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SEPARATION OF POWERS RESTORATION ACT OF 2016

HEARING

BEFORE THE

SUBCOMMITTEE ON
REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

SECOND SESSION

ON

H.R. 4768

MAY 17, 2016

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CONTENTS

MAY 17, 2016

Page

THE BILL

H.R. 4768, the "Separation of Powers Restoration Act of 2016" 3

OPENING STATEMENTS

The Honorable Tom Marino, a Representative in Congress from the State of Pennsylvania, and Chairman, Subcommittee on Regulatory Reform, Commercial and Antitrust Law 1
The Honorable Henry C. "Hank" Johnson, Jr., a Representative in Congress from the State of Georgia, and Ranking Member, Subcommittee on Regulatory Reform, Commercial and Antitrust Law 5
The Honorable Bob Goodlatte, a Representative in Congress from the State of Virginia, and Chairman, Committee on the Judiciary 6

WITNESSES

John F. Duffy, Samuel H. McCoy II Professor of Law, University of Virginia School of Law
Oral Testimony 9
Prepared Statement 12
Jack M. Beermann, Professor of Law and Harry Eldwood Warren SCholar, Boston University School of Law
Oral Testimony 22
Prepared Statement 24
Jeffrey Bossert Clark, Sr., Partner, Kirkland & Ellis LLP
Oral Testimony 35
Prepared Statement 37
John D. Walke, Esq, Clean Air Director, Natural Resources Defense Council (NRDC)
Oral Testimony 46
Prepared Statement 48
Ronald M. Levin, William R. Orthwein Distinguished Professor of Law, Washington University in St. Louis
Oral Testimony 61
Prepared Statement 63
Adam J. White, Research Fellow, The Hoover Institution, Adjunct Professor, The Antonin Scalia Law School at George Mason University
Oral Testimony 83
Prepared Statement 85

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

Prepared statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary 111

OFFICIAL HEARING RECORD

UNPRINTED MATERIAL SUBMITTED FOR THE HEARING RECORD

Supplemental material submitted by Jack M. Beermann, Professor of Law and Harry Eldwood Warren Scholar, Boston University School of Law. This material is available at the Subcommittee and can also be accessed at:

http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=104928

SEPARATION OF POWERS RESTORATION ACT OF 2016

TUESDAY, MAY 17, 2016

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 1 p.m., in room 2141, Rayburn House Office Building, the Honorable Tom Marino, (Chairman of the Subcommittee) presiding.

Present: Representatives Marino, Goodlatte, Issa, Collins, Walters, Ratcliffe, Johnson, DelBene, and Peters.

Staff Present: (Majority) Daniel Flores, Chief Counsel; Andrea Lindsey, Clerk; and (Minority) Slade Bond, Minority Counsel.

Mr. MARINO. The Subcommittee on Regulatory Reform, Commercial and Antitrust Law, will come to order. Without objection, the Chair is authorized to declare recess of the Committee at any time. We welcome everyone to today's hearing on H.R. 4768, the "Separation of Powers Restoration Act of 2016." And I now recognize myself for an opening statement.

Today's hearing continues our discussion and inquiry into the 30-plus-year-old *Chevron* doctrine. Our prior hearing gave us an opportunity to examine *Chevron*, and question whether or not it remains appropriate in light of the modern administrative state.

Today, we turn to H.R. 4768, the "Separation of Powers Restoration Act of 2016," a piece of legislation offered by my friend from Texas, Congressman Ratcliffe. I am proud to cosponsor this legislation that would begin the process of reeling in administrative overreach.

As Chief Justice John Roberts correctly described it 2 years ago, in his dissent in *City of Arlington v. FCC*, "The Framers could hardly have envisioned today's vast and varied Federal bureaucracy and the authority administrative agencies now hold over our economic, social, and political activities."

My own experience as an industrial banker, prosecutor, and now legislator, have exposed me to the myriad levels of hurdles and complete unknowns of the modern administrative state.

Navigating this morass is a daunting task, if not impossible; challenges for employers and workers across the Nation. Agencies often too numerous to count interject themselves into nearly every

aspect of daily life. And to make matters worse, the bureaucrats writing regulation know how to shape their rules to satisfy *Chevron* and achieve their sought-after outcome.

For regulated entities, especially small businesses, the deck is stacked against them from the start. But these citizens have sent us to Washington as representatives of their interests, hardship, and, we hope, success. It is a privilege we often take for granted, and an honor that we can repay through thoughtful, clear, and concise lawmaking. The *Chevron* doctrine represents an abdication of the legislative responsibility.

Over 30 years of *Chevron* deference, we have seen the gradual creep of executive agencies from administrators of the legislative process to becoming legislators themselves. Rather than executing the will of Congress, agencies now have the freedom to define the law as they see fit. This is not a system that respects the checks and balances that have existed since the first days of our Nation.

Chevron and its progeny are a departure not only from the Constitution, but from the Administrative Procedure Act, Congress' original effort to bring order to the rulemaking process.

Today's discussion on the "Separation of Powers Restoration Act of 2016" presents an opportunity to reassert the lawmaking authority of Congress. It embodies the tripartite vision of governance established by our founders. The unfortunate nature of the 21st Century administrative state is its breadth and reach.

As I said in March, while the *Chevron* doctrine may not be as glamorous or headline-worthy as other issues before Congress, its effect on the everyday lives of Americans cannot be understated, and its ability to fundamentally change the working of our government, and undo the guards long put in place to prevent tyranny and abuse, is profound.

Our goal today is to examine the bill before us. Our hope is craft a final bill that creates stability in the rulemaking process, removes the power to legislate that has slowly found its way into the rulemaking process, and return the judiciary to its proper role and power to say what the law is.

[The bill, H.R. 4768, follows:]

I

114TH CONGRESS
2D SESSION

H. R. 4768

To amend title 5, United States Code, with respect to the judicial review of agency interpretations of statutory and regulatory provisions.

IN THE HOUSE OF REPRESENTATIVES

MARCH 16, 2016

Mr. RATCLIFFE (for himself, Mr. GOODLATTE, Mr. MARINO, Mr. CHAFFETZ, Mr. BUCK, Mr. YOHO, Mr. KING of Iowa, Mr. BYRNE, Mr. BRAT, Mrs. LOVE, Mr. BROOKS of Alabama, Mr. BABIN, Mr. SALMON, Mr. HENSARLING, Mr. ROUZER, Mr. BISHOP of Michigan, Mr. PALMER, Mr. MESSER, Mr. MULVANEY, Mr. LABRADOR, Mr. TROTT, Mr. MULLIN, Mr. SCHWEIKERT, Mr. DESANTIS, Mr. LOUDERMILK, Mr. ISSA, Mr. WESTERMAN, Mr. BURGESS, Mr. CULBERSON, Mrs. LUMMIS, Mr. WALKER, Mr. OLSON, Mr. SMITH of Missouri, Mr. KELLY of Pennsylvania, Mr. RENACCI, Mr. LAMALFA, Mr. SENSENBRENNER, Mr. GOSAR, Mrs. MCMORRIS RODGERS, Mr. COLLINS of Georgia, Mr. GRAVES of Georgia, Mr. CHABOT, Mr. FRANKS of Arizona, Mr. FARENTHOLD, Mr. GRIFFITH, and Mr. SMITH of Texas) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend title 5, United States Code, with respect to the judicial review of agency interpretations of statutory and regulatory provisions.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

SECTION 1. SHORT TITLE.

This Act may be cited as the "Separation of Powers Restoration Act of 2016".

SEC. 2. JUDICIAL REVIEW OF STATUTORY AND REGULATORY INTERPRETATIONS.

Section 706 of title 5, United States Code, is amended, in the matter preceding paragraph (1), by striking "all relevant questions of law, interpret constitutional and statutory provisions" and inserting "de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions and rules".

○

Mr. MARINO. We are fortunate to have a panel of witnesses with a wide range of expertise and experience on this issue. I look forward to their testimony and an engaging discussion of this important issue. I now recognize the Ranking Member of the Subcommittee, Mr. Johnson from Georgia.

Mr. JOHNSON. Thank you, Mr. Chairman. Judicial review of final agency action is a hallmark of administrative law, and is critical to ensuring that agency action does not harm or adversely affect the public. But as the Supreme Court held in *Chevron v. Natural Resources Defense Council*, reviewing courts may only invalidate an agency action when it violates a constitutional provision, or when an agency exceeds its statutory authority as clearly expressed by Congress. For the past 30 years, this seminal decision has required deference to the substantive expertise and political accountability of Federal agencies.

Judicial deference is borne from principles of political accountability and separation of powers. As the Court explained in *Chevron*, "Federal judges who have no constituency have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices, and resolving the struggle between competing views of the public interest, are not judicial ones.

Our Constitution vests such responsibility in the political branches." H.R. 4768, the "Separation of Powers Restoration Act of 2016," so-called, would eliminate this longstanding tradition of judicial deference to agencies' interpretation of statutes and rules by requiring courts to review all agency interpretations of statutes and rules on a de novo basis. This misguided legislation is not the majority's first attempt to gum up the rulemaking process through enhanced judicial review.

Since the 112th Congress, a number of deregulatory bills we have considered, such as H.R. 185, the "Regulatory Accountability Act," would require generalist courts to supplant the expertise and political accountability of agencies in rulemaking process with their own judgments. Compare this approach with other deregulatory bills passed this Congress that would greatly diminish judicial review over deregulatory actions by dramatically shortening the statutes of limitations for judicial review, sometimes to just 45 days.

In other words, the majority wants to have it both ways. When it benefits corporate interests, Republican legislation heightens scrutiny of agency rulemaking, threatening to impose years of delay and untold cost on taxpayers. When it benefits the public or our environment, Republican legislation slams the courthouse doors shut through sweeping restrictions on the court's ability to protect public health or the environment.

These proposals, which are transparently the design of the donor class to minimize their exposure to legal accountability, are just another example of how some not only want the fox to guard the chicken coop, they want to give the fox the responsibility of keeping the chicken coop clean as well. H.R. 4768 is more of the same.

In closing, I look forward to testimony from our esteemed panel, and I thank the witnesses for their testimony. And with that, I yield back.

Mr. MARINO. The Chair now recognizes the Chairman of the full Committee, Mr. Bob Goodlatte of Virginia, for his opening statement.

Mr. GOODLATTE. Thank you, Mr. Chairman. The modern Federal administrative state is an institution unforeseen by the Framers of our Constitution and rapidly mushrooming out of control. The "Separation of Powers Restoration Act of 2016" takes square aim at one of the biggest roots of this problem—the *Chevron* doctrine, under which Federal courts regularly defer to regulatory agencies' self-serving interpretations of the statutes they administer. 1Similarly, the bill takes on the related *Auer* doctrine, under which courts defer to agencies' interpretations of their own regulations.

In perhaps the most famous of Supreme Court's early decisions, *Marbury v. Madison*, Chief Justice Marshall declared for a unanimous Court that, "It is emphatically the province and duty of the judicial department to say what the law is."

Since the *Chevron* doctrine allows judges to evade interpreting the law and instead to defer to agencies' interpretations, one must ask—is *Chevron* faithful to *Marbury* and the separation of powers?

In the "Administrative Procedure Act of 1946," often called the "Constitution" of Administrative Law, Congress provided for judicial review of agency action in terms that were plain and direct. It stated that "the reviewing court shall decide all relevant questions of law [and] interpret constitutional and statutory provisions."

That standard is consistent with *Marbury* and the separation of powers. But since *Chevron* allows judges to escape interpreting statutory provisions themselves, one must ask—is *Chevron* unfaithful not only to *Marbury* and the separation of powers, but also the "Administrative Procedure Act?"

These are not just academic questions. They are fundamental questions that go to the heart of how our government works, and whether the American people can still control it.

The genius of the Constitution was that, by separating the legislative, executive, and judicial powers into three distinct branches, the ambitions of each branch would check and balance the ambitions of the others. As long as the separation is kept strong, that system of checks and balances preserves liberty—as the Framers intended.

But judicial deference under *Chevron* weakens the separation of powers, threatening liberty. It bleeds out the judicial branch power to say that what the law is, transfusing that power into the executive branch. And, it tempts Congress to let the hardest work of legislating bleed out of Congress and into the executive branch, since Congress knows judges will defer to agency interpretations of ambiguities and gaps in statutes Congress did not truly finish.

This leads us down the dangerous slope James Madison warned against in Federalist 47—"the accumulation of all powers, legislative, executive, and judiciary, in the same hands," that "may justly be pronounced the very definition of tyranny."

This is what Americans across our Nation feel in their bones to be dangerous when they fear a Federal regulatory bureaucracy growing beyond limits, spinning out of control. They fear a government emboldened to burst our system of checks and balances, trespass without limit on their liberty, and threaten their way of life—

all at the whim of "swarms of administrators" in a far-off capital. They fear an all-reaching, unaccountable bureaucracy that threatens our system of self-government by and with the consent of the people.

The "Separation of Powers Restoration Act of 2016" is timely, bold legislation directed straight at this problem. In one fell swoop, it restores the separation of powers by legislatively overturning the *Chevron* doctrine and the related *Auer* doctrine. This is reform that we must make reality for the good of the people.

I look forward to the testimony of our witnesses as we consider this crucial bill, and I am particularly interested in hearing their views on whether more terms should be added to the bill to further guide the judiciary on the appropriate interpretation of statutes and regulations as it resumes fully "the province and duty of the judicial department to say what the law is."

And I want to especially thank my colleague from Texas, Mr. Ratcliffe, for his leadership on this issue, and for introducing this fine legislation, and to Chairman Marino, for his work Chairing this Subcommittee and addressing this important subject. Mr. Chairman, I yield back.

Mr. MARINO. Thank you. Without objection, other Member's opening statements will be made part of the record.

I will begin by swearing in our witnesses before introducing them. So would you please stand and raise your right hand?

Do you swear that the testimony you are about to give before this Committee is the truth, the whole truth, and nothing but the truth, so help you God?

Let the record reflect that the witnesses have answered in the affirmative. Please be seated. Thank you.

I am going to read each of the witness'—each of your introductions. I will get through all six of you and then we will get back to you making your opening statements as well. Okay?

John Duffy is the Samuel H. McCoy professor of law at the University of Virginia Law School. Prior to joining UVA's law school, Professor Duffy taught at the George Washington Benjamin N. Cardozo and William & Mary Schools of Law. He has also taught at the University of Chicago Law School. Professor Duffy served as an attorney advisor in the Department of Justice's Office of Legal Counsel, and practiced law with the firm of Covington and Burling.

Professor Duffy is widely published, and a coauthor of a casebook on patent law. Professor Duffy earned his bachelor's degree in Physics from Harvard University, and his law degree from the University of Chicago, where he served as articles editor of the Law Review. Professor Duffy clerked for Judge Stephen Williams on the U.S. Court of Appeals for the D.C. Circuit, and for the late U.S. Supreme Court Justice Antonin Scalia. Welcome, professor.

Jack Beermann is the Harry Elwood Warren Scholar at the Boston University School of Law. He previously taught at various universities, including Harvard, DePaul, the Interdisciplinary Center in Herzliya, Israel, and the China University of Political Science and Law.

Professor Beermann is published widely in top-ranked journals. He has authored and coauthored four books on administrative law, including a widely-used casebook and the Emanuel Law Outline on

the subject. Professor Beermann earned his bachelor's degree in political science and philosophy from the University of Wisconsin, Madison. He holds a law degree from the University of Chicago Law School, where he was elected Order of the Coif and served as editor of the Law Review. Welcome, Professor.

Jeffrey Clark is a partner at the law firm of Kirkland and Ellis, LLP, and specializes in complex trial and appellate litigation. Mr. Clark has been with the firm since 1996, with the exception of 2001 to 2005, when he served as the Deputy Assistant Attorney General for the Environment and Natural Resources Division of the Justice Department. During his appointment at Justice, Mr. Clark supervised the division's Appellate Section, 50 lawyers and staff, and Indian Resources Section, 25 lawyers and staff. He has argued and won the noted *Massachusetts v. EPA* case in the D.C. circuit, and is rated AV preeminent, 5.0 out of 5, by the Martindale Hubbell, the highest level of professional excellence.

Prior to joining Kirkland and Ellis, Mr. Clark was a law clerk for Judge Danny J. Boggs of the United States Court of Appeals for the Sixth Circuit. He has written and appeared extensively in public on topics in energy efficiency, clean air, and water law, administrative law, and constitutional law.

Mr. Clark is an elected member of the Governing Council of the ABA Administrative Law Section, and is currently serving as co-chair of the ABA Section of Administrative Law and Regulatory Practice's Committee on Environmental and Natural Resources Regulation.

Mr. Clark graduated with an AB in economics and Russian/Soviet history, cum laude, from Harvard University; an MA in urban affairs and public policy, summa cum laude, from the University of Delaware; and the J.D., magna cum laude, from Georgetown University Law School. Welcome, sir.

Mr. Walke is a Senior Attorney and Clean Air Director for Natural Resources Defense Council in Washington, D.C. He is responsible for NRDC's national clean air advocacy program before Congress, the courts, and the U.S. Environmental Protection Agency. Prior to joining NRDC, Mr. Walke worked for the EPA in the Air and Radiation Law Office of the Office of General Counsel. At the EPA, he worked on permitting, air toxics, monitoring, and enforcement issues under the Clean Air Act.

Prior to working for EPA, Mr. Walke was an associate at Beveridge and Diamond in Washington, D.C. Mr. Walke graduated from Duke University with a BA in English, and earned his JD from Harvard Law School. Thank you, Mr. Walke, for being here.

Ronald Levin is the William R. Orthwein Distinguished Professor of Law at Washington University in St. Louis. Mr. Levin is the co-author of a casebook, State and Federal Administrative Law. Professor Levin has chaired the Section of Administrative Law and Regulatory Practice of the American Bar Association, a group of which he is still an active member. He served as the ABA's advisor to the drafting committee to revise the Model State Administrative Procedure Act.

Professor Levin also served as a public member of the Administrative Conference of the United States, and the chair of its Judicial Review Committee. Professor Levin clerked for the Honorable

John C. Godbold of the U.S. Court of Appeals for the Fifth Circuit, and practiced with the Washington, D.C., firm of Sutherland, Asbill, and Brennan. Mr. Levin received his BA from Yale and his JD from the University of Chicago. Welcome, Mr. Levin.

Adam White is a fellow at the Hoover Institution, and the Adjunct Professor at the Antonin Scalia Law School at George Mason University. Prior to joining Hoover, he was an adjunct fellow at the Manhattan Institute. Mr. White practiced law with Baker Botts, working on various constitutional and regulatory matters, including energy infrastructure regulation.

He also practiced law with Boyden Gray and Associates, where he wrote briefs on constitutional and regulatory issues in the Supreme Court and various other Federal courts. He continues to be of counsel to the firm in three pending cases involving the Consumer Financial Protection Bureau, and the Federal Communications Commission. Mr. White writes on the courts and the administrative state for such publications as the Weekly Standard, The Wall Street Journal, Commentary, The Harvard Journal of Law and Public Policy, and SCOTUSblog. In 2015, he was appointed to the Leadership Council of the American Bar Association's Section of Administrative Law and Regulatory Practice.

He co-chairs the Section's Judiciary Review Committee, and co-directs its Supreme Court Series. Mr. White received his bachelor's degree in Economics from the University of Iowa College of Business, and his law degree from Harvard Law School, where he graduated cum laude. He clerked for Judge David B. Sentelle of the United States Court of Appeals for the D.C. Circuit. Welcome, sir.

Each of the witnesses' written statements will be entered into the record in its entirety. I ask that each witness summarize his or her testimony in 5 minutes or less.

To help you stay within that time, there is a timing light in front of you, and it is—I do not know the colors because I am color-blind, but what I will do is as it gets down to the last color, which I am told is the red light, I will just diplomatically pick up my little gavel here and let you know that: would you please finish as soon as possible.

Professor Duffy, you are on.

TESTIMONY OF JOHN F. DUFFY, SAMUEL H. McCOY II PROFESSOR OF LAW, UNIVERSITY OF VIRGINIA SCHOOL OF LAW

Mr. DUFFY. Thank you. Chairman Marino, Chairman Goodlatte, Ranking Member Johnson, and the distinguished Members of the Subcommittee, thank you for inviting me to testify before you today.

At the outset, I would like to compliment the Subcommittee for devoting time and attention to this matter, and to this important piece of legislation, H.R. 4768, the "Separation of Powers Restoration Act of 2016." The proposed legislation would be a welcome path out of the ever-growing morass of complex case law that these doctrines have generated over the past several decades.

Importantly, the proposed legislation is admirable in its elegance and brevity, filling up less than a page of legislative text, and adding a mere two words, de novo, plus some accompanying stylistic changes, to the first sentence of Section 706 of the APA.

This is a highly desirable approach to supplanting the *Chevron* doctrine and other judge-made doctrines of deference with a clear, easily understood, and theoretically sound principle to govern judicial review of all legal issues arising in administrative cases. My written statement and prior testimony sets forth in detail why I believe that the proposed legislation is not really changing the APA, but is instead confirming the statute's original meaning.

I will mention one point in particular right now, which is that so strong are the statutory arguments in favor of de novo review: a de novo standard of review for legal questions from the original APA, that when Federal courts of appeals have focused on the relevant statutory language, they have interpreted the APA as requiring de novo review of statutory interpretation, even in the years after the Supreme Court decision in *Chevron*.

One of the most important benefits of the proposed legislation is that it would eliminate the uncertainties and needless complexities of current decisional law. The *Chevron* doctrine as it exists today, and indeed the entire set of judge-made doctrines requiring deference to agency legal positions, is riddled with complexities and exceptions.

Indeed, so pervasive are the exceptions that it would be wrong to assert that the proposed legislation would overrule or overturn the *Chevron* doctrine, or other doctrines requiring judicial deference on legal issues. It is far more accurate to say the legislation would get rid of what is left of these doctrines, and as discussed—as I have discussed in my written statement, what is left is not so much in many areas.

Chevron and other doctrines requiring judicial deference on legal issues have come under increasing intellectual scrutiny over the past 2 decades, and because of the inherent theoretical weaknesses of the doctrine, the Supreme Court has made exceptions to them. As a result, the doctrines are both weakened and unpredictable.

Just last year, the Supreme Court in *King v. Burwell* held that *Chevron* deference is inapplicable to any issue of deep economic and political significance that is central to a statutory scheme. *King*'s exception to *Chevron*, which might be called a "too big to defer" exception, creates a major limitation on *Chevron*, and also increases the opportunity for more litigation about whether *Chevron* should apply at all in any particular case, making the doctrine less valuable for agencies, and more burdensome on all litigants.

Another example about the complexities of this doctrine comes from the patents system, an area of administrative regulation in which I teach and write. Under consistent lower court precedent and Supreme Court practice, the Patent Office gets no deference in its interpretation of the substantive provisions of the Patent Act, but why?

Under the reasoning of *Chevron*, which stresses the need for deference to expert politically accountable agencies, the Patent Office would seem to be a leading candidate to receive deference. There are, of course, doctrinal reasons for the absence of deference in this area, but those doctrinal reasons nearly underscore the complexity and incoherence of the case law spawned by *Chevron*. Though the proposed legislation would clearly end judicial deference to agency legal positions, it would not foreclose several unobjectionable judi-

cial practices detailed in my written statement that are sometimes confused with deference.

I will not detail those doctrines in my oral statement, but just say that those statements—those additional principles do not need to be codified in this proposed legislation, and I think the legislation as it exists now is an admirable and elegant vehicle.

In closing, I once again commend the Subcommittee for devoting time to this important matter, and for devising an elegant way to restore the traditional role of Federal courts to say what the law is. Thank you for your time and attention to these issues, and thank you for the invitation to speak to the Subcommittee.

[The prepared statement of Mr. Duffy follows:]

Testimony of

John F. Duffy

Samuel H. McCoy II Professor of Law

University of Virginia School of Law

On

"H.R. 4768: The Separation of Powers Restoration Act of 2016"

Before the Subcommittee on Regulatory Reform,

Commercial and Antitrust Law

of

The Judiciary Committee of the House of Representatives

of the Congress of the United States

Tuesday, May 17, 2016

1:00 pm

Rayburn House Office Building

Washington, D.C.

Introduction

Chairman Marino, Ranking Member Johnson, and distinguished members of the Subcommittee, thank you for inviting me to appear before you today to testify and giving me the opportunity to share my views concerning "H.R. 4768: The Separation of Powers Restoration Act," which would demonstrate statutory disapproval of various judge-made doctrines requiring deference to administrative legal positions, including the doctrine commonly associated with the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[1]

At the outset, I would like to compliment the Subcommittee for devoting time and attention to this matter and to this important piece of legislation. The *Chevron* doctrine and other doctrines of judicial deference to administrative legal positions have enormous practical and theoretical importance in the federal courts, and they are now the source of increasing controversy, confusion, uncertainty, and needless collateral litigation about whether, and to what extent, the doctrines apply. The proposed legislation would be a welcome path out of the ever-growing morass of complex case law that these doctrines have generated over the past several decades.

Importantly, the proposed legislation is admirable in its brevity, filling up less than a page of legislative text and adding a mere two words—"de novo"—plus some accompanying stylistic changes to the first sentence of 5 U.S.C. § 706. While my testimony will make one small stylistic suggestion and one technical suggestion concerning the proposed legislation, my overall view is that the centerpiece of this legislation—the addition of the words "de novo" to the first sentence of § 706—is a highly desirable approach to supplanting the *Chevron* doctrine and other judge-made deference doctrines with a clear, easily understood and theoretically sound principle to govern judicial review of all legal issues arising in administrative cases.

My testimony will be divided into four parts. Part I will address the format of the proposed legislation and will make one small stylistic suggestion. Part II will explain how the proposed legislation is likely to decrease litigation by eliminating the myriad complexities and uncertainties in the current case law governing judicial review of legal issues. Part III will discuss four unobjectionable judicial practices that the proposed legislation would not foreclose. Finally, Part IV will suggest a small technical change to the proposed legislation so that it would apply to all judicial review proceedings, including review proceedings not currently governed by § 706 due to special statutory exemptions such as the one contained in 42 U.S.C. § 7607(d).

I. The Format of the Proposed Legislation.

The proposed legislation provides an elegant solution to the uncertainties and complexities created by the *Chevron* decision and other judge-made deference doctrines. The legislation would insert the words "de novo" into the first sentence of § 706 so that it would begin: "To the extent necessary to decision and when presented, the reviewing court shall decide de novo all relevant questions of law …." That straightforward language would make clear a

[1] 467 U.S. 837 (1984).

congressional intent that existed when the original Administrative Procedure Act (APA) was enacted but that *Chevron* and other decisions have not followed.

Section 10(e) of the original of the APA stated: "So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action."[2] The legislative history of the APA leaves no doubt that Congress thought the meaning of this provision plain. As Representative Walter, Chairman of the House Subcommittee on Administrative Law and author of the House Committee Report on the bill, explained to the House just before it passed the bill, the provision "requires courts to determine independently all relevant questions of law, including the interpretation of constitutional or statutory provisions."[3]

The text and structure of the original statute confirm that Representative Walter's interpretation was correct. The plain language of the original statute itself strongly suggests de novo review of statutory issues, for Congress placed the reviewing court's duty to interpret statutory provisions in the same clause as the duty to interpret the Constitution, and courts have never deferred to agencies in reading the Constitution. The overall structure of the original statute also indicates the congressional intent to have courts review legal questions de novo. Section 10(e) of the original statute, which contained the command for courts to decide all questions of law, did include deferential standards for reviewing courts to apply, but none of those deferential standards applied to review of legal questions.

Indeed, so strong are the statutory arguments in favor of a de novo standard of review for legal questions that, when federal courts of appeals have focused on the relevant statutory language, they have interpreted the APA as requiring de novo review of statutory interpretations even in the years after the Supreme Court decided *Chevron*.[4] Commentators in administrative law have also "generally acknowledged" that § 706 seems to require de novo review on

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[2] 60 Stat. 237, 243 (1946).

