May 12, 2025

The Honorable Russell T. Vought
Director, Office of Management and Budget
725 17th Street NW
Washington, DC 20503

Dear Director Vought:

On behalf of Advancing American Freedom, we are writing to file a comment in response to the Office of Management and Budget's "Request for Information: Deregulation."

We commend the Trump Administration's actions to eliminate red tape from the federal bureaucracy. Your Office's criteria for regulations that must be targeted for repeal—those that are "unnecessary, unlawful, unduly burdensome, or unsound," "are inconsistent with statutory text or the Constitution," "where costs exceed benefits," "where the regulation is outdated or unnecessary," "where regulation is burdening American businesses in unforeseen ways," or that "stifle American businesses and American ingenuity"—are right on target.

We specifically applaud President Trump's executive order, "Unleashing Prosperity Through Deregulation," requiring the elimination of ten regulations for each new regulation implemented. So many burdensome and unnecessary regulations raise the cost of doing business, hinder the well-being of American businesses, and reduce the number of jobs available for American workers. This builds on the legacy of the Trump-Pence Administration, which exceeded its own goal of eliminating two regulations for every new regulation as set out in "Reducing Regulation and Controlling Regulatory Costs," by eliminating five regulations for every new one between 2017 and 2021.

We also support the "Ensuring Lawful Governance and Implementing the President's 'Department of Government Efficiency' Deregulatory Initiative" order and "Directing The Repeal of Unlawful Regulations" memorandum. Advancing American Freedom filed amicus briefs in three of the Supreme Court cases listed in "Directing the Repeal of Unlawful Regulations," (*Jarkesy v. SEC, Loper Bright Enterprises v. Raimondo*, and *Carson v. Makin*)[1], and we wish to further contribute to our shared goal of getting government out of the lives and pocketbooks of Americans with the suggestions below.

[1] *See* Advancing American Freedom's amicus briefs in *Jarkesy v. SEC* (https://advancingamericanfreedom.com/sec-v-jarkesy/), *Loper Bright Enterprises v. Raimondo* (https://advancingamericanfreedom.com/loper-v-bright/), and *Carson v. Makin* (https://advancingamericanfreedom.com/wp-content/uploads/2021/09/Carson-v.-Makin.pdf).

Article I

The inability of the government to raise sufficient funds from the states during the Revolutionary War convinced the Framers of the need to vest taxing and spending powers in the federal government,[2] despite the Framers' awareness that this power could be abused.[3] As Chief Justice John Marshall famously declared, "the power to tax involves the power to destroy." Hamilton defended these powers, reasoning that a government must have the ability to accomplish the objects committed to its care. Recognizing both the necessity of these powers and their potential for abuse, the Framers specifically lodged revenue and appropriations powers with Congress, not with the executive branch. The Constitution requires that bills for raising revenue originate in the House of Representatives and pass the Senate. U.S. Const. art. 1, § 7, cl. 1. The Constitution reserves for Congress the power "to lay and collect Taxes, Duties, Imposts and Excises," U.S. Const. art 1, § 8 cl. 1, and to appropriate federal funds. U.S. Const. art. 1, § 9, cl. 7.

Restricting the power of the purse to the legislative instead of the executive branch provides a check on abuse of that power because, as Justice Gorsuch once said, the "proposed law must win the approval of two Houses of Congress—elected at different times, by different constituencies, and for different terms in office—and either secure the President's approval or obtain enough support to override his veto."[4] The constitutional process encourages deliberation and broad consensus before the power is exercised. If the executive had unilateral authority to tax, fund, and enact laws, there would not be a sufficient check on an "excess of law making" and the accompanying infringements on liberty. As Madison wrote in Federalist No. 48, "[t]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates."[5] As explained in the Appendix, the administrative state was designed to undermine this separation of powers. Repealing bad regulations thus restores the constitutional balance of powers that keeps Americans free.

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[2] *Identifying Defects in the Constitution,* Documents from the Continental Congress and Constitutional Convention, 1774-1789 (June 20, 2024, 1:17 PM), https://www.loc.gov/collections/continental-congress-and-constitutional-convention-from-1774-to-1789/articles-and-essays/to-form-a-more-perfect-union/identifying-defects-in-the-constitution/.

[3] "The apportionment of taxes on the various descriptions of property is an act which seems to require the most exact impartiality; yet there is, perhaps, no legislative act in which greater opportunity and temptation are given to a predominant party to trample on the rules of justice." The Federalist No. 10, at 45 (James Madison) (George W. Carey and James McClellan, eds., The Liberty Fund 2001).

[4] Oliver Elsworth remarked during the Convention that, historically in other Republics, large states tend to influence the executive more than small states, so giving large amounts of power to an elected executive still risks the interests of the large states dominating over the small states, "Even in the executive, the larger states have had ever great influence." Records of the Federal Convention at 193 (Philip B Kurland & Ralph Lerner, *The Founders' Constitution* (2000)).

[5] The Federalist No. 47, at 251 (James Madison) (paraphrasing from Montesquieu's Spirit of Laws) (George W. Carey and James McClellan, eds., The Liberty Fund 2001). With respect to "excess of lawmaking," see generally, Neil Gorsuch & Janie Nitze, *Over Ruled: The Human Toll of Too Much Law* (2024).

The Consolidated Audit Trail (See Also: Article II, Individual Rights)

The Securities and Exchange Commission (SEC) has circumvented congressional authorization and appropriation powers by launching a massive surveillance program against the American people and compelling private entities it regulates to build and pay for it.[6]

The anodyne-sounding Consolidated Audit Trail (CAT), a data collection and surveillance system that aggregates, for the perusal of a multitude of federal and quasi-regulatory agents, every securities trade in the United States and match it to personally identifiable information (PII) of those on both sides of the transaction.[7] The inflow of data is so large that it is believed that the only data-collection program that is larger is one gathering signals intelligence from potential adversaries by the National Security Agency.

