The Proper Role and Function of 21st-Century Courts

Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights

U.S. Senate Committee on the Judiciary

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Dear Chairman Whitehouse, Ranking Member Kennedy, and Members of the Subcommittee,

Thank you for the opportunity to testify today.[1] It is an honor to appear before this subcommittee to discuss the role and operation of federal courts in the twenty-first century. As a legal academic who studies constitutional structure and interpretation, the separation of powers within the federal government, federal courts, and civil procedure, my testimony will focus on the proper role of Congress and the federal courts in structuring, authorizing, and carrying out the exercise of judicial power under Article III of the U.S. Constitution in the service of liberty and justice.[2]

[1] This analysis represents my personal scholarly views as an academic and does not reflect any official position on behalf of my state government employer, the Scalia Law School of George Mason University.

[2] "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America." U.S. CONST., preamble.

The Article III judiciary has a critical role to play in the preservation of individual life, liberty, and property interests.[3] Therefore, one of the most consequential steps that Congress could take to restore the optimal role of courts would be to statutorily require more adjudication of financial and regulatory interests in Article III courts rather than administrative tribunals.[4]

Currently numerous agencies and commissions with significant regulatory authority over broad subject-matter areas have significant discretion to bring in-house investigations of alleged violations of their own regulations that agencies can then choose to internally adjudicate rather than enforce in Article III courts.[5] This discretion often leads to settlement with regulated parties, at times without any supervision by an Article III tribunal, which in turn can lead to the imposition of significant penalties on regulated parties based on no process other than the charges brought and adjudicated or settled by an agency seeking to enforce its own rules.[6] Congress could limit the adjudicative authority of agencies or at a minimum require agencies to provide more transparency about how they decide which charges to bring, when to pursue settlement, and whether to pursue in-house enforcement rather than seek adjudication within the Article III judiciary.

Administrative agencies often apply procedural rules within adjudication that are significantly less favorable to regulated parties than the procedural protections that Article III courts provide under the Federal Rules of Civil Procedure.[7] Further, the mechanism of a jury trial that has long been

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[3] "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." *Id.* art. III, §1.

[4] *See* Jennifer L. Mascott, *Constitutionally Conforming Agency Adjudication*, 2 LOYOLA JOURNAL OF REGULATORY COMPLIANCE 22 (2017) (online); Comment of the Administrative Law Clinic, Antonin Scalia Law School, *Request for Information Regarding Bureau Rules of Practice for Adjudication Proceedings*, Docket No. CFPB-2018-0002 (2018).

[5] *See* Jennifer L. Mascott and Daniella Efrat, "Adjudication With a Stacked Deck," Yale Journal on Regulation Notice & Comment Blog (Feb. 18, 2022), *https://www.yalejreg.com/nc/symposium-decisional-independence-05/*.

[6] *See* Urska Velikonja, *Securities Settlements in the Shadows*, 126 YALE L. J. FORUM 124 (2016-17).

[7] *See* Law Clinic Comment, *supra* note 4 (discussing time limits for responding to agency charges and evidentiary rules).

considered a strong bulwark for individual freedom and self-government[8] is available only within Article III courts and not administrative tribunals. Members of Congress and Senators valuing jury trial rights could enhance the role of this safeguard for accountability and transparency by encouraging more adjudication of rights and property interests within the Article III judiciary.

The Article III judiciary arguably is currently the most stable, best-functioning branch within the federal government. The number of seats on the Supreme Court has been steady for more than 150 years, over the past 10 terms at least 35 percent of the Court's judgments in merits cases have been unanimous,[9] and the Court's decisions are breathtakingly transparent in the level of detailed explanation that the Court provides in written opinions when it resolves orally argued cases. President Biden began his Administration with an effort to probe whether the Supreme Court needs significant reform, and the president's reform commission saw no unified mandate to urge far-reaching reform, advising instead that many of the suggested structural changes to the Court that the Commission evaluated would "offer uncertain practical benefits."[10]

The Constitution authorizes Congress to establish federal courts and assign their scope of jurisdiction over cases and controversies.[11] So Congress has the power to prescribe certain rules impacting the operation of federal courts and the courts' consideration of categories of cases.[12] Dating back to the first federal Congress, however, the House and Senate authorized federal

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[8] *See, e.g.*, Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 860 (2017); THE FEDERALIST No. 83 (Hamilton); 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND **342–43 (1768).

