Written Statement

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"The *Chevron* Doctrine:
Constitutional and Statutory Questions in Judicial Deference to Agencies"

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

March 15, 2016

I. INTRODUCTION

Chairman Marino, Ranking Member Johnson, and members of the Subcommittee, my name is Jonathan Turley and I am a law professor at George Washington University where I hold the J.B. and Maurice C. Shapiro Chair of Public Interest Law. It is an honor to appear before you today to discuss the *Chevron* Doctrine and its constitutional implications for our system of government.

It is a particular pleasure to appear today with this esteemed body of academics, including my colleagues Dick Pierce and Emily Hammond, and my former GW colleague John Duffy. The panel reaffirms what I have always maintained that there really is no need for Congress to go outside George Washington for all of its legal needs. Indeed, we are just short of a faculty quorum today.

I have long written about the rise of a "fourth branch" in our system and I cannot pretend that this trend is insignificant or benign. Indeed, as Woody Allen once observed, "I wish I could think of a positive point to leave you with" but asked if the crowd would "take two negative points" instead. There are many defenders of the Administrative State who, while admitting that our system has changed, insist that it has changed for the better. However, this is a case where two negatives do not make a positive – at least from a Madisonian perspective. Indeed, what you are likely to discern today is how *Chevron* is viewed differently from constitutional law and administrative law perspectives. I tend to view the doctrine through the lens of the separation of powers. Some of my colleagues tend to view the doctrine through the lens of agency powers.

The unavoidable fact is that our system is changing in a fundamental way and that change is occurring without public debate or consent. That is why this hearing is so important. No case better reflects this new governmental model than *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*., an administrative law case that has come to embody the role of federal agencies in not just enforcing but creating law. If our system is to be returned to its original moorings, we must be able to address, and alter, the *Chevron* doctrine in how it affects the balance of power within our federal system.

I come to this issue as someone who often agrees and supports the work of federal agencies. Indeed, law professors have a natural affinity toward agencies, which are

usually directed by people with advanced degrees and public service values. The work of federal agencies is critical to the preservation of our health and security as a nation. This is not a debate about the importance of the work of the agencies, but rather the accountability of agencies in carrying out that work. The agreement with the work of agencies – or for that matter with this Administration as a whole – should not blind us to the implications of the growing influence and independence of federal agencies. To that end, I would like to begin by briefly discussing the concern surrounding the growing independence of federal agencies and the emergence of a type of "fourth branch" of government. I will then turn to the doctrine itself in both its original conception and later evolution. Finally, I will suggest a few areas where Congress can act to realign the system and restore some of the original balance between the branches. As will be clear, I believe that the Supreme Court has made a colossal mess of this field with ill-defined and at times conflicting standards. Indeed, it imposed a solution to a problem that did not really exist and, in doing so, created a host of greater problems for our system. If the Court was judged under the medical standard that the first duty is "to do no harm," *Chevron* would be viewed as nothing short of legal malpractice. I believe that Congress can play a key role in restoring the system and addressing the negative (and unintended) consequences of *Chevron*.

II. THE RISE OF A FOURTH BRANCH IN A TRIPARTITE SYSTEM.

I have previously written[1] and testified[2] about the rise of the Fourth Branch and

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[1] *See, e.g.*, Jonathan Turley, *Madisonian Tectonics: How Form Follows Function in Constitutional and Architectural Interpretation*, 83 GEO. WASH. L. REV. 305 (2015); Jonathan Turley, *A Fox in the Hedges: Vermeule's Vision of Optimized Constitutionalism in a Suboptimal World*, 82 U. CHI. L. REV. 517 (2015); Jonathan Turley, *Recess Appointments in the Age of Regulation*, 93 B.U. L. REV. 1523 (2013); Jonathan Turley, *The Rise of the Fourth Branch of Government*, WASH. POST (May 24, 2013); *see also* Jonathan Turley, *Constitutional Adverse Possession: Recess Appointments and the Role of Historical Practice in Constitutional Interpretation*, 2013 WIS. L. REV. 965 (2013) (discussing the separation of powers consequences in the reduction of legislative authority).

[2] *See Authorization to Initiate Litigation for Actions by the President Inconsistent with His Duties Under the Constitution of the United States: Hearing Before the H. Comm. on Rules*, 113th Cong. (2014) (prepared statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School), http://docs.house.gov/meetings/RU/RU00/20140716/102507/HMTG-113-RU00-Wstate-TurleyJ-20140716.pdf; *Enforcing The President's Constitutional Duty to Faithfully Execute the Laws: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 30–47 (2014) (testimony and prepared statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School) (discussing nonenforcement issues and the rise of the Fourth Branch); *Executive Overreach: The President's Unprecedented "Recess" Appointments: Hearing Before the H. Comm. on the Judiciary*, 112th Cong. 35–57 (2012) (prepared statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School); *see also Confirmation Hearing for Attorney General Nominee Loretta Lynch: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2015) (prepared statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School) (discussing the loss of legislative power and the role of

the growing imbalance in our governmental system. The American governmental system obviously has changed dramatically since the founding when the vast majority of governmental decisions rested with state governments. In 1790, the federal government was smaller than most modern city governments with just 1,000 nonmilitary workers. By 1962, it had grown to 2,515,000 federal employees. We now have roughly 2,840,000 federal workers in 15 departments, 69 agencies, and 383 nonmilitary sub-agencies.[3] This does not count the millions of contractors and subcontractors working for the government. The growth in the size of the federal government resulted in a shift in the center of gravity for our system as a whole. Massive federal agencies now promulgate regulations, adjudicate disputes, and apply rules in a system that often has relatively little transparency or accountability to the public. All but a tiny fraction of these actions are (or can be) reviewed by Congress, which has relatively few staff members and little time for such reviews. As a result, it is the Administrative State, not Congress, which now functions as the dominant "law giver" in our system. The vast majority of "laws" governing the United States are not passed by Congress but are issued as regulations, crafted largely by thousands of unseen bureaucrats. For example, in 2007, Congress enacted 138 public laws, while federal agencies finalized 2,926 rules, including 61 major regulations.[4] Agencies now adjudicate most of the legal disputes in the federal system. A citizen is ten times more likely to be tried by an agency than by an actual court. In a given year, federal judges conduct roughly 95,000 adjudicatory proceedings, including trials, while federal agencies complete more than 939,000. This does not mean that these regulations and adjudications are inherently tyrannical or that Congress has no influence over agencies. Rather, it states the obvious: this system is adopting new pathways and power centers that were never anticipated in the design of our system.