It appears that, "through a long train of abuses and usurpations," the SEC has been piecing together this unconstitutional chimera since 2012, hacking off powers from one branch of government and monstrously grafting them on to parts of others, while amputating various parts of the Bill of Rights. The SEC, a regulatory agency in the executive branch, has abrogated the congressional power of the purse by force, funding CAT through entities it regulates that are in no position to protest. In turn, CAT surveilles Americans on a mass scale without benefit of judicial warrant and chills First Amendment freedoms of speech and association. It is hard to imagine a less constitutional construct in the entire administrative state. The CAT is responsible for storing incredible amounts of sensitive information about Americans in a database which will become the number one target of malicious state and non-state hackers. CAT is an attempt to regulate Commerce and to exercise a taxing power[8] and would not be a Necessary and Proper Exercise of Congress's Commerce Clause authority, even if it had been created by Congress.

When it established the CAT, the SEC, an agent of the executive branch, usurped the legislature's power of the purse. This erosion of the Constitution's separation of powers guarantees which will have vast economic and political consequences, triggering the major questions doctrine. This deviation from the original understanding of the Constitution infringes on guarantees essential to the protection of liberty. Self-regulatory organizations and brokers will be forced to fund the

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[6] Justice Gorsuch points out that regulatory agencies regularly circumvent congressional authority. "[A]gencies can write, change, and change again rules affecting millions of Americans – all without any input from Congress." Neil Gorsuch & Janie Nitze, *Over Ruled: The Human Toll of Too Much Law* 77 (2024). As for the constitutionality of such an arrangement see *Marbury v. Madison*, 5 US (2 Cranch) 137, 174, 176 (1803): "All laws which are repugnant to the Constitution are null and void."

[7] *See* Advancing American Freedom's amicus brief in *Davidson v. Gensler* (https://advancingamericanfreedom.com/davidson-v-gensler/) for more.

[8] Even if congressionally authorized, the CAT would be unconstitutional because it is not a necessary and proper exercise of Congress's commerce power. The Constitution grants Congress the power "[t]o regulate Commerce . . . among the several States." The CAT does not fit the definition of commerce.

CAT through an Executed Share Model.[9] The CAT operating committee will issue fees and fund the program indefinitely, without any initial authorization or subsequent input from Congress.[10]

The CAT's funding mechanism usurps Congress's constitutionally delegated authority to tax and appropriate funds and erodes the separation of powers. Fees are determined and issued to participants (self-regulatory organizations) and industry members (the brokers of the exchanges) by the CAT operating committee, a group chosen by the participants.[11] The CAT's funding structure allows the executive branch to fund and implement the program indefinitely without an appropriation or law that passes through all the checks, balances, and broad consensus that bicameral legislation entails. Ensuring power does not aggregate in one branch is the essential protection for freedom. The preservation of liberty requires conformance with the Constitution's delegation of the taxing and spending powers, limitations the CAT mechanism clearly exceeds.

Courts have recognized the unconstitutionality of such funding structures. Last year, the Fifth Circuit ruled that an analogous Federal Communications Commission (FCC) scheme that "subdelegated the taxing power to a private corporation… [which] in turn, relied on for-profit telecommunications companies to determine how much American citizens would be forced to pay for the "universal service" tax that appears on cell phone bills across the Nation…violates Article I, § 1 of the Constitution." The CAT's *de facto* tax fails to pass constitutional muster.

The SEC's creation of the CAT implicates and violates the major questions doctrine. Under the doctrine, "administrative agencies must be able to point to 'clear congressional authorization' when they claim the power to make decisions of vast 'economic and political significance.'" *West Virginia v. EPA*, 597 U.S. 697, 735 (Gorsuch, J., concurring). The doctrine is triggered when an agency claims to "resolve a matter of great 'political significance' . . . or end an 'earnest and profound debate across the country.'" It can also be activated when an agency seeks to "regulate 'a significant portion of the American economy' or 'require billions of dollars in spending by private persons or entities.'"

The major questions doctrine applies to the creation and funding of the CAT. The collection and storage of personally identifiable information coupled with concerns of infringement of a Bill of Rights guarantee make CAT and its data collection a matter of "great political significance." The Federal Reserve reports that 58 percent of American households owned stocks in 2022.[12] A Pew Research poll conducted in 2019 found that 66 percent of American adults believed that the potential risks of government collection of their private data outweighed the benefits, and 64

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[9] *CAT NMS Plan Amendment: Funding Model*, U.S. Securities and Exchange Commission, (June 20, 2024, 11:50 AM), https://www.sec.gov/files/34-98290-fact-sheet.pdf.
[10] *Id.*
[11] *CAT NMS Plan Amendment: Funding Model*, U.S. Securities and Exchange Commission, (June 20, 2024, 11:50 AM), https://www.sec.gov/files/34-98290-fact-sheet.pdf.
[12] Katie Kolchin, *Top 10 Takeways from SIFMA's 2024 Capital Markets Fact Book*, SIFMA (August 12, 2024), https://www.sifma.org/resources/news/top-10-takeaways-from-sifmas-2024-capital-markets-fact-book/.

percent expressed concern about how the government uses the data collected.[13] In 2023, the percentage that expressed such concern increased to 71 percent.[14]

Beyond its political significance, the CAT also "regulates a significant portion of the American economy" and "requires billions of dollars in spending by private persons or entities." The development of the CAT cost $1 billion dollars in 2022,[15] and its maintenance is currently estimated to cost over $200 million dollars a year.[16] These costs do not consider the likely billions of dollars in compliance costs nor the change in consumer behavior that will result from the increased costs of engaging in trade and fear of data breaches. The decision to implement the CAT changed the trajectory of billions of private dollars, making it a decision of "vast economic significance." This triggers the major questions doctrine. Therefore, for the SEC to implement the CAT, the agency must point to "clear congressional authorization."

