Testimony of

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On

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

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

At the outset, I would like to compliment the Subcommittee for devoting time and attention to the *Chevron* doctrine. This single doctrine has enormous practical and theoretical importance in the federal courts, and yet it remains deeply controversial. In recent years, Supreme Court case law has indicated a fundamental shift in the theory underlying the doctrine. While that change is a welcome reform, the doctrine remains both tremendously confusing and deeply troubling from a theoretical standpoint. I believe that the Congress could write and enact clarifying legislation to supplant *Chevron* with more theoretically sound and more easily understood principles.

My testimony will be divided into four parts. Part I will summarize very briefly the *Chevron* case and the two major missteps in the Court's decision. Part II will elaborate in more detail on those two major mistakes. Part III will discuss the Supreme Court's subsequent case law, which has slowly been correcting at least one of the two mistakes in the original *Chevron* opinion. Finally, Part IV will make some concrete suggestions for corrective legislation.

I. The *Chevron* Decision and Its Two Mistakes.

The familiar facts of *Chevron v. Natural Resources Defense Council*[1] need not be set forth in much detail. Suffice to say that the case presented a challenge to a Reagan-era rule of the Environmental Protection Agency that defined the term "stationary source" in the Clean Air Act to include all polluting activities within an entire industrial facility. The EPA's rule became known as the "bubble" concept because it allowed firms to comply with the Clean Air Act by obtaining a single permit for a whole facility (a whole "bubble"), rather than multiple, individual permits for each smokestack in the facility.

The D.C. Circuit invalidated the EPA's rule, but the Supreme Court reversed and announced the now familiar two-part inquiry applicable (so the Court then claimed) whenever "a court reviews an agency's construction of the statute which it administers."[2] The first part of the inquiry requires the court to determine whether the statute is unambiguous or "clear" on the precise question at issue. If so, "that is the end of the matter."[3] That conclusion is unsurprising, because clear statutory language always constrains agencies. *Chevron*'s innovation comes in the second part of the inquiry: "If the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction

[1] 467 U.S. 837 (1984).
[2] Id. at 842.
[3] Id.

of the statute."[4] That limitation on the judicial role, the Court believed, meant that the reviewing court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[5]

In producing such a new test for reviewing agency constructions of statutes, the *Chevron* Court made two mistakes. First, and most importantly, the Court decided for itself whether, and to what extent, federal courts should grant deference to an administrative agency's statutory interpretations. In making that decision, the Court relied explicitly on its own policy views—justifying judicial deference to administrative interpretations of statutes because judges are neither "experts in the field" nor "within a political branch of the Government."[6]

The *Chevron* Court seemed to assume, at least implicitly, that Congress did not have an opinion on the matter. That implicit assumption was wrong. In 1946, Congress enacted legislation governing how courts should review administrative action, and that legislation—the Administrative Procedure Act or APA—regulates the standards that courts are to apply in reviewing administrative action. Rather than using its own policy justifications to justify judicial deference, the Court should have looked to the APA and then determined whether and to what extent *Congress* wanted the federal courts to defer to the judgments of administrative agencies.

Second, the *Chevron* Court muddled the distinction between (i) giving some weight to an agency's views as part of a process of interpreting the statute, and (ii) recognizing the scope of an agency's delegated lawmaking powers.

The key to understanding this distinction is to focus on the effect of changes in the agency's positions. Traditionally, courts engaging in statutory interpretation would not afford an agency's views significant weight if the agency had changed its interpretation of the statute. The intuition behind that rule is easy to understand. Courts seeking to interpret a statute are trying to find *the* correct meaning of the statute. Thus, if an agency had held inconsistent views about the correct meaning, the court had no reason to prefer one view over the other and so the varying agency positions were simply not helpful.