[3] 92 Cong. Rec. 5654 (1946) (statement of Rep. Walter), reprinted in Staff of Senate Comm. on the Judiciary, Legislative History of the Administrative Procedure Act, S. Doc. No. 79-248, at 370 (1946) [hereinafter, APA Legislative History]. Both the House and the Senate Reports also state that "questions of law are for courts rather than agencies to decide in the last analysis." H.R. Rep. No. 79-1980, at 44 (1946), reprinted in APA Legislative History at 233, 278; S. Rep. No. 79-752, at 28 (1945), reprinted in APA Legislative History at 185, 214. The legislative history also indicates that Congress excepted "interpretative" rules from the APA's notice and comment rulemaking procedures because it believed that "'interpretative' rules—as merely interpretations of statutory provisions—are subject to plenary judicial review." Staff of the Senate Comm. on the Judiciary, 79th Cong., Report on the Administrative Procedure Act (Comm. Print 1945), reprinted in APA Legislative History at 11, 18.

[4] See Velasquez-Tabir v. INS, 127 F.3d 456, 459 n.9 (5th Cir. 1997); DuBois v. USDA, 102 F.3d 1273, 1284 (1st Cir. 1996); Smith v. Office of Civilian Health & Med. Program of the Uniformed Servs., 97 F.3d 950, 955 (7th Cir. 1996); Stupak-Thrall v. United States, 70 F.3d 881, 887 (6th Cir. 1995); and Molina v. Sewell, 983 F.2d 676, 679 n.3 (5th Cir. 1993) (all citing § 706, the codified version of original § 10(e), as requiring de novo review on issues of law). Pre-*Chevron* courts also read the APA this way. See, e.g., Rice v. Wilcox, 630 F.2d 586, 589 (8th Cir. 1980); Hanly v. Kleindienst, 471 F.2d 823, 828 (2d Cir. 1972); SEC v. Cogan, 201 F.2d 78, 86-87 (9th Cir. 1952) ("In enacting the Administrative Procedure Act Congress did not merely express a mood that questions of law are for the courts rather than agencies to decide, it so enacted with explicit phraseology.").

questions of law.[5] So too Justice Scalia, who had previously been an ardent champion of the *Chevron* doctrine, acknowledged in his last full term on the Supreme Court that the APA "contemplates that courts, not agencies, will authoritatively resolve ambiguities in statutes and regulations."[6]

Thus, in changing the current statutory language from "decide all relevant questions of law" to "decide de novo all relevant questions of law," the proposed legislation is not really changing the APA but is instead confirming the statute's original meaning.

The proposed change does, however, create a stylistic issue concerning the language after "all relevant questions of law." The current version of the sentence, as codified in 5 U.S.C. § 706, reads:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.

The proposed legislation would change that text to read (changes to current § 706 are in bold):

> To the extent necessary to decision and when presented, the reviewing court shall decide **de novo** all relevant questions of law, **including the interpretation of** constitutional and statutory provisions **and rules**, and determine the meaning or applicability of the terms of an agency action.

I suggest that the following language might be slightly better stylistically (again changes to current § 706 are in bold):

> To the extent necessary to decision and when presented, the reviewing court shall decide **de novo** all relevant questions of law, **including the interpretation of** constitutional and statutory provisions and **the determination of** the meaning or applicability of the terms of an agency action.

This slight stylistic change would make clear that the questions of law subject to the de novo review standard include both (i) "the interpretation of constitutional and statutory provisions" and (ii) "the determination of the meaning or applicability of the terms of an agency action." The suggested stylistic change does not, however, change the central feature of the proposed legislation, which is the addition of the words "de novo" to clarify the reviewing court's obligation in deciding questions of law. That feature is both effective and elegant.

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[5] Cynthia R. Farina, Statutory Interpretation and the Balance of Power in the Administrative State, 89 Colum. L. Rev. 452, 473 n.85 (1989); see also Thomas W. Merrill, Capture Theory and the Courts: 1967-1983, 72 Chi.-Kent L. Rev. 1039, 1085-86 (1997) (noting the "embarrassing" point that the "APA appears to compel the conclusion" that "courts should decide all questions of law de novo," and finding it "puzzling" that there has been no ""rediscovery' of the language of the APA"); Thomas W. Merrill, Judicial Deference to Executive Precedent, 101 Yale L.J. 969, 995 (1992) (arguing that 706 "suggests that Congress contemplated courts would always apply independent judgment on questions of law").

[6] Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring in the judgment).

II. The Proposed Legislation's Ability to Eliminate the Uncertainties and Unnecessary Complexities of Current Case Law.

One of the most important benefits of the proposed legislation is that it would eliminate the uncertainties and needless complexities of current decisional law. The *Chevron* doctrine as it exists today, and indeed the entire set of judge-created doctrines requiring deference to agency legal positions, is riddled with complexities and exceptions. Indeed, so pervasive are the exceptions that it would be wrong to assert that the proposed legislation would overrule or overturn the *Chevron* doctrine or other doctrines requiring judicial deference on legal issues. It is far more accurate to say that the legislation would get rid of *what's left* of those doctrines. And, as discussed below, what's left is not so much in many areas.

Chevron and other doctrines requiring judicial deference on legal issues have come under increasing intellectual scrutiny over the past two decades and, because of the inherent theoretical weakness of those doctrines, the Supreme Court has made exceptions to the doctrines. As a result, the doctrines are both weakened and unpredictable. Below are four examples.

1. *King v. Burwell* and the "Too Big To Defer" Exception.

The Supreme Court's recent decision in *King v. Burwell* held that *Chevron* deference is inapplicable to any issue of "deep 'economic and political significance' that is central to [a] statutory scheme."[7] *King*'s exception to *Chevron,* which might be termed the "too big to defer" exception, creates a major limitation on *Chevron* and also increases the opportunity for more litigation about whether *Chevron* should apply at all in any particular case.

The *King* limitation means that the *Chevron* doctrine can no longer be defended as a desirable rule to help agencies address important national issues. If the issue is deeply significant, the *Chevron* rule might not apply at all. *King* thus dramatically decreases the value of the *Chevron* doctrine to administrative agencies. At the same time, however, *King* also increases the litigation costs of the doctrine. Because *King* did not provide much guidance as to how significant—how big—an issue must be before *Chevron* becomes inapplicable, both the government and parties challenging the administrative actions will now have to spend resources briefing and litigating the scope of the *King* exception *in addition to* briefing and litigating the meaning of the relevant statute.

2. *United States v. Mead* and the Statutory Prerequisite for *Chevron.*

In *United States v. Mead*, the Supreme Court limited the *Chevron* doctrine to situations in which Congress has conferred upon the administrative agency the power "to be able to speak with the force of law."[8] Where an agency does not have such delegated power or has not exercised such a power in a procedurally proper manner, *Mead* held that *Chevron* deference is not appropriate.

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[7] 135 S. Ct. 2480, 2489 (2015).

[8] 533 U.S. 218, 229 (2001).

Mead is an extraordinarily important decision because it reinterpreted the *Chevron* doctrine as being about the proper reach and proper use of agency lawmaking powers—i.e., as a doctrine about delegation rather than deference. While that step was theoretically sound, it also dramatically decreases the value of *Chevron* to agencies and increases the uncertainty and concomitant litigation costs associated with the doctrine.

Ever since *Mead*, administrative agencies cannot treat *Chevron* as a reliable *per se* rule of deference applicable to all administrative interpretations. Rather, *Mead* requires agencies to justify the application of *Chevron* deference in each case by demonstrating the existence and proper application of a statutory power to "speak with the force of law." That approach decreases the value of *Chevron* deference because, where an agency has a statutory power to make law, it typically could prevail in the case if the reviewing court merely affords the agency the proper scope of its delegated power. In other words, a theory of judicial deference to the agency's legal interpretation is less necessary because a delegation theory would suffice in most cases.

Mead, however, increases the litigation costs of the *Chevron* doctrine. While the *Mead* Court identified two *per* se circumstances in which agencies would generally be presumed to have authority to speak with the force of law—where the agency properly engages in rulemaking or in formal adjudication—the Court left uncertain the largest category of administrative actions, informal adjudication.[9]

3. *Chevron*'s Uncertain Application to Agency Interpretive Rules.

Prior to the Supreme Court's decision in *Mead*, the issue whether *Chevron* deference should apply to agency interpretive rules seemed like a non-issue to the D.C. Circuit, the nation's most prominent lower court for reviewing administrative action. That court stated quite clearly that it would "defer to an agency's reasonable interpretation of the laws and regulations it administers none the less because that interpretation appears in an interpretive rather than a legislative rule."[10] That approach also made sense under the original reasoning of the *Chevron* opinion, which seemed to rest on the supposed duty, in the field of statutory construction, of "federal judges—who have no constituency—…to respect legitimate policy choices made by those who do."[11] In other words, if *Chevron* was all about judicial deference to agency legal interpretations, interpretive rules should be at the very bull's eye of the doctrine.

The Court's decision in *Mead*, however, instructed the lower courts that "interpretive rules … enjoy no *Chevron* status as a class."[12] That teaching makes sense under *Mead*'s

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[9] *See id.* at 231 (recognizing that "the want of [a more formal] procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded"); *see also id.* at 239 (Scalia, J., dissenting) (recognizing the *Mead* decision as "an avulsive change in judicial review of federal administrative action" and criticizing the Court majority for having "largely replaced" the relatively clear rule in *Chevron* with the uncertain approach "most feared by litigants who want to know what to expect"—"th' ol' 'totality of the circumstances' test").

[10] Interport Inc. v. Magaw, 135 F.3d 826, 829 (D.C. Cir. 1998).

[11] *Chevron*, 467 U.S. at 866.

[12] *Mead*, 533 U.S. at 232.

reformation of *Chevron* from a doctrine about deference to one about the proper scope of delegated power. Under *Mead*, interpretive rules generally do not get *Chevron* deference, but the very next year after it decided *Mead*, the Court in *Barnhart v. Walton* held that, for the particular interpretive rule at issue in that one litigation, the agency should receive *Chevron* deference due to no fewer than five factors—"[1] the interstitial nature of the legal question, [2] the related expertise of the Agency, [3] the importance of the question to administration of the statute, [4] the complexity of that administration, and [5] the careful consideration the Agency has given the question over a long period of time."[13] The tension between *Mead* and *Barnhart*, and the inherent difficulties generated by those two decisions in determining the proper standard for judicial review of agency interpretive rules, demonstrate the diminished and uncertain stature of the *Chevron* doctrine in current case law.

4. The Uncertainties of Judicial Deference to Agency Interpretation of Rules.

The uncertainties associated with judicial deference to agency legal interpretation extend beyond the *Chevron* doctrine and include also the distinct issue whether courts should defer to an agency's interpretation of its own rules and regulations. Prior to 2012, this issue was controlled by the Supreme Court's 1997 decision in *Auer v. Robbins*,[14] which applied the Court's pre-APA precedent in *Bowles v. Seminole Rock & Sand Co.*[15] to hold that an agency's interpretation of its own regulation is "controlling unless '"plainly erroneous or inconsistent with the regulation."'"[16] In 2012, however, the Supreme Court's decision in *Christopher v. SmithKline Beecham Corp.* emphasized that judicial deference to agency interpretations of regulations is not appropriate where "there is reason to suspect that the agency's interpretation does not reflect the agency's fair and considered judgment on the matter in question," including situations where the agency's interpretation may be merely a "convenient litigating position" or "post hoc rationalizatio[n] advanced by an agency seeking to defend past agency action against attack."[17]

Since the *Christopher* decision, three Justices have expressed dissatisfaction with the entirety of the *Auer/Seminole Rock* deference doctrine and a willingness to overrule the doctrine.[18] While one of those three Justices has since passed away, there is good reason to think that at least two additional Justices, and perhaps more, would also be willing to reconsider the Court's *Auer/Seminole Rock* doctrine. Thus, the current status of the *Auer/Seminole Rock* doctrine is highly uncertain. The Court's *Christopher* decision demonstrates that agencies cannot

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[13] 535 U.S. 212, 222 (2002).

[14] 519 U.S. 452 (1997).

[15] 325 U.S. 410 (1945).

[16] *Auer*, 519 U.S. at 461 (quoting Robertson v. Methow Valley Citizens Council, 490 U. S. 332, 359 (1989) (quoting Bowles v. Seminole Rock & Sand Co., 325 U. S. 410, 414 (1945))).

[17] 132 S. Ct. 2156, 2166 (2012) (internal citations and quotations omitted).

[18] Perez v. Mortgage Bankers Assn, 135 S. Ct. 1199, 1210-11 (2015) (Alito, J., concurring in part and concurring in the judgment); *id.* at 1212-13 (Scalia, J., concurring in the judgment); *id.* at 1213 (Thomas, J., concurring in the judgment).

be assured of judicial deference even if the *Auer/Seminole Rock* doctrine remains good law, and the entirety of the doctrine might be reconsidered and overruled by the Court.

III. Unobjectionable Practices Not Foreclosed by the Proposed Legislation.

Though it would clearly end judicial deference to agency legal positions, the proposed legislation would not foreclose several unobjectionable judicial practices that are sometimes confused with deference.

First, the proposed legislation would not (and should not) prevent a reviewing court from holding that, where Congress has delegated lawmaking power to an agency, such delegated power permits the agency to fill in the details of the statutory scheme in a reasonable manner—i.e., in a manner that is not arbitrary, capricious or otherwise contrary to law. Such an approach is not, properly considered, a form of judicial deference to the agency but is instead a judicial recognition that some statutory provisions, interpreted de novo, provide an agency with sufficient authority to accomplish the agency's policy objectives. The actual result in the *Chevron* case could have been based on such a judicial recognition of the full scope of the agency's delegated authority.

Second, the proposed legislation would not prevent reviewing courts from adhering to the traditional view that some issues decided by agencies are not pure issues of statutory interpretation but are instead mixed questions of law and fact. For such questions, reviewing courts might provide deference to the agency decision not because of the agency's abilities at statutory interpretation, but because of the agency's superior ability to apply a statutory concept to the specific factual context in that adjudication. This theory of deference was articulated by the Supreme Court in *NLRB v. Hearst Publications, Inc.*,[19] and it provides another proper basis for recognizing the full scope of an agency's statutory authority, without denying to the federal courts their traditional role in deciding issues of law *de novo*. The approach is also consistent with the APA, which permits reviewing courts to grant deference to an agency's factual judgments.

Third, the proposed legislation would not prevent reviewing courts from carefully and fully considering an agency's position as the court resolves an issue of statutory interpretation. As noted by the Supreme Court in *Skidmore v. Swift*, an administrative agency's "rulings, interpretations and opinions …, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[20] Importantly, however, such use of agency positions does not constitute deference. Rather, the court affords the agency's view the degree of "weight" merited by "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[21]

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[19] 322 U.S. 111, 130-131 (1944).

[20] 323 U.S. 134, 140 (1944).

[21] *Id.*

The approach required by *Skidmore* is similar in kind, if perhaps different in degree, to the approach that a court might take in considering the views articulated in a prominent treatise or in a thorough law review article written by a professor who also has "power to persuade" but no "power to control." It might also be compared to the pragmatic weight that one circuit court of appeals would give to one of its co-equal circuit courts. Courts of Appeals do not lightly diverge from another circuit's precedent; they do not lightly create circuit splits. Yet no one would say that one federal Court of Appeals, in considering a statutory issue previously decided by another circuit, must grant some sort of deferential weight to the statutory interpretations of the other circuit.

Fourth and finally, in deciding "the meaning or applicability of the terms of an agency action," a reviewing court might take into account an agency's pronouncements as some evidence of what the agency meant to do in its agency action. Thus, for example, a reviewing court might consider an agency's interpretation of its own rules as some evidence of the agency's intended meaning. Such an approach would not be equivalent to the *Auer/Seminole Rock* deference doctrine because it would not allow agencies to change views about the meaning of a particular rule or to articulate new views about the meaning of regulations long after they have been promulgated. Moreover, the theory of such a practice would be not that the agency is better than the court at interpreting certain legal texts, but that, as with any author, the agency might be able to give good insights into its intended meaning when it wrote the regulation.

In my prior testimony, I suggested that Congress could write new legislative language to codify principles such as the four listed above. While I continue to believe that such additional legislative language is possible, it is certainly not necessary. The proposed bill is commendable for its simplicity and elegance. Furthermore, an elaborate code of principles to govern the judicial process of resolving legal questions would, to some extent, be in tension with the general point that the Judicial Branch should be viewed as fully capable of interpreting statutes and deciding other questions of law. The proposed legislation as currently drafted merely corrects one inexplicable and unjustified abdication of the courts' traditional role in deciding legal questions. It might be best to make that one correction without trying to codify a compendium of additional principles.

IV. A Final Technical Suggestion.

In its current form, the proposed legislation modifies 5 U.S.C. § 706 to include a *de novo* review standard for all questions of law. That change would cover the vast bulk, but not all, of judicial review proceedings.

Some judicial review proceedings are not subject to § 706 because of special statutory exemptions. A good example is found in § 307 of the Clean Air Act, 42 U.S.C. § 7607(d), which provides that "section 706 of title 5 of the United States Code shall not, except as expressly provided in this subsection, apply to" judicial review of certain EPA rulemakings.[22] Without

[22] Without a comprehensive review of the entire U.S. Code, it is not possible to assess how many statutory provisions create exemptions from § 706.

additional statutory language in H.R. 4768, judicial review proceedings such as those referenced in § 307 of the Clean Air Act might not be affected by the proposed legislation.

To close this gap in coverage, I suggest that H.R. 4768 place the first sentence of § 706, as amended, into a new subsection (a), and that the new subsection (a) include its own "clear-statement" canon of construction that would assure, to the extent possible, the general applicability of the de novo review standard. Specifically, I suggest something such as:

> (a) To the extent necessary to decision and when presented, the reviewing court shall decide de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions and the determination of the meaning or applicability of the terms of an agency action. Notwithstanding any other law, this subsection shall apply in any action for judicial review of agency action authorized under any provision of law, and any prior or subsequent statute exempting an action for judicial review from this section shall be construed as not creating an exemption from this subsection unless such statute expressly references this subsection.

The proposed language, with its requirement that subsequent statutes must "expressly" make any exemptions to new § 706(a), tracks the approach of the original APA, which also includes a clear-statement canon of construction, now codified in 5 U.S.C. § 559, disfavoring modifications of the APA's general statutory framework.[23]

If that suggestion is followed, the remainder of current § 706 should then be placed in a new subsection (b). This suggestion would have the additional benefit of curing a long-running, well-known formatting error in § 706, which currently is missing subsection divisions even though it includes statutory paragraph and subparagraph divisions.

* * *

In closing, I once again commend the Subcommittee for devoting time to this important matter and for devising an elegant way to restore the traditional role of federal courts "to say what the law is."[24]

Thank you all for your time and attention to these issues, and thank you again Mr. Chairman for the invitation to speak to the Subcommittee.

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[23] See 5 U.S.C. § 559 (last sentence). Section 559 would not, in its current form, apply the proposed new language in § 706 to proceedings governed by § 307(d) of the Clean Air Act. Section 559 provides merely that a "[s]ubsequent statute may not be held to supersede or modify [the APA] except to the extent that it does so expressly." 5 U.S.C. § 559. Section 307(d) of the Clean Air Act does, however, expressly supersede § 706 of the APA because it plainly states that § 706 "shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies." 42 U.S.C. § 7607. That language easily satisfies § 559's clear-statement canon and, without a corrective measure, would make all of § 706 inapplicable.

[24] Marbury v. Madison, 5 U.S. 137, 177 (1803).

Mr. MARINO. Thank you. Professor Beermann?

TESTIMONY OF JACK M. BEERMANN, PROFESSOR OF LAW AND HARRY ELDWOOD WARREN SCHOLAR, BOSTON UNIVERSITY SCHOOL OF LAW

Mr. BEERMANN. Thank you very much, Chairman Marino and Ranking Member Johnson, and distinguished Members of the Subcommittee. It is truly heartwarming as an administrative law professor to see the Committee spending such dedicated time and attention to this important issue that many of us have been working on for years. And I am a *Chevron* skeptic, as the material included with my written submission reveals, and the language of H.R. 4768 would certainly be a complete reversal of *Chevron* and related doctrines.

But while I share the view that the *Chevron* doctrine has gone too far and has become too confusing, the long history of judicial deference to agency legal decisions may point in favor of a less complete rejection of deference.

Long before *Chevron*, it was generally understood that reviewing courts should pay close attention to agency reasoning when reviewing agency legal decisions, especially agency construction of the agency's enabling act in order to ensure that agencies remained within their delegation from Congress.

What was extreme about *Chevron* was its assumption that statutory silence or ambiguity virtually always indicates Congress's intent to delegate interpretive authority to the administrative—to the administering agencies. Even if this assumption was erroneous, that does not mean that Congress does not sometimes delegate interpretive authority to an agency. In highly technical or sensitive areas in which Congress expects agencies to apply expertise, ambiguity might be an indication that Congress might want a reviewing court to be highly attentive to the agency's views.

For example, when Congress delegated authority to the Federal Communications Commission to award broadcast licenses in the public interest, convenience, and necessity, Congress certainly intended for the agency to be primarily responsible for determining the meaning of those general terms. It would be a fundamental shift if H.R. 4768 were understood to forbid reviewing courts from deferring to agency determinations of that or similar statutory language.

It has also been suggested that H.R. 4768 would have the salutary effect of introducing strict construction of delegations of authority to agencies, and that this would be positive. There are reasons, however, to be cautious on both of these scores.

First, merely instituting *de novo* review of agency interpretations of statutes would not necessarily mean that such delegations would be construed narrowly. There are many traditional methods of statutory construction that point toward broad constructions of statutes, including delegations of authority to agencies. Second, although there are circumstances in which, as a policy matter, it is appropriate to read delegations of authority narrowly, sometimes Congress intends agencies to have broad authority to address the social problems within its jurisdiction.

For example, narrowly construing agency delegations regarding communicable diseases or chemical contamination could have serious social negative—negative social effects. Before *Chevron*, traditional legal doctrine was by and large successful at distinguishing those situations in which broad interpretation of agency authority is more appropriate than narrow interpretation.

Also, while I share Chief Justice Roberts' concern that agencies should not have free rein to determine their own jurisdiction, I am afraid that it would be virtually impossible to craft statutory language that would distinguish jurisdictional from nonjurisdictional matters of statutory interpretation. So, although I agree that H.R. 4768 is a laudable effort to dispel some of the negative consequences and confusion caused by the *Chevron* doctrine, I am afraid that it would disable reviewing courts from taking into account the views of an administering agency on questions of statutory interpretation that would aid in advancing Congress's intent.

So in my prior testimony, I suggested language under which Congress could react to all the problems of *Chevron* deference, without totally ruling out judicial deference to agency views. My suggestion would be, and I will repeat it here, to add language to APA 706 as follows:

"Unless expressly required otherwise by statute, the reviewing court shall decide all questions of law *de novo*, with due regard for the views of the agency administering the statute, and any other agency involved in the decision-making process."

Under this standard, courts would apply the pre-APA *Skidmore* factors for determining how much to defer to agency interpretation, with flexibility to shape deference to meet modern concerns.

In my view, *Skidmore* includes a sensible set of criteria for determining whether an agency interpretation is worthy of deference. In fact, the term "deference" may be a misnomer in this context. When Congress has delegated to an agency the power to administer a statute, and the agency has thoroughly considered a problem and provided persuasive, valid reasoning for its consistent view of the meaning of the statutory term, a reviewing court is likely to be convinced that the agency has made a correct decision, or at least a decision that is as likely to be correct as any contrary view advanced by the challengers on judicial review.

So this reform, in my view, would restore to Congress the ultimate decision to determine how much deference there should be to agency legal decisions, and that is of course where such authority belongs. Thank you.

[The prepared statement of Mr. Beermann follows:*]

***Note:** Supplemental material submitted by Mr. Beermann is not reprinted in this record but is on file with the Committee, and can also be accessed at:

http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=104928

"Hearing on H.R. 4768, The Separation of Powers Restoration Act of 2016"

May 17, 2016

House Committee on the Judiciary: Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Testimony of Jack M. Beermann

Professor of Law and Harry Elwood Warren Scholar

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Beermann, *Chevron* Testimony, 5/17/2016

"Hearing on H.R. 4768, The Separation of Powers Restoration Act of 2016"

May 17, 2016

House Committee on the Judiciary: Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Testimony of Jack M. Beermann, Professor of Law and Harry Elwood Warren Scholar

Boston University School of Law

The questions for discussion today concern the desirability of amending Section 706 of the Administrative Procedure Act to require courts to review agency legal conclusions de novo, i.e. without deferring to the agency's construction of its enabling act, its regulations or any other provision of constitutional or statutory law. On March 15, 2016, before the introduction of H.R. 4768, I testified on this subject before this Committee. That testimony is appended to this testimony, which is brief and focused on particular issues that might arise surrounding H.R. 4768. This is an important issue that has caused great controversy and confusion since the early days of the administrative state.

As the Committee is aware, the Supreme Court's landmark 1984 decision in Chevron U.S.A., Inc. v. NRDC,[1] appears to greatly increase the degree to which federal courts should defer to agency decisions of statutory construction. In Bowles v. Seminole Rock & Sand Co.[2] and Auer v. Robbins,[3] the Court appears to mandate even greater deference to agency construction of its own regulations. The language of H.R. 4768 would replace these doctrines with a requirement that federal courts conducting judicial review of agency action decide "de

[1] 467 U.S. 837 (1984).
[2] 325 U.S. 410 (1945).
[3] 519 U.S. 452 (1997).

novo all relevant questions of law, including the interpretation of constitutional and statutory provisions and rules." In this testimony I will address some concerns regarding the language and structure of H.R. 4768 and discuss language that would allow reviewing courts to take the views of administering agencies into account when reviewing agency legal conclusions.

I. H.R. 4768.

The language of H.R. 4768 would certainly be a complete reversal of *Chevron* and related doctrines. Because APA § 706 instructs reviewing courts to "decide all relevant questions of law [and] interpret constitutional and statutory provisions" it may be argued that H.R. 4768 would restore Congress's original intent in enacting the APA.[4] However, while I share the view that the *Chevron* doctrine went too far and has not succeeded in bringing order to the review of agency legal determinations, the long history of judicial deference to agency legal decisions may point in favor of a less complete rejection of deference to agency legal decisions.

Long before *Chevron*, it was generally understood that reviewing courts should pay close attention to agency reasoning when reviewing agency legal decisions, especially agency construction of the agency's enabling act. This review—designed to ensure that agencies remained within their delegation from Congress—was often expressed as review of the "reasonableness" of agency statutory construction.[5] In the pre-*Chevron* era, judicial deference to agency statutory interpretation was based on a realistic assessment of the degree to which

[4] SEC v. Cogan, 201 F.2d 78, 86–87 (9th Cir. 1952), quoted in John E. Duffy, Administrative Common Law in Judicial Review, 77 Tex. L. Rev. 113, 194 n. 48 (1998).

[5] See United States v. Correll, 389 U.S. 299, 306 (1967) (court's role in reviewing regulations of Commissioner of Internal Revenue is to ensure that "the Commissioner's regulations fall within his authority to implement the congressional mandate in some reasonable manner.") See also Jack M. Beermann, End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled, 42 Conn. L. Rev. 779, 820-12 (2010).

Congress had delegated interpretative authority to an agency and the relative position of court and agency with regard to Congress's intent.

What was extreme about *Chevron* was its assumption that statutory silence or ambiguity virtually always indicates Congress's intent to delegate interpretive authority to the administering agencies. However, even if this assumption was erroneous, that does not mean that Congress does not sometimes delegate interpretive authority to an agency. In a highly technical or sensitive area in which Congress expected an agency to apply its expertise, ambiguity might be an indication that Congress would want a reviewing court to be highly attentive to the agency's views.[6] Application of H.R. 4768 might frustrate Congress's intent in such cases. Further, Congress sometimes explicitly indicates that an agency should define a statutory term, and it is unclear how the terms of H.R. 4768 would interact with apparently conflicting statutory language in those instances. Under pre-*Chevron* law, it was widely accepted that reviewing courts should defer to agency statutory construction when Congress explicitly delegated interpretive authority to the administering agency.

