Statement before the House Committee on Veterans' Affairs

On Restoring Congressional Power over VA After *Loper Bright Enterprises v. Raimondo*

There Is No Substitute for Congress Legislating

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Chairman Bost, Ranking Member Takano, and Members of the Committee, thank you for the opportunity to join you today to discuss the prospects for a reassertion of congressional lawmaking prerogatives in the wake of the Supreme Court's seminal 2024 decision, *Loper Bright Enterprises v. Raimondo*.

Let me begin with a word on the perspective I bring to these issues. I am not an expert on veterans' issues, nor am I a lawyer. Rather, I am a political scientist who has studied America's policymaking process for more than a decade, and who is thus especially attuned to the problem of executive branch agencies circumventing Congress. Whereas lawyers focus their attention on the nuances of legal doctrines, I take a more institutionalist approach. A major theme of my research is the way that taking decision-making authorities away from politically accountable elected officials leads to flawed and unstable policies and ultimately to legitimacy problems for the federal government. In short, I am a champion of Congress as an institution, as I believe it is only through informed congressional deliberation and legislation that the American people can work through difficult issues to reach mutually acceptable, enduring settlements.

In recent years, I have given most of my attention to studying the contemporary Congress, and especially the House of Representatives. As you all well know, this often means considering dysfunction and hyperpartisanship. But I have always tried to keep in mind the parts of Congress that continue to function well, often without getting much attention for their efforts. The Veterans' Affairs Committee has consistently stood out as one such institution within the House, known for its ability to focus on solving real problems facing America's veterans rather than serving as a venue for partisan recriminations. And so, I am hopeful this committee can lead by example, demonstrating that legislators can insist on their centrality in the policymaking process and thereby constructively improve both outcomes and legitimacy.

The Post-*Chevron* Legal Landscape

Several developments in the Supreme Court's statutory interpretation jurisprudence in recent years make this an ideal time to examine Congress' place in our constitutional system. While the overturning of *Chevron* deference in *Loper Bright* has received the most attention, just as important has been the emergence of the Major Questions Doctrine, especially in *West Virginia v. EPA* (2022) and *Biden v. Nebraska* (2023). A simple principle unites the Court's majority opinions in all these cases, which is that the executive branch ought not be treated as an independent legislative authority. Yes, by necessity, the executive branch must do its best to interpret the laws that Congress has passed. And no, much as it might appeal to some purist notion of constitutional law, we ought not pretend that executive branch actors will never have to use their judgments or discretion. Indeed, many statutes clearly delegate choices to executive agencies, and it is important to understand that nothing in the Court's recent decisions suggests it seeks to find such delegations constitutionally impermissible.

Rather, what the court is striving to do is to stop abuses of discretion that have too often been accepted in the name of deferring to agency expertise. Agencies are not permitted to misread their statutes, and their interpretations ought to be regarded with special skepticism when they purport to find sweeping new authorities in old statutes. Because moving new legislation through Congress is difficult, and because the accretion of statutes over the past half-century gives agencies so many different powers and opportunities for discretion, policy entrepreneurs often see initiating a new program through executive action as the path of least resistance. The court has clearly indicated that it dislikes this tendency and wants to discourage it.

But the announcement of this doctrinal shift tells us very little about how policymaking dynamics will change in the years ahead. There is no guarantee that Congress will change its behavior much in response to these legal developments, and so it may be that the main practical result is to shift decision-making responsibility from executive branch officials to the federal judges asked to review their decisions. That might result in quite different policy outcomes, or it might not—some scholars predict that even if automatic "deference" has now been ruled out of bounds, the "respect" for agencies explicitly deemed permissible may be a close substitute. In any case, if legislators are content to sit back and watch struggles between agencies and litigants play out, Congress might hardly come into the picture at all.

Uncertainty about Congress's role also looms large in trying to predict how post-*Chevron* legal developments will affect longstanding policies originating from controversial executive branch interpretations. The Chief Justice's majority opinion in *Loper Bright* disavowed the idea that reversing *Chevron* automatically reverses prior cases in which the doctrine was invoked. Statutory *stare decisis* leaves prior rulings in place. That includes hundreds of agency decisions that have withstood legal challenges over the past four decades. Reversing these policies would require some further intervention.

Many observers hope that these interventions can come from the executive branch—specifically, from political appointees in the upcoming Trump administration. Notably, Elon Musk and Vivek Ramaswamy, who lead the recently conceived Department of Government Efficiency, argued in the *Wall Street Journal* that the court's recent rulings open the door for the president to "nullif[y] thousands" of regulations based on improper interpretations through non-enforcement and then "review and rescission."

It is not at all clear that this is a sound prescription, simply in terms of what legal changes are likely to stick. Although courts found the Deferred Action for Childhood Arrivals (DACA) program to have fatal legal flaws, the Supreme Court nevertheless found (in *Department of Homeland Security v. Regents of the University of California*, 2020) that summarily ending the program without an extensive legal process violated the Administrative Procedure Act. This suggests there may be serious practical limitations on relying only on the executive.