By contrast, where an agency is wielding a delegated lawmaking power, courts fully expect the agency to have power to change its position. Indeed, the ability of an agency to change positions is typically part and parcel of an administrative rulemaking power which, as defined by the APA, encompasses not only the power of "formulating" a rule, but also the powers of "amending" or "repealing" prior rules.[7] Courts reviewing an agency's exercise of its lawmaking powers would expect that the agency can change its positions, but—and this point is crucial—the court would not traditionally have thought that the agency's exercise of its rulemaking power was an exercise in statutory interpretation.

The *Chevron* decision blended together these two quite different concepts. It treated the issue in the case as involving deference to an agency's statutory interpretation, but it borrowed

[4] Id. at 843.
[5] Id.
[6] Id. at 845.
[7] 5 U.S.C. § 551(5) (defining rule making).

from delegation theory the crucial concept that agencies engaged in rulemaking can be expected to change their positions:

> The fact that the agency has from time to time changed its interpretation of the term "source" does not, as respondents argue, lead us to conclude that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis. Moreover, the fact that the agency has adopted different definitions in different contexts adds force to the argument that the definition itself is flexible, particularly since Congress has never indicated any disapproval of a flexible reading of the statute.[8]

The novelty in that passage is not the Court's recognition that an agency engaged in rulemaking can change its views on "policy," but the assertion that an agency can also change its view about statutory meaning without losing judicial deference.

II. The Relevance of the APA and Delegated Lawmaking Powers to *Chevron*.

As discussed in Part I, the *Chevron* Court did not try to reconcile its reasoning with the APA, and it also conflated delegated lawmaking powers with deference in statutory interpretation. Here, I describe those errors in more detail.

A. The APA's Command for Courts to Decide All Relevant Questions of Law.

The *Chevron* case was fully subject to the APA, so a natural starting place for the analysis in the case would have been the judicial review provisions of the APA which, as the Supreme Court has noted in other cases, were supposed to provide a "uniform approach to judicial review of administrative action."[9]

The first sentence of § 706 of the APA requires a reviewing court to "decide all relevant questions of law" and to "interpret constitutional and statutory provisions."[10] 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."[11]

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[8] 467 U.S. at 863-64.
[9] Dickinson v. Zurko, 527 U.S. 150, 154 (1999).
[10] 5 U.S.C. § 706.
[11] 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

The text and structure of the statute confirm that Representative Walter's interpretation of the first sentence in § 706 is correct. The plain language alone suggests de novo review of statutory issues, as courts routinely conclude when they focus on the APA rather than on the Supreme Court's administrative common law.[12] Furthermore, the APA places the court's duty to interpret statutes on an equal footing with its duty to interpret the Constitution, and courts never defer to agencies in reading the Constitution. The overall structure of Section 706 provides even more support. Section 706 concerns the scope of review, and it does include deferential standards of review - just none that apply to review of legal questions. For all these reasons, commentators in administrative law have "generally acknowledged" that § 706 seems to require de novo review on questions of law.[13]

Chevron also cannot be justified as a canon of statutory construction. Traditional canons of construction help courts to determine a fixed meaning for a statute. That is not how *Chevron* works. Under *Chevron*, a court must allow an agency to change its interpretation of a statute. Thus, a court sustaining an agency interpretation under *Chevron* does not itself decide the meaning of the statute; it determines only that the statute is ambiguous and then allows the agency to determine its meaning. This feature of *Chevron* is at the heart of the doctrine. But the feature also makes it impossible to consider *Chevron* a traditional canon of statutory construction, because the doctrine is not a rule to help the court determine a meaning.

There is one argument that does avoid a conflict between *Chevron* and § 706. Under this view, *Chevron* is a presumption that any statutory ambiguity should be interpreted as implicitly delegating, to the administrative agency with jurisdiction over the statute, the lawmaking authority necessary to resolve the issue. The theory avoids the problem with § 706 because the court *does* interpret the statute de novo; the court just finds that the statute (or rather the ambiguity in the statute) gives the agency the power to make the rule of decision. The problem with the "implicit delegation" view of *Chevron* is that it violates another provision of the APA.