[9] *See* Statistical Analysis on Unanimity, SCOTUSblog, *available at* https://www.scotusblog.com/wp-content/uploads/2020/07/Unanimity-7.20.20.pdf.

[10] *See* Presidential Commission on the Supreme Court of the United States, Draft Final Report at 7–8 (Dec. 2021), *available at* https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final.pdf.

[11] *See* U.S. CONST. art. I, § 8, cl. 9 (power "[t]o constitute Tribunals inferior to the supreme Court"); *id.* art. I, § 8, cl. 18 (Necessary and Proper Clause); *id.* art. III, §§ 1-2 (establishing federal courts).

[12] *See, e.g.*, Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 839–41 (2008).

courts to devise their own procedural rules subject to significant discretion.[13] There may even be a certain core constitutional minimum of supervisory authority that courts must maintain over their own operations that Congress would lack the authority to regulate even if it had the political will to do so.[14] Regardless of the statutory or constitutional character of judicial supervisory authority, the practice of Congress has been to authorize and affirm the ability of the courts to exercise significant internal supervisory power over their own operations. Contemporary political considerations are not a solid ground on which to change this centuries-old general practice and approach.

If there is any factor causing the courts to appear to lack sufficient accountability and transparency, it would be the trend over the past century for the American public and its institutions to turn to the Supreme Court to sit as the final arbiter of significant social and political questions. The expectation that the Court will resolve some of the most contentious issues of our time, on a broad scale, such as privacy rights, family and education policy, and the proper demographic makeup of societal institutions misconceives of the Court's proper constitutionally constrained role to resolve concrete cases and controversies.

The Constitution established Congress, principally, along with the Executive Branch to serve as the federal lawmaking and law-executing departments. Through regular elections, Congress and the President are accountable to the representative will of the public and therefore are appropriately charged with making and executing policy in the areas of authority constitutionally allocated to the federal government. Further, Congress is the singular federal branch on which the Constitution expressly imposes disclosure requirements.[15]

Congress should not apply mandates and restrictions to the courts that would make courts resemble the political branches. Mandates like cameras

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[13] *See, e.g.*, Rules Enabling Act of 1934; Judiciary Act of 1789, section 17 ("And be it further enacted, That all the said courts of the United States shall have power . . . to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States.").

[14] *See* Barrett, *supra* note 12, at 840–46.

[15] *See, e.g.*, U.S. CONST. art. I, § 5, cl. 3 (requiring each House to "keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy" and requiring the public recording of votes upon the request of one fifth of the members present).

in the courtroom or far-reaching disclosure requirements are unnecessary and likely ill-advised for an institution that is to remain independent as a final backstop for the protection of individual rights and liberty.[16] If Congress is interested in constraining or more particularly guiding court operations, it could instead consider providing more specific instructions to the courts about the breadth of the remedies that they provide.[17] Congress could also legislate with more specificity when enacting federal law to provide even greater clarity about the federal policies it is authorizing, thereby avoiding the impetus for courts to apply the discretionary canons and interpretive tools that statutory ambiguity often purportedly triggers. Further, the tension of significantly powerful, non-electorally responsive federal courts would be alleviated if the federal government reduced its sphere of governance across the board, permitting more space for individual states to provide tailored and localized policy solutions and governance.

[16] *See, e.g.*, THE FEDERALIST No. 78 (Hamilton).

[17] *See, e.g.*, Michael T. Morley, *Disaggregating Nationwide Injunctions*, 71 ALABAMA L. REV. 1 (2019); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017).