Obviously, the rise of a massive administrative state within the previously tripartite system is a transformative change from the original design of our system. James Madison viewed the separation of powers of the three branches in quasi-Newtonian terms – as three bodies locked in a stable orbit with the public at the center. The carefully balanced powers of the three branches allowed inverse pressures to check abuses of power. The separation of powers doctrine was first and foremost a protection of individual rights from the concentration of power in any single branch or single person. Madison believed that the separation of powers, as a structure, could defeat the natural tendency to aggrandize power that tended toward tyranny and oppression. In Madison's view, "the interior structure of the government"[5] distributed the pressures and

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confirmation hearings to address separation of powers issues).

[3] Turley, *Recess Appointments in the Age of Regulation*, *supra* note 1, at 1533; WALTER E. VOLKOMER, AMERICAN GOVERNMENT 231 (11th ed. 2006) (citing Bruce D. Porter, *Parkinson's Law Revisited: War and the Growth of American Government*, 60 PUB. INT. 50, 50 (1980)). In 1816, the federal system employed 4,837 employees. Deanna Malatesta, *Evolution of the Federal Bureaucracy*, *in* 1 A HISTORY OF THE U.S. POLITICAL SYSTEM: IDEAS, INTERESTS, AND INSTITUTIONS 373, 380 tbl.1 (Richard A. Harris & Daniel J. Tichenor eds., 2010).

[4] Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 936 (2009).

[5] THE FEDERALIST NO. 51, at 320 (James Madison).

destabilizing elements of nature in the form of factions[6] and unjust concentration of power.[7] He envisioned what he described as a "compound" rather than a "single" structure republic and suggested it was superior because it could bear the pressures of a large pluralistic state. Alexander Hamilton spoke in the same terms, noting that the superstructure of a tripartite system allowed for the "distribution of power into distinct departments" and for the republican government to function in a stable and optimal fashion.[8]

The structure of this system represents more than just the rigid lines defining interbranch powers. The structure is meant to transform factional interests into majoritarian compromises. I have previously written about what I call a "conarchitectural" approach to constitutional interpretation and understanding the separation of powers.[9] In architecture, the concept of structure has been developed to a far greater extent than in the law despite our long-standing debate of form and functionalism. It is well understood that structure does not just protect those within but also directs their interrelationships. As Winston Churchill once said that "[t]here is no doubt whatever about the influence of architecture and structure upon human character and action. We make our buildings and afterwards they make us."[10] The design of the structure both reflects and directs the action within it. In both architectural and constitutional theory, form follows function. The separation of powers forces a greater array of participating actors, and therefore interests, to be considered in the shaping of laws. A conarchitectural approach treats the structure itself as the expression of the Framers' vision of human nature and the optimal space for political deliberations.

As in architecture, constitutional structure plays the same determinist role in shaping perspective and choice. The structural lines and spaces created by the Framers are best seen as a recognition of the need to frame not just the inherent powers but the perception of power within a system. By structuring political decision-making, constitutional structure funnels decision-making and political dialogue along particular pathways. The confines of the tripartite system serve much of the same function as "choice architecture" in funneling political energies and actions. By maintaining separation, the Framers likely sought to achieve stability even within the dynamic and divisive political environment. The guarantees of separation ideally discouraged dysfunctional choices that Congress or a President might make in an effort to circumvent one another or "go it alone" through unilateral action.[11] The structure was not just shaped

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6 *See* THE FEDERALIST NO. 10, at 79 (James Madison) (noting that the "causes of faction" are "sown in the nature of man.").

7 *See* THE FEDERALIST NO. 51, *supra* note 5, at 320 (James Madison); *see also* Douglass Adair, *"That Politics May Be Reduced to a Science": David Hume, James Madison, and the Tenth Federalist*, 20 HUNTINGTON LIBR. Q. 343, 348–57 (1957).

8 THE FEDERALIST NO. 9, at 72 (Alexander Hamilton).

9 *See, e.g.*, Turley, *Madisonian Tectonics*, *supra* note 1; Jonathan Turley, *A Fox in the Hedges*, *supra* note 1.

10 Paul Goldberger, *Why Architecture Matters* 1 (Yale 2009) (quoting Churchill's address to the English Architectural Association in 1924).

11 The controversy over the nonenforcement of federal law is a direct result of "bad choices" made in the absence of clear lines of separation as I have previously discussed

by human realities, but the structure also would shape those realities. The limitations on executive, legislative, and judicial powers were meant to limit the horizons of power: to influence the range of choices and expectations within the system. When viewed from this perspective, the rise of a system of federal agencies within the constitutional structure changed how those within it interact and react. The tripartite design of the Madisonian system is carefully calculated to resolve divisions in a pluralistic society.

The danger of the addition of the equivalent of a Fourth Branch is obvious. Social and political divisions were never meant to be resolved through an array of federal agencies, which are insulated from the type of public participation and pressures that apply to the legislative branch. A recent example is the intervention of a small federal office to force a result in the long-simmering public debate over the name of the Washington Redskins football team.[12] The Trademark Trial and Appeal Board voted to rescind federal trademark protections for the Redskins – a decision that could ultimately decide the controversy over the 80-year-old name. There are perfectly good reasons to be offended by this name, but the public remains deeply divided. Social and market pressures may still result in a name change but it should not come by some administrative edict of the little-known administrative body of a little-known board. The problem is that the board had at its disposal a ridiculously ambiguous standard that allows the denial of a trademark if it "may disparage" a "substantial composite" of a group at the time the trademark is registered. Congress should have addressed that ill-defined standard years ago, but the overreach of the board was breathtaking. We have seen other examples of agencies intervening in political or social controversies in ways that undermine the legislative process as the means for resolving such conflicts, as I have previously discussed.[13]

While the future of the Redskins name is hardly a threat to our system of government, the circumvention of political process in such controversies could well be. We are gravitating to the de facto creation of an English ministry system in this case. Academics often treat the rise (and dominance) of the Administrative State as an inevitability and, accordingly, view those of us who cling to the Madisonian model as hopelessly naïve and nostalgic. However, until the American people decide to adopt a bureaucracy or technocracy as the principle form of government, Congress has a duty to act to preserve the essential components of our tripartite system. To do that, it must first deal with *Chevron*.