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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.

[12] 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); and Stupak-Thrall v. United States, 70 F.3d 881, 887 (6th Cir. 1995), Molina v. Sewell, 983 F.2d 676, 679 n.3 (5th Cir. 1993) (all citing § 706 as requiring de novo review on issues of law). Pre-Chevron courts also read 706 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.").

[13] 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").

Often overlooked, Section 558(b) of the APA forbids agencies from issuing "substantive rules … except [(1)] within jurisdiction delegated to the agency and [(2)] as authorized by law."[14] The implicit delegation view of *Chevron* violates this provision because it allows an agency to assert a "de facto rule-making power"[15] so long as only the first condition is satisfied—the agency has a jurisdiction over the statute.

B. *Chevron* and Delegation.

One of the most puzzling aspects of the *Chevron* decision is that, while the Court's opinion articulated a radically new theory of judicial deference to changed administrative interpretations of statutes, no such new theory was needed to decide the case. In fact, the Solicitor General of the United States urged the Court to sustain the legality of EPA's rules on the fairly conventional ground that the agency had a sufficiently broad rulemaking power to formulate the challenged definition of "stationary source."

The *Chevron* Court seemed to appreciate that its new approach to statutory interpretation effectively provided a new source of delegated power to administrative agencies. The Court cited no particular statutory basis for this effective power, but instead reasoned that "sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit."[16] The Court need not and should not have relied on any sort of "implicit" delegation theory.

The EPA had an explicit delegation under § 301 of the Clean Air Act "to prescribe such regulations as are necessary to carry out [its] functions under this Act."[17] That statute confers the "authorization by law" demanded by § 558(b) for an agency to issue "substantive rules" and eliminates the need for an implicit delegation theory, with all its weaknesses. The importance of this rulemaking power was well appreciated by the Solicitor General, who began the EPA's argument for deference by quoting the EPA's § 301 rulemaking power in full, in the text of the brief.[18] Such rulemaking power reconciles the *result* reached in *Chevron* with the APA, even if it does not support the Court's reasoning.

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[14] 5 U.S.C. § 558(b) ("A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law."). The legislative history shows that this provision was "framed on the necessary assumption that the detailed specification of powers must be left to other legislation relating to specific agencies. Its effect is to confine agencies to the jurisdiction and powers so conferred." 92 Cong. Rec. 5654 (1946) (statement of Rep. Walter), reprinted in APA Legislative History at 367-68.

[15] Louis L. Jaffe, Judicial Control of Administrative Action 564 (1965) (as Jaffe summarized it, his "argument … is that even in the absence of a formal rule-making power, formally exercised, a de facto rule-making power is recognized when a court approves (as it often does) a policy or interpretation but stops short of adopting it as *the* interpretation"). See also Henry P. Monaghan, Marbury and the Administrative State, 83 Colum. L. Rev. 1, 26 (1983) (recognizing that "if interpretive rule making is coupled with a [judicial] deference principle, it is, from a legal perspective at least, the functional equivalent of substantive rule-making authority").

[16] *Chevron*, 467 U.S. at 844.

[17] Clean Air Act § 301(a)(1), 42 U.S.C. § 7601(a)(1). Although the Chevron court did not cite this provision, it did describe the EPA as "an agency to which Congress has delegated policymaking responsibilities," *Chevron*, 467 U.S. at 865, and "policymaking responsibilities" often refers to rulemaking powers in administrative law.

[18] See Brief for the Administrator of the Environmental Protection Agency at 21, in *Chevron v. Natural Resources Defense Council* (No. 82-1005).