Sometimes, the generality of statutory language indicates that Congress intends to delegate interpretive authority to an agency. For example, when Congress delegated authority to the Federal Communications Commission in the Communications Act of 1934, 47 U.S.C. § 309, to award broadcast licenses in the "public interest, convenience and necessity" Congress certainly intended for the agency to be primarily responsible for determining the meaning of those general terms. It would be a fundamental shift in authority if H.R. 4768 were understood to forbid reviewing courts from deferring to agency determinations under that or similar statutory language. While *Chevron* certainly went too far by holding that any ambiguity indicates

[6] See Beermann, End the Failed Chevron Experiment Now, 42 Conn. L. Rev. at 798 & nn. 68-69 (discussing examples of explicit and implicit delegations of interpretive authority).

delegation of lawmaking authority to the administering agency, there are circumstances under which the generality or ambiguity of statutory language is a reliable indicator of such a delegation.

It has been suggested that H.R. 4768 would have the salutary effect of introducing strict construction of delegations of authority to agencies and that this would be a positive step. There are reasons, however, to be cautious on both of these scores. First, merely instituting de novo review of agency interpretations of statutes delegating authority would not necessarily mean that such delegations would be construed narrowly. There are many traditional methods of statutory construction that often point toward broad construction of statutes including delegations of authority to administrative agencies. If Congress expresses broad purposes during the framing of a statute, it might lead a court to construe the statute broadly, in line with that purpose, even if the administering agency read the statute more narrowly. For example, in Massachusetts v. EPA,[7] the EPA denied that it had statutory authority to regulate greenhouse gases emitted by automobiles, but the Supreme Court majority declined to defer to the agency and read the statute more broadly to grant EPA jurisdiction in that case. Under current traditions of statutory interpretation, de novo review cannot be equated with narrow construction.

Second, although there are circumstances in which it is appropriate to read delegations of authority narrowly, for example in determining whether an agency has the authority to pre-empt state law,[8] Congress often intends agencies to have broad authority to address the social problems within its jurisdiction. For example, narrowly construing agency authority to combat communicable diseases or chemical contamination could have serious negative social effects.

[7] 549 U.S. 497 (2007).

[8] See Cipollone v. Ligget Group, Inc., 505 U.S. 504, 518 (1992). Even then, after finding authority to preempt under narrow construction, courts do not necessarily construe the cope of preemption narrowly. See Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 743-44 (1996) (Scalia, J.).

Traditional legal doctrine has, by and large, been successful at distinguishing those situations in which broad interpretation of agency authority is more appropriate than narrow interpretation. It would frustrate Congress's intent if all delegations of authority were read narrowly, even when Congress intended a broad delegation of authority to an agency.

Another issue that frequently arises is whether agency jurisdictional determinations should be afforded deference. Chief Justice Roberts, in dissent, argued recently that they should not.[9] While I sympathize with the Chief Justice's view that courts should decide de novo whether Congress intended to delegate interpretive authority to an agency in a particular matter, I fear that as a practical matter it would be impossible to create a workable distinction between jurisdictional and non-jurisdictional legal issues. A vast array of legal issues addressed by agencies could be characterized as going to the question of whether the agency has authority in a particular area. In my view, it would not be possible in a statutory provision to distinguish statutory construction involving jurisdictional issues from other instances of statutory construction.

There is a further technical problem with H.R. 4768, which is that it does not cover review of agency legal determinations when the administering agency's actions are reviewed under a statute other than the APA. For example, the Clean Air Act, which was at issue in the *Chevron* case itself, contains its own judicial review provision, which mimics the language of APA § 706(2)(A).[10] For any statute to have the effect of overruling all deference to agency legal determinations, broader language would be necessary, language specifically addressed to non-APA judicial review. Language such as "notwithstanding any other provision of law in a statute

[9] See City of Arlington v. FCC, 133 S. Ct. 1863, 1877 et. seq (2013) (Roberts, C.J., dissenting).
[10] See 42 U.S.C. § 7607(d)(9) (providing that rules under the Clean Air Act shall be set aside if they are "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law".)

providing standards of judicial review of agency action, the reviewing court shall review de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions and rules." But this would be very complicated because then it would make it difficult for Congress to indicate situations in which it intends deference to agency statutory construction. Multiple statutes with competing standards of judicial review could result in even greater confusion than exists today under *Chevron*.

In sum, H.R. 4768 is a laudable effort to dispel some of the negative consequences and confusion caused by the *Chevron* doctrine. However, insofar as it would disable reviewing courts from taking into account the views of an administering agency on questions of statutory interpretation and make it difficult for Congress to allow deference to administering agencies when appropriate, it may go too far. In the next section, I lay out a proposal, which this Committee has seen before, for a more moderate reform that would eliminate the extreme form of *Chevron* deference while allowing reviewing courts to take agency views into account when appropriate.

II. Alternative Language

In my prior testimony, I suggested language under which Congress could react to all of the problems *Chevron* deference has caused without totally ruling out judicial deference to agency views on legal conclusions. My suggestion, which I repeat here, is to add the following language to APA § 706, after sub-section 2(F):

> Unless expressly required otherwise by statute, the reviewing court shall decide all questions of law de novo, with due regard for the views of the agency administering the statute and any other agency involved in the decisionmaking process.

Under this standard, courts would apply the pre-APA *Skidmore*[11] factors for determining how much to defer to agency interpretations, but they would have flexibility to shape the deference doctrine to meet modern concerns and legal doctrine.[12]

The "due regard" language would allow courts to calibrate the degree of deference to the particular situation.[13] For example, there might be contexts in which minimal to no deference is appropriate, for example where Congress has expressed strong policy preferences but in ambiguous language and thus would expect reviewing courts to ensure agency compliance with Congress's purposes. There may also be statutory gaps that Congress would expect to be filled in accord with its intent rather than by agency policy views. There may be other contexts, however, in which the language, structure and purposes of a statute indicate that Congress expects reviewing courts to defer to persuasive agency reasoning concerning the proper construction of a statute or statutory gaps that Congress would have wanted an agency to fill in line with consistent administrative policy. Concerns over excessive deference would be met by application of the *Skidmore* factors, informed by fidelity to Congress's expressed preference for less deference than has been the case under *Chevron*.

Skidmore includes a sensible set of criteria for determining whether an agency interpretation is worthy of deference. These factors are "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." These have

[11] See Skidmore v. Swift & Co., 323 U.S. 134 (1944).
[12] For clarity's sake, § 706 with the suggested amendment is reproduced in Appendix A to this testimony.
[13] If the Committee is concerned that the "due regard" standard is too vague, the Committee might consider codifying the *Skidmore* factors themselves. For example, in a provision of the Dodd-Frank Act, Congress instructed reviewing courts to review preemption determinations of the Comptroller of the Currency "depending upon the thoroughness evident in the consideration of the agency, the validity of the reasoning of the agency, the consistency with other valid determinations made by the agency, and other factors which the court finds persuasive and relevant to its decision." Dodd-Frank Act § 1004(b), 12 U.S.C. § 25b(b)(5).

long been the factors that courts not following *Chevron* have applied when deciding whether to defer to agency statutory interpretation. Agency interpretations deserve deference when the agency has thoroughly considered the question, when its reasoning makes good sense and when its views have been consistent (and thus not shifting with the political winds). These factors are good indications that the agency has applied its expertise to the matter and acted with due regard for Congress's intent underlying the statute being construed.

In fact, to some, the term "deference" may be something of a misnomer in this context. When Congress has delegated to an agency the power to administer a statute, and the agency has thoroughly considered a problem, and provided persuasive, valid reasoning for its consistent view of the meaning of a statutory term, a reviewing court is likely to be convinced that the agency has made a correct decision, or at least a decision that is just as likely to be correct as any contrary view advanced by the challengers on judicial review. In such a case, the agency's decision ought to be approved regardless of whether the *Skidmore* factors are considered to be indicators of persuasion or of deference.

This reform would restore to Congress the determination of how much deference reviewing courts should give to agency legal decisions. Under *Chevron*, that determination is made by reviewing courts using unrealistic and indeterminate criteria. This reform would instruct reviewing courts to defer only if there are strong indications that Congress intends deference.

III. Conclusion

While pre-*Chevron* practice under *Skidmore* may not have been perfect, by preserving flexibility it would place Congress in charge of the degree to which reviewing courts should

defer to agency legal conclusions and would allow Congress to calibrate that deference rather than wipe it out altogether, which would be the case under H.R. 4768. Administrative law cuts across a wide swath of governmental functions, implicating important policy issues and fundamental separation of powers concerns. There are good reasons to consider, at this time, reforms designed to make judicial review more responsive to Congress's intent and to bring judicial review back in line with the principles underlying the APA. However, completely ruling out judicial deference to agency legal conclusions may unduly hinder Congress's ability to employ administrative agencies effectively.

APPENDIX A

5 U.S. Code § 706 - Scope of review [with suggested amendment in brackets]

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

[Unless expressly required otherwise by statute, the reviewing court shall decide all questions of law de novo, with due regard for the views of the agency administering the statute and any other agency involved in the decisionmaking process.] In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Mr. MARINO. Thank you. Mr. Clark?

TESTIMONY OF JEFFREY BOSSERT CLARK, SR., PARTNER, KIRKLAND & ELLIS LLP

Mr. CLARK. Thank you, Chairman Marino, Ranking Member Johnson, and distinguished Members of the Committee, and thank—is it not on? There we go. Apologies.

Thank you, Chairman Marino and Ranking Member Johnson and Members of the Committee, for the opportunity to appear before you today to speak about the "Separation of Powers Restoration Act of 2016." It is important that the title that you gave to this legislation—it indicates, you know, where you are coming from, which I agree with.

You know, the separation of powers was an idea crystallized by the French thinker Montesquieu, and the Founders knew a good idea when they saw one, and they embedded that idea into the structure of the constitution and the difference between articles I, II, and III.

The *Chevron* doctrine is entirely foreign to that classical conception of the Constitution, and I would submit to you that there is zero evidence that the Congress that adopted the APA, intended that to occur, intended such massive delegations or intended to violate the separation of powers. And so I agree with Professor Duffy that what your Act is doing is really restoring not just the separation of powers, but the original meaning of the APA which, in any event, even if there were ambiguity, is something that should be interpreted consistent with the Constitution, or to avoid separation of powers concerns.

The *Chevron* doctrine was never squared with the separation of powers, which makes it a defective decision on its own, and there is a lot of talk about *Chevron* being a case about expertise, but I would submit to you that it is a very curious decision if that is what it is. It talks about expertise, but the test that it adopts has "expertise" nowhere to be found in it.

The first step of the *Chevron* two-step is to look at the text of the statute, and the second step is, once again, to look at the text of the statute in terms of whether the agency has produced a reasonable construction of it. There is no portion of the *Chevron* test that has expertise built into it, so to defend the *Chevron* decision on expertise grounds, it seems to me, makes little sense and is something that, if it is being supported on that ground, it must be really supported because of results that it produces that those who favor those results like.

In practice—and this is a perspective I can help to bring to you as being a practitioner, as being someone who served in the government—I can tell you that, you know—and I set it out in my analysis—there was a particular compromise that animated *Chevron*. I think that the extent to which that compromise was ever really adhered to, it has broken down. The approach that I see—and I think, to be fair, I saw it not just in this Administration, but I also saw it to some extent in the Bush administration—I saw approaching the statute with a particular idea in mind about what public policy in some area should be. It did not look first to the statute

to see what instructions you, as Members of Congress, had given the executive branch in a particular area.

It instead looked at those constraints as inconveniences to be dealt with, essentially, and so various smart lawyers are sicced on the problem of, "How do we get this through the *Chevron* two-step? How do we secure deference?" And from that perspective, *Chevron*, I think, has been a failed experiment as well.

There has been a lot of talk about *Sidmore* deference as well, and I would caution you, and disagree with those who say that *Sidmore* deference should be the substitute, *Chevron* should be wiped off the map, adopt *Sidmore*. My first question about is *Sidmore* is, what work is it really doing? It is essentially urging courts to take seriously the reasons that agencies have given. That is, you know, number one, what courts already do when they read briefs in the Supreme Court from the Solicitor General or from the Justice Department in cases.

And in fact, the agency already has an immense institutional advantage because it gets to pre-brief those issues by writing the decision, and also, given administrative law waiver doctrines that have risen up, it gets a preview of all of those who object to the role as well, and gets to write the reasons in light of those comments and objections that have been filed or evidence that has come out in the adjudicative process.

And my other objection to *Sidmore* is I think it is entirely indeterminate. It is not rule-like. It would produce whatever outcome the judges who are applying it would see fit to apply.

So, I applaud the Subcommittee and Congress for—and the drafter of the legislation—for proposing this solution, which I think is elegant, and the last thing I would like to do is just offer to you a couple of second-bests in case there are other ways, you know, to skin the cat, as it were, of too much authority being given to the executive branch.

Number one is it is widely acknowledged the *Chevron* doctrine's implied delegation rationale is a legal fiction, and it is not something that Congress actually ever adopted itself. You could more narrowly target reversal of that. Also, I agree with the major questions doctrine enunciated in Brown & Williamson and *King v. Burwell*. That is also something that you could enshrine, even if you did not go as far as this legislation.

And the last second-best I offer for you was to overrule Brand X and allow that in situations where the courts get to a question first, the agency should be bound; they should not be able to override judicial decisions. That is turning the separation of powers on its head.

So, in closing, thank you for the opportunity to speak today, and the ultimate second-best is to write clear statutes, and to think about how the administrative agencies might try to circumvent them, and I would urge you always to keep that in mind when you pass new legislation. Thank you.

[The prepared statement of Mr. Clark follows:]

Testimony of

Jeffrey Bossert Clark, Sr.

Partner, Kirkland & Ellis, L.L.P.

To the House Judiciary Committee's Subcommittee on Regulatory Reform and Antitrust Law

May 17, 2016

Hearing re H.R. 4768

The "Separation of Powers Restoration Act of 2016"

Thank you, Chairman Marino, Ranking Member Johnson, and Members of the Subcommittee for the opportunity to address you. Specifically, it is an honor to testify to you again today and speak to the topic of The Separation of Powers Restoration Act of 2016.

This is a simple bill but one that would have a profound effect on administrative law. I believe it to be directionally correct and after explaining why, I would like to turn your attention, if I could, to certain related problems and potential reforms that should be further analyzed by Congress.

Commentary on the Bill as It Stands and a Word of Caution Regarding Development of Legislative History on This Bill

As you are aware, the Bill would modify 5 U.S.C. Section 706 — a key part of the APA, the statute's "judicial review" provision — to establish *de novo* review by the courts of "all relevant questions of law, including the interpretation of constitutional and statutory provisions and rules."

Notwithstanding the fact that Section 706 already seems fairly clear that this is what Congress intended when it enacted this provision of the APA, the Supreme Court has formulated the so-called *Chevron* doctrine, which creates a two-part test that (a) requires courts reviewing agency action to enforce the unambiguous text of congressional statutes (as supplemented by the traditional tools of statutory interpretation); or (b) where such guides to meaning are ambiguous, to defer to reasonable constructions of statutory text by the agency delegated such authority.

The *Chevron* doctrine has always been on shaky ground, for two essential reasons: ***First***, there is no support in the APA's text for such a highly deferential test that requires Congress to speak clearly or else cede, in effect, its lawmaking authority to the Executive Branch. ***And second***, given Chief Justice Marshall's injunction in *Marbury v. Madison* that it is emphatically the province and duty of the courts to say what the law is — with the Supreme Court having the last word — it has never been explained how *Chevron* comports with the separation of powers. How could the Judiciary decide, consistent with the Constitution, that its function has been delegated by Congress to the Executive Branch? For the essence of the judicial function is to interpret legal provisions and apply them to the facts of particular cases and controversies. *See* U.S. Const. art III.

Consider the structure of the APA as it is currently codified. Both Section 701 and the "***legislative-history equivalent***" of the Attorney General's *Manual on the APA* make clear that Congress anticipated that delegation would occur explicitly. *See* 5 U.S.C. Section 701(a) ("This chapter applies, according to the provisions there, except to the extent that— (1) statutes preclude judicial review [which is equivalent to saying that the courts have been instructed to stay out of a particular type of matter]; or (2) agency action is committed to agency discretion by law [which is just the flip side of saying that there has been an express and exclusive delegation to an agency]." Nothing in Section 701 or anywhere in Chapter 7 of the APA

provides that agencies are to be deemed the arbiters of the meaning of statutory text when they have not been expressly delegated that power.

Turning to the *Manual on the APA*, it states that Section 10(e) in the session law that was the APA, now codified at Section 706, "[ob]viously ... does not purport to empower a court to substitute its discretion for that of an administrative agency and thus exercise administrative duties. In fact, with respect to constitutional courts, it could not do so." ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT, 107 (1947); *see also Vermont Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519, 546 (1978) (the *Manual* is "a contemporaneous interpretation previously given some deference by this Court because of the role played by the Department of Justice in drafting the legislation").

The first example the Attorney General gave for this point, which will serve to explain what the Attorney General was referring to here, is *Keller v. Potomac Electric Power Co.*, 261 U.S. 428 (1923). But even a quick review of that case causes one to realize that what the Attorney General was saying – giving his view of the intent of Congress and the applicable constitutional constraints as declared by the Supreme Court– is that Congress could not validly delegate policymaking powers to the Judiciary. On the facts of *Keller*, what the Supreme Court held unconstitutional was Congress, in effect, conferring on the courts the power to raise or lower utility rates. It is clear *Keller* was not talking about a purported power of the Executive Branch to interpret legal provisions and expect their interpretations to command obedience or even voluntary acquiescence by the Judicial Branch. Quite the contrary. As this contrast in the opinion makes clear, the *Keller* court understood interpreting provisions of law to be the judicial function whereas rate-setting was a quintessential legislative function:

> What is the nature of the power thus conferred on the District Supreme Court. Is it judicial or is it legislative? ***Is the court to pass solely on questions of law, and look to the facts only to decide what are the questions of law really arising, or to consider whether there was any showing of facts before the commission upon which, as a matter of law, its finding can be justified?*** Or has it the power, in this equitable proceeding, to review the exercise of discretion by the commission and itself raise or lower valuations, rates, or restrict or expand orders as to service? Has it the power to make the order the commission should have made? If it has, then the court is to exercise legislative power, in that it will be laying down new rules, to change present conditions and to guide future action, ***and is not confined to definition and protection of existing rights.***

Keller, 261 U.S. at 440. In sum, what *Keller* provides, and what was baked into the APA, is the classic conception of the separation of powers. The role of courts was deemed as being to "pass solely on questions of law, and look to the facts only to decide what are the questions of law really arising, [and] to consider whether there was any showing of facts before the commission upon which, as a matter of law, its finding can be justified." *Id.* Court would do

this through the process of interpretation, acting to define and protect existing rights.

With that legal background from the text and structure of the APA in mind, as well as by consulting the Attorney General's *Manual*, it becomes clear that the APA ***already provides by its terms for* de novo *review***. That being said, given the *Chevron* doctrine, there is clear utility in clarifying this critical point. What I would respectfully suggest to the Subcommittee is that the legislative history associated with the Separation of Powers Restoration Act of 2016 make clear that Congress is clarifying here what the APA has meant since its inception.

My concern in a nutshell is that by considering this legislation, the proponents of the Bill not be taken as creating "negative subsequent legislative history" as to the meaning of the APA as it was enacted. The summary of the Bill, for instance, provides as follows: "***This bill modifies the scope of judicial review of agency actions*** to authorize courts reviewing agency actions to decide de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions and rules." That could be taken to mean that you are changing the scope of judicial review as provided for in the text and contemporaneous history of the APA as construed in and explained by the *Manual*. Once again, with deep respect, I think what you intend here is a modification of case law, most specifically *Chevron*, not a modification of the statute.

So to make my position clear, I agree with the Bill's sponsors that the Separation of Powers Restoration Act of 2016 is a salutary project to try override *Chevron*, which effectively transfers core judicial functions in agency cases to the Executive Branch. But it is a project that should have been unnecessary, given the clarity with which the text of APA Section 706 already speaks: "To the extent necessary to decision and when presented, ***the reviewing court shall decide all relevant questions of law***, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action ...." "[A]ll" means all. "[S]hall" means shall. Your action here is called for not by virtue of some fatal mistake or even drafting error by the 1946 Congress but by virtue of the fact that *Chevron* was decided without remaining tethered to the text of the APA. To some extent that is unsurprising because *Chevron* was itself handed down only pursuant to what we practitioners sometimes call "the Little APA" of the Clean Air Act. But whether *Chevron* was intended to be limited to judicial review of certain Clean Air Act actions or not, it has clearly morphed into much more and been exported to virtually all administrative law areas when questions of agency statutory interpretation are involved. In practice, *Chevron* has become more important than the text of Section 706. That gets matters backwards. You are thus rightly aiming here to correct what is not a legislative mistake but a judicial one.

General Commentary on *Chevron*

In both private practice and in my government service in the Department of Justice, I'd like to think that I am a very proficient wielder of *Chevron*. And unless and until the pervasiveness of the *Chevron* approach is legislatively or judicially altered, I will continue in the practice of law to use *Chevron* in the service of my clients. My normative views of how the

law might be improved have to be separated from the law as it currently stands, which I must follow and utilize. And it is that very experience which leads me to the following set of conclusions as to important limits that exist on *Chevron*, which the Subcommittee should be aware of:

(1) under the Supreme Court's *Adams Fruit* case, it is possible to establish that some questions have not been delegated to courts at all, in which case, no deference is owing — my colleagues and I essentially established that certain claims and continuations rules adopted by the Patent & Trademark Office fell into that category — it is not the null set;

(2) if one can competently engage in textual interpretation, a lot of agency action falls (or, to be cynical in the sense of the Legal Realists, can be made to fall) into *Chevron* step one where the constraints on the agency under the *Chevron* test are at their zenith;

(3) under footnote 9 of *Chevron*, the traditional tools of statutory interpretation, including structure, canons of interpretation, and even legislative history, can be used, so the question of *Chevron* step one application is not just whether the text standing alone is ambiguous but whether it is ambiguous after it is put together with those other tools, as they all tend to narrow down the viable span of the meaning for any given statutory provision;

(4) it is not a lost cause if one reaches *Chevron* step two, as I have won cases under *Chevron* step two, most notably the *American Trucking* case in the Supreme Court where I helped to establish with my colleagues for our clients that EPA's ozone compliance rules ran afoul of a schedule for ozone nonattainment area compliance that effectively left a highly calibrated congressional compliance schedule for a preexisting ozone standard stillborn; and

(5) under the *Brown & Williamson* case and the more recent *UARG* case, *Chevron* recognizes situations in which an agency engages in a major power grab with enormous consequences for the national economy, wherein the courts apply a heightened form of *Chevron* scrutiny to analyze whether Congress ***really intended*** for the sort of regulation the agency is engaged in to be among the agency's delegated powers.

See Utility Air Regulatory Group v. EPA, 134 S. Ct. 2427 (2014); *Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000); *Adams Fruit v. Barrett*, 494 U.S. 638 (1990); *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

Because of these safety valves, as it were in *Chevron*, I want to be careful not to exaggerate the dimensions of the problem that regulated entities face today. To be clear, I think *Chevron* is both textually at odds with the APA and constitutionally dubious. But *Chevron* doctrine plainly does not authorize courts to willy-nilly defer to whatever an agency says, whenever it says it. This is especially true in "the big cases," where the best advocates are brought to bear on the regulatory problems at hand and where the Supreme Court and D.C. Circuit's special administrative law expertise applies. The problems often enter in as to

Circuits other than the D.C. Circuit and in situations in which the advocates retained do not understand all of the ins and outs of *Chevron* and the canons or doctrines that surround it. Some of those situations result in industry getting trounced in situations where industry is right or at least far closer questions are involved.

Also, as I can confirm for you from having worked with some of the most sophisticated advocates ***on the government's side*** — those who defend major environmental rulemakings (perhaps the most complex category of cases as a general matter) at the Environment and Natural Resources Division of Justice — the skill those Department advocates and EPA policymakers have in using *Chevron* is exceptionally strong. For many advocates and for businesses that do not frequently find themselves in a position where a major rulemaking gores their interests, that institutional advantage in deploying *Chevron* and winning in getting a deferential opinion from the Courts of Appeal, frequently overwhelms them. This is especially true when these lawyers are operating at the behest of Administrations that weight economic impacts and business concerns less heavily than pro-regulatory concerns and is true in ***any Administration*** when a ***signature rulemaking*** is involved — *i.e.*, the sort of rulemaking that is of critical policy significance to a particular President or Cabinet member and ***all the stops are pulled out to defend such a rulemaking***.

And that is an excellent way to segue into my final set of points, which involve additional points to consider in related bills in this area:

Further Concepts for Potential Congressional Follow-Up

To a great extent, the dysfunctionalities of *Chevron* are the product of the genie of delegation getting out of the bottle. Now that the genie is out of the bottle, it is difficult to put it back in. The Progressive Era first and then the New Deal created an ethos of government by expert. Increasingly, I think the average informed voter (I emphasize the adjective "informed") is skeptical of the notion that government by expert is superior to government by, to borrow the Buckley-ism, rule by a randomly selected set of white-pages individuals with common sense, or, consistent with the Constitution, by the People's representatives in Congress — this body.

As long as the three branches are confined to their constitutional roles, a lot of problems never arise. Once one allows for Congress to delegate its power to the Executive Branch, however, it is not surprising that problems the Founders never directly contemplated arise. If I can be so bold, I think the evil you aim to correct in the Separation of Powers Restoration Act of 2016 is that *Chevron* cedes too much power to Executive Branch agencies. But the problem that led Justice Scalia, in particular, to become *Chevron*'s most-ardent champion (at least for most of his career prior to recent terms), was, I would submit, borne out of his experience at the Office of Legal Counsel, defending executive branch action and seeing the courts, especially the D.C. Circuit of the 1970s and early 1980s, twist, in his view, statutes to shut down the exercise of the expertise embodied in the conservative policy community. From that

perspective, what you are trying to solve here is not a one-sided error — aggrandized executive power. Instead, you have to seek the right balance, since if all provisions of law are reviewed with no respect for agency expertise whatsoever, you are going to substitute rule by courts for rule by agencies. Depending on the Judges in question, that could be worse than government by out-of-control agencies.

One would think there would be grounds for potential compromise by recognizing that (a) expertise is not monopolized in any one side of the political spectrum, but instead (b) if we are going to have government by experts, then the reasonable policy innovations of each side have to be given the chance to work and not strangled in their cribs by judicial generalists. But I recognize that, in one sense, I am describing the essential policy compromise that *Chevron* tried to maintain. And that compromise was intended to give every Administration (of any stripe), its "turn at bat," as it were, disallowing conservative courts from shutting off progressive policy innovation and disallowing liberal courts from shutting off conservative policy innovations.

The problem is — and I think this is why we are here today — is that this compromise is clearly no longer working, if indeed it ever really worked as it was intended to work. The reason for this is that for the principle to work, a certain meta-principle or assumption has to be shared by the executive branch. And that meta-principle or starting-point assumption has to be that ***Congress is, at the very least, the prime policy mover***.

But, at least as to this Administration, I don't think that is the starting point for analysis of statutes inside agencies now. Instead of reading statutes to deduce at least the basic outlines of what Congress wanted accomplished and then trying to fill in interstices and making policy choices within those boundaries, I think it is truly fair to say that many agencies come to policy areas with a set of initiatives they want to adopt. That's backwards. Those officials then turn loose the best and brightest lawyers inside the departments and agencies and at the meta-agency of the Department of Justice to looking at the governing statutes and making the best *Chevron* arguments possible to get to wherever they want to go (disregarding where Congress wanted to go).

I've heard prominent officials oftentimes say these days that Congress is gridlocked, so if we want to make policy progress, we in the Executive Branch have to drive it. That's not just a perversion of the constitutional system where the Framers fully intended that gridlock would mean that new laws would not get passed and in that way liberty would be protected, it's a subversion of the premises on which *Chevron* stands. If an agency does not see its first task at discerning the will of Congress and then trying to innovate, to the extent possible, ***only within that framework***, then *Chevron* cannot function properly. At that point, *Chevron* turns into an elaborate game that sophisticated lawyers play, like cats and mice or five-dimensional chess. The situation becomes more one of what an agency ***can get away with*** based on clever lawyering, than on it taking a rough set of marching orders and doing their best to carry out

Congress's instructions.

In this sort of vein, I offer the following additional types of APA amendments for you to consider:

First, one of the main problems with *Chevron*, which is entirely theoretically under-justified whatever one thinks of the outcomes *Chevron* tends to produce, is that Congress intended to put the agencies superintending particular statutes in charge of interpreting statutes via ***implied delegation***. No factual support for such a conclusion was given in *Chevron*. But even putting aside that the Constitution gives you this authority, the relevant discussion in *Chevron* of explicit vs. implicit delegations would clearly allow you to change *Chevron*'s ***default rule*** that gaps in statutes can implicitly create delegations.