The only thing clear about the CAT is that it is not based on "clear congressional authorization." The SEC cites a 1988 provision in section 11a of the Securities and Exchange Act to claim that Congress granted the power to create and implement the CAT, which gives the SEC the authority to "require self-regulatory organizations to act jointly with respect to matters as to which they share authority under the Exchange Act in planning, developing, operating, or regulating a facility of the National Market System." The SEC admits this language does not give express authorization for the creation of the CAT. Furthermore, the CAT differs dramatically in its content from prior regulations that rely on section 11a. Historically, the SEC used the statute to require disclosures of market data to other market participants to ensure a fair current market. Such regulations were previously used to require the disclosure of the price, size of last sale, national highest bid, and national lowest offer for each stock on the exchange. The CAT differs in that it focuses on government surveillance and data storage to conduct searches of past market activity at the level of individual trades. The SEC has "never had this level of access to personally identifiable information previously."[17] The Framers implemented the separation of powers to safeguard liberty and protect inalienable rights, but CAT evades these checks and forces Americans to fund the erosion of their own freedom.

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[13] Brooke Auxier, Lee Rainie, Monica Anderson, Andrew Perrin, Madhu Kumar, Erica Turner, *Americans and Privacy: Concerned, Confused and Feeling Lack of Control Over their Personal Information*, Pew Research Center (November 15, 2019), https://www.pewresearch.org/internet/2019/11/15/americans-and-privacy-concerned-confused-and-feeling-lack-of-control-over-their-personal-information/.

[14] Colleen McClain, Michelle Faverio, Monica Anderson, Eugenie Park, *How Americans View Data Privacy*, Pew Research Center (Oct. 18, 2023), https://www.pewresearch.org/internet/2023/10/18/how-americans-view-data-privacy/.

[15] Brief for Amici Curiae Tom Cotton and 21 members of Congress, American Securities Association and Citadel Securities v. United States Securities and Exchange Commission, (2024) (No.4-968).

[16] *Consolidated Audit Trail, LLC, 2023 Financial and Operating Budget*, Perma.cc (March 28, 2023), https://perma.cc/36W2-CKJ5).

[17] John Kennedy, *SEC's Consolidated Audit Trail is a disaster waiting to happen*, John Kennedy U.S. Senator for Louisiana (Nov. 16, 2023), https://www.kennedy.senate.gov/public/2023/11/sec-s-consolidated-audit-trail-is-a-disaster-waiting-to-happen.

"Commission Interpretation Regarding Automated Quotations Under Regulation NMS"

Regulation NMS (National Market System) is a series of Securities and Exchange Commission (SEC) rules that provides price priority for displayed and accessible quotations, as trading centers must prevent the execution of a trade at a price below that of a "protected" quotation. Rule 600 of Regulation NMS requires "protected" quotations to be "immediately and automatically" accessible.[18] At the time of the rule's adoption, the SEC clarified that "[t]he term 'immediate' precludes any coding of automated systems or other type of intentional device that would delay the action taken with respect to a quotation."[19] However, in 2016, the Commission opted to unilaterally reinterpret the term "immediate" to allow for "de minimis" intentional delays.[20] Since then, several exchanges and alternative trading systems have taken advantage of this to display quotations to be adjusted or cancelled during the intentional delay- while improperly maintaining protected quote status.[21] As the Commission considers how to handle these de facto "conditional" quotes, there is an obvious lack of a defined framework to determine what constitutes a "de minimis" intentional delay and the degree to which protected quotes can be made "conditional," making arbitrary decisions inevitable. The redefinition of "immediate" is not a constitutional power belonging to the SEC or any other executive branch agency. We recommend that the Commission reverse its decision[22] to faultily and unlawfully reinterpret the term "immediate" in Regulation NMS and cease granting protected quote status to displayed quotations that are not actually immediately accessible.

"Railroad Operating Practices"

The National Transportation Safety Board (NTSB)'s (NTSB) rule imposing a costly minimum crew size standard for railroads, which it justified by pointing to the need for higher standards after the 2023 derailment in East Palestine, Ohio, should be repealed. The NTSB's own report on that tragedy failed to draw any connection between the disaster and crew size standards.

Setting the number of operators on a rail line is an act of legislation, not execution, because it sets binding rules on private conduct. As Justice Gorsuch explained in his dissent in *Gundy v. United States*, "When it came to the legislative power, the framers understood it to mean the power to adopt generally applicable rules of conduct governing future actions by private persons—the power to 'prescribe the rules by which the duties and rights of every citizen are to

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[18] 17 CFR 242.600(b)(3).
[19] Exch. Act. Rel. No. 51808 (June 9, 2005), available at: https://www.sec.gov/files/rules/final/34-51808.pdf.
[20] Interpretation Regarding Automated Quotations Under Regulation NMS, 81 FR 40785 (June 23, 2016), available at: https://www.govinfo.gov/content/pkg/FR-2016-06-23/pdf/2016-14876.pdf
[21] *See, e.g.,* 84 Fed. Reg. 30282 (June 26, 2019), available at: https://www.govinfo.gov/content/pkg/FR-2019-06-26/pdf/2019-13537.pdf and 87 FR 79401 (Dec. 27, 2022), available at: https://www.finra.org/sites/default/files/2022-12/sr-finra-2022-032-federal-register-notice.pdf
[22] https://www.federalregister.gov/documents/2016/06/23/2016-14876/commission-interpretation-regarding-automated-quotations-under-regulation-nms

be regulated,' or the power to 'prescribe general rules for the government of society.'" These are the powers the Constitution vests in Congress, not the Executive Branch.

For four years, the Trump-Pence administration repealed unneeded regulations, rejecting special interest calls to impose policies unrelated to the core focus of the U.S. Department of Transportation: advancing safety. Policymaking was based on sound data, and it showed: train derailments were down on average compared to the Obama administration. This administration should follow in the first Trump Administration's footsteps. Railroads exist today in large part due to deregulatory efforts that took place nearly half a century ago. Despite recent high-profile incidents, hazmat incidents are down 78% since 2000, and mainline accidents are down 44% thanks to private capital investment and technology upgrades empowered by the free market over the years. As we anticipate a potential new outbreak of inflation, terminating rules like 49 CFR Part 218[23] would be wise.