III. THE ORIGINAL CONCEPTION AND EXPANDING ROLE OF *CHEVRON* IN THE ADMINISTRATIVE STATE.

While many point to the New Deal programs of Franklin Delano Roosevelt as the advent of the "age of regulation," the creation of large agencies does not in and of itself create an Administrative State characterized by agencies with active, ubiquitous, and

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before Congress. *See* Duty to Faithfully Execute Hearing, *supra* note 2, at 113–63; *see also* Jonathan Turley, *The President's Power Grab*, L.A. TIMES, Mar. 9, 2014, at A28.

[12] Jonathan Turley, *Another Federal Agency Goes Outside of Bounds Over Redskins Name*, WASH. POST (Sunday), June 22, 2014.

[13] Jonathan Turley, *Politics by Other Means,* USA TODAY, July 8, 2014.

largely independent governing authority. You can have large agencies that are still subordinate and controlled by the political branches. If the New Deal created the components for the Administrative State, it was the Supreme Court that gave those components the ability or license to govern with relative independence. *Chevron* has grown as a doctrine despite relative clarity of the obligation of courts to review agency decisions under federal law, which is conspicuously silent about any sweeping deference to be accorded to agencies. Section 706(2) of the Administrative Procedure Act (APA) states that court shall:

> 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 . . . .

The statutory duty to decide whether an agency action is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" reflects a traditional judicial review standard. There is no license for yielding a substantial part of that duty to agencies as presumptively correct interpreters of the law. In the APA, Congress specifically instructed courts to decide "all relevant questions of law."[14] When read in combination with the APA, *Chevron* reads as much a delegation of judicial function as legislative function.

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.[15] addressed the question of how the Environmental Protection Agency (EPA) could treat "non-attainment" states that had failed to attain the air quality standards under the Clean Air Act. The Reagan Administration had liberalized preexisting rules requiring a permit for new or modified major stationary sources. The Natural Resources Defense Council challenged the EPA regulation and prevailed in court. With three justices not participating in the decision, the court voted 6-0 to reverse and order deference to the EPA's interpretation.[16]

The *Chevron* decision proved to be something of a Trojan horse doctrine that arrived in a benign form but soon took on a more aggressive, if not menacing, character for those concerned about the separation of powers. The doctrine on its face is unremarkable and even commendable in the Court seeking to limit the ability of unelected judges to make arguably political decisions over governmental policy. As noted by Chief Justice John Roberts, "*Chevron* importantly guards against the Judiciary arrogating to itself policymaking properly left, under the separation of powers, to the Executive."[17] *Chevron* put forward a simple test for courts in first looking at whether the

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14 5 U.S.C. § 706 (2016).

15 *Chevron*, 467 U.S. 837 (1984).

16 Chief Justice Rehnquist, Justice Thurgood Marshall, and Justice Sandra Day O'Connor recused themselves from the case.

17 *City of Arlington v. FCC*, 133 S. Ct. 1863, 1886 (2013) (Roberts, C.J., dissenting).

underlying statute clearly answers the question and, if not, whether the agency's decision is "permissible" or reasonable.[18] That highly permissive standard shifted the center of gravity of statutory interpretation from the courts to the agencies contrary to the language of the APA. With sweeping deferential language, the Court practically insulated agencies from meaningful review. In a system based on checks and balances, the Court helped create an internal system that would flourish under a protective layer of agency deference. To be sure, the Court has repeatedly recognized the right of Congress to check federal agencies. However, in practice, *Chevron* has proven a windfall for agencies in advancing their priorities and policies in the execution of federal laws. It is the administrative equivalent of *Marbury v. Madison*. Rather than declaring courts as the final arbiter of what the law means in *Marbury*, *Chevron* practically resulted in the same thing for agencies by giving them the effective final word over most administrative matters. Even though Congress can override agency decisions, it is unrealistic to expect millions of insular corrections to be ordered over agencies decisions.

While it seems that we have always lived under the dominance of the *Chevron* doctrine, it is important to note that it is only a little over 30 years old. Before *Chevron*, there was not a period of utter confusion and judicial tyranny in the review of agency decisions. Courts simply applied traditional interpretive approaches that looked at whether there was an ambiguity or gap in a statute as opposed to clarity on a given question. If so, it then reviewed the agency decision to determine whether it was legal and proper. This analysis was later developed further by the decision in *Skidmore v. Swift & Co.*, where the Court articulated factors to use to decide whether to overturn the particular agency's determinations.[19] Notably, without granting sweeping deference, the Court in *Skidmore* already recognized that agency determinations would carry weight, just not controlling weight:

> 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. 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.

Id. Justice Jackson referred to a historical treatment of agency interpretations with due "respect" and "considerable weight." *Id*. at 140. Thus, the courts did not have a hostile or counter-agency position in such cases, but a fairly accommodating standard. Courts in the United States also have a well-understood and respected tradition of avoiding political questions and limiting judicial discretion. *Chevron* could have resulted in the very same way under this prior case law, but the Court instead created a new deferential standard that proceeded to expand as soon as the Court gave it breath.

The late Justice Scalia once criticized *Chevron* as resting on a belief that Congress

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18 *Chevron,* 467 U.S. at 842-43.

19 *Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944).

knowingly passes vague or gap-filled laws with the intention that agencies should answer the lingering questions. Justice Scalia called that notion a "fiction" adopted by the Court to create the sweeping *Chevron* doctrine.[20] Yet, that fiction has become embedded in legisprudence and law students are often taught that agency interpretations are a part of the statutory process – as if Congress frames issues while agencies work out specific resolutions.[21] While Congress clearly at times leaves gaps due to poor legislative crafting or political impasses in statutes, it can hardly be said that those gaps are knowing invitations for agency lawmaking. Indeed, the notion that critical legislative decisions have been effectively delegated to the agencies runs against the grain of the Madisonian system and moves critical decision-making further from public review and influence.

