on the very issue she attacked us on just last week. So, you couldn't ask for a more current and better example of what's going on at the Biden Administration's FTC.

With that, I would yield the balance of my time to Mr. Bishop.

Mr. BISHOP. I thank the gentleman for yielding.

It does seem to me, pursuant to—or apropos of the conversation that happened in part on my time, if that process—the notion here is, well, we have to rely on the agencies to make rules because the agencies is where expertise is brought to bear, and that this will be somehow less susceptible to politics.

I thank the gentlelady from Washington for raising it, the administrative process appears—in the creation of rules appears to be susceptible to influence from corporate lobbyists. Some say a few people have seen a corporate lobbyist or two around Capitol Hill.

So, if you're talking about one or the other, then it seems to me a false choice that you're going to get rid of politics by leaving it in the administration. In fact, what you're going to do is you're going to effectively put lawmaking into the hands of executive officials higher up.

Let me ask you, Mr. Cleckner, some years ago, there was Operation Choke Point. Are you familiar with that situation?

Mr. CLECKNER. I am, sir. Yes.

Mr. BISHOP. So, several agencies, the FDIC, Office of the Comptroller of the Currency, the DOJ came together at the same time to have a new regulation that would encourage banks to not do business with entity—with businesses that were in the manufacturing arms or something like that. Isn't that correct?

Mr. CLECKNER. That's correct.

Mr. BISHOP. There's no reason to believe that was a product of sudden expertise, is it? That was a political thing, yes?

Mr. CLECKNER. Completely political and done secretly for a couple of years, until it even came out that it was official.

Mr. BISHOP. So, if you wanted to place lawmaking in the hands of people who don't have broad popular support, would there be any better way to do it than do it through this Administrative Law system?

Mr. CLECKNER. You need it to be done by people who are accountable to the American public.

Mr. BISHOP. Professor Hammond, do you believe in the principle that government derives this legitimacy from the consent of the governed?

Ms. HAMMOND. Yes.

Mr. MASSIE. The witness may answer, and the gentleman's time is expired.

Does the gentleman yield back?

Mr. BISHOP. Oh, I'm out.

Mr. FITZPATRICK. I yield back.

Mr. MASSIE. The gentleman yields back.

I now recognize Ms. Scanlon from Pennsylvania for five minutes.

Ms. SCANLON. Thank you, Mr. Chair.

So, as I understand it, regulatory lawmaking whatever, it's not something we talk about usually over the dinner table, not something I get a lot of questions about in my town halls. As I understand it, this hearing has been called to address concerns about the proper balance between Congress and the Federal agencies on how we create rules and regulations with enough detail to implement and oversee the laws that Congress passes for the benefit, presumably, of the American people.

Those rules have a huge impact on public health and safety; when we get in a plane it helps ensure the plane is not going to crash; that when we eat food it's safe and—or so is medications that we take; businesses can't scam us out of our hard-earned dollars; and employers have to provide safe workspaces. So, these are all the things that these regulations do. As I understand it, we have about 4,000–6,000 of these rules published every year.

To hear what we're hearing in the rhetoric today, these Federal agencies are running roughshod over Congress and there's nothing Congress can do about it. That's not how it works. Basically, an agency convenes, as we've heard, experts and seeks public input and publishes rules. There's a whole process where people can have input, we can look at this; and before these regulations take effect, Congress has to be notified.

With respect to major regulations, which is what this REINS Act seeks to address, and there's about 60–80 of them a year, it ebbs and flows a little bit, those regulations can't take effect for an additional 60 days after Congress is notified. So, Congress has this window in which to say, Nope, don't like that law, nope, we want to change it in some way, and, in fact, is trying to do that as we speak.

So, if Congress isn't using that authority, it's not the Federal agency's fault; it's as people have variously described it today, it's a matter of congressional neglect, that there's a vacuum, that there's a lack of bandwidth and staffing.