"**Nondiscrimination in Health Programs and Activities"**

On May 6, 2024, HHS issued a final rule regarding section 1557 of the Affordable Care Act.[24] This rule reinterprets Section 1557 to mandate gender transition procedure insurance coverage for minors and could be used as "strings" to force doctors to perform such procedures on youth, a power that executive branch agencies do not have. This rule should be repealed.

"Health and Human Services Adoption of the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards"

On October 2, 2024, HHS released an interim final rule entitled "Health and Human Services Adoption of the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards," which expanded the flawed *Bostock* (2020) Supreme Court decision that interpreted Title VII's prohibition on sex discrimination to include sexual orientation and gender identity as protected classes.[25] This rule adopted *Bostock's* definition of discrimination for health grants and Head Start education programs, despite the fact that the Supreme Court made clear that its ruling only applied to Title VII. Executive branch agencies cannot redefine words in a statute. We are worried that this opens the door for preschoolers to be indoctrinated with LGBT ideology and exposed to sexualized curricula. This rule could also require health and education providers to perform gender transition procedures in order to receive federal grants. This rule was silent about conscience protections for religious organizations and required them to undergo a lengthy bureaucratic process to seek exemptions. This rule should be eliminated.

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[23] https://www.ecfr.gov/current/title-49/subtitle-B/chapter-II/part-218

[24] https://www.federalregister.gov/documents/2024/05/06/2024-08711/nondiscrimination-in-health-programs-and-activities

[25] https://www.federalregister.gov/documents/2024/10/02/2024-21984/health-and-human-services-adoption-of-the-uniform-administrative-requirements-cost-principles-and

Article II

The Constitution vests "[t]he executive Power . . . in a President of the United States."[26] The President is vested not just with some of the executive power, but "all of it," as the Supreme Court has said. That the Framers and ratifiers of the Constitution understood themselves to be creating a unified, or unitary, executive as opposed to a multimember executive council, is undeniable. "Since 1789, the Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary," as the Court said in a 2010 opinion. In the deliberations of the Constitutional Convention, different forms of executive structure were considered, with the convention ultimately settling on a single President. As Justice Scalia explained, the Framers "consciously declined to sap the Executive's strength in the same way they had weakened the Legislature: by dividing the executive power.

When Alexander Hamilton defended the Constitution's design for the Executive Branch, his efforts were directed at showing the benefits of, and dispelling concerns about, the unity of the Executive, not at defending the claim that the executive power was unified, a fact that was obvious from the plain meaning of Article II. Hamilton's description of unity in Federalist 70 is unsurprisingly short. He notes, basically in passing, that unity of the executive means that the executive will be "one man," and that "in proportion as the number [of those with authority over the executive power] is increased," the qualities of the energetic executive will be decreased.[27] The question for those considering the proposed Constitution was not whether the executive it created would be unitary. The question was whether a unified executive was a good idea. Hamilton took "it for granted . . . that all men of sense will agree in the necessity of an energetic executive."[28] According to Hamilton, "[t]he ingredients which constitute energy in the executive, are, unity; duration; an adequate provision for its support; competent powers."[29] The unity of the executive, in turn, can be destroyed, "either by vesting the power in two or more magistrates, of equal dignity and authority; or by vesting it ostensibly in one man, subject, in whole or in part, to the control and cooperation of others, in the capacity of counsellors to him."[30]

Multimember agencies with removal protections undermine constitutional executive unity in both respects. First, the agencies themselves act as councils composed of "two or more magistrates, of . . . equal authority."[31] The Securities and Exchange Commission (the agency that formulated the Consolidated Audit Trail) is a five-member commission with the commissioners sharing equal power in decisions for the administration. Thus, the SEC operates as a council over the relevant

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[26] *See* Advancing American Freedom's amicus brief in *American Securities Association v. SEC* (https://advancingamericanfreedom.com/aaf-fights-for-a-return-to-constitutional-order-in-the-executive-branch/) for more.
[27] The Federalist No. 70, at 363 (Alexander Hamilton) (George W. Carey and James McClellan, eds., The Liberty Fund 2001).
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*

areas of law. This multi-headed structure violates the basic principle of executive unity as established in the Constitution.

Second, Hamilton explains that the unity of the executive may be destroyed "by vesting [the executive power] ostensibly in one man, subject, in whole or in part, to the control and cooperation of others, in the capacity of counsellors to him."[32] Multimember-headed agencies with removal protection destroy the unity of the executive in this way as well. The President's agenda in areas of the law executed by multimember-headed executive agencies with removal protection is always subject to the approval or disapproval of the council, or as they are called today, the commission. While the Framers elsewhere divided government power among different bodies to protect the people's liberty, they believed that that same liberty demanded an energetic executive.

To offset this need for unity and energy, the Framers consciously made the President the most "politically accountable official in Government," subjecting that office to election "by the entire Nation."[33] Yet removal protections undermine that political accountability that is central to the proper constitutional function of the chief executive. The Constitution vests the unitary President with certain specified powers and imposes on him the responsibility to "take care that the laws be faithfully executed." U.S. Const. art. II, § 3. As the Supreme Court has explained, "[t]he President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them." When Congress invests the executive power in an administrative agency with heads insulated from presidential control, it undermines the fundamental structure the Constitution establishes. Any regulations that violate this constitutional design should be eliminated.

Article III

The constitutional separation of powers was not an accident. It was designed by the Framers of the Constitution to ensure that the federal government, which exists to protect individual rights, would not become a source of those rights' violation. The Constitution's structures are not suggestions or guidelines. They are rules those who govern must follow. The SEC's adjudication of cases before its own administrative law judges ("ALJ") undermines that structure by violating the distribution of powers among the three branches and thus is illegal.[34]

According to then-SEC Commissioner Edward Fleischman, "the true life force of a fourth branch agency is expressed in a commandment that failed, presumably only through secretarial haste, to survive the cut for the original decalogue: Thou shalt expand thy jurisdiction with all thy heart, with all thy soul and with all thy might."[35]

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[32] *Id.*
[33] *Id.* at 224.
[34] *See* Advancing American Freedom's amicus brief in *SEC v. Jarkesy* (https://advancingamericanfreedom.com/sec-v-jarkesy/) for more.
[35] Edward H. Fleischman, Commissioner, SEC, Address to the Women in Housing and Finance, *The Fourth Branch at Work*, (November 29, 1990) https://www.sec.gov/news/speech/1990/112990fleischman.pdf.

