

Constitutional restoration

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Restraining the federal government's powers is at the heart of our Constitution. That document designates the boundaries of federal power as well as separates and balances the government's executive, legislative, and judicial functions. These restrictions not only limit what the government can do, but they also limit which branch of the government may do it. This demarcating, separating, and balancing is supposed to prevent any one branch of government from wholly dominating another.

There is a sharp conflict between this classical vision of American constitutionalism and the day-to-day proceedings of the modern administrative state. In particular, many federal agencies now wield a multitude of both executive and non-executive powers. That is: some of their powers appear to be executive in nature, but others appear to be legislative or judicial.

Many Cabinet agencies now wield powers once confined to the legislative or executive branch. Such agencies now investigate and prosecute those who are alleged to have broken the law (an executive function); they issue rules with the force of law (a legislative function); and they conduct hearings, trials, and appeals to apply the law (a judicial function). An observer of these agencies exercising various powers—especially when those powers cross intragovernmental property lines—may wonder what is left of the Constitution's promise of the balance and the separation of powers.

Both the separation and the balance of powers are vital elements of American governance. Congress should set new boundaries to restore these structural aspects of governance to their proper place. The long-term plan should be that legislative powers will be reassigned to Congress and judicial powers now exercised by administrative agencies will be reassigned to Article III federal courts. This restructuring would revive classical American constitutionalism and lead to a transformative change in American governance. We call this reconstruction Constitutional Restoration. Constitutional restoration will banish the specter of unlimited government, relegating it to the dustbin of history.

Constitutional restoration, as applied to the modern administrative state, is essential to good government — and not just because it makes for a cleaner or more aesthetically elegant federal structure. In *The Federalist* Number 47, when James Madison warned that “the accumulation of all powers, legislative, executive, and judiciary, in the same hands” may justly be called “the very definition of tyranny,” he was not just explaining the formal beauty or the aesthetic importance of a well-designed organizational chart.

Madison’s fundamental concern was that a collapse of the separation of powers would create terrible consequences for real people’s lives because it would demolish the system of limited government that is a necessary condition of individual freedom. Preserving this freedom is contingent upon each branch exercising only its constitutionally prescribed powers. To revive the federal Constitution’s separation of powers and balance of powers, Congress should:

- Amend the Administrative Procedure Act (APA) by eliminating the adjudicatory authority of federal agencies;
- Fully implement what CEI has called “constitutional restoration”; and
- Reassert control over the CFPB and other similarly unaccountable federal bureaucracies.

Amend the APA: Eliminating the adjudicatory authority of federal agencies (aside from federal benefit adjudication) and absorbing what was the work of administrative law judges (ALJs) into the work of an enlarged federal judiciary would end a state of affairs in which defendants’ constitutional rights are increasingly undermined. This issue is something many courts—including the Supreme Court— have acknowledged. Many agencies have disregarded the APA’s guardrails by expanding their bureaucratic control over adjudication, including switching the burden of proof onto the accused, the Labor Department’s empowering of its ALJs to deny a private party’s access to evidence (beyond the exclusion categories in section 556 of the APA), board members in the NLRB making *ex parte* communications with its ALJs to review their draft opinions (in violation section 557 of the APA), and in some entities (like the SEC) allowing agency leaders to initiate and resolve all cases absent from their ALJs, and allowing agency leaders to bypass ALJs to resolve cases. Although the Jarkesy decision has achieved some progress, the ultimate resolution is through the passage of federal legislation that ensures that only impartial Article III judges exercise adjudicatory powers.

Restore the Constitution: In the long run, Congress should take additional measures to reassign all federal legislative powers to Congress and all federal judicial powers to Article III courts. The best way to do this would be a gradual transition of staff and funding from the executive branch to Congress itself that would, over the long run, allow our federal legislature to produce sufficiently detailed legislation so that the issuance of interpretive regulation would be less frequent and less necessary.

Measures of this kind would restore the constitutional design based on political accountability and self-government. The array of positive effects that constitutional restoration would create includes encouraging Congress to make hard decisions rather than delegating such decisions to unaccountable bureaucrats.

Control CFPB, other agencies: The best way to do so would be by ending permanent appropriations processes that create invulnerability to congressional oversight and modification. Congress is responsible for guarding the public trust for all federal programs and all federal spending. The status quo, which allows the CFPB complete and unmodified discretion to capture and spend Treasury funds, is an unambiguous abandonment of Congress's guardianship of the public trust.

Experts: Dan Greenberg, David McFadden, Devin Watkins

For further reading:

Dan Greenberg & Devin Watkins, "Constitutional Restoration: How to rebuild the separation of powers," June 22, 2023, <https://cei.org/studies/constitutional-restoration-how-to-rebuild-the-separation-of-powers/>