So, it appears to me a better use of resources that if we want to adjust some of the terms of the Act or provide more resources to Congress, so Congress can better exercise its oversight capability, that's where we should be pushing instead of trying to add additional workload to Congress requiring passage of more bills through the Senate.

We do have bipartisan agreement that the Senate doesn't work fast enough as it is now. To require it to pass every major regula-

tion that the Federal Government needs to put into effect for the health and safety of Americans would be a huge disservice.

So, just turning to the practical impact of what we're talking about here. It's my understanding that the REINS Act could undo multiple major rules, including many that keep our kids safe. Professor Hammond, could you give us a couple examples of regs that protect our children, whether from consumer products or food or medication?

Ms. HAMMOND. Yes. Indeed, the one that I mentioned earlier with respect to soot, kids, of course, are more vulnerable to air pollution and that's a proposed regulation, particularly for people—kids who have asthma, as well as others. So, I don't have a specific example in mind from some of the other agencies, but that's one that I think is a great one.

Ms. SCANLON. Well, and that particularly resonates with me because the Philadelphia area has one of the highest rates of childhood asthma in the country. One in four kids in our region has environmentally induced childhood asthma. It's a huge, huge problem. So, obviously, I, for one, would like our best experts looking at these things and trying to figure out how we can best ensure the safety of our children.

With that, I would ask unanimous consent to introduce a letter from the American Lung Association, Allergy and Asthma Network, National Association of Pediatric Nurse Practitioners, and a whole range of folks, expressing their strong opposition to the REINS Act because of its harmful impact on our communities. With that, I would yield back, after unanimous consent.

Mr. MASSIE. Without objection.

Ms. SCANLON. Thank you.

Mr. MASSIE. The gentlelady yields back.

The gentlelady from Wyoming, Ms. Hageman, is now recognized for five minutes.

Ms. HAGEMAN. Thank you, Chair Massie.

Professor Hammond, do you know what the cost of the Federal regulatory burden is in this country on a yearly basis?

Ms. HAMMOND. I don't have the number at this time.

Ms. HAGEMAN. Well, would it surprise you to know that it's over $2.1 trillion, and that's just the Federal regulations?

Ms. HAMMOND. I wouldn't be surprised. To compare that to the benefits, you'd find that it's lower.

Ms. HAGEMAN. So, I want to go ahead and address some of the reasons as to why I'm here and why I actually ran for Congress. I've been a water, natural resource, and constitutional attorney for over 30 years, and one of the things that I've had to deal with on behalf of my clients is the overwhelming regulatory burden that they must navigate pretty much every single day of their lives.

The Administrative Procedure Act provides only minimal protection from—against agency overreach, but it at least does require some form of a process which allows some participation by the American public. I recently had a case involving the USDA, the United States Department of Agriculture. A couple years ago, they posted on their website a two-page guidance document, and this guidance document required all our livestock producers to start

using RFID ear tags and to register their ranches with the Federal Government.

According to the USDA, this would've had a $2 billion cost on the livestock industry. It didn't go through a rulemaking process. It didn't go through notice and comment. They didn't invite the ranchers in to discuss whether it was even feasible in a 100,000-acre ranch out in Wyoming, as to whether they would be able to use this kind of technology. It was just simply issued from on high.

I can assure you that this happens every day from these agencies. Guidance documents, answers to frequently asked questions, they have all different kinds of names that they use, but the reality is that they're used to circumvent the rulemaking process. Are you aware of that, Professor Hammond?

Ms. HAMMOND. I'm familiar with guidance documents.

Ms. HAGEMAN. OK. So, the Trump Administration actually worked to address the issue of the agency abuse of guidance documents through Executive Orders 13891 and 13892. Notably, by the end of the Trump Administration, which all it did was require these agencies to post on their websites what guidance documents they had issued—the bump stock document, I believe, is a—the banning—the ATF's efforts to ban bump stocks, I believe, was through a guidance document, since the ATF did not have the authority to issue that as a regulation. By the end of the Trump Administration, several agencies had actually established an online portal, and there were over 70,000 guidance documents from just a few of those agencies.

