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BEFORE THE HOUSE COMMITTEE ON JUDICIARY
SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW

MARCH 15, 2016

Thank you, Chairman Marino, Vice-Chairman Farenthold, and distinguished Members of the Subcommittee, for the opportunity to testify today concerning judicial deference to federal administrative agencies.

I am Associate Dean for Public Engagement and Professor of Law at the George Washington University Law School, and am also a member-scholar of the not-for-profit regulatory think-tank, the Center for Progressive Reform, and the Chair of the Administrative Law Section of the Association of American Law Schools. I am testifying today, however, on the basis of my expertise and not as a partisan or representative of any organization. As a professor and scholar of administrative law, I specialize in the deference doctrines of administrative law and the resulting relationships between Congress, the courts, and the executive branch. My work is published in the country's top scholarly journals as well as in many books and shorter works, and I regularly speak on the subject of deference. Early in my career, I practiced as a civil engineer; that experience and training particularly inform my assessment of the deference doctrines when agencies make decisions involving scientific or technical complexity.

In my testimony today, I will first provide a general overview of the role of the courts in administrative law. Next, I will outline deference under the *Chevron* regime, emphasizing its limits and variations as well as its relationship to hard-look review. Thereafter, I will make note of how courts' remedial options fit within the deference regimes. I conclude by emphasizing that although this system is imperfect, a legislative fix is unlikely to improve the system and would likely have the opposite effect. This is because the overall system of deference regimes and remedies furthers important administrative law and constitutional norms.

I. The Role of Deference and the *Chevron* Regime

We ask a great deal of courts when they review agencies. They police the jurisdictional boundaries set by Congress, they guard against serious errors, and the fact of review incentivizes agencies to engage in legitimizing behaviors before the fact, such as promoting participation, deliberation, and transparency. In turn, these behaviors and judicial review facilitate external monitoring of agency behavior, whether by interested parties, the press, the executive, or Congress.

These things could be achieved with de novo review, but there are important reasons for giving some level of deference to agencies, most of which relate to comparative institutional competence and the constitutional roles of each of the three branches. The familiar test announced in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* is directed at

those considerations.[1] The test provides that when a court reviews an agency's interpretation of a statute it administers, the court must ask first whether Congress has spoken clearly; if so, the clear language controls.[2] If not, the court must uphold the agency's permissible—that is, reasonable—construction of the statute.[3] The deferential aspect of *Chevron* in step two has often been criticized, but it is not particularly remarkable. Even prior to the enactment of the Administrative Procedure Act (APA), courts afforded at least some deference to agencies' legal interpretations in many circumstances.[4]

Indeed, as all the relevant cases suggest and as scores of scholars have articulated, there are often good reasons for deference by a court to an agency's judgment. Agencies have experience with the statutes they administer and the challenges that arise under the applicable regulatory regimes. Relative to the courts, agencies also have superior expertise, particularly with respect to complex scientific or technical matters. Agency officials are not elected, but they are subject to the oversight of the President, so there is more democratic accountability at the agencies than at the courts. All of these rationales stem from separation-of-powers principles relative to the court-executive relationship.

But there are also important separation-of-powers principles at work relevant to the legislative branch. First, courts defer to agencies because Congress has assigned to them—not to the courts—the duties associated with our major statutory schemes. With thirty years' experience with *Chevron*, moreover, Congress can craft substantive statutory language more tightly if it wants to cabin an agency's discretion in carrying out its mandate. The *Chevron* doctrine also facilitates Congress's ability to monitor agencies by incentivizing agencies to use procedures that are more transparent, a point to which I will return below. Finally, I want to emphasize that *Chevron* is an exercise in judicial self-restraint: by deferring to agencies' reasonable constructions rather than substituting their own judgment, the unelected courts avoid inserting their own policy preferences into administrative law.

Notwithstanding these important reasons for deference, there are of course times when deference is not appropriate. The courts have delineated some guideposts here, too. First, agencies may not use a limiting interpretation to cure a statute that is defective on nondelegation grounds.[5] This limitation preserves the most basic of structural constitutional norms. Second, in rare cases the Court has determined that Congress did not intend the relevant agency to exercise interpretive authority. Although such cases, which include *FDA v. Brown & Williamson Tobacco Corp.*[6] and *King v. Burwell*[7] can seem jarring, they are best viewed as unusual and very context-specific cases.