After decades of neglect during which the Court remained relatively passive in the face of the rising dominance of agencies in our system, the Court began to seek incremental limitations on the authority of agencies. While Scalia called *Skidmore* "an anachronism"[22] the Court would rediscover the value of more serious judicial review in some cases. For example, in *Christensen v. Harris County*,[23] the Court suggested that the prior standard in *Skidmore* would apply to less formal agency decisions as opposed to those agency documents that carry "force of law." Justice Clarence Thomas drew a distinction of when an agency interprets a statute in a decision that has "the force of law" from more rudimentary decision. As noted by Harvard Professor (and my former professor at Northwestern) Thomas Merrill,[24] Thomas' proposal tracked a recommendation by the Administrative Conference of the United States.[25] Thomas described the former category including "formal adjudication or notice-and-comment rulemaking."[26] Thus, because this case involved a Department of Labor opinion letter that was merely advisory on the meaning of the Fair Labor Standards Act, there was no deference extended under *Chevron*. In applying the *Skidmore* standard, the Court rejected the interpretation. Adding to the confusion of current meaning of Chevron were differing minority opinions, including the dissenting opinion of Justice Breyer who insisted that Chevron did not create a new standard and that *Skidmore* remains the only standard for deference.[27] *Chevron* in his view only extended the basis for deference on the basis that "Congress had delegated to the agency the legal authority to make those

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20 Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517.

21 Notably, Scalia would later be highly critical of the Skidmore standard in favor of the *Chevron* deference standard in cases like *Mead*. United States v. Mead Corp., 533 U.S. 218, 241 (2001) (Scalia, J., dissenting).

22 *Christensen v. Harris Cty*., 529 U.S. 576, 589 (2000) (Scalia, J., concurring in part and concurring in the judgment).

23 *Christensen*, 529 U.S. 576 (2000).

24 *See generally* Thomas Merrill, Chevron *at 30: Looking Back and Looking Forward: Step Zero After* City of Arlington, 83 FORDHAM L. REV. 731 (2014).

25 OFFICE OF THE CHAIRMAN, ADMIN. CONFERENCE OF THE U.S., RECOMMENDATIONS AND REPORTS, RECOMMENDATION 89-5: ACHIEVING JUDICIAL ACCEPTANCE OF AGENCY STATUTORY INTERPRETATIONS 31-33 (1989).

26 Merrill, *Chevron at 30*, *supra* note 24, at 587.

27 *Id.* at 596 (Breyer, J., dissenting).

determinations."[28]

The evolving and conflicting view of *Chevron* was also captured in the decision of *United States v. Mead Corp*.[29] In that case of tariff classification rulings, the eight-justice majority opinion, recognized different deference tests under *Skidmore* and *Chevron*. Consistent with *Christensen*, the Court noted the application of *Chevron* for agency interpretations that have the "force of law."[30] The Court embraced the notion of delegated authority from Congress for "the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[31] However, the condition of what is an action with the force of law remained undefined. Yet, the ruling became the basis for the concept of "Chevron Step Zero," the court first inquires into whether Congress delegated the authority before applying *Chevron* deference. If not, the less favorable standard in cases like *Skidmore* would apply.

One of the more alarming applications of *Chevron* came in *City of Arlington v. FCC*.[32] The case concerned a 1996 amendment to the Federal Communications Act mandating that local land use agencies process applications for the construction or modification of wireless transmission towers "within a reasonable period of time."[33] The statute provided an avenue with a "court of competent jurisdiction" for relief to parties who did not receive action on requests. The case perfectly captured the fluid authority and utter flexibility of agencies in exercising their interpretive powers post-*Chevron*. The Federal Communications Commission (FCC) initially disclaimed the authority under the statute but then reversed itself and issued an order setting a 90-day limit for any tower expansion or 150-day limit for new construction under the rule. The jurisdictional authority of the FCC was challenged. For many years, it was generally thought that, no matter how expansively *Chevron* is read, the one area where an agency could not claim deference would be in the interpretation of its own jurisdictional powers. After all, as discussed above, the APA specifically leaves to the court to determine if an agency has acted "in excess of statutory jurisdiction." Nevertheless, the Fifth Circuit held that *Chevron* would apply in an agency defining its own jurisdiction. The Supreme Court agreed in a 5-4 decision with Justice Scalia joining the majority. Chief Justice Roberts (with Justices Kennedy and Alito) dissented. Five Justices found no way to distinguish jurisdictional and non-jurisdictional questions. Indeed, in his separate decision, Justice Scalia called such distinctions little more than a "mirage."[34]

Chief Justice Roberts, joined by Justices Kennedy and Alito, dissented, and expressed the view that such expanded authority raised transformative challenges for the

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28 *Id.*

29 *Mead*, 533 U.S. 218 (2001).

30 *Id.* at 226-27.

31 *Id.* at 27.

32 City of Arlington v. FCC, 133 S. Ct. 1863, 1886 (2013).

33 47 U.S.C. § 332(c)(7)(B)(ii) (2012).

34 Justice Scalia saw the distinction as another attack on *Chevron* that would exploited in future cases. *City of Arlington*, 133 S. Ct. at 1873 (Scalia, J., concurring) ("Make no mistake - the ultimate target here is *Chevron* itself. Savvy challengers of agency action would play the 'jurisdictional' card in every case.")

federal system. Roberts decried the court evading its core responsibility in drawing lines of authority within that system: "Our duty to police the boundary between the Legislature and the Executive is as critical as our duty to respect that between the Judiciary and the Executive . . . We do not leave it to the agency to decide when it is in charge."[35] In a chilling warning, Roberts further notes that "[i]t would be a bit much to describe the result as 'the very definition of tyranny,' but the danger posed by the growing power of the Administrative State cannot be dismissed."