There are several things you could do in this area. You could pass a law indicating that implicit delegations are a thing of the past as a general matter. Alternatively, as you pass new statutes on a rolling basis, you could specify that *Chevron* does not control and rather that particular statute is not intended to contain any implicit delegations. Only explicit delegations will do.

Second, you should consider codifying some form of the *Brown & Williamson* test, which some law professors have taken to calling "the major questions doctrine." (I think *Brown & Williamson*, as it is presently formulated, is really a "canon" that operates within the *Chevron* framework (not a "doctrine"), but that is the kind of fine line that I won't bore you with defending today.) Perhaps Congress could instruct the courts that rules with a particular economic magnitude would have to be reviewed on a *de novo* basis, if the Bill you are considering today were not to be adopted. Alternatively, a *Brown & Williamson* supplement to today's Bill might be in order — an instruction that even in situations where the best reading of the applicable sources of law is that a particular regulation is permissible, where a rule triggers certain major economic or other types of highly significant consequences that Congress would need to define, courts must also find that there are significant indicators that Congress specifically intended the sort of outcomes that would be brought about by the rule under review.

Third, in recognition of the fact that the courts are supposed to be the principal (or exclusive) interpreters of the law, consider overruling *National Cable & Telecomm. Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), by allowing Supreme Court interpretations of law that precede attempted uses of *Chevron* authority to be decisions that the agencies must respect. This would bar them from trying to attempt, as it were, **Chevron *themselves around*** judicial decisions they don't like.

Fourth, especially as to any laws adopted during the period before the reform embodied in this Bill or in other bills in the same area might be enacted, my counsel is for Congress to assert its traditional role as much as possible when enacting any law: Make not

just the fundamental policy choices in the legislation you pass, but look around corners and focus on the details of such legislation as well and provide specific direction on as many questions as you can think of. Don't shunt that hard work. Speak clearly, speak explicitly, get into the details. Seek out advice about how an agency armed with *Chevron* might try to circumvent the main provisions of legislation and then write provisions into the laws designed to shut off such circumvention. For unless and until *Chevron* is eliminated or reformed, you have, essentially, been told by the Supreme Court that you are expected to speak clearly. You speak vaguely at your own peril. Speak vaguely and the reality of the meaning of what you have adopted is ceded to another constitutional actor, whether that be the courts or the President and his delegates, or the independent agencies, or all of them.

I sincerely thank the Subcommittee for the opportunity to testify today.

Mr. MARINO. Thank you. Mr. Walke?

TESTIMONY OF JOHN D. WALKE, ATTORNEY, CLEAN AIR DIRECTOR, NATURAL RESOURCES DEFENSE COUNCIL (NRDC)

Mr. WALKE. Thank you, Chairman Marino, Ranking Member Johnson, and Members of the Subcommittee, for the opportunity to testify today. H.R. 4768, the "Separation of Powers Restoration Act of 2016," is a deeply flawed and harmful bill that should not become law.

My oral statement will address two basic topics: the antiregulatory legislative context that the bill now joins, and second, the bill's numerous flaws and harmful consequences. These harms include impaired safeguards for public health, safety, the environment, financial markets, consumer rights, civil rights, and other social concerns that Federal regulatory statutes address.

Additional harms include reduced political accountability, even more or overburdened courts, increased judicial forum shopping, greater uncertainty for regulated entities, and the waste of public resources and tax dollars.

H.R. 4768 overthrows a longstanding and well-founded framework for judicial review. When acknowledging a regulatory process grounded in extensive administrative records, lengthy processes of public input and expert evaluations, that framework is ultimately carried out by officials appointed and confirmed by elected officials working under an elected president. H.R. 4768 substitutes for that system one in which the judiciary may nullify agencies' reasonable regulations because one judge or a set of judges may prefer a different reasonable regulation or outcome. H.R. 4768 permits the judiciary to ignore administrative records and expertise, and to substitute its own inexpert views and limited information.

In my testimony I quoted Justice Scalia's opinion for the Supreme Court in *City of Arlington* where he said a *de novo* review standard practiced by 13 different courts of appeals would end up applying a totality-of-the-circumstances test, which Justice Scalia recognized not to be a test at all. He wrote that "this would simply be an invitation to ad hoc judgments that would render the binding effects of agency rules unpredictable, destroy the whole stabilizing purposes of the *Chevron* doctrine, and result in chaos."

To impose this kind of judicial fiat seems especially odd coming from Members of Congress who have repeatedly condemned supposed judicial overreach, and who constantly point out that the judiciary is unelected. It seems that the bill's supporters are so intent on overturning our system for protecting the public through regulation that they are willing to empower a Federal judiciary that they have long denounced, even though Congress has the constitutional authority to change regulatory statutes, or to alter or reject individual regulations anytime it wishes. But Congress does not do that because the public will not support it.

First, I would like to place H.R. 4768 in a broader legislative context. Since the start of the 112th Congress, there has been a wave of legislation embodying conservative political and corporate attacks on our modern system of Federal regulation and law enforcement by the executive branch. H.R. 4768 is the latest bill to join that wave.

During the 112th and 113th Congresses, there were 553 House votes by the majority to weaken environmental and health safeguards. These attacks failed. Having failed despite repeated attempts to weaken substantive organic laws they do not support, anti-regulatory politicians have retreated to broad attacks on the legal infrastructure backing Federal regulations. These include, for example, the REINS Act in its one-chamber legislative veto of regulations.

Now H.R. 4768 joins that list. Members have promoted H.R. 4768 by condemning a runaway administrative state that is out of control. Press releases promoting the bill have blasted numerous Obama administration regulations that the Members happen not to support. It is clear that support for the bill is motivated as much as by opposition to Federal safeguards, as it is by the tug-of-war over separations of power between the branches. Next, I would like to address some of the numerous harmful consequences the bill will produce.

First, agencies will issue fewer regulations to carry out Federal laws and protect Americans. Many more congressional deadlines will be missed. I expect that is precisely what some opposed to regulation hope will happen.

Second, agencies will resort to simply repeating ambiguous and unclear statutory language verbatim in regulations.

Third, for the same reasons regulations will contain far fewer details to assist State and local regulators with implementation.

Fourth, uneven application of national laws would adversely impact the certainty with which businesses could operate across the country. Justice Scalia's regulatory chaos would ensure.

Agencies also would find it more difficult to adopt deregulatory rules that would be considered reasonable under today's *Chevron* test. In my experience, it is true that starkly deregulatory rulemakings in prior Administrations have foundered more often at the first step of *Chevron*. That would continue to be the case were H.R. 4768 to become law.

One suspects, therefore, that political and corporate opponents of regulation, and proponents of deregulation, have made a calculation that the bill would have disproportionate adverse impacts on regulations rather than deregulation. That is almost certainly true, and is a central reason why the bill should not become law. For all of these reasons, I urge Members of the Subcommittee to oppose this legislation. Thank you.

[The prepared statement of Mr. Walke follows:]

TESTIMONY OF JOHN D. WALKE

CLEAN AIR DIRECTOR

NATURAL RESOURCES DEFENSE COUNCIL

HEARING ON H.R. 4768, THE "SEPARATION OF POWERS RESTORATION ACT OF 2016"

BEFORE THE SUBCOMMITTEE ON REGULATORY REFORM

COMMERCIAL AND ANTITRUST LAW

OF THE

COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

MAY 17, 2016

Thank you, Chairman Marino, and Ranking Member Johnson for the opportunity to testify today. My name is John Walke, and I am clean air director and senior attorney for the Natural Resources Defense Council ("NRDC"). NRDC is a nonprofit organization of scientists, lawyers, and environmental specialists dedicated to protecting public health and the environment. Founded in 1970, NRDC has more than 2.4 million members and online activists nationwide, served from offices in New York, Washington, Los Angeles, San Francisco, Chicago, and Beijing. I have worked at NRDC since 2000. Before that I was a Clean Air Act attorney in the Office of General Counsel for the U.S. Environmental Protection Agency, and prior to that a private attorney in a corporate law firm in Washington, D.C.

H.R. 4768, the "Separation of Powers Restoration Act of 2016," is a deeply flawed and harmful bill that should not become law. The legislation overthrows a longstanding and well-founded framework for judicial review—a framework that acknowledges a regulatory process that is grounded in extensive administrative records, lengthy processes of public input and expert evaluations. That framework is ultimately carried out by officials appointed and confirmed by elected officials, and working under an elected president.

H.R. 4768 substitutes for that system one in which the judiciary may nullify agencies' reasonable regulations because one judge or a set of judges may prefer a different reasonable regulation or outcome. The judicial decisions will be based on non-expert evaluation of the same administrative record *de novo*, but in the much more abbreviated time period of court cases and compressed page limits of legal briefs, with input from a vastly smaller body of litigants rather than from the public at large.

H.R. 4768 permits the judiciary to ignore administrative records and expertise and to substitute its own inexpert views and limited information. To impose this kind of judicial fiat seems especially odd coming from Members of Congress who have repeatedly declaimed against supposed judicial overreach and who constantly point out that the judiciary is "unelected." It seems that the bill's sponsors are so intent on overturning our system for protecting the public through regulation, that they are willing to empower a federal judiciary that they have long inveighed against, even though Congress has the Constitutional authority to change regulatory statutes or to alter or reject individual regulations any time it wishes. But Congress does not do that because the public won't support it.

The Supreme Court has provided instructive views on what a system would look like in which all the courts of appeals undertake *de novo* reviews of agency interpretations of statutes in a judicial search for congressional intent or what judges consider more "reasonable." Ruling for the majority in *City of Arlington, Tex. v. F.C.C.*, Justice Scalia wrote:

> Rather, the dissent proposes that even when general rulemaking authority is clear, *every* agency rule must be subjected to a *de novo* judicial determination of whether *the particular issue* was committed to agency discretion. It offers no standards at all to guide

> this open-ended hunt for congressional intent (that is to say, for evidence of congressional intent more specific than the conferral of general rulemaking authority). It would simply punt that question back to the Court of Appeals, presumably for application of some sort of totality-of-the-circumstances test—which is really, of course, not a test at all but an invitation to make an *ad hoc* judgment regarding congressional intent. Thirteen Courts of Appeals applying a totality-of-the-circumstances test would render the binding effect of agency rules unpredictable and destroy the whole stabilizing purpose of *Chevron*. The excessive agency power that the dissent fears would be replaced by chaos.

City of Arlington, Tex. v. F.C.C., 133 S. Ct. 1863, 1874 (2013) (emphases in original). So too with the "Separation of Powers Restoration Act": it would destroy the whole stabilizing purposes of *Chevron*. Chaos and randomness would replace the agency power that its sponsors profess to fear. Even if some members or corporate lobbyists are prepared to accept the chaos and regulatory uncertainty that this legislation would create as the price for facing fewer regulations that safeguard Americans, Congress should not accept this reckless outcome.

My testimony will examine some of the harmful and irresponsible consequences that I believe the "Separation of Powers Restoration Act of 2016" (hereinafter "H.R. 4768") would yield. These include impaired safeguards for public health, safety, the environment, financial markets, consumer rights, civil rights and other social concerns that federal regulatory statutes address. Additional harms include less political accountability, even more overburdened courts, increased judicial forum shopping, greater uncertainty for regulated entities, and the waste of public resources and tax dollars.

Before turning to these harmful outcomes, however, I first would like to address the political and legislative context in which this bill is being introduced.

I. Congressional Opposition to Reasonable Regulations and the Executive Branch

Since the start of the 112th Congress, there has been a wave of legislation embodying conservative political and corporate attacks on our modern system of federal regulation and law enforcement by the executive branch. H.R. 4768 is the latest bill to join that wave. Other bills include the Regulatory Accountability Act;[1] the Regulations of the Executive in Need of Scrutiny (REINS) Act;[2] the Secret Science Reform Act;[3] the Searching for and Cutting

[1] Regulatory Accountability Act of 2015, H.R. 185, 114th Cong. (2015), https://www.congress.gov/bill/114th-congress/house-bill/185 (weakens and delay federal safeguards; tailor regulations to impose the least costs on corporations even if that denies Americans vastly higher net benefits).

[2] Regulations from the Executive in Need of Scrutiny Act of 2015, H.R. 427, 114th Cong. (2015), https://www.congress.gov/bill/114th-congress/house-bill/427 (adopts a one-house legislative veto to block regulations and obstruct executive branch law enforcement).

Regulations that are Unnecessarily Burdensome Act;[4] and the Sunshine for Regulatory Decrees and Settlements Act,[5] among others. This irresponsible legislative agenda, unsuccessful thus far, is attempting a roots-and-branches dismantling of a system of federal regulation that has worked for decades to protect clean air, clean water, food safety, financial markets, workers, consumers, and all Americans.

Consider public health and environmental regulations. A House Energy and Commerce Committee minority staff report[6] cataloged 553 votes by the majority to weaken environmental and health safeguards during the 112th and 113th Congresses. Predictably, these attacks failed in the Senate or faced veto threats by the White House, in part because the environmental and health safeguards they attack are widely popular with Americans. Facing repeated failure with direct attacks on substantive laws, the conservative Congressional response turned to undermining the backbone legal principles of the modern administrative state.

This wave of regulatory reform legislation should be seen as an example of ongoing political subversion. Having failed, despite repeated attempts, to weaken substantive, organic laws they do not support, anti-regulatory politicians have retreated to broad attacks on the legal infrastructure backing federal regulations: manipulating cost-benefit analysis; undermining the legal norms governing regulation and the scientific process; departing from constitutional legislative norms to authorize one-house legislative vetoes of regulations; and restricting the power of the courts to redress harms suffered by citizens. Finally, in the "Separation of Powers Restoration Act," this political agenda seeks to scuttle the standards by which judges review and uphold reasonable agency interpretations of federal statutes the executive branch is bound to enforce.

It is instructive to compare H.R. 4768 to another notorious regulatory reform bill, the so-called "Regulations from the Executive in Need of Scrutiny" Act. Conservative congressional

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[3] Secret Science Reform Act of 2015, H.R. 1030, 114th Cong. (2015), https://www.congress.gov/bill/114th-congress/house-bill/1030 (stops federal agencies from using the best peer-reviewed science to better protect Americans' health and environment).

[4] SCRUB Act of 2016, H.R. 1155, 114th Cong. (2016), https://www.congress.gov/bill/114th-congress/house-bill/1155 (adopts a mindless "cut-go" system to eliminate an existing regulation for every new one adopted).

[5] Sunshine for Regulatory Decrees and Settlements Act of 2015, S. 378, 114th Cong. (2015), https://www.congress.gov/bill/114th-congress/senate-bill/378 (undermines citizens' ability to hold government accountable when it breaks the law, and obstructs enforcement of important federal safeguards).

[6] U.S. House of Representatives, Committee on Energy and Commerce, Minority Staff, The Anti-Environment Record of the U.S. House of Representatives 113th Congress (1st Session), December 2013 *available at* https://www.hsdl.org/?view&did=748326.

opponents of regulation are pushing the extreme and harmful REINS Act, which transfers basic law enforcement and implementation powers away from the executive branch to the legislative branch. Corporate and congressional REINS Act backers profess their commitment to greater political accountability[7] that they claim resides in Congress more so than with the elected executive branch and its pejoratively dubbed 'unelected bureaucrats.'[8] On the other hand, these same politicians and corporate lobbyists are pushing the "Separation of Powers Restoration Act," which transfers law enforcement and implementation powers again away from an executive branch headed by a politically accountable president to unelected judges who are not politically accountable to Americans.

So what unites the political promotion of the REINS Act and the "Separation of Powers Restoration Act," since it is certainly not accountability? The answer is political opposition to regulatory safeguards and protections, and hostility to law enforcement and implementation by the executive branch.[9]

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[7] The REINS Act is certainly not about accountability. Its core feature—a one-chamber legislative veto—would allow only one of the two chambers in Congress to refuse or fail to authorize enforcement of federal statutes. By refusing to authorize a regulation that carries out federal law, one congressional chamber would nullify operation of that federal law without any need by the other chamber to vote; the REINS Act requires both chambers to approve a regulation, meaning only one legislative chamber is needed to veto the execution of federal laws. So one chamber escapes any accountability to the public.

But the REINS Act goes even further. Nothing in the legislation stops political leaders in either chamber from refusing to hold votes on resolutions to approve or disapprove a rule before the deadline by which that rule may not become effective by automatic operation of the legislation. And despite elaborate procedures in the REINS Act that pretend to *force* Congress to hold such votes, the bill tellingly notes that either chamber may change its rules at any time, and that "no determination, finding, action, or omission under this chapter shall be subject to judicial review." Accordingly, when Congress wishes to 'violate' the Act's (non)requirement to hold votes on approval resolutions, it may either alter that requirement (with no need for legislation first) or ignore the elaborate procedures, fully aware that no omission or action shall face judicial review. Both outcomes belie any claim to accountability over the substance or benefits of the rule that was quietly nullified.

[8] See, *e.g.*, https://toddyoung.house.gov/reins/faqs/.

[9] Professor Sid Shapiro at the Wake Forest University School of Law, for example, has rightly noted that "the REINS Act. . . isn't about [regulatory] capture; it's about gumming up the regulatory process." http://www.progressivereform.org/CPRBlog.cfm?idBlog=962E84F3-A9F3-3EA9-BEA5D2FC1972753A. See also https://www.nrdc.org/experts/david-goldston/reins-act-

Both the REINS Act and the "Separation of Powers Restoration Act" have been designed to undo the fundamental structure and viability of the regulatory system that has improved food safety; cleaned our air and water; protected workers; reduced discrimination; limited economic instability and protected Americans in countless other ways. REINS would make it virtually impossible to promulgate any new regulations, and would return the U.S. to a failed regulatory process that was thrown out at the end of the 19th Century. H.R. 4768 is almost as sweeping.

The similar flaws in the two bills are striking. Both bills envision federal agencies spending years on rulemakings involving advanced notices of proposed rulemakings, regulatory proposals and final rules; stakeholder engagements, solicitations of public comment and responses to those comments; preparation of extensive administrative records often involving complex and technical analyses, literature reviews, and detailed justifications; all conducted by agency officials with subject matter expertise in the sciences, medicine, engineering, statistics, accounting, economics and financial markets, and the full gamut of professional disciplines.

The REINS Act empowers one chamber of Congress, or even refusal by Congress to act,[10] to nullify rules emerging from those lengthy, robust processes without considering *any* of that extensive information or expertise. The "Separation of Powers Restoration Act" also allows single judges and panels of circuit court judges to nullify rules if the judges conclude the rules should have been based on a given reasonable interpretation different than the reasonable interpretation the agency relied on. *De novo* judicial review and consideration of vast administrative records would be limited to the time available on already-crowded judicial dockets. Third-party input would be limited to small pools of litigants operating under the constraints of page limits for legal briefs under federal rules. In both instances, reasonable statutory interpretations and reasonable rules to enforce federal laws could be summarily rejected in a manner completely incommensurate with the time, resources, consideration, expertise and public input occurring with the agency.[11]

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why-congress-should-hold-its-horses & https://www.nrdc.org/experts/john-walke/frequently-asked-questions-about-reins-act.

[10] See *supra,* fn. 7.

[11] Indeed, some opponents of EPA regulations are arguing to the Supreme Court now that the Administrative Procedure Act requires the automatic *vacatur* of all federal regulations found to be unlawful in some respect. Mot. to Govern of Certain States and Industry Petitioners, No. 12-1100, *White Stallion Energy Center v. EPA*, Sept. 24, 2015, Document #1574809 *available at* https://www.edf.org/sites/default/files/content/white_stallion_v_epa_-_state_industry_petitioners_motion_to_vacate_-_9-24-15.pdf. While this outlier view is not the law, its adoption would greatly exacerbate the harms created by the "Separation of Powers Restoration Act" from empowering judges to more easily find regulations unreasonable.

I have worked as an attorney for a federal agency, and it is easy to predict how federal agencies would react. First, agencies will issue fewer regulations to carry out federal laws and protect Americans. Many more congressional deadlines will be missed. I expect that is precisely what some members and corporate lobbyists opposed to regulation hope will happen. It is why they support this legislation. Second, agencies will resort to simply repeating ambiguous and unclear statutory language verbatim in regulations. They will do so in an attempt insulate themselves from adverse judgments by judges conducting *de novo* reviews of agency resolutions of statutory ambiguities, conflicts and gaps that are differently reasonable than the judge's notion of what is reasonable.

Third, for the same reason, regulations will contain far fewer details to assist state and local co-regulators with implementation. Fourth, regulations will contain fewer details and instructions about complex compliance obligations for regulated entities, but without excusing the statutory compliance obligation. This will leave hundreds of thousands of regulated businesses across the country to sort out these details for themselves, knowing they must still comply with the statutory obligations and directives.

A second form of the regulatory chaos that Justice Scalia described will then ensue: state and local co-regulators will settle on wildly varying approaches to implementing and enforcing federal regulations, resulting in different and conflicting approaches to carrying out the same uniform national laws. Compliance responses and decisions by thousands of regulated entities will be even more varied, divergent and conflicting. Many of those decisions will be subpar and at odds with congressional intent. Sporadic and infrequent resolutions of these conflicts and variances, coupled with failures to comply with federal statutes, will necessitate more enforcement actions by federal and state officials as well as citizens. This will significantly increase the need for federal and state judges in civil, criminal and administrative courts to address inconsistent compliance with unclear regulations in enforcement proceedings. Complaints and defenses by regulated entities about a lack of fair legal notice in those costly proceedings will skyrocket. Federal agencies like EPA will face greater pressures and need to order legal corrections of deficient state and local programs or even withdraw those delegated authorities to carry out the federal regulations.

The ultimate consequence is actually the most insidious and most obvious: compliance with federal laws, through the adoption of necessary implementing regulations, will plummet. The objectives and promises of federal laws will not be satisfied. This will be true even with good-faith actions by regulated entities and federal, state and local officials. The uncertainties and confusion and contradictory practices and chaos, to use Justice Scalia's term, will simply be too pervasive and too inevitable to fulfill the purposes of a uniform system of national laws with legally required roles for regulators and judges.

It is revealing to examine the reasons offered by co-sponsors of the "Separation of Powers Restoration Act" to show the bill's true motivations. Congressional supporters have justified the

bill by denouncing Clean Water Act protections,[12] energy efficiency regulations and the Affordable Care Act,[13] among other safeguards. As with the regulatory "reforms" discussed above, it is not the regulatory process itself that some proponents of H.R. 4768 challenge, but rather the substantive outcomes of certain rulemakings that do not turn out the way that some members prefer, under statutes that those members are unsuccessfully trying to weaken. Members have promoted H.R. 4768 by condemning a "runaway administrative state" that is "mushrooming out of control."[14] It is clear that support for the bill is motivated as much by regulatory animus as it is by the tug-of-war over separations of powers between the branches.

Tellingly, some of the very regulations that H.R. 4768 co-sponsors invoke as justification for the legislation have been upheld by courts, including the Supreme Court. It is not that agencies are breaking the law that so infuriates; it is that courts are concluding agencies are not. Equally revealing, *Congress* has not disapproved these contested regulations using the Congressional Review Act or other legislation. Nor has Congress mustered the votes to amend the underlying federal statutes that produced regulations that some members find objectionable. This is consistent with the pattern of over 500 votes in the 112th and 113th Congress attacking health and environmental safeguards that did not become law, followed by the continuing wave of so-called "reform" legislation targeting the executive branch, law enforcement, the infrastructure of administrative law and now judicial review.

II. Corporate Opposition to Reasonable Regulations

Corporations and their lobbyists have joined the attacks on regulations, administrative law, the ability of citizens to hold government accountable for lawbreaking and now judicial review of reasonable agency interpretations enforcing federal laws. The U.S. Chamber of Commerce, for example, has written a letter supporting the "Separation of Powers Restoration Act of 2016."[15] The Chamber's letter fundamentally mischaracterizes the legislation, however, writing that "[l]imiting the degree of deference that courts grant to agencies would restrain those agencies from writing regulations that exceed their legal authority." This is wrong. Courts today already reject agency regulations that exceed their legal authority under the longstanding *Chevron*

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[12] See *supra*, fn. 8.

[13] Press Release, "Rep. Ratcliffe Introduces Bill to Rein In Power of Unelected Bureaucrats," March 17, 2016, *available at* https://ratcliffe.house.gov/media-center/press-releases/rep-ratcliffe-introduces-bill-rein-power-federal-bureaucrats.

[14] Press Release, "Senate, House Leaders Introduce Bill To Restore Regulatory Accountability Through Judicial Review," March 17, 2016, *available at* http://www.hatch.senate.gov/public/index.cfm/2016/3/release-senate-house-leaders-introduce-bill-to-restore-regulatory-accountability-through-judicial-review.

[15] Letter from R. Bruce Josten, U.S. Chamber of Commerce, to U.S. Congress, March 18, 2016 *available at* https://www.uschamber.com/sites/default/files/documents/files/3.18.16-_hill_letter_to_congress_supporting_h.r._4768_and_s._2724_the_separation_of_powers_restoration_act.pdf.

framework, if those regulations contravene the plain language of the statute, or if the agency action is arbitrary or capricious or impermissible where the statute is silent or ambiguous with respect to the specific issue.

What the Chamber letter supports, and H.R. 4768 produces, is judges empowered henceforth to void safeguards rooted in *reasonable* statutory interpretations that would be found *not to exceed* the agency's legal authority under the *Chevron* doctrine. Judicial review tests in place both before and after H.R. 4768 became law still would find unreasonable agency interpretations to be unlawful; only the "Separation of Powers Restoration Act" would empower judges to find *reasonable* agency interpretations unlawful in favor of merely different reasonable interpretations or outcomes preferred by judges.

Accordingly, it is evident that the Chamber letter and other corporate lobbyists' support for the legislation reflect a greater preference for reduced and halted safeguards than for regulatory certainty. (Not surprisingly, these corporate lobbyists also support the extreme REINS Act and other deregulatory bills discussed earlier.)

It is important to examine briefly the far greater regulatory uncertainty that the "Separation of Powers Restoration Act" and REINS Act would produce. As Professor Pierce put it at this Subcommittee's March 15th hearing, "the *Chevron* test reduces geographic differences in the meaning given to national statutes by reducing the number of splits among the circuits that were produced by circuit court applications of [less deferential judicial review tests]."[16] Similarly, within the same circuit exercising exclusive jurisdiction under a particular federal statute, greater significance will attach to the make-up of the panel selected to review a given regulation, in contrast to today's *Chevron* regime.

As a result, some corporate lobbyists' preference for regulatory laxity over regulatory certainty is shortsighted. Businesses operating in different parts of the country, including Chamber members, would be subject to different interpretations of national regulatory statutes depending upon whether the state and circuit in which that business operated had given a different reasonable interpretation to a statute versus other circuits. Litigation would multiply, judicial forum shopping would increase, and divergent regulatory outcomes of previously uniform national statutes would become the norm.

Finally, it is worth mentioning the impact that H.R. 4768 would have on *deregulatory* rules by federal agencies, including deregulation that NRDC might strenuously oppose. The judicial deference doctrines under *Chevron* and its progeny apply equally to regulation and deregulation. If an administration more ideologically opposed to regulation wishes to take advantage of the

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[16] U.S. Cong., House Committee of the Judiciary, Subcommittee on Regulatory Reform, Commercial, and Antitrust Law, Hearing on *The Chevron Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies*, March 15, 2016, 114th Cong. (2016), Statement of Professor Richard J. Pierce, Jr., at 6 (hereinafter "Pierce Testimony").

inevitable vagueness, conflicts and gaps in federal statutes, it may adopt the least protective regulation permissible under a federal law. An agency may even repeal more protective existing regulations, so long as (1) the agency's action is based on a permissible construction of the statute, and (2) the agency adequately explains its interpretive reversal under the 1983 Supreme Court decision in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*[17] H.R. 4768 interferes with the ability of agencies to adopt such deregulatory rules that would be considered reasonable under today's *Chevron* test, if a future judge or set of judges overturns the deregulation under the judges' differently reasonable interpretation.