The Advantages of Congressional Assertiveness

Just as importantly, it is not normatively desirable to try to sort out all of these disagreements through yet another round of executive branch policymaking. As the justices frequently point out in their Major Questions Doctrine cases, we want important decisions to get made by Congress. To the extent that legislators think the executive branch has abused its discretion, it ought to work to change the law in question so that it cannot be misconstrued in the future. Iterative acts of lawmaking that clarify and restrict the scope of existing laws offer a far more durable solution than simply having a new president reverse the policies of the last one. There is no reason to believe that the policy will not simply get reversed again when political control of the White House changes hands.

The remedy for excessive administrative power is a revitalization of congressional power, not just a different flavor of administrative power as overseen by a more aggressive court.

What should that revitalization look like? It must, centrally, involve more lawmaking generated by congressional committees. Put simply, when committees learn about a problematic interpretation of the law, they need to be nimble enough to counteract them by formulating legislation and then moving it onto the floor of their chamber for consideration. To be sure, oversight and informal communications ought to be the first responses to potentially troubling executive branch decisions, but they cannot be the last steps if the agency decides to carry on with it actions. Oversight disconnected with lawmaking becomes mere commentary. Congress must find ways to move legislation swiftly if it is to take responsibility. If our current legislative processes make this too cumbersome, we need to seriously consider changing those processes.

Admittedly, when roughly half of the chamber's members believe that the administration's actions are both legal and laudable, swift legislative action will be difficult. But what is striking is how many instances there are in which members are broadly agreed on the need to revise underlying statutes, and yet still fail to do so in a timely manner. Before long, members may convince themselves that letting the administrative action stand without further legislative action is the most desirable way to proceed.

Legislators should be aware of the downsides of their passivity, though. Statutory inadequacy can lead to distortions in policies that are designed as much to preempt legal challenges as for considerations of sound policymaking. Legal defects can lead policies to collapse dramatically—and they are probably even more likely to do so in the post-*Chevron* era. Deciding policy through endless rounds of litigation fails to provide stable and predictable policies, which often creates serious difficulties for those citizens and firms affected.

The Case of VASP

Although, as I hastened to admit at the outset of my testimony, I am no expert on the policy matters handled by this committee, I will attempt to apply my general observations to one of the programs under your jurisdiction: the Veterans Affairs Servicing Purchase (VASP) program. To my eye, it seems to be a clear example of the hazards of policymaking through repeated exercises of executive policymaking.

By all accounts, the Department of Veterans Affairs faced a real problem: servicemembers who had benefited from COVID-related mortgage payment relief found themselves facing the prospect of unaffordable back payments once that relief ended. For tens of thousands of veterans, many of whom felt they had been misled about how pandemic-era relief would affect their future payments, foreclosure seemed to be imminent. This scenario seemed unacceptable, and the VA naturally wanted to find a way to head it off.

Making use of existing discretionary powers found in 38 U.S.C. §3720 and 3732, the VA fashioned the VASP program, which will offer veterans facing foreclosure the chance to have their loan purchased by the VA and restructured as a 30-year fixed rate loan with 2.5% interest—or, if that fails to bring down monthly payments enough, a 40-year fixed rate loan at 2.5% interest. To put it mildly, that is an extraordinarily generous form of relief, one that may well tempt many veterans who currently bear the burden of mortgages with 7 or 8 percent interest rates. The program's protections against strategic default seem quite feeble.

It may well be that, left to its own devices, this program will succeed on its own terms. But it is worth noting that many people believed that the Biden administration's student loan relief programs were basically legally unassailable, only to find that courts were willing to consider challenges and eventually rule them unlawful. Some cloud of legal uncertainty is likely to hang over the VASP program, creating worries for veterans who take out mortgages under its auspices.

The creation of VASP also seems to be an example of a situation in which the rhetoric of crisis, and continued assertions of the executive's superior ability to provide a speedy policy change, ended up discouraging Congress from addressing a statute's manifest shortcoming. Because the prospect of foreclosures was so imposing, Congress may have been inclined to let the executive branch improvise a solution. But note that the solution did not come particularly quickly. The VA continually imposed a foreclosure moratorium while it worked out the details of its program. During that time, many veterans accepted loan modifications with their original lenders, and they will find that VASP is unable to offer them any relief.

Had Congress decided to assert itself, it might have quickly been able to give the VA the flexibility to design a solution that would have helped more veterans and fine-tuned its relief so that it could have accommodated borrowers' different abilities to make their payments. That relief might have found a way to avoid the VA taking on the considerable administrative burden of holding these loans for many decades, as well. If Congress had intervened more assertively,

it's likely the VA would have ended up fashioning a loan modification program that better reflected Congress's priorities, including protection of the taxpayer.

I realize that all this is easier for me to say than for you to do. The members of this committee clearly played a constructive role in demanding answers from the VA about the VASP program as it was being finalized. You introduced bills that put the agency on notice that it was not operating entirely without accountability. And yet I believe it would have been possible, during the course of 2023 and 2024, for Congress to take the lead in determining what the solution to this problem should look like. Members of both parties could have gotten information and guidance from the professionals at the VA and then pushed bipartisan legislation through Congress. If that seems like a pie-in-the-sky idea of how the House operates, then we all need to be asking how to make it work better.

Conclusion

This concludes my testimony. I look forward to taking the committee's questions, either at the hearing or in writing.