Officials of the federal government have no authority or right to change the Constitution apart from the amendment process. Yet for at least one hundred years, an effort has been made to undermine the constitutional separation of powers without going through that process. The Framers understood that governmental structure was a necessary protection for individual liberty. When government officials violate that structure, they undermine those protections, endangering the liberty of the people that it is their job to safeguard.

Delegation of judicial power to ALJs is inconsistent with Article III and is thus outside the power of Congress or the President. Any regulations that extend ALJ power beyond the statutorily required minimum should be repealed.

Individual Rights

According to the Declaration of Independence, the purpose of government is to secure the God-given rights of the people. These rules undermine those rights, including, in some cases, violating the specific constitutional prohibitions on government abuse in the Bill of Rights.

CAT's disclosure requirements constitute unreasonable mass seizures that allow unrestricted, suspicionless searches violative of the Fourth Amendment. The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." While government actors may use traditional surveillance methods like following suspects in public, "[i]t may be that achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy," as the Supreme Court explained in 2012. As former Attorney General William Barr observed, "If the government can collect this information just in case, that's the big-brother surveillance state."[36]

The CAT entails initial unreasonable mass seizures that allow the SEC and self-regulatory organizations (SROs) to perform suspicionless searches of people's personal information included in their securities records, without any judicial or legislative authorization. 17 C.F.R. § 242.613 (c)(2)-(8). 17 C.F.R. § 242.613(e)(2) says that "such access to and use of such data by each [exchange or association] . . . for the purpose of performing its regulatory and oversight responsibilities pursuant to the federal securities laws, rules, and regulations shall not be limited," which is deeply concerning. It would be a dubious proposition to claim that people buying stocks expect their names, addresses, and comprehensive transaction details including "the original receipt, or origination, modification, cancellation, routing, and execution" of their orders on any U.S. exchange to be automatically subject to unsupervised snooping. 17 C.F.R. §

[36] Zach Kessel, *SEC Finalizing a 'Big Brother' Database to Track Americans' Stock Trades in Real Time* (July 23, 2024 1:58 PM) https://www.nationalreview.com/news/sec-finalizing-a-big-brother-database-to-track-americans-stock-trades-in-real-time/.

242.613 (c)(2)-(8)., (e) (2)**;** 17 C.F.R. § 242.613(j)(9). This arrangement subjects people's private investments to arbitrary, intrusive, and permeating surveillance.

Regardless of whether the securities records CAT compiles are considered the modern-day equivalents of customers' papers or effects or the business records of U.S. exchanges, the CAT reporting requirements constitute a "taking" of these records into CAT LLC's "possession," and thus qualify as seizures under the Fourth Amendment under the Supreme Court's standard in *California v. Hodari D.*. The compilation of these records into the CAT database allows customers' securities records to be searched, as the SEC and various SROs can paw through these records for the alleged purpose of finding regulatory violations. 17 C.F.R. § 242.613 (e)(2).

The SEC grasps at two exceptions to justify its unrestricted searches under the CAT: the consent exception through the third-party doctrine, and the administrative search exception. The CAT fails to meet constitutional muster under both.

The third-party doctrine holds that there is "no legitimate expectation of privacy in information voluntarily turn[ed] over to third parties," as explained by the Supreme Court in the 1979 case *Smith v. Maryland*. When customers make stock transactions on U.S. exchanges, they are not expressly handing over the details of those transactions to their exchange. Rather, those details are recorded, regardless of that customer's wishes. Thus, simply making transactions on a U.S. exchange should not be taken to imply a customer's consent to the accompanying records being compiled into a database which is accessible to regulators.

Even if customers' stock transactions on U.S. exchanges are viewed as a voluntary conveyance of the accompanying details, the CAT is still not a proper application of the third-party principle. This is because the exchanges are the records' owners, and CAT rules force U.S. exchanges to transmit their records to CAT LLC, rendering the disclosure an involuntary seizure. 17 C.F.R. § 242.613(c)(7)(i)-(viii). Nevertheless, even if the CAT is held as a facially proper imposition of the third-party principle, it is still unconstitutional under the Fourth Amendment.

The CAT is not a proper application of the administrative search exception, as it does not provide any opportunity for pre-compliance review. For a regulatory scheme to constitutionally subject even a closely regulated industry to warrantless search, it must satisfy the Fourth Amendment's reasonableness test. This test's third prong requires that "the statute's inspection program, in terms of the certainty and regularity of its application, provid[e] a constitutionally adequate substitute for a warrant," as stated in *New York v. Burger*.

The CAT regulations do not have an adequate warrant substitute. The only requirement coming close to a limitation on the SEC's or an SRO's access to the CAT is that it be for the purpose of "performing "regulatory and oversight responsibilities." Because the SEC's access to the CAT for regulatory purposes would "not be limited," and there is no requirement for government actors to have any particularized suspicion or judicial authorization, the CAT's compelled

disclosures and search accessibility do not comport with the administrative search exception. 17 C.F.R. § 242.613(e)(2).

Large, centralized government databases are catnip to hackers seeking troves of Americans' personal information. The SEC's very own Electronic Data Gathering, Analysis, and Retrieval system (EDGAR),[37] which processes over 1.7 million electronic filings annually, was not immune to this threat.