NRDC has lost its fair share of lawsuits challenging federal agency rules that were deregulatory or that failed to fulfill statutory promises to protect public health and the environmental, when judges decided that the challenged agency interpretations were permissible under the *Chevron* test. By jettisoning *Chevron* deference, H.R. 4768 also would incentivize more frequent and more wide-ranging lawsuits challenging deregulatory actions by agencies under administrations committed to that agenda. It is true that starkly deregulatory rulemakings in prior administrations have foundered more often at the first step of *Chevron*, by contravening the plain language of statutes.[18] That would continue to be the case were H.R. 4768 to become law. One suspects, therefore, that political and corporate opponents of regulation and proponents of deregulation have made a calculation that H.R. 4768 would have disproportionate adverse impacts on regulations protecting the public. That is almost certainly true, and it is the central reason why this irresponsible legislation has no business becoming law.

III. Federal Agencies and Judicial Review Doctrines

Well-established judicial review doctrines headlined by *Chevron v. Natural Resources Defense Council* establish that reviewing courts defer to a federal agency's interpretation of a federal statute that is silent or ambiguous with respect to a particular issue, if that statutory construction is permissible or reasonable. Professor Richard J. Pierce, Jr. outlined these judicial review doctrines in his March 16 testimony before this Subcommittee.[19] In short, for present purposes, the *Chevron* doctrine states:

> First, always is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter. If, however, the court determines Congress has not directly addressed the precise question at issue, the

[17] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42, 103 S. Ct. 2856, 2866, 77 L. Ed. 2d 443 (1983).

[18] See, *e.g.*, John Walke, Setting the Record Straight on the Obama EPA's Clean Air Act Track record in Court (Feb.2013), https://www.nrdc.org/experts/john-walke/setting-record-straight-obama-epas-clean-air-act-track-record-court (discussing Bush administration EPA deregulatory rules under the Clean Air Act overturned for violating plain language of the law).

[19] See *supra*, fn. 16, Pierce Testimony.

> court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question is whether the agency's answer is based on a permissible construction of the statute.

Pierce Testimony at 5, quoting *Chevron v. Natural Resources Defense Council,* 467 U.S. 837, 843 (1984). Professor Pierce correctly noted that by designing the doctrine thusly, the Supreme Court deferred to the relevant administrative agency on "issues of policy that should be resolved by the politically accountable Executive Branch rather than the politically unaccountable Judicial Branch when Congress has declined to resolve the issue."[20] Further, Professor Pierce notes that "[t]he *Auer* doctrine is similar in its effects to the *Chevron* doctrine but it applies not to agency interpretations of agency-administered statutes but to agency interpretations of agency rules."[21] Neither doctrine approaches the radical framework that *de novo* review would impose upon judicial review of agency regulations. As Professor Emily Hammond noted in her March 16 testimony before this Subcommittee, "[e]ven prior to the enactment of the Administrative Procedure Act (APA), courts afforded at least some deference to agencies' legal interpretations in many circumstances."[22]

Federal agencies today exercise their subject-matter expertise and understanding in promulgating regulations, utilizing the appropriate subject matter experts for a rulemaking—scientists, doctors, economists, engineers and other technical experts who supply valuable input into the regulatory process. Further, these administrative rulemakings can involve lengthy public processes, large administrative records with hundreds or thousands of technical documents and comments, including input from many stakeholders. Through these sometimes lengthy and highly technical processes, agencies finalize complex rulemakings over fairly long time horizons. Saddling the judicial branch with such time-intensive, complex, and technical reviews of each challenged rulemaking would grind the judicial branch to a halt. The judicial system is already extremely resource-constrained, and H.R. 4768 would compound those problems immeasurably.

Professor Emily Hammond notes in greater depth the implications of a *de novo* review regime, as proposed in H.R. 4768. In particular, she notes that "there are [] important separation-of-powers principles at work relevant to the legislative branch. First, courts defer to agencies because Congress has assigned to them—not to the courts—the duties associated with our major statutory schemes."[23] Further, "Congress can craft substantive statutory language more tightly if it wants to cabin an agency's discretion in carrying out its mandate." *Id.* In contrast to *de novo* review,

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[20] *Id.*, at 6.
[21] *Id.*, at 8.
[22] U.S. Cong., House Committee of the Judiciary, Subcommittee on Regulatory Reform, Commercial, and Antitrust Law, Hearing on *The Chevron Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies,* March 15, 2016, 114th Cong. (2016), Statement of Professor Emily Hammond, at 2 (hereinafter "Hammond Testimony").
[23] *Id.*, Hammond Testimony, at 2.

"*Chevron* is an exercise in judicial self-restraint: by deferring to agencies' reasonable constructions rather than substituting their own judgment, the unelected courts avoid inserting their own policy preferences into administrative law." *Id.*

It is well-documented that the federal judiciary is overburdened handling current litigation dockets. Chief Justice John Roberts, in his annual report on the state of the federal judiciary, notes that federal judges are "faced with crushing dockets."[24] Further, the Chief Justice notes that overburdened court dockets are threatening the public's interest in speedy, fair, and efficient justice.[25] The American Bar Association affirms that the federal judiciary is overtaxed, and that this problem is compounded by increasing numbers of vacancies on the federal bench. Specifically,

> persistently high numbers of judicial vacancies deprive the nation of a federal court system that is equipped to serve the people. This has real consequences for the financial well–being of businesses and the personal lives of litigants whose cases may only be heard by the federal courts–e.g. cases involving challenges to the constitutionality of a law, unfair business practices under federal antitrust laws, patent infringement, police brutality, employment discrimination, and bankruptcy.[26]

Currently, there are over 87 judicial vacancies on the federal bench.[27] The ABA notes that these twin pressures of increased vacancies and overtaxed dockets, if left unchecked, "inevitably will alter the delivery and quality of justice and erode public confidence in our federal judicial system."[28]

The *de novo* review standard advanced in today's draft legislation would add further pressure to this plight by greatly incentivizing judicial forum shopping. Where *Chevron* has "increased geographic uniformity in interpretation of national statutes," today's legislation would have the opposite effect.[29] Regulated entities and other constituents dissatisfied with a national rulemaking or the outcome of a challenge to the same, could try their luck in numerous jurisdictions, with different plaintiffs.[30] Uneven application of national laws would adversely impact the certainty with which businesses could operate across the country, and would bias

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[24] U.S. Supreme Court, Chief Justice's Year-End Report on the Federal Judiciary, at 10, *available at* http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf.
[25] *Id.*, at 11.
[26] American Bar Association, *Judicial Vacancies, available at* http://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_judiciary/judicial_vacancies.html.
[27] U.S. Federal Courts, *Judicial Vacancies* (last updated May 13, 2016) *available at* http://www.uscourts.gov/judges-judgeships/judicial-vacancies.
[28] *See supra,* fn. 25.
[29] *See* Pierce Testimony, *supra* fn. 16, at 6.
[30] *Id.*

outcomes and justice in favor of those possessing the resources to challenge a federal agency decision in multiple circuits.

For all these reasons, I urge members of the Subcommittee to oppose this legislation.

Mr. MARINO. Thank you. Professor Levin?

TESTIMONY OF RONALD M. LEVIN, WILLIAM R. ORTHWEIN DISTINGUISHED PROFESSOR OF LAW, WASHINGTON UNIVERSITY IN ST. LOUIS

Mr. LEVIN. Chairman Marino, Ranking Member Johnson, and Members of the Subcommittee, thank you for the privilege of testifying at this hearing. My basic message today is to urge the Subcommittee to be cautious about trying to legislate on the challenging and subtle topic of the manner in which courts should review agency interpretations of statutes and rules. There has never been consensus about how to analyze these issues, either before or after the *Chevron* decision.

For generations, courts have recognized that agencies have some inherent advantages in interpreting their enabling legislation. For example, agencies are more familiar with the complexities in the field than a generalist court can be; they have the responsibility to make the entire system work; and they are accountable to the political process in a way that life-tenured judges are not. At the same time, courts have always balanced their deference with a commitment to uphold the law if the agency's interpretation is untenable or unreasonable.

Now, *Chevron* changed the way in which courts speak about these problems, but it did not change the state of affairs very much. The presumption that ambiguity constitutes a delegation sounds odd, but we should never forget that it does not exist in isolation. Courts have always found plenty of ways to work within and around the two-step formula in order to exert control over agencies, and the net results are not very different from what you see in other contexts in which other verbal formulas are used.

But still, courts and lawyers and judges have been struggling with the complexities of this problem continuously since well before the APA was adopted, and you are asking for trouble if you assume that Congress can clear up these problems by adding a handful of words to Section 706. Now, one of the issues on the table today illustrates how difficult this is. Should the amendment add only the words "de novo" to the APA, or should it also codify the *Sidmore* test?

Well, if you do the former, you throw out two centuries of tradition in which courts have found agency interpretations important to their decision-making. That is what most people would understand the words "de novo" to imply. On the other hand, if you do the latter, you accomplish very little, because the *Chevron* and *Skidmore* tests tend to lead to about the same results, no matter what the wording of those tests seems to say, and you also will send mixed messages that would cause a great deal of confusion.

You know, until I read Professor Beermann's testimony, I thought everybody in administrative law agreed that the law of deference was disorderly and inconsistent prior to *Chevron*, during the *Sidmore* era. So I seriously doubt that trying to revive that regime by adding a few vague and conclusory phrases to Section 706 would clear things up, and these days you cannot use legislative history to cure these ambiguities.

Well, where does this ill-conceived initiative to amend Section 706 come from? Partly it comes from a desire to shrink government, but expanding judicial power to overturn agency actions is a poor way to accomplish this, because in the long run, liberal judges can use that power to overturn conservative actions just as easily as the other way around.

The initiative also stems from a belief that this amendment would recapture the original meaning of the APA, and I find that notion remarkable. For 70 years, administrative lawyers have taken it for granted that Section 706 allows courts to make their own judgments of how to decide questions of law, with or without deference. So it is startling to hear claims that all these lawyers, over three generations, have been wrong about that point in hundreds of thousands of cases.

And ironically, as every member of this panel knows, Section 706 has been dramatically reinterpreted in multiple ways over the years to serve the changing needs of the administrative law system. Those changes range from the Hard-Look doctrine to the rulemaking record principle. So the sudden absorption with original intent seems quite baffling to me.

Finally, this initiative grows out of the imaginative theory that deference to agency interpretations of their own regulations, so-called *Auer* deference, poses special dangers because it gives agencies too much incentive to write regulations vaguely. And yet, there is no evidence at all that agencies actually do act on that incentive. You know, people sometimes criticize Congress for relying too heavily on anecdotes, but nobody can say that here, because the critics of *Auer* deference have not even got an anecdote that supposedly supports their theory about its impact. Yet, on the basis of this completely speculative theory, they want to throw out a doctrine that courts have found helpful for at least three generations or more. To me, that attack on *Auer* is not credible.

In conclusion, Mr. Chairman, the courts are actively engaged in trying to answering challenging questions about the right way to reconcile the advantages of deference with the need for judicial controls. They should be allowed to continue that process on their own and the legislature should stay out of it. That concludes my remarks, and I will be happy to answer any questions.

[The prepared statement of Mr. Levin follows:]

Testimony of Ronald M. Levin
William R. Orthwein Distinguished Professor of Law
Washington University in St. Louis

Before the
United States House of Representatives
Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Hearing on H.R. 4768, the "Separation of Powers Restoration Act of 2016"

May 17, 2016

SUMMARY

The Separation of Powers Restoration Act would prescribe "de novo" judicial review of agencies' interpretations of statutes and rules. Thus, it would seek to eliminate judicial deference with respect to those questions. Yet such deference has been recognized for many generations as serving legitimate purposes, such as taking account of agencies' familiarity with their fields of regulation and need for flexibility in administering them. An attempt to prohibit it would be unwise.

The sponsors of SOPRA take explicit aim at the *Chevron* standard for reviewing agencies' statutory interpretations, but in fact the bill would also forbid the more longstanding *Skidmore* approach. Yet I cannot foresee the sponsors revising the bill to eliminate *Chevron* and codify *Skidmore*, because such a bill would have too limited an impact to fulfill the sponsors' declared goals. Moreover, it could aggravate, not ameliorate, concerns about unpredictable results in appellate practice.

Even if I could agree with the sponsors that the broad authority now exercised by federal agencies is so excessive as to constitute a separation of powers problem, amendment of the scope of review standards in the Administrative Procedure Act would be an inapt cure. Over time, control of the executive branch will shift back and forth between two parties, so an amendment to permanent legislation like the Act would sometimes benefit each party's interests and sometimes harm them.

Finally, so-called *Auer* deference, governing judicial review of agencies' interpretations of their own regulations, should be preserved for essentially the same reasons as apply to the other forms of deference just discussed. I disagree with the late Justice Scalia's theory that a combination of regulation-writing and regulation-interpreting authority in agencies' hands creates a separation of powers problem. That commonplace state of affairs is very different from traditionally recognized separation of powers problems and should not be condemned without a strong policy rationale. Justice Scalia argued that such a rationale can be found in the supposed incentive that *Auer* creates to write regulations vaguely. The theory is unconvincing, however, because of the complete lack of evidence that the supposed incentive has any impact.

Testimony of Ronald M. Levin
William R. Orthwein Distinguished Professor of Law
Washington University in St. Louis

Before the
United States House of Representatives
Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Hearing on H.R. 4768, the "Separation of Powers Restoration Act of 2016"

May 17, 2016

Chairman Marino, Ranking Member Johnson, and members of the subcommittee, thank you for the opportunity to appear today. It is a privilege to be able to participate in this hearing on H.R. 4768, known as the Separation of Powers Restoration Act of 2016 (SOPRA).

SOPRA would insert the words "de novo" into the introductory language of the scope of review provision of the Administrative Procedure Act (APA), 5 U.S.C. § 706, so that it would provide that a reviewing court shall decide "de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions and rules." The bill is the product of a coalition of Senate and House conservatives called the Article I Project (A1P). According to policy briefs and press releases issued by members of A1P, the purpose of SOPRA is to eliminate judicial deference on issues of law.[1]

By its terms, the amendment would apply to the interpretation of constitutional provisions, statutory provisions, and rules. In this statement I will first discuss the implications of the bill for review of statutory questions, and then turn to its implications for review of questions relating to the interpretation of rules. (The bill's application to constitutional questions is not significant, because judicial review of agencies' rulings on those questions is already nondeferential.[2]) I have relied on your subcommittee's May 11, 2016, background memo in deciding what topics to emphasize.

SOPRA bears a marked resemblance to the so-called Bumpers Amendment, a proposal that received extended consideration from the House and Senate between 1975 and 1982.[3] It too would (at least as originally drafted) have inserted the words "de novo" into the introductory clause of § 706. Ultimately, the bill was never enacted, and some of the same factors that led to its demise retain their force as arguments against the current bill. I served as the consultant for

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[1] See, e.g., *Senate, House Leaders Introduce Bill To Restore Regulatory Accountability Through Judicial Review*, Mar. 17, 2016, http://www.lee.senate.gov/public/index.cfm/2016/3/senate-house-leaders-introduce-bill-to-restore-regulatory-accountability-through-judicial-review; Policy Brief, *Reforming Executive Discretion, Part I: The End of* Chevron *Deference* (Article I Project, Mar. 17, 2016), http://www.lee.senate.gov/public/index.cfm/2016/3/remarks-on-separation-of-powers-restoration-act-ending-chevron-deference; *Marino joins Goodlatte and Ratcliffe to Introduce Legislation to Rein in Runaway Administrative State*, Mar. 17, 2016, https://marino.house.gov/media-center/press-releases/marino-joins-goodlatte-and-ratcliffe-introduce-legislation-rein-runaway.

[2] Ronald M. Levin, *Administrative Procedure and Judicial Restraint*, 129 HARV. L. REV. F. 338, 342 (2016).

[3] S. 2408, 94th Cong. (1975).

the Administrative Conference of the United States (ACUS) during its consideration of the amendment, and I will draw upon some of the lessons of that controversy in my testimony.

I. JUDICIAL REVIEW OF AGENCY INTERPRETATIONS OF STATUTES

A. Doctrinal Background

In modern judicial review of agency statutory interpretations, two standards of review are most prominent. One is the formula found in the 1984 case of *Chevron U.S.A. Inc. v. NRDC*,[4] which sets forth a two-step inquiry: a reviewing court should ask "whether Congress has directly spoken to the precise question at issue" and "whether the agency's answer is based on a permissible construction of the statute."[5] In simpler terms, this means that the agency interpretation should prevail if the statute is ambiguous in relation to the issue presented, and the agency's interpretation is reasonable. The other prominent approach in the area was most famously expressed by Justice Robert Jackson in his 1944 opinion in *Skidmore v. Swift & Co.*[6]:

> We consider that the rulings, interpretations and opinions of the [Fair Labor Standards Act] Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[7]

As a rough generalization, *Chevron* review is normally used during judicial review of interpretations rendered in formal adjudications and notice-and-comment rulemaking,[8] and *Skidmore* review applies to judicial review of interpretations announced in opinion letters, policy statements, agency manuals, and enforcement guidelines.[9] I will not dwell at any length on questions as to how to sort out that distinction, because, as I will discuss, indications are that SOPRA seeks to abolish both standards of review. Thus, although the subcommittee's memo and other A1P pronouncements put more emphasis on *Chevron*, both must be analyzed here.

1. Deference and its purposes

The type of review exemplified by *Skidmore* developed first. It has a long lineage in the American legal tradition, traceable back to the days of Chief Justice John Marshall (notwithstanding suggestions that deference on issues of law is incompatible with *Marbury v.*

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[4] 467 U.S. 837 (1984).

[5] *Id.* at 842-43.

[6] 323 U.S. 134 (1944).

[7] *Id.* at 139-40.

[8] United States v. Mead Corp., 533 U.S. 218 (2001).

[9] Christensen v. Harris County, 529 U.S. 576 (2000).

Madison[10]). In a customs case decided six years after *Marbury*, he remarked that "[i]f the question had been doubtful, the court would have respected the uniform construction which it is understood has been given by the treasury department of the United States upon similar questions."[11] In subsequent decades, numerous cases affirmed the idea that courts should give weight to administrative constructions of statutes they administer. In my report to ACUS on the Bumpers Amendment, I compiled many examples and summarized them in these terms:

> [T]he courts' practice of giving weight to agency constructions [is] a complex phenomenon on which there has been extensive judicial commentary. The primary justification for this approach is that agencies tend to be familiar with, and sophisticated about, statutes that they are charged with administering. The expertise is assumed to result not only from the frequency of an agency's contacts with the statute, but also from its immersion in day-to-day administrative operations that reveal the practical consequences of one statutory interpretation as opposed to another. Hence the courts approach agency interpretations with a measure of respect that is distinct from, though not wholly divorced from, their assessment of the inherent persuasiveness of the agencies' arguments.[12]

All of this analysis predated the *Chevron* decision, which did alter the landscape, although not nearly to the extent that the A1P sponsors appear to believe. *Chevron* deference rests in part on respect for congressional delegation. It recognizes that Congress often decides to entrust policymaking authority in certain areas; when it does so, and the agency acts within the scope of that delegation as the court understands it, a court is obliged to honor the legislature's expectations by upholding a rational exercise of that authority, even where the agency reaches a conclusion that the reviewing court would not have reached. In other words, in this context "[j]udicial deference to agency 'interpretation' of law is simply one way of recognizing a delegation of law-making authority to an agency."[13] That aspect of the test is straightforward.

The more controversial aspect of the test is its presumption that an ambiguity in an authorizing statute should be taken as an indication that Congress intended to delegate the matter. This presumption has elicited much criticism from commentators who point out that, although it will often correspond to reality, it often does not. Virtually all jurists and commentators agree, however, that this presumption is a legal fiction and is not intended as a descriptively accurate model of congressional expectations.[14] Rather, it is a judicially created principle of statutory interpretation, analogous to other canons of statutory construction.[15] The

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[10] 5 U.S. (1 Cranch) 137 (1803).

[11] United States v. Vowell, 9 U.S. (5 Cranch) 368, 372 (1809); *see also* Edwards' Lessee v. Darby, 25 U.S. 206, 210 (1827) ("In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law and were appointed to carry its provisions into effect is entitled to very great respect.").

[12] Ronald M. Levin, Judicial Review and the Bumpers Amendment, 1979 A.C.U.S. 565, 576, *available at* https://www.acus.gov/publication/judicial-review-and-bumpers-amendment (hereinafter *Bumpers Report*).

[13] Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 26 (1983); *see* Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 20-22 (1985).

[14] Michael Herz, Chevron *is Dead; Long Live* Chevron, 115 COLUM. L. REV. 1867, 1875-76 (2015).

[15] Many such canons, inside and outside the field of administrative law, rest on judicial beliefs about the needs of a sound legal order, rather than suppositions about the most probable intent of the legislature. Familiar examples

Court created it (and has subsequently, at various times, expanded or contracted it) to serve purposes that it considers important for our legal system. It can only be understood and evaluated, therefore, in light of the policies on which it apparently rests.

What are these policies? They correspond roughly to the factors that courts deemed important prior to *Chevron*, as summarized above. The opinion itself and the post-*Chevron* commentary have particularly emphasized a few: Agencies tend to have expertise and experience in their respective fields of specialization and are politically accountable in ways that courts are not.[16] In the well-known words of Justice Stevens in *Chevron*:

> Judges … are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices. … In such a case, federal judges -- who have no constituency -- have a duty to respect legitimate policy choices made by those who do.[17]

More generally, *Chevron* creates space for agencies to work out problems that arise in the court of administering their programs. It also promotes predictability, because citizens can put some confidence in the expectation that decisions by a centralized agency will not be readily overturned by a variety of courts in different parts of the country.[18]

2. Limitations on deference

All of this discussion sounds onesided. I should emphasize, however, that both *Skidmore* and *Chevron*, as implemented, leave considerable room for judicial creativity and assertive control. I made this point about the *Skidmore* line of cases in my ACUS report on the Bumpers Amendment:

> [T]he courts have proceeded over the years to develop criteria indicating where deference to an agency's construction of its governing statute is desirable and where it is not. Indeed, the principle of deference is not so much a "presumption" as a collection of rules of statutory construction, any of which may be applicable depending upon the circumstances of the particular case. In this fashion, the case law has yielded a set of considerations designed to assure that no agency interpretation receives more deference than it deserves.[19]

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include the "rule of lenity," constitutional avoidance, the presumption against retroactivity, and the presumption in favor of the availability of judicial review of agency action.

[16] *Chevron*, 467 U.S. at 865-66.

[17] *Id.*

[18] *See* Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987).

[19] *Bumpers Report, supra*, at 577.

I listed some of the most commonly recognized criteria and concluded:

> In summary, no matter how they may preface their opinions with praise for administrative wisdom, the courts in practice have carefully avoided treating administrative constructions of statutes as conclusive. The agency's views "are only one input in the interpretational equation," to be considered along with a number of other factors customarily used to determine Congress's intention.[20]

To this day, the general understanding is that *Skidmore* review is compatible with judicial independence, correctly understood: "'*Skidmore* weight' addresses the possibility that an agency's view on a given statutory question may in itself warrant respect by judges who themselves have ultimate interpretive authority."[21]

In a similar though less obvious fashion, the manner in which courts apply the two step *Chevron* test is a far cry from a policy of indiscriminate deference. The opinion itself states that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, applying traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."[22]

I would agree with critics who say that the opinion also contains more troubling language, but the underlying reality is that courts exercise significant control over agencies as they apply both of the two *Chevron* steps. Judicial opinions declaring that a statute "directly addresses the precise question at issue" (and thus is not ambiguous) are commonplace – sometimes when it does not seem at all obvious to external observers that the statute was actually unambiguous.[23] Moreover, the second *Chevron* step -- whether the agency's decision was reasonable – is often treated as an inquiry into whether it was *reasoned*.[24] This revised inquiry leads to an overlap with the hard look doctrine;[25] as such, it can lead to reversal even where the court is not prepared to claim the statute is clear. In addition, the developing "step zero" body of case law identifies circumstances in which the *Chevron* framework should not be applied in the first place. As I mentioned, informal actions such as agency guidance and opinion letters are in this category. So are certain "extraordinary" cases that raise a question of deep "economic and political significance," at least if *King v. Burwell*[26] is to be believed.

In short, the overall picture is that the courts do not treat *Chevron* as fixed or absolute; the circumstances in which judges may identify a basis for overriding deference are manifold. In

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[20] *Id.* at 579.

[21] Peter L. Strauss, *Deference is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 COLUM. L. REV. 1143, 1145 (2012).

[22] 467 U.S. at 843 n.9.

[23] *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000); MCI Telecomms. Corp. v. AT&T, 512 U.S. 218 (1994).

[24] ABA Sec. of Admin. L. & Reg. Prac., A Blackletter Statement of Federal Administrative Law 34-35 (2d ed. 2013).

[25] *See, e.g.*, Judulang v. Holder, 132 S. Ct. 476, 4484 n.7 (2011); Verizon Commc'ns, Inc. v. FCC, 535 U.S. 467, 527 n.27 (2002); Shays v. FEC, 414 F.3d 76, 96–97 (D.C. Cir. 2005).

[26] 135 S. Ct. 2480, 2489 (2015).

other words, if one chooses to criticize the presumption that an ambiguity means that Congress intends a delegation, one should at least not overlook the demonstrable reality that the presumption can be overcome in a wide variety of situations. Thus, as the subcommittee undertakes to appraise the merits of SOPRA, it should not exaggerate or overstate the force of either *Skidmore* or *Chevron*. Deference gives agencies something of an edge, for a variety of reasons, many of which have been well recognized for generations; but it is not a blank check.

B. Problems with Abolishing Judicial Deference to Agency Interpretations of Statutes

Against this background, SOPRA strikes me as deeply problematic. It would sweep away two hundred years of judicial doctrine regarding the value of agency interpretations. It is radical, not conservative. The Administrative Conference's objection to the Bumpers Amendment still rings true:

> ... The Conference does not believe that in the resolution of [statutory interpretation] questions the legal position taken by the administering agency is *automatically* entitled to special weight, but the Conference does believe that special weight may be justified by the circumstances surrounding the agency's adoption of or adherence to such position. These circumstances may include the fact that the agency interpretation was "a contemporaneous construction of the statute by [those] charged with the responsibility of setting its mechanism in motion," *Norwegian Nitrogen Products Co. v. United States,* 288 U.S. 294, 315 (1933); or that the agency interpretation has been asserted consistently, that it has received Congressional approval or acquiescence, that affected interests have relied on it, and that the interpretation is a direct outgrowth of the agency's experience in implementing the statute, *see Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The Conference does not favor legislation that would require courts to disregard such circumstances in reviewing the actions of agencies for conformity with the statutes they administer.[27]

Post-*Chevron*, this critique would have to be framed in different terms, but the basic message would be about the same. The *Chevron* two-step test makes a tempting target, because its presumption about legislative intent is generally acknowledged to be a fiction, and the *Chevron* test *appears* to be inconsistent with judicial independence in statutory interpretation matters. But its awkward language should not be evaluated out of context. Fundamentally, the *Chevron* presumption resembles the canons of interpretation that underlie the *Skidmore* mode of analysis. Although they may not clearly acknowledge the extent to which they are influenced by judgments about the reliability of the agency's interpretation, courts do continue to exert significant control over dubious administrative actions through flexible applications of the two-step formula and the "step zero" exceptions, as I discussed above.

Regardless, critiques of the *Chevron* formula as awkwardly framed are really beside the point, because the SOPRA "de novo" requirement is drafted broadly enough to sweep aside not

[27] ACUS Recommendation 81-2, *Current Versions of the Bumpers Amendment*, 46 Fed. Reg. 62,806 (December 29, 1981); see also ACUS Recommendation No. 79-6, *Elimination of the Presumption of Validity of Agency Rules and Regulations in Judicial Review, as Exemplified by the Bumpers Amendment*, 45 Fed. Reg. 2308 (January 11, 1980) ("An across-the-board judgment that judicial deference to agency expertise or to an agency's interpretation of its statutory mandate is never warranted, would be unwise, and Congress should not enact legislation precluding such deference.").

only the specific *Chevron* test, but also the *Skidmore* brand of deference that many critics of the *Chevron* test would put in its place. In other words, as I interpret the bill, it would forbid not only deference that treats legal interpretations as binding unless (supposedly) restrictive conditions are met, but also a deference regime that treats the courts as primary interpreters but nevertheless gives weight in selected circumstances to the agency's position. Framing this bill as an attack on *Chevron* alone is misleading.

