

Scholar: Empower Congress to bolster separation of powers

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Congress should actually be empowered in order to uphold the constitutional checks and balances that help to curb overreach by the other two branches of government, says University of Illinois law professor Jamelle Sharpe. Credit: University of Illinois College of Law

Although it may not receive high marks these days as a public body, Congress should actually be empowered so it can uphold the constitutional checks and balances that help to curb overreach by the other two branches of government, a University of Illinois expert in administrative law says in a newly published paper.

By adopting a doctrine of "complete delegation," courts have systematically hamstrung the ability of Congress to influence bureaucratic decision-making, says Jamelle Sharpe, a professor of [law](#) at Illinois.

"I think that courts and legal scholars systematically undervalue the role that Congress should be playing, often because Congress doesn't put its best institutional face forward," said Sharpe, who also is the associate dean for academic affairs in the College of Law. "It may be a time of historic congressional disapproval by the public, but that's why it's important to step back and look at things – not necessarily at how things are working now, but at how they are supposed to work, and how they work best."

The paper, published in the journal *Administrative Law Review*, contends that concentrating too much oversight control in the judicial or executive branches undermines the separation of powers the framers of the Constitution believed to be critical in preventing tyranny.

By adopting a policy of "partial sub-delegation" and giving Congress a judicially enforceable voice in how courts review agency policymaking, courts could increase political accountability and reduce the problem of "agency slack" caused by the broad delegation of regulatory powers, according to the paper.

"It may seem counterintuitive, given its historically low approval ratings, but there is an important role for Congress to play in managing the work

of the administrative state," Sharpe said. "We should expect that Congress partake in that role, and that perhaps the courts should work a little bit harder to make sure that Congress plays that role."

Legal academics and courts often think that once Congress has passed a law, the work of the legislative branch is essentially done, Sharpe says.

"One of the points I make in the article is that Congress' powers are broadly divided into two groups – legislative and oversight," he said. "With the legislative function of Congress, the ability to create laws, they look out into the world and see conduct they don't like, or conduct they do like, and they pass a law discouraging that conduct or encouraging it. To most people, that's what Congress does. It passes laws, the executive branch enforces the laws, and the judicial branch interprets and applies those laws to individual circumstances to determine whether a plaintiff or defendant wins a case.

"Other people get to deal with how the law actually lives – how it's interpreted, to whom it's applied, when it gets enforced, and Congress acts more or less like a bystander."

But Congress also has an important oversight function, Sharpe said.

"This is something that's well known to political scientists, but I think that it's something that is undervalued by everyone else," he said.

According to Sharpe, the courts have zealously guarded against congressional involvement in the way that laws are interpreted and enforced after that law has been enacted.

"I understand the inclination to prevent Congress from being involved in interpretation and enforcement, but my view is that courts have essentially over-corrected in their case law," he said. "There is an

important balance of congressional oversight that is evident in the constitutional scheme. When the balance is out of whack, you cede more power to the other two branches to oversee administrative decision-making in ways that can actually be detrimental both to the public good and to the political process."

Part of the fear of congressional power stems from the founders, who looked at the British experience and in many ways consciously rejected a parliamentary style of government, where members of the legislature simultaneously served in executive law-enforcing positions, Sharpe said.

"The founders wanted to make sure that these powers were separated and would not commingle, because they thought that that would make the legislature omnipotent and individual liberties would suffer as a result," he said. "I can understand that impulse at the founding moment, but the idea that we would be exposed to the parliamentary tyranny that the founders feared in the past seems strange today."

Downplaying the role of Congress primarily empowers the presidency, Sharpe said.

"If the courts are the ones placing the limitations on congressional oversight, that empowers the presidency in ways that, in my view, countervail the separation of powers principles as well as the protections that are supposed to be produced by the separation of powers," he said.

Truncating post-legislative involvement by Congress not only empowers the presidency, it also gives the people less political recourse for correcting administrative decision-making, Sharpe said.

"I think that everyone can agree that the president is a pretty busy guy," he said. "If you're told it's your political leaders who have to correct any administrative decisions, they're the ones whom you have to appeal to.

Well, when the courts have scaled back Congress' involvement, you're essentially left with the executive branch answering to everyone in the U.S.

"A better approach would be to allow for a more judicially recognizable and respected role of congressional oversight to counterbalance power, and to assist the president in serving the people, and make sure that the bureaucracy doesn't run amok."

Although much maligned, the institution of Congress is one of the primary avenues for protecting the freedoms Americans hold dear, so it's important to protect its role relative to the other two branches of government, Sharpe said.

"But part of that protection is expecting more of what members of Congress do for us," he said. "And so it's not just that courts should interpret laws in such a way that allows for a greater role for congressional oversight. We also should expect that our elected leaders would undertake these responsibilities in a manner that is consistent with our wishes – and in a manner that we can understand, even if we don't agree."

More information: The article, "Judging Congressional Oversight," is available [online](#).

Provided by University of Illinois at Urbana-Champaign

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