As former Attorney General William Barr noted, "It's guaranteed that all this data will end up with our adversaries, likely with the Chinese. Far more secure agencies have been successfully hacked."[38] In 2018, a hacker breached 60 million records of US Postal Service user account details even after being warned a year prior.[39] Hackers stole the personal information of 21.5 million current and former federal government employees from Office of Personnel Management files in 2015.[40] 26,000 current and former Defense Intelligence Agency employees experienced a breach of personally identifiable information (PII) in 2023.[41] A British teenager published the contact information of 20,000 FBI agents in 2016.[42] United States Army soldier Chelsea Manning infamously handed over 750,000 classified documents to WikiLeaks.[43] The healthcare information of 4.6 million active duty servicemembers, veterans, and their family members was compromised in a 2011 Tricare breach.[44] GovPayNow.com, which is used by thousands of state and local governments, leaked 14 million records in 2018, including addresses, phone numbers and partial credit card numbers.[45] Additionally, a hacker exposed 191 million records from a database of American voters in 2015.[46] Creating a centralized hub would generate an appetizing target for hackers and enemies of the United States to find everything they want to know about the 58% of American households who own stock.

For all of these reasons, the rule creating the CAT (17 CFR § 242.613)[47] should be dismantled.

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[37] Amir Bibawy, *SEC reveals 2016 hack that breached its filing system*, Associated Press (Sep. 20, 2017 11:37 PM) https://apnews.com/article/d81daf569c75472bbcba22d2f5ba0f34.
[38] Kessel, *supra* note 16.
[39] Paul Bischoff, *A recent history of US Government Breaches – can you trust them with your data?*, Comparitech (Nov. 28, 2023) https://www.comparitech.com/blog/vpn-privacy/us-government-breaches/.
[40] *Ibid.*
[41] David DiMolfetta, *The Pentagon is notifying individuals affected by 2023 email data breach*, Government Executive (Feb. 15, 2024) https://www.govexec.com/technology/2024/02/pentagon-notifying-individuals-affected-2023-email-data-breach/394184/.
[42] Mary Kay Mallonee, *Hackers publish contact info of 20,000 FBI employees*, CNN (Feb. 8, 2016 8:34 PM) https://edition.cnn.com/2016/02/08/politics/hackers-fbi-employee-info/index.html.
[43] Bill Hutchinson, *Chelsea Manning speaks of solitary confinement during New Year's Day poetry event*, ABC News (Jan. 2, 2024 4:29 PM) https://abcnews.go.com/US/chelsea-manning-speaks-solitary-confinement-new-years-day/story?id=106043233.
[44] Jim Forsyth, *Records of 4.9 mln stolen from car in Texas data breach*, Reuters (Sep. 29, 2011 6:00 PM) https://www.reuters.com/article/us-data-breach-texas-idUSTRE78S5JG20110929/.
[45] Bischoff, *supra* note 21.
[46] Thomas Brewster, *191 Million US Voter Registration Records Leaked In Mystery Database*, Forbes (Dec. 28, 2015 8:50 AM) https://www.forbes.com/sites/thomasbrewster/2015/12/28/us-voter-database-leak/.
[47] https://www.govinfo.gov/app/details/CFR-2020-title17-vol4/CFR-2020-title17-vol4-sec242-613

Bad Policy

Along with many of those listed above, these regulations are bad policy and should be repealed to restore common sense governance.

"Fair Lending, Fair Housing, and Equitable Housing Finance Plans"

The 2024 "Fair Lending, Fair Housing, and Equitable Housing Finance Plans" rule (RIN 2590–AB29) spurs risky loans and extending already generous "protection" to delinquent tenants.[48] Responsible homeowners and tenants will shoulder these costs. According to the agency, this rule provides "reasonable opportunities to accommodate hardships by the renter or homeowner to allow continuation of the housing opportunity." However, the bill's equity policies aimed at extending credit to "underserved communities" classifies "individuals with limited mainstream credit and banking history" (people with bad or no credit) as one such community. This yields higher mortgage financing costs and rental prices for responsible families, which effectively redistributes resources to those with riskier profiles. Higher rents and mortgage rates will be required to mitigate the heightened risk from delinquency and defaults. Prospective renters may find themselves subject to increased security deposits and tighter credit checks. Ultimately, home prices for the lower-income segment of the population may become even more expensive as borrowers are supplied with more dollars to chase the limited supply of homes.

This threatens to worsen the recent phenomena of smaller homes appreciating at twice the rate of larger homes. Subsidies — regardless of the market — drive up costs. Using equitable housing finance plans to cajole lenders into making riskier loans and diminishing investor protections against delinquent tenants and defaulting borrowers will only further harm the American people. In line with Executive Order 14151, "Ending Radical and Wasteful Government DEI Programs and Preferencing," this rule should be eliminated.[49]

Health Data, Technology, and Interoperability: Protecting Care Access

In 2024, the Department of Health and Human Services promulgated a rule about the collection of medical data that included absurd pronouns such as ze/zir/zir/zirs/zirself, co/co/cos/cos/coself and, reflecting the ups and downs of life, yo/yo/yos/yos/yoself. [50] HHS should amend the rule in line with Executive Order 14168 "Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government," and focus on improving healthcare.

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[48] https://www.federalregister.gov/documents/2024/05/16/2024-09559/fair-lending-fair-housing-and-equitable-housing-finance-plans

[49] For more information, see Joel Griffith, "Equitable housing finance plans will complicate Detroit homeownership," Oct. 27, 2024 (https://www.detroitnews.com/story/opinion/2024/10/27/griffith-equitable-housing-finance-plans-will-complicate-detroit-homeownership/75839215007/) and Joel Griffith, "Comment on Proposed Rule: Fair Lending, Fair Housing, and Equitable Housing Finance Plans" (RIN 2590–AB29) (https://static.heritage.org/2023/Regulatory_Comments/FHFA_RIN%202590%E2%80%93AB29.pdf)

[50] https://advancingamericanfreedom.com/aafs-comment-on-the-new-proposed-rule-from-department-of-health-and-human-services/

"Designated Placement Requirements Under Titles IV-E and IV-B for LGBTQI+ Children"

On April 30, 2024, the Administration for Children and Families (ACF) under HHS finalized its proposed rule to establish new requirements for the "safe and proper care" of children in the foster care system who identify as LGBT.[51] The rule mandated that foster agencies affirm children's professed identities in order to participate in the system, making it much harder for agencies and couples who do not agree with LGBT ideology to help these children. It threatens the rights of foster parents by pressuring them to facilitate the provision of gender transition procedures to a foster child in their care and endangers the place of faith-based providers in the foster care system. This rule should be repealed.