City of Arlington fulfilled many of our worst fears of the trajectory of *Chevron*. Despite tailoring in cases like *Christensen* and *Mead*, *City of Arlington* gave agencies a critical and expansive power to define its own jurisdiction under the protection of heavy *Chevron* deference standard. For that reason, the avoidance of *Chevron* analysis in the recent decision in *King v. Burwell* only deepened the uncertainty over the scope and meaning of the doctrine. The case would seem ripe for *Chevron* analysis in the interpretation of an agency of the meaning of state and federal exchanges within the overall scheme of the Affordable Care Act (ACA). Writing for a six-justice majority, Chief Justice Roberts, wrote:

> When analyzing an agency's interpretation of a statute, we often apply the two-step framework announced in *Chevron*. Under that framework, we ask whether the statute is ambiguous and, if so, whether the agency's interpretation is reasonable. This approach is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.[36]

It is the type of fluid, undefined standard that has characterized not just the post-*Chevron* cases but many other areas of jurisprudence from the Court. The Court appears to believe that it will be self-evident when a court is dealing with a "question of deep economic and political significance."[37] Of course, many, if not most, federal agency decisions have significant impacts. While *King v. Burwell* may reflect a degree of belated buyer's remorse, it will hardly correct an ambiguous standard by grafting on an equally ambiguous limitation on that standard. Indeed, the Court appears convinced that adding layers of ambiguity will somehow produce clarity under *Chevron*.

IV. REFORMING *CHEVRON* AND REALIGNING GOVERNMENTAL AUTHORITY WITHIN THE SEPARATION OF POWERS.

The most obvious avenue for limiting or even eliminating the *Chevron* doctrine is through judicial action. After all, the doctrine is the creation of the Court and, while certainly reflecting constitutional values, is not imposed directly by any constitutional provision. Indeed, many have argued that the doctrine runs against the constitutional grain, particularly in the Vesting Clause of Article I. More importantly, as noted above,

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35 *Id.* at 1886 (Roberts, C.J., dissenting).

36 *King v. Burwell*, 135 S. Ct. 2480, 2488-89 (2015) (citations omitted).

37 *Id.* at 2489.

the doctrine is based in large part on the perceived or assumed delegation of Congress. As the Supreme Court has made clear, "Agencies are creatures of Congress; 'an agency literally has no power to act . . . unless and until Congress confers power upon it.'"[38]Accordingly, this is an area where Congress can have a direct and pronounced impact. The question is not the authority but the desire of Congress to reassert its authority over agencies. Advocates of the Administrative State have been open in their skepticism that Congress would, or even could, exercise meaningful review over agency decisions and rulemaking. However, I fear that the growth of federal agencies is reaching a critical mass within our system – a point where rapid, exponential, and irreversible expansion will occur.

As noted above, post-*Chevron* cases have built limiting principles around the notion of implied delegation of interpretive questions to federal agencies. These cases flip the presumption of nondelegation that some of us view as inherent under the Vesting Clause or critical to the separation of powers.[39] This view is based on the text and purpose of Article I, Section: "All legislative Powers herein granted shall be vested in a Congress of the United States ˇ ˇ ˇ " Reinforcing this power is the Take Care Clause in Article II that states "[The President] shall take Care that the Laws be faithfully executed . . ."[40] Both provisions reinforce the role of Congress in the creation of laws that are to govern the nation. However, these clauses reflect a division of authority that is meant to do more than create a process for legislation. The separation of powers first and foremost protects individual liberty from the concentration of authority in the hands of any one agency or person. It also creates a transformative structure for resolving problems that divide us.

Even at the start of this Republic, the United States was one of the most pluralistic nations on Earth. Within that fabric were different groups and identifications and interests that represent the factions that were a preeminent concern for Madison and many of his contemporaries. The tripartite system, and particularly the bicameral system of Congress, works to convert disparate factional interests into majoritarian compromises. It is a system that not only works to perfect federal legislation but foster compromise and consensus. Factions are forced to deal with each other in the legislative process in order to achieve any shared goals. The result is a key stabilizing role for the country as a whole. The danger with the rise of the Fourth Branch is that key decisions are moving farther and farther away from this transformative and representative system. Accordingly, the presumed delegation of legislative functions raises fundamental dangers for a system based on the legislative process as a stabilizing and motivating component of our government.

What is fascinating to me is how the rise of the Administrative State has secured what the Framers sought to deny – a new type of "royal prerogative." The Framers

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[38] *City of Arlington, 133 S. Ct. at 1880 (quoting Louisiana Pub. Serv. Comm'n v. FCC*, 476 U. S. 355, 374 (1986)).

[39] See, e.g., Larry Alexander and Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death are Greatly Exaggerated*, 70 U. Chi. L. Rev. 1297 (2003); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1237-41 (1994).

[40] U.S. CONST. art. II, § 3, cl. 4.

divided the powers of government against the backdrop of over 150 years of tension with the English monarchy.[41] They were specifically aware of the circumvention of the legislative and judicial branches by sovereigns like James I. The King insisted that the enactment of laws was merely the starting point of legislation and that the King – not just legislators or judges – plays a critical role in perfecting laws. He insisted that "I thought law was founded upon reason, and I and others have reason as well as the judges."[42] That was the view rejected by the Framers. Thomas Jefferson wrote in 1783 with regard to the Virginia Constitution that "[b]y Executive powers, we mean no reference to the powers exercised under our former government by the Crown as of its prerogative . . . We give them these powers only, which are necessary to execute the laws (and administer the government)."[43] Likewise, James Wilson defended the model of an American president by assuring his colleagues that "did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature."[44] While the Framers opposed this role in crafting the first three articles of the Constitution, a type of "agency prerogative" has arisen within the system that is founded on the very same premise articulated by James I. As with the use of unilateral executive power, agency decisions now claim to further the legislative process though administrative reasoning. This prerogative is insulated from meaningful judicial review by the *Chevron* doctrine.

Efforts to regain control over agencies have met with limited success. The Congressional Review Act (CRA).[45] The CRA allowed Congress to block significant regulations. Yet, both houses had to pass resolutions of disapproval and the president had to sign the law. Not surprisingly, the law had little impact. The "Regulations from the Executive in Need of Scrutiny Act" or REINS, is a more muscular effort to regain congressional control over regulations.[46] REINS would require regulations to secure congressional approval in order to take effect. It would flip the dynamic of CRA from allowing congressional intervention to requiring congressional approval for major new rules. The law however has a default against new rule: if Congress does not act on a major rule within 70 days, it would be deemed "not approved" unless the president makes

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41 *See* Julius Goebel, Jr., *Ex Parte Clio*, 54 COLUM. L. REV. 450, 474 (1954); David Gray Adler, *The Steel Seizure Case And Inherent Presidential Power*, 19 CONST. COMMENT. 155, 164 (2002).