So, Mr. Wolfson, can you please explain for us how guidance documents obfuscate these already minimal protections under the APA, and further throw into peril the notion of self-governance and government accountability?

Mr. WOLFSON. Thank you, Congresswoman.

Yes, the guidance document problem exists in part because the agencies know that's a loophole. So, you've got regulators who want to regulate. They may not want their expertise really is in understanding the process of how to get regulations done, and they know that they don't have to go through the Administrative Procedure Act if they have a guidance document.

The kind of the quintessential example people point to is the Department of Education Dear Colleague letter toward the end of the Obama Administration. All of these things end up basically hinting that there may be regulatory enforcement by the agency if certain practices are not undertaken, and this changes people's behavior even if there's no legislative authority behind that guidance document.

Ms. HAGEMAN. So, what was interesting is Executive Orders 13891 and 13892 were just really transparency requirements. Isn't that correct?

Mr. WOLFSON. That's absolutely right. When I was at the Labor Department, we had to review over 13,000 guidance documents, some of which only existed in paper form at the library at the Department of Labor.

Ms. HAGEMAN. OK. Are either of those Executive Orders still in place?

Mr. WOLFSON. Unfortunately, no.

Ms. HAGEMAN. Why is that?

Mr. WOLFSON. I don't know the inside workings, but it's unfortunate that I believe that, for example, the EPA no longer even has their guidance portal. So, people who want to find the guidance documents have to go back to the old method of kind of searching through the entire department of—EPA's website to find those.

Ms. HAGEMAN. Well, isn't it correct, Mr. Wolfson, that one of the very first things that President Biden did when he took office was that he nullified those two Executive Orders?

Mr. WOLFSON. That is correct.

Ms. HAGEMAN. So, this administration intentionally made it difficult for the American citizens to learn about the guidance documents that are enforced and affecting these agencies and intentionally is hiding the information that is so important for the regulated community. Isn't that fair?

Mr. WOLFSON. It certainly would be an assumption one could make from what has gone on.

Ms. HAGEMAN. All right. Thank you. I yield back.

Mr. MASSIE. The gentlelady yields back.

The gentleman from Texas, Mr. Moran, is recognized for five minutes.

Mr. MORAN. Thank you, Mr. Chair.

I'm convinced that the preservation of liberty does not just happen through the substantive decisions that we make here in Congress; rather, and just as importantly, the preservation is a result of structural safeguards that our Constitution put in place almost 250 years ago.

Important structural principles embedded in our Constitution and the history of this Nation, like separation of powers, checks and balances, federalism, they're critical to preserving life, liberty, and the pursuit of happiness. It's something I talk about often when I talk to my constituents to say, we cannot seek an end, and in the meantime, trample over the correct means. We must preserve those structural safeguards, and that's what we're talking about here today is separation of powers.

Unfortunately, over the years, both Democrats and Republicans have eroded these structural protections in pursuit of some substantive end that fits with our, or their political agenda, and it's a problem with both parties. It's the American people who suffer as a result of that.

Professor Hammond, I want to start with you. You mentioned that there is room to bring more voice to the rulemaking process. I think I wrote that quote down correctly. If agencies, though, during that rulemaking process run into overwhelming opposition to a rule, a proposed rule, are they bound to reform the rule to accommodate those comments, or can they simply proceed forward in the manner that they would like?

Ms. HAMMOND. The requirement is that they respond to significant comments raised, and very frequently, agencies do adjust their final rules as compared to their proposed rules based on the comments that they receive.

Mr. MORAN. I know that's the answer, but the true answer to my question is they don't have to. They can simply ignore the comments from the public. They can simply move forward with the rule

that they would like to put in place, and they do not have to respond, to react. They're not accountable to the people of this Nation. We, the elected officials, are accountable to the people in this Nation. We are entrusted with decisionmaking when it comes lawmaking. They are not. That is the point that I want to make with that question.

