Testimony of

Jeffrey Bossert Clark, Sr.

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

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

May 17, 2016

Hearing re H.R. 4768

The "Separation of Powers Restoration Act of 2016"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

General Commentary on *Chevron*

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

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

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

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

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

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

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

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

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

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

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

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

Further Concepts for Potential Congressional Follow-Up

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

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

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

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

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

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

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

Congress's instructions.

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

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

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

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

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

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

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

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