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[1] 467 U.S. 837 (1984).
[2] *Id.* at 842-43 (1984).
[3] *Id.*
[4] *E.g.*, Skidmore v. Swift, 323 U.S. 134 (1944); NLRB v. Hearst, 322 U.S. 111 (1944).
[5] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).
[6] 529 U.S. 120 (2000).
[7] 135 S. Ct. 2480 (2015).

Indeed, the third point is that deference is not a rubber stamp. At step two, agencies must explain their interpretive choices, including addressing any significant counter-arguments. That analysis is best understood as a special application of hard-look review, which balances administrative law and constitutional norms.[8] And in particular, by requiring reasoned decisionmaking from agencies via hard-look review, courts temper the nondelegation-related constitutional concerns inherent in the broad delegations of authority under which most agencies operate. As I wrote in my *Columbia Law Review* article *Deference and Dialogue in Administrative Law*:

> The reasoned decisionmaking requirement carries with it an important corollary: A court will consider an agency's reasoning only at the time the agency made its decision. . . . Before the APA's enactment, there was some indication that the presumption of constitutionality afforded legislatures would translate to an analogous presumption of lawfulness in administrative law. In a 1935 decision, for example, the Supreme Court wrote that, when reviewing an administrative order, "'if any state of facts reasonably can be conceived that would sustain [the order], there is a presumption of the existence of that state of facts."' In other words, courts would be free to accept hypothetical rationales for an agency's actions, even if those rationales were not part of the agency's reasoning at the time it made its decision.
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> This approach did not survive the massive transformation in the administrative state that came with the New Deal, the enactment of the APA, and the view that it was constitutionally permissible for agencies to exercise power broadly delegated by Congress. Now separation of powers and administrative law values justified treating agencies differently than the democratic Article I branch. As the Supreme Court wrote in its 1947 decision *SEC v. Chenery Corp*. (Chenery II), "a reviewing court . . . must judge the propriety of [agency] action solely by the grounds invoked by the agency." [This] principle persists. It is a bedrock, unwavering rule, supporting the very legitimacy of the administrative state.
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> The reasoned decisionmaking requirement likewise reinforces constitutional norms. In particular, the late 1960s and 1970s saw an explosion of risk regulation by federal agencies. While Congress was busy delegating broad authority to those agencies to make sweeping decisions in the face of scientific uncertainty, others—including the courts—were increasingly concerned about the possibility of agency capture by powerful interest groups. From this worry emerged the hard look approach, which enables the other branches to more closely monitor agency behavior. In this way, reasoned decisionmaking is crucial to "alleviating core separation of powers concerns associated with the administrative state." By enabling judicial review of an agency's reasons, moreover, procedural requirements like the details in notices of proposed rules and concise statements of basis and purpose further these goals.

[8] *See* Emily Hammond et al., *Judicial Review of Statutory Issues Under the* Chevron *Doctrine*, *in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 94-98 (2015).

> In sum, a commitment to meaningful judicial review comports with both administrative law and constitutional norms. Although much judicial rhetoric counsels deference to expert agencies, that theme is balanced by the *Chenery* . . . principle, the reasoned decisionmaking requirement, and related procedural rules. These doctrines promote "rationality, deliberation, and accountability," while drawing support from separation of powers principles.[9]

Finally, under both the *Chevron* framework and under hard-look review generally, courts can tailor the level of deference as needed to reinforce administrative law and constitutional norms. Consider this example. As the Court recently held in *Perez v. Mortgage Bankers Ass'n*, an agency's interpretive rule, which is exempt from notice-and-comment rulemaking under the APA, need not undergo notice-and-comment rulemaking when it memorializes a change from a prior interpretation.[10] While agencies may derive value from nonlegislative rules (and regulated entities receive guidance as to the agencies' views), there are prices to using them.