Professors Duffy and Beermann, in their testimony to your subcommittee in March, envisioned the possibility of a bill that would add "de novo" to § 706 but would *also* require or permit reviewing courts to rely on deference factors in resolving appeals from agency action. However, regardless of whether this combination of features would provide a harmonious combination of principles (as they probably would maintain) or a confusing bundle of mixed messages (as I suspect), it seems clear that SOPRA is not intended to be such a bill. Its prescription of "de novo" review stands alone; and, according to general understanding, the concept of "de novo" review "refers to an approach to judicial review in which the court does not confer any deference on the agency; the court resolves the issue before it as if the agency had never addressed the issue."[28] More importantly, the press releases, web pages, and statements of its sponsors, the AIP, contain – so far as I have been able to discover – not a hint of interest in preserving any kind of deference. Their condemnations of deference are firm and categorical.[29]

The subcommittee's memo does invite comment on the possibility of incorporating *Skidmore* standards into the bill, and I will comment on that option below. On the basis of present information, however, I am constrained to believe that the purpose of SOPRA is to abolish all deference to agencies on statutory interpretation questions. And that is what makes it, in my judgment, a very unsound legislative proposal. Members of Congress should think long and hard before continuing with this quest to overthrow the present system. It would jettison tradition, not "restore" it.

C. Responses to Separation of Powers Objections to Deference

As the title of SOPRA suggests, the sponsors of the bill promote it as a cure for various derangements in our nation's system of separation of powers. There is more than a little ambiguity about the sense or senses in which they believe this would be true. I believe this position is primarily a *policy* argument that the distribution of powers among the branches has gotten out of balance and that SOPRA would bring about a better balance.

Before I respond directly to that thesis, however, I will address the memo's assertion that *Chevron* is unlawful because the APA "states unequivocally" that the reviewing court shall decide all relevant questions of law. If this really were true, one would have to wonder how the proponents of the legislation could think that SOPRA could accomplish anything. A statute that

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[28] Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 83 (2011). *See also* 5 U.S.C. § 706(2)(F) (2012) (clause of the APA providing for de novo trial of the *facts*).

[29] See *The End of* Chevron *Deference*, *supra* ("[The bill] would require courts to review challenges to agency interpretations of statutes or regulations 'de novo' – that is, starting fresh from the text of the law or regulation itself, rather than preemptively deferring to the agency's lawyers. ... [F]ederal judges will be able to begin fresh and weigh agency rules and decisions against the text of the law or the regulation itself – not an arbitrary and extra-constitutional standard of deference.")

is already unequivocal cannot need clarification. However, I do not believe that § 706 is actually as unambiguous as has been claimed. On its face, it merely says that a court shall "decide" questions of law. It says nothing about what kinds of interpretive principles the court may use in reaching its decision.[30]

Moreover, if one is going to look to historical sources, I believe the better reading of § 706 would be the one stated in the well-respected *Attorney General's Manual on the APA*: the section "restates the present law as to the scope of judicial review."[31] The background law at the time of the APA's enactment included precedents such as *NLRB v. Hearst Publications, Inc.*,[32] which had said that a reviewing court's role should be "limited" when it reviews an agency's "specific application of a broad statutory term," and *Bowles v. Seminole Rock & Sand Co.*,[33] the direct antecedent of what is now called *Auer* deference. If the drafters of the APA had intended to disapprove these contemporaneous precedents (decided in 1944 and 1945, respectively), they presumably would have found a more conspicuous method of doing so than relying on the vague introductory clause of § 706 – a clause that actually seems to have elicited relatively little attention in the legislative history.

More fundamentally, this focus on the alleged original meaning of § 706 strikes me as misdirected. In order to keep up with the evolving needs of the administrative law system, this section of the APA has repeatedly been construed in ways that are dramatically at odds with the expectations of its authors. The original meaning of the "arbitrary and capricious" clause, § 706(2)(A), was that it was equivalent to the extremely deferential test by which the constitutionality of economic legislation is determined, but it has blossomed into the modern "hard look" doctrine. The authors of the Act never expected that the reference to a "record" in the last sentence of § 706 would be construed to require judicial review on an "administrative record" in informal proceedings such as notice-and-comment rulemaking, but now that requirement is firmly established. Correspondingly, the language in § 706(2)(F), providing for "trial de novo" by the reviewing court, was originally expected to be used broadly, but in modern times it has been virtually construed out of existence. Nobody denies that these changes were departures from the original scheme, yet there is no discernible movement to reverse them. Thus, the modern understanding of § 706 is that, while it did recognize the law as it stood in the 1940s, it does not foreclose case law development over time.

As I said above, I gather that when the A1P members seek to "restore separation of powers" with this bill, they primarily mean to express a policy judgment that the executive branch has acquired too much power in recent years. Many people, including myself, would disagree with this premise. A government for a complex society of three hundred million

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[30] Even less convincing is the suggestion (offered by Professor Duffy in his testimony in March) that § 558(b) of the APA mandates nondeferential judicial review of agency actions. That subsection merely provides that "[a] sanction may not be imposed or a rule or order issued except within jurisdiction delegated to the agency and as authorized by law." It is silent about the standard of review by which a court should determine the scope of the agency's jurisdiction or authority. Indeed, the provision is addressed to agencies, not to courts. Nor does it say that the jurisdiction or authority must be conferred expressly rather than implicitly. I cannot ever recall seeing a case that has suggested that § 558(b) is relevant to the issue of judicial deference.

[31] Attorney General's Manual on the Administrative Procedure Act 108 (1947).

[32] 322 U.S. 111 (1944).

[33] 325 U.S. 410 (1945).

inhabitants could not survive without a significant administrative apparatus. No advanced nation does. Congress cannot make more than a small fraction of the decisions that such a society needs, even when it is operating at top efficiency (a description that few people would apply to the experience of the last few years[34]). More particularly, society benefits greatly from regulation that protects public health, safety, sound transportation and communications systems, and the environment. Moreover, many of the actions that courts regularly review under the APA do not easily fit the rhetorical framework of "overregulation" that the A1P sponsors so frequently invoke. Many appeals, for example, involve the provision of benefits, such as Social Security, Medicare, and veterans' benefits, which are much less controversial and politically charged. This political debate over the proper scope of regulation is familiar to everyone, and particularly to members of this subcommittee, so I will not elaborate on it in this statement.

Instead, I want to emphasize a different point. Even people who agree with the anti-government premises of the sponsors should recognize that a change in the APA standard of review is an inapt tool for advancing that agenda. It is shortsighted, because it ignores the fact that, over time, political administrations change. Sometimes the administration in office will generally be in favor of *deregulation*, and in these circumstances a more intrusive standard of judicial review would tend to undercut that administration's policies just as surely as it may tend to undercut a more progressive administration's policies when the latter holds power. The APA applies equally to affirmative regulation and to deregulation.

Ironically, the *Chevron* standard of review first became established because it appealed to *conservatives* who embraced it at a time when it would strengthen the hand of the then-incumbent President, Ronald Reagan.[35] It has now lost favor among the self-described conservatives of the A1P, who are well aware that executive power is currently being wielded by an administration of which they generally disapprove. But if an administration committed to more congenial substantive policies were to take office, one can reasonably expect that the A1P assault on deferential judicial review would come to a quick end. Suppose, for example, that a Republican president were to take office in 2017. His administration's actions would face review at the hands of courts of appeals judges, a majority of whom (at least for now) have been appointed by Democratic Presidents.[36] If SOPRA were to have been enacted by then, conservatives might soon discover (or rediscover) the appeal of Justice Stevens's observation in *Chevron* that courts, which are not politically accountable themselves, have good reasons to display deference toward agencies that do have political accountability.

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[34] As is well known, the 112th and 113th Congresses enacted fewer laws (more than a hundred fewer) than any other Congress in at least the past seventy years. See *Résumé of Congressional Activity*, OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, http://library.clerk.house.gov/resume.aspx.

[35] See, e.g., Testimony of Andrew M. Grossman, *Examining the Proper Role of Judicial Review in the Regulatory Process*, Hearing Before the Senate Subcomm. on Regulatory Affairs & Federal Mgmt., Comm. on Homeland Security & Gov'tal Affairs, 114th Cong., 1st Sess. at 2 (Apr. 28, 2015) http://www.hsgac.senate.gov/hearings/examining-the-proper-role-of-judicial-review-in-the-federal-regulatory-process ("The [*Chevron*] doctrine quickly gained currency on the D.C. Circuit, particularly among Reagan appointees like then-judges Antonin Scalia and Kenneth Starr, who recognized it as a "landmark" and a "watershed," respectively, for deregulation."). Another contributing factor was aggressive promotion of *Chevron* in briefs filed by Reagan administration lawyers. *See* Thomas W. Merrill, *The Story of* Chevron: *The Making of an Accidental Landmark*, in ADMINISTRATIVE LAW STORIES 399, 426 (Peter L. Strauss ed. 2006).

[36] Jeremy W. Peters, *Building Legacy, Obama Reshapes Appellate Bench*, N.Y. TIMES, Sept. 13, 2014.

In short, a change in the *permanent* law of judicial review is inherently an unsound strategy for promoting a policy agenda that depends heavily on the contingency of the philosophy of the incumbent administration. This is essentially the point that then-Professor Scalia made when the Reagan administration was about to take office: He suggested that boosters of the Bumpers Amendment should reconsider their support for that bill, because if it were enacted it would retard the pursuit of their own policy agenda:

> At a time when the GOP has gained control of the executive branch with an evident mandate for fundamental change in domestic policies, Republicans, and deregulators in general, seem to be delighting in the prospect of legislation which will make change more difficult. ... It would be bad enough, from the viewpoint of an enlightened deregulator, if Bumpers merely eliminated the Reagan administration's authority to give content to relatively meaningless laws. Worse still, however, Bumpers does not eliminate that authority but merely transfers it to federal courts which, at the operative levels, will be dominated by liberal Democrats for the foreseeable future![37]

A more recent analog derives from Congress's experience with the Line Item Veto Act of 1996. The sponsors of this Act hoped that it would enable the President to take the lead in trimming allegedly wasteful spending from the federal budget (a power that many state governors possess). The Act did not work out as they had anticipated. A principal reason for their dissatisfaction was that, as matters worked out, the Act was implemented by a reelected President Bill Clinton, rather than by a presidential administration that would be more sympathetic to their political goals. Thus, when the Supreme Court held the Act unconstitutional in 1998,[38] "[e]ven some Republicans who eagerly voted for the law in 1996 breathed a sigh of relief."[39] The lesson to be learned, I submit, is that dissatisfaction with the manner in which power is exercised in the context of the political conditions of the moment is an unwise, if not self-defeating, basis for making changes in enduring structural legislation such as the APA.

D. Possible Amendment of the Bill to Incorporate *Skidmore* Standards

The subcommittee memo raises the question of whether *Skidmore* standards should be added to the bill, as suggested by Professors Beermann and Duffy in March. In my view, commingling such a provision with the "de novo" provision that SOPRA already contains would generate enormous uncertainty and confusion. "De novo" review *means* consideration without regard to what the agency said. Certainly that was the premise of Senator Bumpers's original amendment, which sought to add a "de novo" mandate in order to *overcome* the then-prevailing *Skidmore* approach. I cannot see what congressional goals could be furthered by an APA amendment that would send such mixed messages.

A more straightforward bill would emerge if the subcommittee were to omit the word "de novo" altogether and simply undertake to codify the *Skidmore* approach. In the abstract, the resulting bill would be far superior to the present bill. However, I cannot foresee any likelihood

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[37] Antonin Scalia, *Regulatory Reform – The Game Has Changed*, REGULATION, Jan./Feb. 1981, at 13, 13.

[38] Clinton v. City of New York, 524 U.S. 417 (1998).

[39] Andrew Taylor, *Few in Congress Grieve as Justices Give Line Item Veto the Ax*, CONG. Q. WEEK. REP., June 27, 1998, at 1747, also available at http://library.cqpress.com/cqalmanac/document.php?id=cqal98-0000191043.

that the A1P sponsors would agree to rewrite the bill to endorse *Skidmore* deference, because in that event their rationale for passing it would largely evaporate. The results of the legislation (even assuming that courts would conscientiously live up to its prescription, which is a *very* uncertain assumption) would be simply too limited to fulfill the sponsors' goals and justify the congressional intervention. According to empirical studies, affirmance rates do not differ very much when courts apply *Chevron*, on the one hand, or *Skidmore*, on the other. Professor Pierce, summarizing the results of several studies, reports that agencies win between 64% and 81.3% of the time when courts of appeals apply *Chevron*, and between 55.1% and 70.9% of the time when they apply *Skidmore*.[40] This differential of about ten percent suggests that the choice of review standard may have *some* influence on a private party's chances of prevailing,[41] but the effect, if any, is not dramatic. At the Supreme Court level, the differential seems to be close to nonexistent: 76.2% under *Chevron* and 73.5% under *Skidmore*.[42] I seriously doubt that the A1P Senators and Representatives would embrace a bill that would have so limited an impact, scarcely qualifying as "restoring separation of powers."

I also would disagree with any suggestion that this hypothetical substitution of *Skidmore* for *Chevron* should be pursued in order to "clarify the law." In the first place, I am not very troubled by the common observation that the results of judicial review can be hard to predict. That is a normal state of affairs. To some extent, a disparity in results is exactly what we should hope and expect to see, because it is a sign of the very judicial independence that sponsors of SOPRA say they want. No judicial review standard leads to entirely predictable results, any more than is true of the "substantial evidence" test for review of jury verdicts, or the "clearly erroneous" test for review of district court findings. Society expects the courts to take account of broad realities such as the overall needs of the regulatory scheme.[43] Moreover, to the extent that case law doctrine is unruly, courts themselves are far better positioned to make adjustments than is a legislature. Statutory codification of scope of review standards carries a substantial risk of unintended consequences that are hard to correct subsequently.

On a narrower level of analysis, I would disagree with any suggestion that a bill that would substitute across-the-board *Skidmore* review for the present more variegated system would lead to more predictable results. Exactly the opposite is true. *Skidmore* review allows a court to consider the thoroughness, cogency, and consistency of the agency's reasoning as well as "*all* those factors which give it power to persuade." In other words, it is a vague, totality-of-circumstances test, as Justice Scalia said it is.[44] Indeed, the pre-*Chevron* regime was notorious for its inconsistencies and disorderliness. Thus, the hypothetical bill might well lead to a more predictable *review standard*, but not to more predictable *outcomes*. On the contrary, I adhere to

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[40] Pierce, supra, at 84.

[41] Even that inference may not be correct. Possibly courts simply tend to find that interpretations rendered in the relatively formal types of actions typically reviewed under *Chevron* are more credible than interpretations rendered in the less formal types of action normally reviewed under *Skidmore*. This explanation could suggest that the rates of affirmance for these respective types of action would exist regardless of the prescribed standard of review.

[42] William N. Eskridge & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1143 (2008).

[43] Ronald M. Levin, *Judicial Review and the Uncertain Appeal of Certainty on Appeal*, 44 DUKE L.J. 1081, 1088-91 (1995).

[44] United States v. Mead Corp., 533 U.S. 218, 241 (2001) (Scalia, J., dissenting).

the view that one of the *virtues* of the *Chevron* regime is that it tends to enable regulated parties to make plans on the assumption that the administering agency's opinion will usually control, whereas more openended judicial power would tend to encourage scattered tribunals across the country to reach diffuse results, resulting in splits of authority that often take years to resolve.[45]

Still, I suspect that this whole discussion of clarifying doctrine is beside the point, because I interpret SOPRA as undertaking primarily to *radically transform* judicial review practice, not merely simplify it.

II. JUDICIAL REVIEW OF AGENCY INTERPRETATIONS OF RULES

I now turn to what is now commonly known as "*Auer* deference" – the doctrine that when the meaning of a regulation is in doubt, the agency's interpretation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." The doctrine gets its name from the 1997 case of *Auer v. Robbins*.[46] Before that time the same principle was known as "*Seminole Rock* deference," after a 1944 case, *Bowles v. Seminole Rock & Sand Co.*[47]

In big-picture terms, the policy issues regarding *Auer* deference are quite similar to those relating to *Chevron* and *Skidmore*. However, as the subcommittee memo explains, the possibility of abandoning *Auer* deference, while presumably retaining *Chevron* deference, has recently been raised by several Justices[48] and is a subject of much current debate. I will, therefore, address in some detail the distinctive issues presented by *Auer* deference. For this purpose I will draw upon testimony I presented in 2015 at a Senate subcommittee hearing devoted to that topic.[49] Presumably, however, this issue would only be relevant to SOPRA if that bill were modified considerably. If the bill were enacted as currently written, both *Chevron* and *Auer* would be overruled, and discussions about the distinctive nature of *Auer* deference would be moot.

A. The Development and Purposes of *Auer* Deference

As with statutory interpretation, judicial deference to agencies' interpretations of

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[45] *See* Strauss, *One Hundred Fifty Cases Per Year, supra.*

[46] 519 U. S. 452 (1997).

[47] 325 U. S. 410 (1945).

[48] *See* Perez v. Mortgage Bankers Ass'n. 135 S. Ct. 1199, 1211-13 (2015) (Scalia, J., concurring in the judgment); id. at 1213-25 (Thomas, J., concurring in the judgment); id. at 1210 (Alito, J., concurring in part and concurring in the judgment); Decker v. Northwest Envtl. Law Ctr., 133 S. Ct. 1326, 1339-42 (2013) (Scalia, J., concurring in part and dissenting in part); id. at 1339 (Roberts, J., joined by Alito, J., concurring); Talk America, Inc. v. Michigan Bell Tel. Co., 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring).

[49] *See* Testimony of Ronald M. Levin, *Examining the Proper Role of Judicial Review in the Regulatory Process*, Hearing Before the Senate Subcomm. on Regulatory Affairs & Federal Mgmt., Comm. on Homeland Security & Gov'tal Affairs, 114th Cong., 1st Sess. (Apr. 28, 2015) http://www.hsgac.senate.gov/hearings/examining-the-proper-role-of-judicial-review-in-the-federal-regulatory-process. For an analysis that makes similar points, see Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of* Auer (forthcoming in U. CHI. L. REV.) (preliminary draft at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2716737.

regulations (as I will call them[50]) is a longstanding part of the administrative law tradition. Its roots can be traced back to the nineteenth century.[51] More importantly, *Seminole Rock* predated the APA itself, so it is scarcely a late-blooming development.

As noted, the canonical verbal formula derived from *Seminole Rock* and *Auer* is that the agency's interpretation of a regulation is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation." The formula is commonly understood to prescribe a level of deference comparable to that of *Chevron*. However, as in the case of statutory interpretation deference, *Auer* deference does not apply across-the-board. In particular circumstances, the courts may resort to *Skidmore* review rather than *Auer* in evaluating a given interpretation. Thus, in *Christopher v. SmithKline Beecham Corp.*,[52] the Court found reasons to measure a Department of Labor interpretation of a regulation on the basis of *Skidmore*. Thus, the scope of the "domain" of *Auer* is still very unsettled, even apart from the advent of calls by individual Justices for reappraisal of this whole area.[53]

Various writers articulate the rationale for *Auer* deference in differing ways. One common justification is that the agency probably knows what the regulation was intended to say, because the agency itself wrote it. To my mind this is not the strongest argument available. It will *sometimes* correspond to reality – often enough to suggest that SOPRA's across-the-board rejection of *Auer* deference is excessive. But there will be other instances in which the actual authors of a regulation have left the agency or have new responsibilities. Moreover, the agency's current objectives may be different from the ones that prevailed when the regulation was written; its incentive is to interpret the regulation in a manner that serves the former goals, not the latter ones.

To my mind, the strongest justifications run parallel to the pragmatic justifications for *Chevron*. The Court has said, for example, that such deference is important when a "regulation concerns 'a complex and highly technical regulatory program,' in which the identification and classification of relevant 'criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.'"[54] Indeed, another case says, "[b]ecause applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers."[55]

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[50] Unlike the word "rule," the word "regulation" is not an APA term. It is, however, most commonly used to mean a "legislative rule" adopted under statutory authority, as distinguished from an interpretive rule that might construe it. For clarity of exposition, I will use it that way here.

[51] "The interpretation given to the regulations by the department charged with their execution, and by the official who has the power, with the sanction of the President, to amend them is entitled to the greatest weight, and we see no reason in this case to doubt its correctness." United States v. Eaton, 169 U.S. 331, 343 (1898) (sustaining the plaintiff's appointment as acting vice-consul-general to Siam, in view of having been approved by the Department of State and Secretary of State).

[52] 132 S. Ct. 2156, 2168 (2012).

[53] *See generally* Matthew C. Stephenson & Miri Pogoriler, Seminole Rock's *Domain*, 79 GEO. WASH. L. REV. 1449 (2011).

[54] Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994).

[55] Martin v. OSHRC, 499 U.S. 144, 151 (1991).

The ABA Administrative Law Section was mindful of this reasoning when, in 2011, it opposed a provision in the House version of the Regulatory Accountability Act (RAA)[56] that would (in effect) have abolished all deference to agencies' interpretations of regulations.[57] As the Section argued, "many regulations are highly technical, and their relationship to an overall regulatory scheme may be difficult to discern. Surely, when construing such a rule, a court should have the prerogative of giving weight to the views of the agency that wrote the rule and administers it."[58]

As with the deference doctrines that apply to statutory interpretation, *Auer* deference is not a blank check for agencies. Empirical studies indicate that, at least in lower courts, agency interpretations of regulations have been upheld under *Auer* at about the same rate as with the other standards of review discussed above. One study found affirmance rates of 76%.[59] A later study, examining more recent cases decided from 2011-14, suggested that the criticism of *Auer* in Supreme Court opinions has led to a downward trend in affirmance rates, ending up at 70.6%.[60] In the Supreme Court, in contrast, the affirmance rate when *Auer* is applied has been found to be much higher — around 91%.[61] I tend to think, however, that the data for lower courts is the more meaningful aspect of these results, because the Supreme Court *chooses* what cases it will hear. Regardless, it seems clear that lower courts do not perceive the Supreme Court's behavior as imposing as much discipline as the Court's own track record might lead one to expect.

B. Separation of Powers and the *Auer* Doctrine

In this statement, following the lead of the subcommittee's memo, I will focus on the criticisms of *Auer* offered by Justice Scalia, especially in his separate opinion in *Decker v. Northwest Environmental Defense Center*.[62] That opinion, which drew on the scholarship of Professor John Manning (Justice Scalia's former law clerk),[63] rested on considerations that were

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[56] *See* H.R. 3010, 112th Cong. (2011). The provision under discussion here was § 7 (proposing to add § 706(b)(1) to the APA). The current version of the bill, already passed in the 114th Congress, is H.R. 185.

[57] Strictly speaking, the clause in question would have provided that a court shall not defer to an agency's interpretation of a regulation unless the agency used rulemaking procedures to adopt the interpretation. As the Section's comment letter explained, however, this would mean that the agency could never receive any deference for its interpretation of the regulation, because if it did resort to the notice and comment process, "the agency would actually be issuing a new regulation – it would not be interpreting the old one." ABA Sec. of Admin. L. & Reg. Prac., *Comments on H.R.3010, the Regulatory Accountability Act of 2011*, 64 Admin. L. Rev. 619, 668 (2012).

[58] *Id.*

[59] *See* Richard J. Pierce, Jr., & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 Admin. L. Rev. 515, 519 (2011).

[60] Cynthia Barmore, Auer *in Action: Deference After* Talk America, 76 Ohio St. L.J. 813, 827 (2015)

[61] Eskridge & Baer, *supra*, at 1142

[62] 133 S. Ct. 1326, 1339-42 (2013) (Scalia, J., concurring in part and dissenting in part). In my Senate testimony (*supra*, at 12-13), I also responded to criticisms of *Auer* voiced by Justice Thomas in *Mortgage Bankers*, 135 S. Ct. at 1312-25 (Thomas, J., concurring in the judgment).

[63] John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1998).

targeted specifically at deference to agency interpretations of regulations and did not pose a direct challenge to *Chevron* deference. More specifically, Justice Scalia argued in *Decker* that the proposition

> that the agency can resolve ambiguities in its own regulations … would violate a fundamental principle of separation of powers — that the power to write a law and the power to interpret it cannot rest in the same hands. …
>
> [w]hen an agency interprets its *own* rules … the power to prescribe is augmented by the power to interpret; and the incentive is to speak vaguely and broadly, so as to retain a "flexibility" that will enable "clarification" with retroactive effect. "It is perfectly understandable" for an agency to "issue vague regulations" if doing so will "maximiz[e] agency power."[64]

I will discuss the separation of powers aspect of this analysis first, and then I will turn to its policy-oriented aspect.

The idea that *Auer* offends the constitutional separation of powers is far from self-evident. After all, the field of administrative law has worked out a variety of political and judicial oversight mechanisms to maintain a delicate balance of power among the branches of government. When an agency action is questioned as possibly erroneously interpreting a regulation, all of those mechanisms apply in the same way as they usually do in the case of other administrative actions. Moreover, any interpretation that would be a candidate for *Auer* deference must relate to a matter that the court finds or assumes is within the authority that Congress delegated to the agency (otherwise the agency's position would fail *Chevron* deference).

Despite these background factors, Justice Scalia and Professor Manning argued that a separation of powers problem *comes into existence* when law-writing and law-applying are entrusted to the same hands – even though administrative agencies (and other bodies such as city councils) have routinely performed both functions for countless years. They supported this contention by referring to a variety of ways in which the framers of the Constitution (and the theorists on whose work the framers relied, such as Montesquieu and Blackstone) decided to divide up the powers of government so that each branch could check the others. Of course, nobody questions that the structure of the Constitution contains a number of such divisions of responsibility. Yet none of the antecedents that furnish the support for this argument is directly comparable to the relationship between an administrative agency and a reviewing court. Analogies to the lines of separation between the legislative and executive branches, or between the legislative and judicial branches, furnish only imperfect comparisons. A salient distinction is that an agency's interpretation of its regulation is not nearly as insulated from a judicial check as the many other relationships that, according to Justice Scalia's argument, are subject to "separation" under the Constitution. As I pointed out above, the agency interpretation is "controlling" under *Auer* only if it is not "plainly erroneous or inconsistent with the regulation," and reviewing courts have more than a little freedom to determine whether those predicate conditions are met.

My reservation about the separation of powers critique, then, is not that it is necessarily mistaken, but rather that it is indeterminate. Since none of the restrictions specifically written

[64] 133 S. Ct. at 1341.

into the constitutional structure is directly applicable, the argument has to depend heavily on what one takes to be the spirit of the Constitution's separation of powers model. And, as Justice Anthony Kennedy once wrote in a different context, "The problem with spirits is that they tend to reflect less the views of the world whence they come than the views of those who seek their advice."[65]

In this connection it is important to recognize that when Professor Manning relied on the constitutional policy of separating law-writing and law-executing, the conclusion he drew was that agency interpretations of their own regulations should be subject to the *Skidmore* standard.[66] Justice Scalia, however, uses that policy to support the much more drastic step envisioned by SOPRA -- namely, the elimination of all judicial deference in reviewing such interpretations. That extension may raise countervailing separation of powers concerns of its own. Professor Manning viewed *Chevron* as a "constitutionally inspired canon of construction,"[67] basing that proposition on the passage in the *Chevron* opinion in which Justice Stevens cautioned the courts against being too quick to substitute their judgments for those of politically accountable administrators. In this statement, I have not contended that *Chevron* is itself constitutionally required, but Manning's line of argument does at least suggest that the separation of powers implications of Justice Scalia's quite transformative proposal cut two ways.

In short, the separation of powers theme in Justice Scalia's recent opinions on this subject strikes me as inconclusive. To my mind, therefore, a more fruitful approach is to consider the concrete, practical objections to *Auer* deference on their own terms, without clothing them unnecessarily in the rhetorical frame of constitutional law. I now turn to that level of the discussion.

C. The Incentives Argument

The main policy argument that underlay Justice Scalia's challenge to *Auer* deference was the thesis that the deference prescribed in the case gives agencies an incentive to write regulations vaguely, so that they will then be able to adopt interpretations that have not undergone the rigors of the notice and comment process but will nevertheless receive the benefit of strong judicial deference. Justice Alito alluded to this possibility in his opinion for the Court in *Christopher*,[68] and I have met many administrative lawyers who take it seriously, even if they find little appeal in the constitutional arguments that Justice Scalia used in promoting it.

