

# Wisconsin Institute for Law & Liberty: Rick Esenberg Submits Testimony on bill to reform judicial deference

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SB 745 would restore legislative power, curtail the administrative state, and preserve separation of powers

February 6, 2018 - Milwaukee, WI - Wisconsin Institute for Law & Liberty (WILL) President and General Counsel Rick Esenberg submitted [written testimony](#) Tuesday to the Senate Committee on Labor and Regulatory Reform regarding SB 745 - a bill to clarify and reform judicial deference to administrative agencies.

Judicial deference means that Wisconsin courts will defer to an administrative agency's interpretation of the law, as long as it is not absurd or can be said to be reasonable. This matter strikes at the very heart of our form of government, whereby all legislative power is vested in the legislative branch. When the courts defer to interpretation by administrative agencies, members of the executive branch, it violates a core tenet of republican government. SB 745 does several things to restore legislative power and curtail the administrative state:

- Restore the rule-making process for administrative agencies by preventing the end-around use of "guidance documents" to interpret the law and make quasi-official rules with the force of law.
- When an administrative agency does issue a guidance document, it must be posted publicly on its website for at least 21 days before guidance goes into effect.
- An administrative agency cannot adopt rules based on a court order, settlement agreement, or consent decree, without going through the prescribed rule-making process. This prevents the expansion of agency authority via "sue and settle" strategies.

WILL President and General Counsel Rick Esenberg wrote in testimony:

"Judicial deference to agency interpretations of the law not only usurps the judicial role but threatens to impinge on the legislative function because it changes the nature of statutory interpretation. Instead of seeking to best interpret the intent of the legislature, courts instead permit the executive (via administrative agencies) to interpret the law however it wishes, so long as, in the case of great weight deference, the interpretation is not absurd or, in the case of due deference, can be said to be as reasonable as others. Such an approach collapses administration, adjudication, and perhaps even legislation into one."