To overturn a rule to put in place—that has been put in place, let's talk about that for a moment as well, because under the Congressional Review Act, which one of my colleagues mentioned, is the method by which we can do that. It's not just the House that can do that on its own, but instead we have to pass a resolution to disapprove the rule, then we have to send it to the Senate, they have to disapprove the rule, and then it goes to the President, and he must sign that joint resolution from Congress to undo that rule. Isn't that correct, Professor Hammond?

Ms. HAMMOND. I believe the rule does not go into effect without that, so it indeed undoes the rule.

Mr. MORAN. Without that process happening, effectively, a veto that must require disapproval by the House and the Senate and then to the President who oversees and ostensibly is directing the very rulemaking that we're trying to overrule, we can't prevent it from going into place. Isn't that true?

Ms. HAMMOND. Are you speaking about the REINS Act as proposed, or are you speaking about the Congressional Review Act?

Mr. MORAN. Congressional Review Act.

Ms. HAMMOND. Yes, it is in place.

Mr. MORAN. Yes. The point I'm trying to make here is, effectively, we can't undo what an administrative agency is actually going to put in place unless we get through that whole process. It's nearly impossible because it turns on its head the lawmaking responsibility of Congress, because instead of us having some almost impossible veto power over an agency, we should be, in fact, be in the primary place to put those rules in place to begin with or to enact those laws.

I want to go back to Ms. Ho. I have just a minute. If we work to eliminate the Chevron standard, I want you to speak more to what you believe should be the replacement standard there.

Ms. HO. Certainly, I think the replacement is the foundational principle of the judiciary, and that is, it is the province of the judiciary to say what the law is. So, I think that would be a return to the bedrock principle and the proper putting the judiciary as well in its proper sphere of operation in our system of separation of power and checks and balances.

Mr. MORAN. Thank you.

It seems so simple, doesn't it, separation of powers. It's not a complex concept, but over time, again, I think both parties have eroded that, and unfortunately, we're having to deal with that today.

Mr. Wolfson, noncompete clauses, just with 15 seconds, are an integral part, in my opinion, to protecting confidential and proprietary information for businesses generating innovation and investment. Do you agree with that?

Mr. WOLFSON. I think there are places where noncompete clauses make a lot of sense. There are probably other places that they don't

make a lot of sense. For example, there's some examples of fast food restaurants that may require line workers to have a noncompete. I think that there is a great policy discussion that we should be having about this, but the place to have those kinds of policy discussions is in the halls of Congress, or more appropriately actually is in the halls of the individual legislators of the States who can evaluate in their particular States are noncompete clauses being used appropriately or not.

Mr. MORAN. I completely agree. I yield back. Thank you.

Mr. MASSIE. The gentleman yields back.

I now recognize myself for five minutes. We've had a great discussion today about the structure and nature of our republic and actually how far we've wandered afield from our original Founders' intent of having separation of powers. So much power has been concentrated within the Executive that actually the lobbyists have gone there now. I don't see many lobbyists here today very concerned about what we're doing. They're all over at the Executive Branch and at the administration.

In fact, under the Obama White House, Google was coresident. They hired high-level Google people to run the patent board, to sit inside the White House. So, I reject this notion that somehow the Executive Branch is immune to lobbying. We've been at a very high level for the most part today, and that's what's made this a really good hearing. We've talked about the structure and nature of government.

Mr. Cleckner, I want you to boil this down to the specific example of a recent rule on the pistol brace and what that means, how many people it's going to affect, are these civil infractions or criminal infractions? Can you tell us about the pistol brace rule when it goes into effect and what the consequences are of letting an agency write law.

Mr. CLECKNER. Thank you, Mr. Chair.

I've heard plenty today about profits over people, and I think we're putting regulations over people. I don't think we're keeping people safe with more regulations. In fact, I think regulations and rules like the pistol brace one is actually making it more dangerous.