A problem with the incentives argument, however, is that there is no good evidence showing that this incentive often has the effect that the theorists ascribe to it – or indeed that it ever has. In a speech delivered in 2009, Justice Scalia himself noted the uncertainty that surrounds an assessment of this kind:

> [In my dissent in *United States v. Mead Corp.*, 533 U.S. 218, 246 (2001),] I … predicted that the Court's decision would create a perverse incentive for agencies to adopt

[65] Public Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 473 (1989) (Kennedy, J., concurring in judgment).

[66] Manning, 96 Colum. L. Rev. at 686-90.

[67] *Id.* at 623-27.

[68] Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2168 (2012).

> bare-bones regulations, because acting by regulation showed that you were acting pursuant to congressional delegation. The agency could, with the benefit of substantial judicial deference, later interpret or clarify those regulations, by adjudication or even by simple agency pronouncement, without any bothersome procedural formality. The initial regulation having been adopted via notice-and-comment would earn *Chevron* deference, and the subsequent agency clarification would earn the so-called *Auer* deference. …
>
> Well, it's hard to confirm or to refute this particular prediction. I really don't know if agency rules have in fact become less detailed and more ambiguous since the Court's decision in *Mead*. I'm not even sure how one would measure that or how one would control for the various other factors that undoubtedly bear upon a regulation's clarity.[69]

Justice Scalia wrote these words before he announced a change of heart about *Auer* (which he himself had written but later disavowed), but he never distanced himself from this particular observation. Nor did he claim, in any of his separate opinions in the line of decisions running from *Talk America* through *Mortgage Bankers*, that the specific regulations underlying those cases were, in fact, examples of rules in which the incentive to be vague had played any part. Indeed, I have never seen, in the judicial or academic literature, *any* good evidence of a situation in which an agency has actually yielded to the incentive about which Justice Scalia has been warning.[70]

I do not mean to suggest that the incentive does not exist at all. It presumably does – but it surely does not exist in a vacuum. A myriad of factors may influence agencies in their decisions about how broadly or narrowly to write a given regulation. Some of those factors can militate toward specificity rather than vagueness. A good reason to be specific, for example, is to nail down a concrete application of the regulation, instead of leaving the question to be resolved through all the contingencies and delays that may accompany the implementation and enforcement process.[71] One can only conjecture about how these influences net out in the regulatory process.

As a practical matter, a court would have no good way to decide in a given case whether the agency had or had not yielded to the incentive that *Auer* deference is said to create. In the

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[69] Remarks by the Honorable Antonin Scalia for the 25th Anniversary of *Chevron v. NRDC* (April 2009), *in* 66 Admin. L. Rev. 243, 245 (2014).

[70] In *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 (1994), which involved a dispute over the validity of a Medicare regulation, Justice Thomas's dissent charged that "the Secretary has merely replaced statutory ambiguity with regulatory ambiguity. It is perfectly understandable, of course, for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process." *Id.* at 525 (Thomas, J., dissenting). One difficulty with using this remark to support the case against *Auer* is that the majority opinion (written by Justice Kennedy and joined by Justice Scalia, among others) read the regulation differently: "[T]he language in question speaks not in vague generalities but in precise terms about the conditions under which reimbursement is, and is not, available. Whatever vagueness may be found in the community support language that precedes it, the anti-redistribution clause lays down a bright line. …" *Id.* at 517 (opinion of the Court). Thus, on the threshold question of whether the regulation was vague at all, the example is at best contested rather than clear-cut. But even assuming it to be unduly vague, Justice Thomas provided no evidence for his suspicion about the agency's motives.

[71] According to one agency lawyer, "agencies have a strong interest in writing clear regulations. Agencies can effectively enforce only clear regulations; otherwise, they risk running afoul of fair notice and due process considerations [as well as APA procedural challenges]." Aditi Prabhu, *How Does Auer Deference Influence Agency Practices?*, ADMIN. & REG. L. NEWS, Winter 2015, at 11, 12-13.

abstract, virtually any regulation could have been written to be more specific than it actually was, but agencies often have very good reasons to refrain from trying to settle too much by regulation. It is largely for this reason that the federal courts have essentially abandoned any effort to force agencies to engage in rulemaking as opposed to adjudication.[72] The potential variables are far too elusive for a court to weigh knowledgeably.[73]

Thus, if the courts are going to overrule or modify *Auer* in order to counteract the incentive to write vague regulations that the doctrine is said to create, they will presumably have to do so on an across-the-board, or at least very broad, basis. Indeed, SOPRA as currently written does attempt to eliminate the doctrine in toto. A cost of any such sweeping action, however, would be that it inevitably would remove or at least diminish judicial deference in numerous situations in which the incentive to be vague played no actual role in the agency's calculus.

An obvious reason to be concerned about that development would be that, in order to solve a supposed problem that is speculative at best, the doctrinal change would lead courts to give short shrift to the affirmative benefits of *Auer* deference – especially the value to the interpretive process of the agency's experience and responsibility for making the regulatory scheme work. Judge Richard Posner, commenting on the Scalia analysis, has reached a similar conclusion. He argues that the incentives point

> is a valid concern, but it doesn't justify a blanket refusal to grant some deference, some leeway, to agency interpretations of their own regulations. The regulation may deal with a highly technical matter that the agency understands better than a court would; its interpretation may be in the nature of explanation and clarification rather than alteration. Scalia proposes that in all cases in which an agency's interpretation of its own regulation is challenged, the reviewing court should resolve the challenge "by using the familiar tools of textual interpretation." Those tools are notably unreliable, especially when dealing with a technical regulation. In *Decker*, the regulation concerned storm water runoff from logging roads.[74]

* * * * * *

In conclusion, judicial review is an important topic for the subcommittee to study, and possibly to make the subject of legislation. I believe, however, that SOPRA is seriously misconceived, and I urge the subcommittee not to proceed with it. Thank you again for the opportunity to testify, and I would be happy to respond to any questions the subcommittee may have.

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[72] NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974) (holding that choice between rulemaking and adjudication lies within agency discretion). Exceptions to this principle are all but nonexistent in federal court case law.

[73] SEC v. Chenery Corp., 332 U.S. 194, 202-03 (1947); John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 909-13 (2004) ("courts can make rough judgments about how precise a statute or regulation *is*; they have no basis for determining how precise it *should be* in order to satisfy some abstract duty to make policy through a prescribed method.").

[74] Richard A. Posner, *Can't Justice Scalia learn a little science?*, SLATE, June 24, 2013.

Mr. MARINO. Thank you. Professor White?

TESTIMONY OF ADAM J. WHITE, RESEARCH FELLOW, THE HOOVER INSTITUTION, ADJUNCT PROFESSOR, THE ANTONIN SCALIA LAW SCHOOL AT GEORGE MASON UNIVERSITY

Mr. WHITE. Thank you. Chairman Marino, Ranking Member Johnson, Chairman Goodlatte, and other Members of the Subcommittee, thank you for inviting me today to testify on this crucially important bill. In the last 3 decades, *Chevron* deference's greatest offender was Justice Antonin Scalia. He believed that *Chevron* struck a proper balance between judicial decision-making under the rule of law, and regulatory policy-making under constitutional principles of republican self-government.

But in the last 5 years, Justice Scalia appeared to change his mind, or at least, he began to reconsider all of this. He hinted at this in opinions, and he is said to have expressed significant doubt about *Chevron* in private conversations, and one can surmise from Scalia's original pro-*Chevron* writings, why he would have changed his mind.

Perhaps he concluded that lower courts were not enforcing statutory limits rigorously enough. Perhaps he concluded that modern administrative agencies simply did not respect statutory limits anymore, and were leveraging *Chevron* to negate those statutory limits. Or perhaps he looked around at his colleagues at the Court and the lower courts, and seeing fewer or no people—none of his colleagues willing to defend *Chevron* as strongly as he had, he decided it was time for the law to move in a direction that better reflects the realities of the modern administrative state and the rule of law, which differ starkly from three decades ago.

But whatever his reasons, Congress should follow his example, not just in reforming *Chevron*, but in recalibrating the law with an eye not just to courts, but also to agencies, and to Congress itself. As Justice Scalia recognized, this area of law affects the incentives motivating both Congress and the agencies. The APA should be amended to improve those incentives to promote better legislation and better administration.

For Scalia, *Chevron*'s most important quality related not to the courts or to the agencies, but to Congress. Specifically, he believed that the law needed to set a stable, predictable principle for Congress to have in mind as it drafted, enacted, and amended Federal statutes.

Indeed, *Chevron* is from the beginning rooted in a presumption about Congress, namely that Congress intended to allocate interpretive authority largely to the agencies rather than the courts. Whether that presumption was accurate or not, now is a good time for Congress to engage the issue directly.

Whether it ultimately enacts the "Separation of Powers Restoration Act of 2016" in its current form, or amends the legislation to set other standards for judicial review, Congress needs to take the lead. Perhaps the most pressing constitutional debate of our time is that of the proper relationship between Congress, the courts, and the administrative state. It affects everything from financial and environmental law to regulation of the Internet, and increasingly to regulatory burdens on religious liberty.

Thank you for grappling with this issue, and thank you for inviting me to testify today.

[The prepared statement of Mr. White follows:]

"H.R. 4768, THE 'SEPARATION OF POWERS RESTORATION ACT OF 2016'"

Testimony of
Adam J. White
The Hoover Institution[1]

Before the United States House of Representatives,
Committee on the Judiciary,
Subcommittee on Regulatory Reform, Commercial and Antitrust Law

MAY 17, 2016

Chairman Marino, Ranking Member Johnson, and other members of the Subcommittee, thank you for inviting me to testify today on this crucially important subject: the proper relationship between Congress, the courts, and the modern administrative state.

As the Chief Justice wrote three years ago, "[t]he administrative state wields vast power and touches almost every aspect of daily life. The Framers could hardly have envisioned today's vast and varied federal bureaucracy and the authority administrative agencies now hold over our economic, social, and political activities."[2] One might further doubt that the Framers could have envisioned the

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[1] Research Fellow, the Hoover Institution; Adjunct Professor, the Antonin Scalia Law School at George Mason University. The views expressed in this testimony are mine alone, and are not offered on behalf of the Hoover Institution or any other organization.

[2] *City of Arlington v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) (quotation marks and citations omitted).

federal courts affording such decisive deference to agencies' own interpretations of the statutes and regulations that they administer.

The modern doctrine of *Chevron* deference was expounded for laudable reasons—among them, to create space for agencies to exercise policy discretion within the limits set by broadly worded statutes, part of the Supreme Court's sustained response to lower courts' own efforts to prevent agencies from undertaking the era's politically popular regulatory reforms.[3] But the passage of three decades has made clear the *Chevron* framework's significant costs, both in practice and in principle—costs that were highlighted by Professor Hamburger's

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[3] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984) ("[A]n agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities."); *see also, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 & n.* (1983) (Rehnquist, J., concurring in part and dissenting in part) ("The agency's changed view of the standard seems to be related to the election of a new President of a different political party. It is readily apparent that the responsible members of one administration may consider public resistance and uncertainties to be more important than do their counterparts in a previous administration. A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration . . . Of course, a new administration may not choose not to enforce laws of which it does not approve, or to ignore statutory standards in carrying out its regulatory functions.").

widely noted book,[4] and in opinions by Justice Thomas and others favoring a significant reconsideration or narrowing of the doctrine.[5]

But the best evidence of *Chevron*'s increasingly apparent flaws may be Justice Antonin Scalia's own shift of *Chevron*, near the end of his life and career. For two decades, until at least 2011, *Chevron* had no stauncher defender than Justice Scalia, who criticized his colleagues harshly for attempting to pare back application of its two-step framework for deference.[6] But in recent years, even Scalia reportedly came to recognize that *Chevron* needed to be recalibrated, a change of mind hinted in an opinion last year.[7]

Perhaps the courts themselves eventually will fix *Chevron*, either by overturning it outright or (more likely) by continuing to limit and recalibrate it. The courts can undertake a much more rigorous analysis of the statute at *Chevron*'s "Step One," applying the "traditional tools of statutory construction," including the clear statement rule and other canons of construction, to decide whether Congress's

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[4] Philip Hamburger, *Is Administrative Law Unlawful?* (2014).

[5] *See, e.g.*, *Michigan v. EPA*, 135 S. Ct. 2699, 2712–2714 (2015) (Thomas, J., concurring).

[6] *City of Arlington*, 133 S. Ct. at 1879–80; *United States v. Mead*, 533 U.S. 218, 239–61 (2001) (Scalia, J., dissenting); *Christensen v. Harris County*, 529 U.S. 576, 589–595 (2000) (Scalia, J., concurring in part in judgment).

[7] *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1212 (2015) (Scalia, concurring in judgment) ("The problem is bad enough, and perhaps insoluble if *Chevron* is not to be uprooted, with respect to interpretive rules setting forth agency interpretation of statutes.").

statute directly answers the legal question at issue in a case.[8] The courts also can be more rigorous at *Chevron*'s Step Two, in deciding whether an agency's interpretation of an ambiguous statute is unreasonable.[9] And the courts can be more rigorous at *Chevron*'s so-called "Step Zero," in deciding whether Congress actually delegated interpretive authority to the agency in the first place, particularly on matters of significant economic or political significance.[10]

But even if courts could succeed in working out the *Chevron* problem on their own, it is *good* for Congress to intervene in this debate on how the courts should review agencies' statutory interpretations. The Supreme Court repeatedly has stressed that *Chevron* is a doctrine premised upon *Congress's* intent to allocate interpretive power between the courts and the agencies. "We accord deference to agencies under *Chevron*," the Court has explained, "because of a presumption that *Congress*, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency," and that *Congress* "desired the agency (rather than the courts) to possess

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[8] *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–161 (2000); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 166–74 (2001); *ABA v. FTC*, 430 F.3d 457, 468–471 (D.C. Cir. 2005) (Sentelle, J.); *Loving v. IRS*, 742 F.3d 1013, 1016–1022 (D.C. Cir. 2014) (Kavanaugh, J.).

[9] *See, e.g.*, *Util. Air. Reg. Group v. EPA*, 134 S. Ct. 2427, 2442–2446 (2014).

[10] *See, e.g.*, *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015); *U.S. v. Mead*, 533 U.S. 218, 227–234 (2001). But note that the Court has been inconsistent in prescribing the standard of review that applies when *Chevron* does not. In *Mead*, the Court rejected *Chevron* deference but applied the lesser "*Skidmore*" deference; more recently, in *King*, the Court applied *de novo* review.

whatever degree of discretion the ambiguity allows."[11] Similarly, Justice Scalia repeatedly urged that the purpose of *Chevron* has been to "provid[e] a stable background rule against which Congress can legislate" when Congress so desires.[12]

Simply put, in *Chevron* the courts have been deferring not in spite of Congress's (presumed) intent, but *because* of it. It is now well past time for Congress to plainly announce its present intent. And I believe that Justice Scalia's own writings exemplify the cast of mind with which Congress should approach this task.

I. Reforming *Chevron* requires Congress to strike a prudential balance between judicial decisionmaking and democratic policymaking.

The Constitution neither requires nor prohibits *Chevron* deference. Nor does the Administrative Procedure Act (APA) expressly prohibit it: while the APA's Section 706 directs the courts to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action," it does not expressly require the courts to do so without deference, and indeed the APA's legislative history seems to include at least

[11] *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740–741 (1996) (emphasis added); *see also, e.g.*, *King*, 135 S. Ct. at 2488–89 ("In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.").

[12] *City of Arlington*, 133 S. Ct. at 1868; *see also* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 517 (1989) ("any rule adopted in this field represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate").

some indications that the APA's drafters expected courts to apply some measure of interpretive deference in some cases.[13]

Being neither prescribed nor proscribed by law, *Chevron* reflects the Court's striking of a balance between two competing constitutional values: the courts' "province and duty . . . to say what the law is,"[14] but also the republican notion that policy judgments should be made by the more politically accountable executive and legislative branches, not the insulated judicial branch.[15]

This prudential balance was best described by Justice Scalia himself, in his 1989 *Duke Law Journal* article defending *Chevron*. He conceded that it is at best a legal fiction to ascribe to Congress a specific intent to commit interpretive authority to an agency with a given statute. But it was, at that time, a *justifiable* legal fiction:

> Surely . . . it is a more rational presumption today than it would have been thirty years ago—which explains the change in the law. Broad delegation to the Executive is the hallmark of the modem administrative state; agency rulemaking powers are the rule rather than, as they once were, the exception; and as the sheer number of modern departments and agencies suggests, we are awash in agency "expertise." If the *Chevron* rule is not a 100% accurate estimation of

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[13] *See, e.g.*, Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. at 511–12 (discussing the APA's legislative history); *cf. Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring in judgment) ("As I have described elsewhere, the rule of *Chevron*, if it did not comport with the APA, at least was in conformity with the long history of judicial review of executive action, where '[s]tatutory ambiguities . . . were left to reasonable resolution by the Executive.'" (quoting *Mead*, 533 U.S. at 243 (Scalia, J., dissenting))); *but see Mead*, 533 U.S. at 241–42 (Scalia, J., dissenting) ("There is some question whether *Chevron* was faithful to the text of the [APA], which it did not even bother to cite. But it was in accord with the origins of federal-court judicial review." (footnote omitted)).

[14] *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

[15] *TVA v. Hill*, 437 U.S. 153, 195 (1978), *quoted in Chevron*, 467 U.S. at 866.

> modern congressional intent, the prior case-by-case evaluation was not so either—and was becoming less and less so, as the sheer volume of modem dockets made it less and less possible for the Supreme Court to police diverse application of an ineffable rule. And to tell the truth, the quest for the "genuine" legislative intent is probably a wild-goose chase anyway. In the vast majority of cases I expect that Congress neither (1) intended a single result, nor (2) meant to confer discretion upon the agency, but rather (3) didn't think about the matter at all. If I am correct in that, then any rule adopted in this field represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate.[16]

That last sentence was key to Scalia's thought. By his estimation, *Chevron*'s most valuable role was not in deciding cases *per se*, but rather in its providing *Congress* a stable background rule against which to legislate. As he further explained, "Congress now knows that the ambiguities it creates, whether intentionally or unintentionally, will be resolved, within the bounds of permissible interpretation, not by the courts but by a particular agency, whose policy biases will ordinarily be known."[17] Thus, he explained, "[t]he legislative process becomes less of a sporting event when those supporting and opposing a particular disposition do not have to gamble upon whether, if they say nothing about it in the statute, the ultimate answer will be provided by the courts or rather by the Department of Labor."[18]

But crucially, Scalia stressed that this approach was not to be carved permanently in stone, but rather was an experiment to be measured by the results

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[16] Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. at 516–17.

[17] *Id.* at 517.

[18] *Id.*

it ultimately produced. Scalia believed that *Chevron* would ultimately justify itself: "I tend to think . . . that in the long run *Chevron* will endure and be given its full scope—not so much because it represents a rule that is easier to follow and thus easier to predict (though that is true enough), but because it more accurately reflects the reality of government, and thus more adequately serves its needs."[19] Which is why he noted, at the outset of the long quote above, that *Chevron*'s presumption regarding legislative intent was "a more rational presumption today than it would have been thirty years ago—which explains the change in the law."

In other words, *Chevron* was justifiable in 1984, thought not necessarily in 1954—or today. This practically minded approach exemplified Scalia's writings on regulation and administrative law throughout that great period of change in the 1980s—including his pre-judicial writings. In an essay marking President Reagan's first inauguration, then-Professor Scalia wrote an essay in AEI's *Regulation* magazine, urging his fellow conservatives to reconsider their approach to regulation in light of new political realities. To persist with the same policies and rules, in a markedly different legislative, regulatory, and legal era, would be utterly counterproductive: "Regulatory reformers who do not recognize this fact, and who continue to support the unmodified proposals of the past as though the fundamental game had not been altered, will be scoring points for the other team."[20]

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[19] *Id.* at 521.

[20] Antonin Scalia, "Regulatory Reform—The Game Has Changed," *Regulation*, Jan./Feb. 1981, p. 14; *cf.* Antonin Scalia, *The Two Faces of Federalism*, 6 Harv. J. L.

Perhaps this practical mindset was what led Justice Scalia to begin to change his mind on *Chevron* near the end of his life, at a time when agencies assert unprecedented powers with barely even a pretense of heeding statutory restraints.[21] Presumptions about the respective intentions of the legislative and executive branches that may have been justifiable in 1985 or 1989 seem far less so today.[22] But by the same token, I would urge Congress to adopt the same practical mindset in crafting its own reforms to *Chevron* and the Administrative Procedure Act today.

II. *Chevron* affects not just the work of courts, but also the work of Congress and agencies—and so will its reform.

Debates over *Chevron* tend to be first and foremost debates about the courts—namely, debates over whether judges are adequately discharging the constitutional responsibilities of the judicial branch, as a check and balance against

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& Pub. Pol'y 19, 20 (1982) ("Since the 1930's, the policies that have come from [the federal government] have been policies that conservatives disfavor. That is surely an understandable tactical reason for opposition to the exercise of federal power. Unfortunately, a tactic employed for half a century tends to develop into a philosophy.").

[21] Thus the problem is not simply one of wanting to defer to Republican Presidents but not to Democrats; were it so, Scalia and others would have changed their positions on *Chevron* in 1993. The problem is one of a startling change in the fundamental nature of the modern administrative state, a problem of a much more recent vintage, exemplified by agencies that expect courts to meekly "stand on the dock and wave goodbye as [the agency] embarks on this multiyear voyage of discovery," agencies who do not hesitate to "rewrite clear statutory terms to suit [their] own sense of how the statute should operate." *Util. Air Reg. Group,* 134 S. Ct. at 2446.

[22] I elaborated upon this point in a handful of essays following Justice Scalia's passing: "The American Constitutionalist," *Weekly Standard*, Feb. 29, 2016; "Antonin Scalia, Reform Conservative," *Weekly Standard Online*, Feb. 22, 2016; "Scalia and *Chevron*: Not Drawing Lines, But Resolving Tensions," *Yale Journal on Regulation: Notice and Comment Blog*, Feb. 23, 2016.

administrative agencies. As important as the courts are, I would caution you to focus also on the ramifications that *Chevron*—and its reform—has on Congress and the agencies.

Justice Scalia recognized that *Chevron*'s ultimate aim is Congress, not the courts—in that, as noted above, *Chevron* established a stable, predictable background rule of law against which Congress can legislate. And as Professors Abbe Gluck and Lisa Schultz Bressman found in their empirical study, Congress (or at least congressional staff) is well aware of *Chevron* as it drafts legislation, and indeed often drafts legislation with *Chevron* in mind: the staffers whom they surveyed "understood the consequences of *Chevron*" and further indicated "that knowing the canon affects the degree of specificity they use while drafting," such that *Chevron* often functions "as a reminder about the consequences of ambiguity and as an incentive to think about the level of detail in a statute."[23]

Similarly, the agencies' rule-writing personnel are well aware of *Chevron*, too. As Professor Christopher Walker found in his own empirical study, 94% of the rule-drafters whom he surveyed knew *Chevron* deference by name, and 90% indicated that they draft rules with *Chevron* in mind. They also indicated overwhelmingly that they are aware of the circumstances making it more or less

[23] Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 996 (2013); *see generally id.* at 995–98.

likely that a court would grant the rule's statutory interpretations *Chevron* deference in the first place.[24]

Because *Chevron* exerts a significant "gravitational pull" on both Congress's drafting of statutes and agencies' process of interpreting them, eliminating *Chevron* would have significant impacts on both legislation and administration.

With respect to legislation, if *Chevron* were eliminated then Congress would have to draft statutes knowing that *courts*—not agencies—would be their most significant interpreters. Because courts are less politically responsive than agencies, Congress would need to take much greater care in writing statutes, to express its legislative intent much more clearly, because Congress would no longer be able to rely on agencies to vindicate legislative intent expressed with insufficient clarity in the actual statutory text.

The removal of *Chevron* would also affect Congress's view of statutes already on the books. Because of *Chevron*, in conjunction with the *Brand X* doctrine (in which an agency can overturn its own prior interpretation of an ambiguous statute and replace it with a new reasonable interpretation),[25] Congress faces less urgency to amend statutes currently being misapplied by agencies: if Congress is dissatisfied with an agency's interpretation of a law, Congress may place its hopes disproportionately in a change of administrations, to be followed by a change of interpretations. But without *Chevron*, there will be greater incentive for Congress to

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[24] Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 Stan. L. Rev. 999, 1059–1065 (2015).

[25] *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

take matters into its own hands by beginning a sustained push to amend the statute, even if amendment ultimately requires the signature of the current President's successor.

Similarly, the removal of *Chevron* deference would require agencies to improve the substance and process of their statutory interpretations, in order to convince the courts to affirm their interpretation of ambiguous statutes. Under *Chevron*, an agency's interpretation will be sustained by the courts even if it is not the "best" available interpretation; it need only be a *reasonable* interpretation.[26] If Congress replaces *Chevron* with "*de novo*" review by the courts, then the agency would prevail in court only if its interpretation actually is the best of all available interpretations.[27] And even if Congress were to soften the removal of *Chevron* with legislative imposition of something approaching the rather tautological *Skidmore* standard (which I discuss more thoroughly in Part III, below), the agency would still need to convince the court that its interpretation warrants judicial deference in light of the agency's interpretation's "power to persuade"—namely, its

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[26] *Id.* at 980; *see also Chevron*, 467 U.S. at 843 n.11 ("The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."); *Van Hollen v. FEC*, 811 F.3d 486, 492 (D.C. Cir. 2016) (*Chevron* Step Two "does not require the best interpretation, only a reasonable one . . . We are bound to uphold agency interpretations . . . regardless whether there may be other reasonable, or even more reasonable, views[.]").

[27] *King*, 135 S. Ct. at 2488–2489, 2492–96.

"thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight."[28]

In sum, removing *Chevron* would challenge both Congress and the agencies. It would challenge Congress to be clearer in writing statutes, and it would require agencies to become more credible in interpreting them.

III. Supplanting *Chevron* with a codified version of *Skidmore* would raise significant questions.

H.R. 4768 proposes to amend Section 706 of the APA to require that the courts review agencies' legal interpretations *de novo*—that is, without any deference at all. On its face, this would appear to foreclose not just *Chevron* deference, but also the lesser (and older) form of deference known as *Skidmore* deference.

In *Skidmore*, the Court explained that the degree of deference to be afforded to an agency's statutory interpretation "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[29] The standard might seem basically a tautology, or as Justice Scalia called it, an "empty truism": the Court can be persuaded by an agency's interpretation, but only to the extent that the Court finds the agency's

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[28] *Mead*, 533 U.S. at 235 (applying *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

[29] *Skidmore*, 323 U.S. at 140, *quoted in Mead*, 533 U.S. at 228.

interpretation persuasive.[30] Yet other justices have urged that *Skidmore*'s standard does have substance above and beyond *de novo* review.[31] Accordingly, if the APA is amended to require *de novo* review of legal questions, then *Skidmore* will be eliminated along with *Chevron*, because *Skidmore* is not "*de novo*."

One might ask whether the APA should be further amended not just to eliminate *Chevron* per se, but also to codify the standards of *Skidmore*.[32] This could have benefits: it would eliminate *Chevron* while preserving space for courts to still give substantive weight to an agency's interpretation. Or, to put a more cynical spin on this, codifying *Skidmore* might be a concession to the possibility that courts would persist in deferring *sub silentio* to an agency's position even when such deference is prohibited by a new APA requirement of *de novo* review.

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[30] *Mead*, 533 U.S. at 250 (Scalia, J., dissenting) ("Justice Jackson's eloquence notwithstanding, the rule of *Skidmore* deference is an empty truism and a trifling statement of the obvious: A judge should take into account the well-considered views of expert observers."); *see also* Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 Duke L.J. 1933, 2001 (2008) ("the empty tautology into which some courts have made *Skidmore*"); Michael Herz, *Chevron Is Dead: Long Live Chevron*, 115 Colum. L. Rev. 1867, 1890 (2015) ("The Supreme Court has done much to sow this confusion. For example, *Mead* identifies 'the persuasiveness of the agency's position' as one of the *Skidmore* factors. But this is not what *Skidmore* actually says. On Justice Jackson's formulation, the *Skidmore* factors are the things that give the agency's interpretation 'the power to persuade'; to say that the 'persuasiveness' of the agency's position is one of the things that give it 'the power to persuade' is tautological.").