42 7 Sir Edward Coke, Reports 65, quoted in ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 61 (1921).

43 This quote is from Jefferson's Draft of a Fundamental Constitution for Virginia. Adler, *supra* note 41, at 164 (citing CHARLES WARREN, THE MAKING OF THE CONSTITUTION 177 (Harvard U. Press, 1947)).

44 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 62-70 (Max Farrand, ed 1911); Adler, *supra* note 41, at 165.

45 5 U.S.C. . 801, et seq§

46 *See* Regulations from the Executive in Need of Scrutiny ("REINS") Act of 2011, H.R. 10, 112th Cong.; *see also* Regulatory Accountability Act of 2011, S. 1606, 112th Cong. (requiring regulators to adopt the "least costly" rule and imposing formal rulemaking procedures); Regulatory Accountability Act of 2011, H.R. 3010, 112th Cong. (same).

a determination that failure to enact the rule would harm the health, safety, or national security or cause conflicts with criminal law or treaty obligations. While there are good-faith objections to REINS as possibly curtailing executive authority and running afoul of cases like *Chadha*, I believe that the premise of the law is sound and compelling in asserting legislative authority over the law-making functions of agencies. I believe that a congressional approval law would be constitutional.[47] There are aspects of REINS that should be reexamined but the categorical objection to such a law is fascinating. Indeed, the arguments from critics that the law would alter our constitutional structure only highlights how engrained the Administrative State has become in our assumptions about government. However, on the assumption that a REINS-like reform is not likely to pass, it may be more productive to look a reform that specifically target areas like the *Chevron* doctrine in seeking to rebalance this system.

A. Reinforcing Nondelegation As A Presumption In Judicial Review.

While perhaps out of vogue with academics, the notion of non-delegable powers runs deep in the constitutional tripartite design. After all, it makes little sense to create this careful balanced system if the powers can simply be delegated or waived. That is particularly the case with the legislative branch. Yet, while distinguishing "strictly and exclusively legislative powers", Chief Justice John Marshall, in *Wayman v. Southard*,[48] wrote for a unanimous Court in holding that Congress "may certainly delegate to others, powers which the legislature may rightfully execute itself." The issue remained one of line drawing for courts to isolate that point "which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions, to fill up the details."[49] This issue was in the forefront of the conflict between the Supreme Court and the White House during the 1930s, though admittedly the Court has routinely rejected nondelegation claims.[50] Yet, in 1928 in *J.W. Hampton, Jr. & Co. v. United States*, the Court upheld a statute that allowed the president to set tariffs because it contained an "intelligible principle" for implementing the statute.[51] Then, in 1935 in *A. L. A. Schechter Poultry Corp. v. United States*,[52] the Court

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47 *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), dealt with the one-house legislative veto. Obviously REINS avoids the bicameralism problem of a one-house veto and there is no reason why such a law cannot be crafted to avoid Presentment Clause problems. Notably, both Justice Stephen Breyer and Professor Lawrence Tribe have previously indicated that they also believed that such a law could be crafted to pass constitutional muster. *See* Stephen Breyer, *The Legislative Veto After Chadha*, 72 Geo. L.J. 785, 793-97 (1984); Laurence H. Tribe, *The Legislative Veto Decision: A Law by Any Other Name?*, 21 Harv. J. on Legis. 1, 19 (1984).

48 23 U.S. 1, 43 (1825).

49 *Id.*

50 Justice William Rehnquist invoked this doctrine in his opinion in *Industrial Union Department, AFL-CIO v. American Petroleum Institute (Benzene*), 448 U.S. 607, 686 (1980) (Rehnquist, J., concurring). No other justice joined him in that position.

51 J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).

struck down a provision of the National Industrial Recovery Act under the nondelegation doctrine for lacking such a principle. Likewise, *Panama Refining Co. v. Ryan*,[53] the Court held that no such principle was articulated when Congress gave the President authority to regulate the transportation of petroleum products.

In part the association with the anti-New Deal cases contributed to the demise of the doctrine.[54] However, there was also a growing view that Congress could never practically address the myriad of issues routinely addressed by agencies in the interpretation and enforcement of so many federal laws. The enactment in 1945 of Administrative Procedure Act reflected this view by creating a quasi-legislative process for notice and comment on new federal rules. The dismissive view of nondelegation was evident in the Court's decision in *Whitman v. American Trucking Ass'ns*,[55] when the Court noted "we have found the requisite 'intelligible principle' lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" Of course, as with its *Chevron* standards, it is often hard to discern what the Court considers an "intelligible" from an "unintelligible" principle for the purposes of delegation. Justice Thomas made this point in his concurring opinion in *American Trucking* when he expressed obvious frustration on finding any meaning in the notion of "intelligible principles":

> Rather, it speaks in much simpler terms: "All legislative Powers herein granted shall be vested in a Congress." U.S. Const., Art. I, 1 (emphasis added). I am not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power. I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than "legislative."[56]

Like the standard under the post-*Chevron* cases of determining those actions with "deep economic and political significance," the standard of "intelligible principles" is largely undefined. The result is ample room for agency actions while maintaining the pretense of judicial review. This is not to assign all of the blame to the courts. Clearly this history shows not just judicial abrogation of the duty to maintain lines of separation but also the willing role of Congress as an enabler of agency expansion. There have been times when Congress has turned a blind eye to the usurpation of its authority by a popular president. Indeed, Congress has at times even facilitated the circumvention of its own

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52 A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

53 *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

54 JOHN HART ELY, DEMOCRACY AND DISTRUST 133 (1980).

55 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474 (2001) (citing *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)).