On one hand, I love the maxim that every bit of gun control is a claim that gun control doesn't work because they want more gun laws. On the other hand, I see all these regulations are making felons out of otherwise law-abiding citizens. So, you asked how many; the Congressional Research Service estimates between 10–40 millions of these are out there. Most of these Americans do not know that this rule is happening, and even the Americans that do know the rule is happening cannot interpret it because the ATF is using vague, ambiguous language with weights similar to this, with a surface area suitable for that.

The citizens cannot make these determinations on their own. We're talking about a piece of plastic that was previously approved by the ATF that people bought maybe even unknowingly, it might have come on the firearm already, and they're going to be made into felons. This is 18 U.S.C. law that ATF is trying to redefine and trying to rewrite. Serious crimes, confusing regulations, going back and forth, I don't see how that's helping anybody.

Mr. MASSIE. When does this take effect? When was it announced? When does it take effect? Is the government undergoing an ad campaign on TV right now telling millions of people they're going to become felons in a few weeks?

Mr. CLECKNER. No, sir. It was technically published on the **Federal Register**, but they had 90 days—

Mr. MASSIE. Oh, I hit refresh on that page every day.

Mr. CLECKNER. Exactly right. This has changed. They approved these. Another thing we have with the guidance letters is they've been giving separate guidance to each manufacturer. They're not even giving consistent guidance to the industry on what they're allowed to do. So, it's conflicting information. That was 2012. A few years later, you couldn't shoulder them, a couple years later, you could. It changes so much, I don't know how someone is going to be able to keep up with what's going on.

Mr. MASSIE. The people who are going to become felons by virtue of an agency making law because there's a different President who hates guns, they weren't they assuming and weren't the manufacturers assuming—why did they assume it was legal to do what they were doing until this rule went into effect?

Mr. CLECKNER. They were specifically told by the ATF that it was legal and that they could proceed. Matter of fact, most of these manufacturers have their version of the letter from the ATF on their website that said, these are legal. See, the ATF said it. Some of them even include a copy in the product in the boxes.

So, all these Americans relied upon the ATF telling them it was good to go, and now they might not even know that it's not, and they're risking being a felon, which takes away their right to have any firearm once they're a felon.

Mr. MASSIE. It seems like our Founders were really wise to put the legislative function in this Chamber and in the Senate, because we're up for reelection so frequently. Also, I have constituents—we haven't said today—nobody said today there should be no regulations. My constituents say, just don't change them on me. Let me know what the rules are.

Our Founders said—the way they set it up required four concurrent majorities for a law to change. Think about how intelligent that is. The House had to agree, a House majority, a Senate majority had to agree, and a majority of the electoral college had to agree for a President to sign that bill, and then it had to pass the Supreme Court.

How many majorities are required to approve of a bureaucrat changing a law or a rule? As Mr. Moran pointed out, they're not subject to anybody's approval, any voter's approval. Now, you might say the Supreme Court. OK, the Supreme Court has to approve the regulation. As Ms. Ho and Mr. Wolfson has pointed out, with Chevron deference even that majority doesn't have to agree because we'll just defer to the regulators on this. So, I think we need to get back to our Founders' intent and put the lawmaking authority back in this body.

With that, seeing no other Members, that concludes today's hearing. We thank the witnesses for appearing before the Committee today. We know this takes a lot of time to fly here, to prepare for this, and to put yourself through this. So, we appreciate all of you

very much for being here and helping us come to an answer, because the answer should come from Congress—it should—on who makes the laws. I hope we all agree, we should be making the law.

Without objection, all Members will have five legislative days to submit additional questions for the witnesses or additional materials for the record, so you could end up with homework as well.

Without objection, the hearing is adjourned.

[Whereupon, at 11:19 a.m., the Subcommittee was adjourned.]

All materials submitted for the record by Members of the Subcommittee on the Administrative State, Regulatory Reform, and Antitrust can be found at: *https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=115456*.

○