Conclusion

We applaud your goal of removing the shackles that constrain the American economy from reaching its full potential. We encourage you to be mindful of the threat of a future administration utilizing excessive and unconstitutional powers and eliminate that possibility by returning those powers to the branches that are to exercise them under the Constitution. We don't want a future President to undo your legacy on cutting corrupt programs through DOGE, cracking down on illegal immigration, and rooting toxic DEI policies out of government.

We also recommend cutting out regulations that contain carveouts for special interests. Such carveouts are not only unfair and pick winners and losers (with the losers often being small businesses), but are often indicative of the regulation's weakness.

We urge you to exist current law and eliminate any noncompliant regulations, such as pro-gender ideology regulations that violate Title VII and Title IX rights that protect women and the Protection of Pupil Rights Amendment to safeguard parents' rights. We also promote any efforts to stop subsidizing violations of constitutional rights by withdrawing funding from state and local governments that do so (see New York State's work to "debank" the National Rifle Association in the *National Rifle Association of America v. Vullo* case).

J. Marc Wheat

General Counsel

Advancing American Freedom

Vice President Mike Pence, Founder

Paul Teller

Executive Vice President

Advancing American Freedom

Vice President Mike Pence, Founder

[51] https://www.federalregister.gov/documents/2024/04/30/2024-08982/designated-placement-requirements-under-titles-iv-e-and-iv-b-for-lgbtqi-children

Appendix

I. Those Who Created the Administrative State Knew That What They Were Proposing was Unconstitutional and Inconsistent with the Fundamental Purpose of the Constitution.

The administrative state became a major, constitutional force in the federal government during the Franklin Delano Roosevelt ("FDR") presidency, largely as a result of his New Deal policies.[52] However, the ideas did not start with him. According to FDR himself, many of the principles for the New Deal came from President Woodrow Wilson.[53] Wilson, in turn, was influenced by Frank Goodnow, a professor at Columbia and later Johns Hopkins.[54] Additionally, one of the most important early architects of the administrative state was James Landis[55]who "became the animating force behind the growth of modern administration as we know it today" "[t]hrough [his] work on securities legislation" and "subsequent service on the FTC and SEC."[56]

A. These early innovators of the administrative state believed that the Framers had gotten the purpose of government wrong.

In the minds of these innovators of the administrative state, the government cannot merely protect the rights of the people because the complexity of the modern world demands government intervention. To Wilson:

> The object of constitutional government is to bring the active, planning will of each part of the government into accord with the prevailing popular thought and need . . .whatever institutions, whatever practices serve these ends, are necessary to such a system: those which do not, or which serve it imperfectly should be dispensed with or bettered.[57]

Goodnow also believed that America had moved past the Founders' vision of government. He wrote, "while insistence on individual rights may have been of great advantage at a time when the social organization was not highly developed, it may become a menace when social rather than individual efficiency is the necessary prerequisite of progress."[58] Apparently, then, it was a good thing that "the sphere of governmental action is continually widening and the actual content of individual private rights is being increasingly narrowed."[59]

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[52] *See* Ronald J. Pestritto, *The Progressive Origins of the Administrative State: Wilson, Goodnow, and Landis*, Social Philosophy and Policy, January 2007, 16, 16 n.1.
[53] *Id*. at 28.
[54] *See id*. at 25, 43.
[55] *Id*. at 25.
[56] *Id*. at 16.
[57] Woodrow Wilson, *Constitutional Government in the United States* 14 (1914) https://www.loc.gov/resource/gdcmassbookdig.constitutionalgo00wils_0/?sp=28&r=-0.831,-0.033,2.661,1.184,0.
[58] Frank J. Goodnow, *The American Conception of Liberty* 21 (1916) https://archive.org/details/americanconcepti00goodrich/page/n5/mode/2up.
[59] *Id*.

Similarly, the increasing "complexities of our modern society" according to Landis "call for greater surveillance by government."[60] Nonetheless, "modern government had to move beyond the separation of powers, since the end of government had changed from rights protection to what Landis called the 'promotion of the welfare of the governed' or, more generally, 'well-being.'"[61]

Somewhat more subtly, though no less dangerously, FDR said, "[t]he task of statesmanship has always been the re-definition of [the] rights [people enter into the social contract to protect] in terms of a changing and growing social order. New conditions impose new requirements upon Government and those who conduct Government."[62] Thus, contrary to the understanding that informed the drafting of the Constitution, these founders of the administrative state saw government's purpose not as rights protection but as the restructuring of society for social and economic efficiency with less and less regard paid to the rights of the people.

B. These founders of the administrative state believed that the structure of good government demands the separation of administration and politics.

Because those who created the administrative state believed the purpose of government was different from that which animated the creation of the Constitution, they also thought the structures created by that Constitution had to go.