56 *Whitman v. Am. Trucking Ass'ns, 531 U.S.* at 487 (2001) (Thomas, J., concurring).

authority. This can occur for a number of obvious reasons. A president may be enormously popular and members fear a public backlash from any action about could be seen as disloyalty. Likewise, the political environment may be viewed as too risky for members to stand on constitutional principle as with periods of national security or economic crisis. The Framers well understood the wavering principles that can characterize politics. While Madison hoped in *Federalist No. 51* that "ambition must . . . counteract ambition," personal ambition can prevail over institutional interests in modern politics as members become agents of their own obsolescence.

These cases reaffirm that there is no inherent authority of agencies to carry out such actions and, as my colleague Dick Pierce noted, "an agency has the power to issue binding legislative rules only if and to the extent Congress has authorized it to do so."[57] Thus, even in carrying out the takeover of the steel mills during wartime, Justice Hugo Black demanded evidence of such congressional intent. Thus in *Youngstown Sheet & Tube Co. v. Sawyer*, he wrote:

> The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied. Indeed, we do not understand the Government to rely on statutory authorization for this seizure.[58]

Professor Merrill has tried to thread this jurisprudential needle by moving beyond a nondelegation doctrine toward an "exclusive delegation doctrine" that states that "the President and executive branch agencies can subdelegate only if and to the extent Congress has authorized subdelegation. The exclusive delegation understanding tells us the Executive has no inherent authority to exercise legislative power."

Whatever perspective is applied, the legislative functions of agencies are based either loosely or directly on a delegation theory. As a result, Congress could alter Section 706 of the APA[59] to expressly reject any presumption of delegation for such interpretations, particularly with regard to the jurisdiction of a federal office or agency. The section currently authorizes judicial review of agency actions to determine if the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[60] The APA could be altered to expressly reject any claimed presumption of delegation and to reject the application of the *Chevron* standard absent an express standard of deference given to an agency. Section 701 already limits judicial review "(1) if a statute expressly precludes review or provides another form of review under the APA, that statute governs; or (2) the 'agency action is committed to agency discretion by law.'"

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57 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.3, at 234 (3d ed. 1994)); *See also* Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2109 (2004).

58 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952).

59 5 U.S.C. § 706 (2012).

60 § 706.

Id. § 701(a). Congress can change the APA to address the standard for review. Clearly if Congress can deny review, it can structure review under the belief that the lesser is contained in the greater in such use of congressional authority.

Putting aside the APA, Congress could also use a standard provision to add to statutes that expressly denies any delegation of authority to agencies to determine their jurisdiction. Such provisions could also deny any intended delegation over force of law interpretations while recognizing that provisions can be subject to a *Skidmore*-like standard of interpretation. Such standard clauses are already used for such legal issues as severability issues for judicial review. Courts could still evade such provisions but they will have to dispense with the pretense that the sweeping deference under *Chevron* is Congress' doing or delegated intent.

B. Reasserting Citizen and Congressional Power Over Agency Action.

While statutory changes would attack *Chevron's* underlying presumption directly, the decades of expansion of administrative agencies left created a myriad of problematic elements that would remain. Indeed, the statutory changes would address some of the overreach of agencies into legislative areas but it would not address other problems related to the judicial review. As noted earlier, citizens are now over ten times more likely to have their disputes adjudicated in an administrative court than a conventional court. There are roughly 870 Article III judgeships in comparison to almost 1,600 Administrative judges.[61] What citizens find in agency hearings is generally a judge who conducts abbreviated and agency-dominated proceedings. Citizens are rightfully irate over their treatment by these administrative courts.

1. Administrative Judges. We have effectively created an alternative – and now larger – shadow court system. Yet, the court system lacks due process guarantees and truly independent judges. I want to emphasize that I respect (and indeed I have represented and counseled) administrative judges. Under the APA, Congress has taken important steps to try to preserve the independence of Administrative Law Judges (ALJs) who are separated from agency staff,[62] removed in terms of compensation from agency heads,[63] and exempted from performance appraisals in agencies.[64] However, these judges remain "inferior officers" under Article I and are subject to removal by the Executive branch. While the Office of Personnel Management (OPM) sets the standards for ALJ selection (including seven years experience and test results), they are dependent on agencies that are empowered to hire as many ALJs as necessary[65] and are subject to

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61 Kent Barnett, *Resolving the ALJ Quandary*, 33 J. NAT'L ASS'N L. JUD. 644, 647 n.5 (2013).

62 5 U.S.C. § 554(d) (2012).

63 § 3105.

64 § 5372.

65 5 U.S.C. § 3105 (2006). The agencies choose among the top three candidates for a given ALJ position. Robin J. Arzt et al., *Advancing the Judicial Independence and Efficiency of the Administrative Judiciary: A Report to the President-Elect of the United States*, 29 J. NAT'L ASS'N ADMIN. L. JUD. 93, 101 (2009).

removal by the Executive Branch (though only for "good cause").[66] ALJs have objected to this process, particularly the role of the OMB, as undermining their independence.[67] Moreover, agency heads can still reverse ALJ decisions.[68]

Adding to this concern is a system that does not always allow for a full and fair proceeding. Indeed, some administrative proceedings resemble a factory-system of adjudication. Consider the ALJs assigned to the Social Security Administration (SSA). The agency expects these judges to assign roughly 2 hours on each case while hearing office staff attorneys are allotted 8 hours to prepare a draft denial decision for the judge's review. These judges labor under a load of 700,000 to 800,000 cases each year.[69] Congress should examine the degree of influence of agencies in the selection of ALJs and the degree to which ALJs are given little time to seriously consider cases. First and foremost, agencies should have no role in the selection, even among the top candidates, to fill these positions. There needs to be greater separation of agencies from the ALJs and their decisions.

2. *Administrative Proceedings.* The most troubling aspect of the rise of ALJ proceedings as a massive shadow court system is that these proceedings lack basic guarantees of due process and access to information. Under Section 554, the APA provides that "every case of adjudication required by statute to be determined on the record" and further states under Section 556(d) that:

> Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. . . . A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

However, the rights afforded under these provisions are limited by an agency's governing statute, which results in a varying procedures and access to review. Citizens complain about the lack of access to information or the ability to present evidence. The rules of evidence do not apply in the same fashion as in the federal courts, including *Brady*-like mandatory disclosures. Standard depositions or discovery forcing motions are generally denied.