[31] *Mead*, 533 U.S. at 234-38; *see also* Kristen E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 Colum. L. Rev. 1235 (2007).

[32] *Cf.* Kent Barnett, *Codifying Chevmore*, 90 N.Y.U. L. Rev. 1 (2015).

That said, I believe that amending the APA to eliminate *Chevron* while codifying the *Skidmore* standard would entail significant costs of its own:

1. First, categorically replacing *Chevron* with *Skidmore*'s mushier approach would eliminate one of *Chevron*'s cardinal virtues: stability and predictability.

Chevron and its progeny, though certainly flawed, offer Congress a relatively stable and predictable background law against which to legislate, as Justice Scalia recognized. *Skidmore*, by contrast, offers no such stable background principle. Legislative drafters will have much less clear an idea of how *Skidmore*'s open-ended standards for deference might play out in practice for a given statute, and so they will have to draft against a presumption of only minimally restrained deference. It is difficult to see how this improves upon our present situation.

2. Second, replacing *Chevron* with *Skidmore* would give immense power to the administration that initially interprets a statute, at the expense of subsequent administrations that might want to re-interpret the statute in light of new political or substantive realities.

As noted above, *Chevron* and its progeny preserve space for agencies to reinterpret ambiguous statutes even after a court blesses a prior interpretation.[33] But this is a feature of *Chevron* specifically: as the Court explained in *Brand X*, "the

[33] *Brand X*, 545 U.S. at 980–86.

whole point of Chevron is to leave the discretion provided by the ambiguities of a statute with the implementing agency."[34]

And such flexibility is *not* a point (let alone the "main point") of *Skidmore*, because *Skidmore* does not share *Chevron*'s presumption that Congress vests the agency, not the court, with primary interpretive authority. Instead, *Skidmore* is undertaken by a court acting as the statute's primary interpreter, looking to the agency for advice but nothing more.[35]

Thus, as Professors Hickman and Krueger have suggested, when the courts adopt an agency's interpretation through *Skidmore* instead of *Chevron*, the court's decision takes on a much stronger *stare decisis* effect than *Chevron* Step Two decision does.[36] Justice Scalia warned of precisely this problem, in *Mead*:

> *Skidmore* deference gives the agency's current position some vague and uncertain amount of respect, but it does not, like *Chevron*, leave the matter within the control of the Executive Branch for the future. Once the court has spoken, it becomes unlawful for the agency to take a contradictory position; the statute now says what the court has prescribed.[37]

In short, replacing *Chevron* with a codified *Skidmore* standard would sacrifice *Chevron*'s virtues of *ex ante* transparency and *ex post* republican

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[34] *Id.* at 981.

[35] *Skidmore*, 323 U.S. at 140 ("We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not *controlling* upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." (emphasis added)).

[36] Hickman & Krueger, *In Search of the Modern* Skidmore *Standard*, 107 Colum. L. Rev. at 1304–05.

[37] *Mead*, 533 U.S. at 247 (Scalia, J., dissenting).

policymaking flexibility, while leaving courts with immense discretion to defer on a case-by-case basis in the name of *Skidmore*'s extremely malleable standards. This is precisely the problem that Justice Scalia warned against in *Mead*: if you replace *Chevron* with "some indeterminate amount of so-called *Skidmore* deference," then "the uncertainty is not at an end—and indeed is just beginning. Litigants cannot then assume that the statutory question is one for the courts to determine, according to traditional interpretive principles and by their own judicial lights."[38] Nor, for that matter, can Congress.

In short, if Congress amends the APA to end *Chevron* but codify *Skidmore*, then it will have "largely replaced *Chevron*, in other words, with that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th'ol' 'totality of the circumstances' test."[39]

Again, I believe the time has come for Congress to weigh in on the proper relationship between Congress, agencies, and the courts. But it should do so in a way that makes the background principle of law going forward more stable, not less.

Thank you for inviting me to testify.

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[38] *Id.* at 239, 240–41.

[39] *Id.* at 241.

Mr. MARINO. Thank you. The Chair now recognizes Chairman of the full Committee, Chairman Goodlatte, for his 5 minutes of questioning.

Mr. GOODLATTE. Thank you very much, Mr. Chairman. Professor Levin, I will start with you. I will pick up where you left off. Congress should not meddle with this jockeying that is going on between the judiciary and the regulatory bureaucracy in terms of how the courts should decide what deference to give them to how they interpret the regulations.

But, I mean, this is the very core of why Justice Scalia was after the fact questioning the merits of the decision that he was a part of, and that is why would Congress not want to assert its legislative powers when what we are seeing more and more—we do not need anecdotal evidence, we can just look at the statistics of the rising number of regulations that are written each year, and particularly the number of regulations that come out based upon old laws, laws written 20, 30, 40 years ago where the bureaucracy comes back and says, "You know what?

We think that law is out of date now. We will just retool our regulations," does not have to go back to Congress at all for Congress to write a new law. All that has to happen is for us to rewrite this regulation. The courts will look at it, and the courts will say, "Well, you know what, if that is what the bureaucracy thinks that regulation means, then we should give deference to that." So I very much disagree with that assessment, and I would be happy to give you an opportunity to respond.

Mr. LEVIN. Thank you for the chance to respond to that. First, I do want to dissociate myself from Mr. White's claim that Justice Scalia was rejecting *Chevron*. Whatever he said in private conversations, in his public pronouncements in the *City of Arlington* case in 2013, he strongly reaffirmed it, challenged the dissent for taking it on. In his Michigan decision shortly before his death, he——

Mr. GOODLATTE. Well, let's get to the core of my point, which is what is the role of the Congress if the regulatory bureaucracy never has to come back here? When they see a need for a change in the law, they just change it themselves.

Mr. LEVIN. Well, Mr. Chairman, as you may know, I have not been a fan of the Committee's regulatory reform effort.

Mr. GOODLATTE. I do not care whether you are a fan or not. Reply to my question.

Mr. LEVIN. But what I am saying is Congress cannot effectively deal with the scope of review in two or three words, because it creates enormous complexities. It is just a few words. There would be endless debates about what it means. I am not saying it is beyond your province. I am just saying you cannot effectively do it.

Mr. GOODLATTE. But what do we do when a regulatory bureaucracy says, "You know what, we are going to reinterpret this decades-old law and write new regulations because we think those are more pertinent to the situation we are trying today?"

Mr. LEVIN. I think you should rewrite the laws to say what you want them to mean.

Mr. GOODLATTE. Sure. But that is this Congress compared to a Congress of 40 years ago. If we cannot get it back here, and they

can bypass the Congress by writing regulations that they want to write—and for us to change that, we have to have it passed through the House, have to have it passed through the Senate where they have archaic rules requiring a 60-vote majority, and then we have to withstand a presidential veto if the President so chooses, whereas the bureaucrat—all they have to do is rewrite regulations on laws that were written long ago, and in no way contemplated the new uses that they are imputing to those old laws. What do we do about that?

Mr. LEVIN. Well, I think you have mechanisms of oversight. But I think you have to recognize that when you give agencies authority to act, then they exercise that authority and they have the legal right to act in that authority.

Mr. GOODLATTE. So what is wrong with telling the courts "you look at the law yourselves; do not give deference to one side or the other in court case?"

Mr. LEVIN. If Congress tells the agency to use discretion, the court would be defying the statute if it did not allow the agency to use the discretion.

Mr. GOODLATTE. I do not think many statutes overtly say, "Use discretion." I think what we do is we do not fill in all the details. We expect them to do so within the black-letter law that is in front of them. And when they do not do that and then the courts look at those regulations, I think the courts are well within their authority to make their own decision rather than give deference to the bureaucracy, because you are just simply—both the courts and the Congress are then transferring power to the executive branch that we should not.

Mr. LEVIN. Sometimes what we call deference is simply recognizing that they used legally delegated authority that the court may not second-guess, and that is often considered a question of law, and if you pass a statute saying the court shall not allow the agency to use that discretion, which this statute appears to do——

Mr. GOODLATTE. Mr. Duffy, would you like to jump in here?

Mr. DUFFY. I certainly agree that—he just made a point that Jack Beermann made in his testimony, which is that a lot of times, the practice is not really deference. In *Chevron* itself—and this is actually exactly what you said, that sometimes Congress writes a framework, and expects the administrative agency to put in reasonable rules. That actually what was happening in *Chevron*, and I was just looking back at my article that dealt with this some years ago.

The Solicitor General appearing before the court in *Chevron* itself did not come up with some newfangled deference test. Instead, they began their legal argument with quoting the rulemaking power of the agency in full, which is what this Congress gave to the agency.

And the basic point of my testimony, I think, and also, I think, Professor Beermann's testimony, is that this legislation would force the agencies to justify their authority on the basis of statutory law. And that is, I think, the core of what is at stake here and I very much believe that Congress does have something to say about this.

The entire APA, which is something that all of us law professors teach in administrative law and have taught for decades, that is Congress' view about how agencies should be structured. I think

that is perfectly appropriate for representative democracy to have the greatest deliberative body in that democracy think about how power should be allocated. So I strongly disagree with the idea that Congress should not have anything to do with it. That is the very statute that I teach through a course called "administrative law." I think that your legislation is perfect to try to force the courts to go back and say, "What we are really looking for is to find administrative—to find agency authority if they have it."

Mr. GOODLATTE. Thank you. I agree. Thank you, Mr. Chairman. I yield back.

Mr. MARINO. The Chair recognizes the Ranking Member, Mr. Johnson.

Mr. JOHNSON. Thank you. Gosh, we are talking about regulatory reform, judicial deference to agency rulemaking, restoring, as you put it, Professor Duffy, restoring the traditional role of courts to determine what the law is. When has there ever been a time when there has not been judicial deference to agency rulemaking?

Mr. DUFFY. If that is a question to me, I think that——

Mr. JOHNSON. It is.

Mr. DUFFY. I think that the answer is that even today, for example, with the patent system there is no deference to the Patent Office's view of what the law is, and that is a good example of why the reasoning of *Chevron* does not even hold up in modern doctrine. The Patent Office is highly expert. They are not even an independent agency, they are in the Department of Commerce. It is a very complicated statute that has vague words in it, and yet the courts have always—and I am not just talking about for 20 years or 30 years, I am talking about for hundreds—for over 100 years, the courts have determined the meaning of those statutory words "de novo."

Mr. JOHNSON. Well, Professor Levin, would you respond to that, whether or not the—in the situation of the Patent Office, *de novo* review.

Mr. LEVIN. Well, I think Professor Duffy is more the expert on the patents system than me. I do know that there is a specialized court—the Federal circuit—that passes on patent cases, and so Congress has specifically set an expert tribunal where you would expect to have more intrusive judicial review than elsewhere. But I would say generally the norm is deference, and has been throughout our history.

Mr. JOHNSON. So, when the Congress decides that it wants to clarify by statute a rule that has been interpreted and placed in effect by Federal agency, a rule that has been promulgated, and the Congress decides that it wants to clarify that area of the law by statute, it always has the ability to do so. Is that not correct?

Mr. LEVIN. It can revise the substance of the law, if that is what your question is, and that is true. The Chairman did point out that it is hard to get such a law passed, but it is within the power of Congress to do it.

Mr. JOHNSON. And that is due to, basically, legislative ossification. We talk about regulatory or rulemaking ossification, but we have had legislative ossification around here for about 5 years or so, and I get——

Mr. LEVIN. That is because of the legislative ossification of the past 5 years plus the inherent nature of the constitutional system with bicameralism and presentment.

Mr. JOHNSON. Which is a good thing when it works.

Mr. LEVIN. Right.

Mr. JOHNSON. If there is gridlock and it does not work, then we do not get anything done and we continue to ossify our legislation which then impacts what Federal agencies would do to try to bring a rule up to modern standards and practical realities of the day.

Do you contend, Professor Duffy, that Federal judges are politically accountable and should undertake the construction of rulemaking with their awesome power and their lifetime power? Are they——

Mr. DUFFY. I do not contend that Federal judges are politically accountable. The Framers of our Constitution made the Federal judiciary very independent by giving them life tenure.

Mr. JOHNSON. So is it not consistent then that the Federal courts would—or that there would be judicial deference to agency rulemaking?

Mr. DUFFY. No, I do not think so. I think that the crucial question is what does Congress want? Now, if Congress wants an agency to have a lot of power, it can give an agency rulemaking power and that will be a lot of power. You do not need deference to understand——

Mr. JOHNSON. Every agency has rulemaking power.

Mr. DUFFY. If the agency has rulemaking power, I still do not think you need deference. I think you just need to say that the agency has power to promulgate reasonable rules as to——

Mr. JOHNSON. Mr. Walke, what would your response be?

Mr. WALKE. My response to much of this talk is that I think Americans are actually more concerned about the harms to the real world that would be unleashed and imposed by this bill. The press release is touting this bill—identify a laundry list of regulations and safeguards that Members happen not to support but do not muster the votes under the Congressional Review Act to overturn, and that is what Americans care about. And *Marbury v. Madison* and the like is very interesting, but this bill would create more harms and impose them on Americans.

Mr. JOHNSON. Because it would hurt the ability of our Federal Government to protect the health, safety, and welfare of the people?

Mr. WALKE. That is correct. The supporters of the bill are touting the fact that it would overturn more regulations than are overturned today.

Mr. JOHNSON. Thank you, and I yield back.

Mr. MARINO. The Chair now recognizes the gentleman from Texas, Congressman Ratcliffe.

Mr. RATCLIFFE. Thank you, Chairman Marino. I want to thank the witnesses for being here today. You know, the reason I drafted this legislation is because if you talk to everyday Americans, as I do, particularly small business owners, you hear a consistent message, and that is that our regulatory system is broken when we have got unelected bureaucrats taking ambiguously written laws and issuing regulations that vastly overstate their power.

And, you know, I have not found myself in agreement with Chief Justice Roberts often recently, but even he agrees with me on this issue.

As the Chairman pointed out, just a few years ago he wrote, "The administrative state wields vast power and touches almost every aspect of daily life. The Framers could hardly have envisioned today's vast and varied Federal bureaucracy and the authority administrative agencies now hold over our economic, social, and political activities."

The practice of courts deferring to agencies' expansive interpretation of their power as directed under *Chevron* has created a serious problem with our regulatory system, and it is one that really has eroded our constitutional systems of checks and balances. And as you will hear me say frequently as we move through this process, this is not a partisan issue, or at least it should not be.

This is not about Republicans versus Democrats, it is about article I versus article II. It is about respecting constitutional lanes of authority. This is not so much about executive overreach as it is about legislative under-reach. Congress is supposed to make laws, not unelected bureaucrats in the executive branch.

And so I would urge my colleagues, my colleagues across the aisle, Republicans and Democrats should support this as a solution to a problem that all Americans, Republicans and Democrats, want to see fixed.

And, Professor Duffy, I agree with you. This situation should never have occurred in the first place. The legislative history of the Administrative Procedures Act resulted in the explicit agreement amongst the lawmakers that there should be no deference on issues of law, and that the reviewing courts should decide all relevant questions of law and interpret constitutional and statutory provisions.

I think the legislative history here is very clear, and in drafting H.R. 4768, my goal was to restore court review of agency interpretation as intended under the Administrative Procedures Act, and to restore the proper role of the judicial branch under the constitution as enumerated in *Marbury v. Madison*. And I think that this bill accomplishes that, and I know that a majority of you here agree with me, at least in part.

Professor Duffy, I want to start with you. I want you to speculate with me for a minute. If the bill were to be enacted with the stylistic technical corrections that you offer, how do you think this would impact the regulatory process?

Specifically, I want to know—how do you think it would impact rulemaking, and in turn, how would the rulemaking impact litigation? Because I know Professor Levin here has indicated that he thinks that litigation would increase, whereas I think from your testimony you agree with me that in fact it would be reduced. So if you would address those for me.

Mr. DUFFY. Yes. I think, as I said in my written testimony, that increasingly there is an enormous amount of litigation around *Chevron*, which is completely collateral to the basic question of whether the agency has authority under the statutory law to do what it wants to do.

So instead of a brief focusing on that central issue, which is about what the law written by this Congress intended for the agency to do—and some of the provisions that the agency can rely on, of course, are rulemaking powers which give the agency quite a bit of power—but instead of focusing on that central issue and focusing on the law, we have an enormous set of doctrines now about *Chevron*, when it does apply, when it does not apply, and when there is just this giant hole through it which *King v. Burwell* created just last year that says, "Well, if it is really important, then it does not apply at all."

And already I have seen that the litigation at the D.C. circuit has increased on these issues. For example, in the case about the Internet, the FCC's regulation of the internet, there is an entire collateral litigation about whether *Chevron* applies or not, that the court will have to go through before it gets to the basic question which I think is the central question, which is whether or not this Congress gave the requisite authority to the agency to write the rules. And so I think the legislation—I think it is great.

I think it is very elegant, and it would simplify things and force courts to focus more on statutory law, which I think is a good thing.

Mr. RATCLIFFE. Thank you, Professor. Professor White, I appreciated your comments about Justice Scalia and the shift there, and I will correct Professor Levin; it is more than just cocktail talk. In *Perez v. Mortgage Bankers*, Justice Scalia in the concurring judgment said, "The problem is bad enough and perhaps insoluble if *Chevron* is not to be uprooted."

But I wanted to ask you, Professor White, about—you referenced Professor Walker in your testimony and the fact that, in his findings, that 94 percent of rule drafters that he surveyed knew *Chevron* deference by name and 90 percent indicated they drafted rules with *Chevron* in mind. So, in your opinion, how do you think rulemaking with *Chevron* in mind changes the ultimate outcome of the rule?

Mr. WHITE. Well, administrators writing rules with an eye to *Chevron* understand that they have more room to play within the scope of the statute, that they already have a thumb on their side of the scale in litigation that will ensue, that they can take more aggressive legal positions with less thorough reasoning than they might need to if they were put to a harder test on judicial review.

Now, Professor Walker did not, if I recall correctly, did not get into the specific ramifications. He talked about the fact that there was broad awareness of *Chevron* at the agencies, so I do not want to say too much, but it does not take a Ph.D. in political science to see how the incentives are going to work under *Chevron*. It is what Justice Scalia recognized, for better and for worse, throughout his career.

Mr. RATCLIFFE. Thank you. My time has expired, but Mr. Chairman, if I can just—I want to address something that Mr. Walke said, because you referred in both your written testimony and your oral testimony, saying that my legislation is "deeply flawed and harmful bill that should not become law," which did not exactly hurt my feelings.

But as I read on in your testimony, when you compared it to a wave of legislation attacking, "modern system of Federal regulation akin to the REINS Act," I know you intended that as a harsh criticism, but I have got to tell you, that is about as high praise and compliment as I could ask for. So while you did not intend that as an endorsement, I appreciate it, and I yield back. Thank you.

Mr. MARINO. The Chair now recognizes the gentleman from California, Congressman Issa.

Mr. ISSA. Thank you. And, Professor Duffy, I am going to follow up because you made a good point and it got sort of cast away a little bit by Professor Levin. The fed circuit was set up to review, and they do review somewhat *de novo*, even that *de novo* review by the district courts, and it was because the decisions coming out of the district courts sometimes, or often, were going all the way to the Supreme Court.

So the Special Appellate exists only because of the importance of not clogging the Supreme Court. Is that not true? That is basically why the fed circuit exists for purposes of patents.

Mr. DUFFY. Well, the Federal circuit was created for a variety of reasons that are complex, and I want to make it clear that the absence of deference long predated the Federal circuit.

Mr. ISSA. Exactly, and it is interesting; the Federal circuit does not show a lot of deference toward the district court decisions. But I want to get one thing quickly in the record. Markman, which is a recent Supreme Court ruling back in—well, not recent anymore.

I have been here 15 years; it predated my congressional time. But the decision in the Markman case that, in fact, the judge was to rule on the meaning of the patent, not—and did not have to rely—could rely on the source documents and the record, the wrapper, if you will, and did not have to rely on any conclusion that either the patent holder or even the PTO reached. Is that not true?

Mr. DUFFY. Well, the Court did say that the job of determining the meaning of the patent was for the courts alone, and that certainly is true. In that particular case, they did not have before it an agency construction of the patent, so they did not, I think, address the relationship between the courts and the agency in that case, but one would think that, at least on issues of law, that there would be—of pure law—that there would be no deference.

Mr. ISSA. You know, there is a number of cases in the FCC and their theory that they have authority that they did not have for the first 20 or so years of the internet, that suddenly they believe they have, or the Federal Trade Commission that has decided that cyber security over personal identifiable information, meaning hackers getting into your site, they have authority. These forms of overreach are not the same ones we are talking about often, because they are not about rulemaking, they are about seizing authority, are they not?

Mr. DUFFY. Well, they do create—they do seize this authority usually through their rulemaking authority, though I guess the Federal Trade Commission might do it through a variety of other ways as well.

Mr. ISSA. Okay. So, for all of us here on this side of the dais, would you say that there is—and this is not—does not specifically go to this legislation—but that, at the time the Congresses passes

a law and the first set of rules are being created, clean air, clean water, et cetera, that there is a—and I will let others opine on this—there tends to be a set of rules that often resemble what Congress intended, and that it is the continued and unfettered rulemaking over generations that often create the ability for an agency to take something never intended in the law, and simply create a rule because some new problem existed, a problem not envisioned in the law, but also not envisioned to be handed with that law to the regulators. Is that kind of a fair statement about the effect of time?

Mr. DUFFY. Well, I think the effect of time is interesting because, again, my overall overarching theme is that the courts and the agencies should look to the Congress to figure out what Congress—what kind of power Congress wanted to give the agencies.

Mr. ISSA. And that is a moment in time not adjusted for the time 20 years later in which they are making a new rule, is what I was saying.

Mr. DUFFY. One thing I think is interesting is some agencies have a super-rulemaking power that expressly allows them to modify statutory law, so rulemaking powers exist on a continuum. And if Congress wants to give an agency broad rulemaking authority, even as some agencies have like—in certain areas the FCC has this power; in certain areas——

Mr. ISSA. Or the Securities Exchange Commission. There are a number of them.

Mr. DUFFY. You can give that power to the agencies. So I again think that it depends on what the Congress wants. If Congress wants to give very broad rulemaking power, it is within their authority.

Mr. ISSA. Again, I am going to follow up just with a sort of a last question, because we are out of time. Congress has obviously not intended to have new laws created decades and decades after without a review, but Congress also did not—often did not put in a stop on rulemaking or, in fact, a sunset on an agency if not reauthorized. Are those not two of the elements that would not impact, if you will, Professors Levin and Walke, your statement that somehow we are all going to be hurt?

Because the basic concept of reauthorizing rulemaking and/or reauthorizing agencies and thus their rulemaking would not be a great burden for the Congress, but ultimately might rein in this question of what is happening decades later without action. Mr. Clark?

Mr. CLARK. I agree with that, Congressman Issa, very much.

Mr. ISSA. So, even though it is not in the bill, would you all agree that those are elements in legislative activity that we should consider when making laws, notwithstanding your disagreement on other parts? Professor?

Mr. LEVIN. Is this question should you have a sunset provision for rules to be periodically reauthorized? That has not worked out very——

Mr. ISSA. Or, in fact, a new rule is to be proposed. In other words, the authority—an agency under a given law relying on that law with no intervening activity, let's say 5 or 10 years, you must either reauthorize the act or reauthorize the continued rulemaking,

for example. And my reason for it is simple: It does appear, having looked at your testimony, having looked at how *Chevron* is often used against ancient rulings of Congress and modern dilemmas, do we not—in fact, part of taking back our responsibility could or should be to set a limit?

I pass a new law, the Affordable Care Act. You get X amount of years to write legislation and you do not get to come back to us—or you must come back to us either for reauthorization of the Act, or reauthorization of rulemaking. Otherwise, the fact is how long do we let you make law after we pass one? And I think I am going to have to call it quits here. Any final comments?

Mr. WALKE. My fear, in light of recent years of Congress, was that it would result in kind of a default nullification of laws and——

Mr. ISSA. It would not be nullification of laws. It would be no new laws. Anyone else on the other side of that one want to weigh in?

Mr. BEERMANN. I just want to point out without going too deeply into it that the sort of activity you are talking about is viewed much more skeptically applying the *Sidmore* factors than it has been under the *Chevron* factors in that if a statute that was passed long ago suddenly gets radically reinterpreted the courts tend to be skeptical about that, whereas under *Chevron*, as long as the statute is ambiguous or silent on the issue, the courts would defer.

Mr. ISSA. Thank you. Thank you, Mr. Chairman.

Mr. MARINO. Thank you. The Chair recognizes Mr. Johnson.

Mr. JOHNSON. Mr. Chairman, I ask that the statement of the Ranking Member be submitted for the record without objection.

Mr. MARINO. So ordered.

[The prepared statement of Mr. Conyers follows:]

Statement of the Honorable John Conyers, Jr. for Legislative Hearing on H.R. 4768, the "Separation of Powers Restoration Act of 2016" Before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Tuesday, May 17, 2016, at 1:00 p.m.
2141 Rayburn House Office Building

H.R. 4768, the "Separation of Powers Restoration Act of 2016," would eliminate judicial deference to agencies and require courts to review *all* agency interpretations of statutes and rules on a de novo basis.

As a result, the bill would empower courts to supplant the determinations of expert agencies with their own, an inherently unpredictable standard.

I believe that this legislation may be harmful for several reasons.

To begin with, H.R. 4768 would make the federal rulemaking process *even more* costly and time-consuming.

This process is already deeply ossified. As the Nation's leading administrative law scholars have observed, agency rulemaking is hampered by many burdens imposed by both the courts and Congress.

By eliminating any deference to agencies, H.R. 4768 would worsen this problem by forcing agencies to adopt even more detailed factual records and explanations, which would further delay the finalization of critical life-saving regulations.

We are talking about regulations that protect the quality of the air we breathe, the water we drink, and the food we consume.

Slowing down the rulemaking process means that rules intended to protect the health and safety of American citizens will take longer to promulgate and become effective, thereby putting us all at risk.

And, H.R. 4768 could also have the perverse effect of undermining agency accountability and transparency by encouraging clandestine rulemaking through civil enforcement actions, for instance.

I am also concerned that H.R. 4768 will deter public participation in the rulemaking process.

As the nonpartisan Congressional Research Service has observed, "[p]ublic participation in agency decisionmaking is highly sensitive to cost and delay."

By imposing greater scrutiny of agency rulemaking, however, the bill will skew the fact-finding process in favor of those with significant resources.

Large corporate interests – devoted only to maximizing profits for the benefit of their shareholders – already have the edge with their vast resources to weaken regulatory standards by burying an agency with paperwork demands and litigation.

Rather than giving *more* opportunities for corporate interests to prevail, we should be considering ways to ensure that that the voices of the public have a *greater* role in the rulemaking process.

Finally, H.R. 4768 would encourage judicial activism.

By eliminating judicial deference, the bill would effectively empower the courts to make public policy from the bench even though they lack the specialized expertise that agencies possess.

Although the Supreme Court has had numerous opportunities to expand judicial review of rulemaking, the Court has rejected this approach, reflecting a long-held belief that generalist courts simply lack the subject-matter expertise of agencies, are politically unaccountable, and should not engage in making substantive determinations from the bench.

Enhanced judicial review would reverse this firmly-established precedent by allowing generalist courts to impose their personal policy preferences as part of their review of an agency rule.

It is somewhat ironic that those who have long decried "judicial activism," would now support facilitating a greater role for the judiciary in agency rulemaking.

In closing, notwithstanding my concerns with this legislation, I thank the witnesses for being here today and I look forward to hearing their testimony.

Mr. MARINO. Gentlemen, we are going to go vote. I am going to forego our asking questions because I do not want to keep you here. I would love to come back because I would have you all to myself for the rest of the night, but I will not do that to you.

So this concludes today's hearing. Thanks to all the witnesses for attending. Any Member and all Members will have 5 legislative days to submit additional written questions for the witnesses or additional material for the record. The hearing is adjourned.

[Whereupon, at 2:23 p.m., the Subcommittee adjourned subject to the call of the Chair.]

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