To understand this point, it is highly useful to appreciate the precise legal issue that was before the Supreme Court. In 1980, under the Carter Administration, the EPA promulgated a definition of stationary source that read:

> 1. "Stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act.
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> 2. "Building, structure, or facility" means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "Major Group" (i.e., which have the same two digit code) as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101-0066 and 003-005-00176-0, respectively).
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> **3. "Installation" means an identifiable piece of process equipment.**[19]

The bolded part of that definition—i.e., paragraph 3—would be omitted in the challenged definition of source promulgated under the Reagan Administration one year later, and the concept of "installation" was folded into paragraph 2:

> 1. "Stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act.
>
> 2. "Building, structure, or facility, **or installation**" means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "Major Group" (i.e., which have the same two digit code) as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101-0066 and 003-005-00176-0, respectively).[20]

Even by just skimming over these definitions of "source," a reader can easily appreciate that, in both the Carter and Reagan Administrations, the EPA was engaged not so much in interpreting the statute as in exercising its delegated power to make binding rules. After all, the statutory language in the Clean Air Act included the phrase "stationary source" but did not define it. Given that statutory silence, how could either the Carter or Reagan Administrations extract from the statute a meaning that, among other concepts, included industrial groups in the

[19] Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans, 45 Fed. Reg. 52,676 (Aug. 7, 1980) (emphasis added).

[20] See 40 C.F.R. 52.24(f) (1982) (emphasis added); see also, Requirements for Preparation, Adoption and Submittal of Implementation Plans and Approval and Promulgation of Implementation Plans, 46 Fed. Reg. 50766 (Oct. 14, 1981).

"Standard Industrial Classification Manual, 1972, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101-0066 and 003-005-00176-0, respectively)"? Certainly, no known form of statutory interpretation could wring such precise meaning from the undefined phrase "stationary source."

The *Chevron* case itself is thus an excellent demonstration of how agencies exercise their delegated rulemaking powers, and that is precisely how the government presented the case at the Supreme Court. The *Chevron* decision's articulation of a new theory of statutory interpretation was as unnecessary as it was unwarranted.

III. Subsequent Supreme Court Case Law.

Though the *Chevron* decision itself appeared to announce a generally applicable approach to reviewing statutory interpretations of administrative agencies, subsequent Supreme Court cases have limited *Chevron* significantly. Most importantly, in *United States v. Mead*, the 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."[21] Where an agency does not have such delegated power, *Mead* held that *Chevron* deference is not appropriate.

Mead is an extraordinarily important case because it reinterprets *Chevron* as being a case about the proper reach of agency lawmaking powers—i.e., as a case about delegation rather than deference. That approach holds the promise of ultimately reconciling the *Chevron* doctrine with the APA's rule that reviewing courts are supposed to decide all issues of law. Under the theory articulated in *Mead*, a reviewing court should approach an administration statute initially with the assumption that it—the review court—will decide all questions of law (as required by § 706). But in the process of reviewing the administrative statute, the court may find (and indeed often will find) that the statute confers on the agency an explicit lawmaking power. Such powers are, of course, common in administrative statutes, and in fact the APA itself expressly recognizes that agency rulemaking powers include the power to "prescribe law."[22]

Other subsequent case also tend to confirm that *Chevron* is not really about judicial deference to agency statutory interpretations, but instead about judicial acceptance of delegated lawmaking powers. Thus, for example, in *National Cable & Telecommunications Assn. v. Brand X Internet Services*, the Court held that an administrative agency can rely on *Chevron* deference to change a prior statutory interpretation *even where that prior statutory interpretation was made by a federal court*.[23] If the *Chevron* doctrine were truly about statutory interpretation, the Court's conclusion in *Brand X* would be truly stunning, for it would allow an administrative agency effectively to "overrule" statutory precedents of any federal court, even those of the Supreme Court itself. Because, however, *Mead*'s reinterpretation of *Chevron* grounds the doctrine in the exercise of an agency's delegated lawmaking powers, the result in *Brand X* makes sense. A new exercise of an agency's rulemaking powers changes law, and when the law changes, prior precedents are no longer necessarily valid.

[21] 533 U.S. 218, 229 (2001).
[22] 5 U.S.C. § 551(4).
[23] 545 U.S. 967 (2005).