If the trend is to continue with administrative courts becoming the dominant adjudicatory system in the country, citizens should be afforded the same evidentiary and discovery protections that they would have in federal courts. Congress should amend the APA to limit the variation among agencies and specifically guarantee access to evidence

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66 5 U.S.C. § 7521(a).

67 Barnett, *supra* note 61, at 653-54.

68 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.").

69 *See generally* Jeffrey S. Lubbers, *The Federal Administrative Judiciary: Establishing an Appropriate System of Performance Evaluation for ALJs*, 7 ADMIN. L.J. AM. U. 589 (1993).

with guarantees that citizens will be given such evidence with ample time before the start of proceedings. Furthermore, Congress should address the relatively light standard of review of agency decisions by federal courts as well as the use of such privileges as the deliberative process privilege to deny access to key agency material. Section 706 specifically instructs that a reviewing court should consider the "full record" in an administrative decision. Yet, the agencies routinely claim privilege over such material, particularly the deliberative process privilege. The mere use of material in the decision-making process should not automatically result in the withholding of such important evidence in a case.

Finally, the APA allows a federal court to set aside agency action.[70] However, with the more limited evidentiary rules, federal courts tend to give such rulings a relatively light look, rather than the hard look, that litigants seek after making it through this mandatory process. Thus, if you are litigant in the EPA system,[71] before an ALJ and then you must go to the Environmental Appeals Board (EAB). Once the EAB rules, you have a final agency action to appeal to federal court. However, the court reviews the record created under the agency rules under Section 706 (2)(A) to determine if the agency acted in an "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." This often amounts to a largely procedural review of whether the agency followed its own rules and whether the decision is so disconnected to the evidence to be arbitrary or capricious. Citizens get hit twice in this system: first by a process that offers fewer rights than federal court and then a review in the federal court where that record is largely outcome-determinative.

3. Reinforce Citizens In Challenging Agency Actions. There is little question that Congress lacks the personnel and the time to directly monitor all of the decisions made in all of the federal agencies. While I strongly believe that congressional committees (and staff) should be significantly expanded to allow for greater monitoring of agency decisions, our federal government is simply too large for Congress to act with regard to more than a relatively small fraction of agency actions. When Congress has faced areas with such limited ability to monitor or identify governmental abuse, it has used private attorneys general or citizen lawsuits. Congress should continue to ally itself with the public in monitoring agencies by creating such provisions to allow citizens to more easily pursue nondisclosures and noncompliance in court. It can further reinforce this system by examining new limitations placed on what constitutes a "prevailing party" for the purposes of recovery of fees and costs in such actions. It should also pursue amendments of laws that are information forcing, like the Freedom of Information Act, by addressing the long delays and expansive privileges imposed by agencies. In so doing, the public can help monitor and deter agency abuse.

V. CONCLUSION

For many supporters of the Administrative State, the shift in gravity toward the Executive Branch and federal agencies is both inevitable and logical. Those arguments raise a myriad of interesting questions that fascinate academics, including myself. They

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70 5 U.S.C. §706.

71 40 C.F.R. §§ 22.1-.52.

are not, however, questions that have been asked of citizens who continue to labor under the assumptions of the tripartite system taught in our schools and expressed in the Constitution. This massive shift in authority has occurred without a national debate and certainly not a national vote. *Chevron* is illustrative of that troubling trend. The doctrine was the creation of the Supreme Court in declaring sweeping deference to agencies – deference that ultimately would extend not only to policy choices but even the interpretation of the agency's jurisdiction. While *Chevron* was not the cause of the expansion of federal agencies, it has been a critical component in the Administrative State, which combines both sweeping authority and sweeping deference in carrying out changes in the country.

Because the doctrine is based on assumption of delegated authority, Congress can aggressively move to limit such deference while also examining the implications of the expanding scope of agency authority. Clearly this country will continue to have a large and active federal bureaucracy. However, Congress can exercise greater control over agencies and empower citizens to challenge agency decisions. While many will argue that it is too late and the Administrative State is now a fait accompli, we need not accept such a fatalistic view. Congress has not become a passive player in government and still retains the ability to actively impose limiting principles on agency action. More importantly, the public is more than the subject of government power – it is the ultimate source of government power. Citizens have not signed on to the concept of a fourth branch of government containing legislative, executive, and judicial components but relatively little direct public influence. Indeed, it is fascinating to see how agencies increasingly work to assume the legitimacy of a legislative process by incorporating "town hall" events and other devices for citizen input.[72] Yet, those with the greatest voice on the administrative-level remain organized interests represented by lobbyists and large organizations.[73] Such town hall events add the patina of an alternative legislative process, but they occur outside of the structure so carefully designed by the Framers.

To return to the offer of Woody Allen, there is the possibility of two negatives making a positive here – though not in the same way as Administrative State advocates suggest (as discussed above). While it is true that the Court has allowed the expansion of agency authority and Congress has largely acquiesced to that expansion, it is also true

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[72] *See* Lisa Blomgren Bingham, *The Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance*, 2010 WIS. L. REV. 297, 297. These new approaches include the "*AmericaSpeaks* 21st Century Town Meeting" model where agencies hold events that have the same appearance as the town halls used by presidents and members of Congress. *See* AMERICA SPEAKS: ENGAGING CITIZENS IN GOVERNANCE, http://www.americaspeaks.org (last visited Sept. 23, 2012). Yet, these events only involved a few thousand citizens and do not represent a significant level of participatory process. Professor Bingham notes "they report that counsel advised this method is inappropriate for rulemaking because it is impossible to capture all the simultaneous dialogue comments of thousands of people in the rulemaking record." Bingham, *supra*, at 316.

[73] The awareness of the shift in political dialogue and citizen participation is reflected in the fact "public participation" is mentioned over 1000 times in the federal code. Bingham, *supra* note 72, at 322 (citing regulations).

that the resulting *Chevron* doctrine is based on a theory of delegated authority that could be used to dramatically limit its application. Congress can also pursue a variety of avenues for exercising greater control over agencies and guaranteeing greater rights for citizens subject to agency proceedings. The result is not the rejection of administrative agencies but of the Administrative State. The first step however in addressing the independence of federal agencies is to reduce their insulation from review. That is why this hearing is so important.

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