These prices are best imposed through the deference regimes. As instructed by *United States v. Mead Corp.*, agencies' procedural choices matter because they impact the level of deference that will be afforded on judicial review.[11] Where an agency has used full-blown notice-and-comment rulemaking to issue an interpretation, that interpretation will presumptively receive *Chevron* deference. But where the agency's procedures did not foster "fairness and deliberation"—as is often the case with nonlegislative rules—the interpretation is entitled to *Skidmore* deference, which is respect only to the extent that it is persuasive.[12] Under *Skidmore*, if an agency vacillates between positions it may be entitled to less deference. And a hard-look approach requires that the agency explain why it has changed its position. In other words, the applicable tests are tailored to the precise circumstances of agency behavior.

II. Remedies and Deference

Any discussion of deference should also account for the judicial approach to remedies in the administrative law context. First, petitioners challenging agency actions often seek stays pending litigation. To decide whether to grant a stay, courts consider equitable factors, including (1) the petitioner's likelihood of success on the merits; (2) the threat of irreparable injury absent the injunction; (3) the possibility of harm to others if the injunction is issued; and (4) the public interest.[13] This fact-specific standard represents a longstanding approach that courts have undertaken in all manner of cases, and has the benefit of flexibility for the many varieties of administrative actions courts might review.

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[9] 111 COLUM. L. REV. 1722, 1735-37 (2011) (footnotes omitted).
[10] 135 S. Ct. 1199 (2015).
[11] 533 U.S. 218 (2001).
[12] *Id.* at 235 (citing Skidmore v. Swift & Co., 323 U.S. 134 (1944)).
[13] *E.g.*, Winters v. Natural Resources Def. Council, 555 U.S. 7, 20 (2008); Nat'l Wildlife Fed. v. Burford, 835 F.2d 305, 319 (D.C. Cir. 1987). Agencies may also stay the effect of rules on their own. 5 U.S.C. § 705 (2012).

Should a court ultimately determine an agency's action to be unlawful, the appropriate remedy is a remand, either with or without vacatur. Again quoting from *Deference and Dialogue*:

> [T]he APA states that courts "shall . . . hold unlawful and set aside" agency action for various substantive and procedural failings. This language can be read to require vacatur of unlawful agency action, and courts frequently do just that. When an agency action is vacated, it is essentially extinguished; if the agency wishes to try again, it must initiate procedures anew. Courts, however, have not read the APA to require this remedy in all cases, and they often simply remand the action to the agency so that it can try again. When a court remands without vacatur, the practical impact is that the agency's action remains in force while the agency works to address the flaws identified by the court. Meanwhile, the court retains the power to vacate the action should the agency ultimately fail to take full corrective action.[14]

Remanding without vacatur has been criticized by opponents of hard-look review, who see the remedy as a way to justify a court's searching scrutiny. But it is better viewed as "an expression of judicial humility" that strikes a balance between searching review and an agency's discretion.[15] Provided the agency moves expeditiously to correct its error on remand—a matter that can be policed by the parties who can alert the courts if there is a problem—this remedy offers another way to tailor judicial review to the specific attributes of the agency action as well as the substantive standard of review.

III. Conclusions

The deference regimes are best understood as part of a larger constitutional framework, within which courts attempt to optimize their reviewing role, the legislature's desires as expressed in the statutory mandate, and the executive branch's policymaking discretion. Although tensions can arise between these norms in a given case, the deference regimes overall strike a reasonable balance. Furthermore, the various deference regimes work together to permit courts to tailor their review to the particulars of the agency actions before them. And those deference regimes also work in tandem with the equitable powers of the courts to further ensure a careful consideration of all the interests at stake. Although one can find reasons to criticize how courts apply these standards, any attempt to legislate a change would be even more problematic. No legislative standard can account for all of the variety in administrative law, and a piecemeal approach would severely interfere with the balance between and among the deference doctrines and remedies.

Thank you again for the opportunity to testify today. I look forward to your questions.

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[14] *Deference and Dialogue*, *supra* note 9, at 1737-38.

[15] *Id.* at 1738 (quoting Ronald M. Levin, *Vacation at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291, 371 (2003)).