A third Supreme Court case limiting *Chevron*—the recent decision in *King v. Burwell*[24]—also makes sense under *Mead*'s reinterpretation of the doctrine. *King* held that *Chevron* deference is inapplicable to any issue of "deep 'economic and political significance' that is central to [a] statutory scheme."[25] *King*'s exception to *Chevron*, which might termed the "too big to defer" exception, makes sense under a delegation theory, for Congress is not likely to grant an administrative agency power to make the fundamental policy choices about the law. Indeed, if a statute were to grant an agency such power with little or no guidance as to the constraints on the exercise of that power, the statute would raise a serious issue under the constitutional nondelegation doctrine.

Each of these Supreme Court cases reformulates *Chevron* to be more of a doctrine about delegated lawmaking power rather about deference to administrative interpretations of statutes. Unfortunately, the doctrine's original formulation as a deference principle survives and is commonly repeated in the case law. The mixture of the two theories is both unhelpful and confusing.

IV. The Desirability of Corrective Legislation.

Even though Supreme Court case law has taken some steps toward reinterpreting *Chevron* as a doctrine about delegation rather than deference, corrective legislation would still be desirable. Here, I outline some possibilities for such legislation.

As an initial matter, however, I would suggest that, in any potential bill, the sponsors of the legislation should make it perfectly clear in the legislative record that they are not seeking to foreclose further judicial reexamination of the *Chevron* decision. The introduction of legislation designed to correct a particular judicial decision is sometimes used strategically in litigation as a congressional recognition that corrective legislation is necessary—i.e., that the targeted judicial decision is currently good law and can be changed only through legislation. While such strategic uses of proposed corrective legislation has waned in recent years as the courts increasingly refuse to rely on unenacted legislation in interpreting prior statutes, some risk of that misuse of proposed legislation remains. To minimize that risk, the congressional sponsors of any bill on this matter would be well advised to state clearly the views (i) that the proposed corrective legislation should not be viewed as confirming the continuing vitality of the *Chervon* decision and (ii) that it should not prevent the ongoing process by which the courts are continuing to reexamine and to dismantle the *Chevron* doctrine.

For the legislation itself, I believe that it should be drafted around four principles. First and foremost, the Congress should reassert, in the clearest possible terms, that reviewing courts are to decide all questions of law *de novo*, without any deference to administrative agency positions.

[24] 135 S.Ct. 2480 (2015).
[25] Id. at 2489.

Second, the legislation should recognize that, where Congress has delegated lawmaking power to an agency, reviewing courts should give proper scope to that lawmaking power by permitting 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. This principle would account for the actual result in the *Chevron* case but would make clear that the agency's authority should be grounded on the existence of delegated rulemaking powers, not on the agency's supposed superior abilities at statutory interpretation.

Third, Congress might also consider recognizing the traditional view that, in formal agency adjudicatory proceedings, some issues decided by the agency are not pure issues of statutory interpretation but are instead mixed questions of law and fact. For such questions, a reviewing court might provide deference to the agency 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*.,[26] and it provides another proper basis for granting deference to an administrative agency that does not deny to the federal courts their traditional role in deciding issues of law *de novo*.

Fourth and finally, the Congress might also recognize that, in interpreting any statute *de novo*, the federal courts may consider an agency's position as some evidence of the statute's meaning. This principle would codify the approach endorsed by the Supreme Court in *Skidmore v. Swift*, which stated that 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."[27] 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."[28] Such weight is similar in kind, if perhaps different in degree, to the weight that might be afforded to a prominent treatise or thorough law review article written by a professor who also has "power to persuade" but no "power to control."

Together these four principles would reaffirm the law already codified in § 706 of the APA and restore the traditional role of federal courts "to say what the law is."[29]

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.

[26] 322 US 111, 130-131 (1944)
[27] 323 US 134, 140 (1944).
[28] Id.
[29] Marbury v. Madison, 5 U.S. 137, 177 (1803).