Goodnow could not have been clearer about the Progressive project: "the sphere of administration," was "outside the sphere of constitutional law,"[63] and "[the] principle of separation of powers and authorities [had] been proven . . . to be unworkable as a legal principle."[64] In place of separation of powers, Goodnow and Wilson advocated for the separation of politics and administration.[65] According to Wilson the government is a living organism, not a machine, as he claimed the Founders thought. As he concludes, "No living thing can have its organs offset against each other, as checks, and live."[66] Wilson further believed that the "field of administration is a field of business" and thus "removed from the hurry and strife of politics; it at most points stands apart even from the debatable ground of constitutional study."[67] Landis, "fully conceded" that "[t]he growth of modern administration . . . does not fit within the form of American constitutionalism," specifically the separation of powers.[68]

As one particularly relevant example of this philosophy in practice, the SEC was designed based on the belief that complexity demands not only government intervention but government free of

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[60] Pestritto, *supra* note 14 at 35.
[61] *Id*. at 27.
[62] Franklin Delano Roosevelt, President of the United States, Address to the Commonwealth Club (September 23, 1932) https://teachingamericanhistory.org/document/commonwealth-club-address/.
[63] Pestritto, *supra* note 14 at 47.
[64] Frank Goodnow, *Politics and Administration*, 14 (The Macmillan Co. 1900).
[65] *See* Pestritto, *supra* note 14, at 25, 46-47.
[66] *Id*. at 39.
[67] Woodrow Wilson, *The Study of Administration*, Political Science Quarterly 197, 209 (June 1887).
[68] *Id*. at 27.

constitutional constraints, with sufficient flexibility to address the apparently ever-arising issues.[69] Landis "pointed to the Securities and Exchange Act of 1934, which he had helped to draft, as an example of how to create an agency with powers flexible enough to meet unforeseen exigencies."[70] Landis thought "[t]he discretionary language with which the act empowered the SEC was a vast improvement" over the earlier Securities Act which gave the agency more constrained powers.[71]

Landis complained that a "legalistic approach that reads a governing statute with the hope of finding limitations upon authority rather than grants of power with which to act decisively" was common because doing otherwise was a political gamble.[72] On the other hand, Landis held up as an example:

> One of the ablest administrators that it was my good fortune to know . . . [who] never read, at least more than casually, the statutes that he translated into reality. He assumed that they gave him power to deal with the broad problems of an industry and, upon that understanding, he sought his own solutions.[73]

The Supreme Court has at times imbibed the Progressive view of government. For example, the Court wrote in *Mistretta v. United States* that "in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." If that is the case, the Constitution may be amended. Until it is, however, those who govern the people are bound by that document as it is, not as they wish it were.[74] Because the innovators of the administrative state had little respect for the Constitution and its limitations on power, it should be unsurprising that the system they created circumvents those limitations.

C. The innovators of the administrative state were widely successful at undermining the basic structure of American federal government.

The administrative state is insulated from both methods of restraint of government foreseen by the Founders. According to Madison, "a dependence on the people" is the "primary control" of government, but "auxiliary precautions" are also necessary.[75] As Justice Clarence Thomas has noted, when "independent agencies wield substantial power with no accountability to the President or the people, they 'pose a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances."

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[69] *See id*.
[70] *Id*.
[71] *Id*.
[72] James M. Landis, *The Administrative Process*, 75 (1st ed. 1938).
[73] *Id*.
[74] As Professor Philip Hamburger shows, these ideas were not native to the United States or the Anglo-American tradition but were imported from Prussia. *See, generally*, Philip Hamburger *Is Administrative Law Unlawful*, 441-478 (The University of Chicago Press 2014).
[75] The Federalist No. 51 at 269 (James Madison) (George W. Carey and James McClellan, eds., The Liberty Fund 2001).

The design of administrative agencies intentionally avoids both popular and structural constraints. First, many agency officials, despite being a part of the executive branch and thus exercising the President's power, are nonetheless protected from removal by, and otherwise from the control of, the President.

Further, the very structures that were designed to protect the liberty of the people function to insulate the administrative state from congressional review. Enacting federal legislation is not easy, nor is it supposed to be. As Justice Neil Gorsuch once said, "Article I's detailed and arduous processes for new legislation," were, "to the framers . . . bulwarks of liberty"). This slow, deliberative process protects liberty against populist whims in the federal government. Yet that same process now makes it practically impossible for the legislature to oversee the exercise of the legislative and judicial power it has delegated to agencies. Because neither the President nor Congress can exercise meaningful oversight of much of what happens in the administrative state, the "primary control" envisioned by Madison and the Framers is rendered largely ineffectual.

Second, the "auxiliary precautions," established by the Constitution are undermined. The general structural protection that comes from a system of checks and balances operating among branches exercising distinct powers is absent in the administrative state which consists of agencies exercising legislative, executive, and judicial powers, all directed towards a shared goal. Thus, neither the primary nor the auxiliary limits on government power are reliably operable in the administrative state. Madison was clear about the danger of this sort of centralization: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many . . . may justly be pronounced the very definition of tyranny."[76]

D. The ideas of these so-called progressives were, in fact, regressive and inconsistent with the Constitution.

Those who designed and established the administrative state thought of themselves as progressive, but they were, in fact, advocating for regression. As President Calvin Coolidge explained on the Declaration's 150th anniversary,

> It is often asserted that the world has made a great deal of progress since 1776, that we have had new thoughts and new experiences which have given us a great advance over the people of that day, and that we may therefore very well discard their conclusions for something more modern. But that reasoning can not be applied to this great charter. If all men are created equal, that is final. If they are endowed with inalienable rights, that is final. If governments derive their just powers from the consent of the governed, that is final. No advance, no progress can be made beyond these propositions. If anyone wishes to deny their truth or their soundness, the only direction in which he can proceed historically is not forward, but backward toward the time when there was no equality, no rights of the individual, no rule of the people. Those who wish to proceed in that direction can not lay claim to

[76] The Federalist No. 47 at 249 (James Madison) (George W. Carey and James McClellan, eds., The Liberty Fund 2001).

> progress. They are reactionary. Their ideas are not more modern, but more ancient, than those of the Revolutionary fathers.[77]

The Founders knew they were doing something unique in world history: building a government from the ground up that was designed to preserve justice through the rule of law. The founders of the administrative state equally knew that they were seeking to undermine that system and institute the rule of men like them, not the rule of law. That rule of law demands a return to the careful balance the Constitution strikes between the three branches of government it creates.

[77] Calvin Coolidge, President of the United States, Speech on the 150th Anniversary of the Declaration of Independence (July 5, 1926) https://millercenter.org/the-presidency/presidential-speeches/july-5-1926-declaration-independence-anniversary-commemoration.