United States House of Representatives
Committee on Veterans' Affairs
Hearing: "Congressional Lawmaking After the End of *Chevron*"
December 18, 2024

STATEMENT FOR THE RECORD

Dear Chairman Bost, Ranking Member Takano, and Members of the Committee:

Thank you for the opportunity to provide this Statement for the Record. My name is Ryan Mulvey, and I am a policy counsel at Americans for Prosperity Foundation ("AFPF"), a 501(c)(3) nonpartisan organization dedicated to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society.[1] I am also counsel at Cause of Action Institute ("CoA Institute"), where I am honored to serve as lead counsel for the fishermen in *Loper Bright Enterprises v. Raimondo*, the historic case in which the Supreme Court of the United States overruled the *Chevron*-deference doctrine.[2] My goal in this statement is twofold: *First*, to explain the significance of the *Loper Bright* decision and, *second*, to show how the Department of Veterans Affairs ("VA") has relied on *Chevron* (and related deference doctrines) to defend policies that hurt veterans.

I. The *Chevron* Deference Doctrine: Origins and Problems

Forty-years ago, the Supreme Court decided *Chevron U.S.A. v. Natural Resources Defense Council*, a case that came to be regarded as one of the most consequential in American jurisprudential history. *Chevron*'s significance stemmed, in large part, from Justice John Paul Steven's explanation of how courts were supposed to handle disagreements about legal meaning in the administrative-law context.

Justice Steven's methodological framework eventually took the form of a two-part test. At "Step One," a court was expected to examine "whether Congress has directly spoken to the precise question at issue."[3] If the law was unambiguous, and the "intent" of Congress "clear," that would be the "end of the matter."[4] But if "Congress ha[d] not directly addressed the precise question at issue"—or, put differently, if a court concluded the law was "silent or ambiguous"—it would instead focus its inquiry on whether the agency's position was "based on a permissible construction of the statute."[5] Both in theory and in practice, this two-step framework ultimately obliged federal judges in some instances to defer to agencies' legal interpretations.[6]

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[1] *See* Ams. for Prosperity Found., https://www.americansforprosperityfoundation.org (last visited Dec. 17, 2024).

[2] This statement is provided solely on behalf of AFPF.

[3] *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

[4] *Id.* at 842–43 ("[T]he court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

[5] *Id.* at 843.

[6] *See id.* at 844 ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

The *Chevron* court attempted to justify its mandate for deference on grounds that implementation of the law by the executive branch often involves the "formulation of policy" to "fill any gap left, implicitly or explicitly, by Congress."[7] On this thinking, courts take for granted that Congress anticipates (and thus delegates authority to) agencies to flesh out the intricacies of the law. Proponents of *Chevron* deference would then go a step further by suggesting it was better for such "policymaking" to be exercised by agencies rather than unelected, life-tenured judges.

But *Chevron* deference was wrong from the start. The *Chevron* court never grappled with the actual text of the Administrative Procedure Act ("APA"), which governs the behavior of most agencies. And Justice Stevens never reconciled the inconsistency between *Chevron*'s competing claims that, while courts are "the final authority on issues of statutory construction,"[8] they "need not conclude that [an] agency construction [is] the only one it permissible could have adopted . . . or even [be] the reading the court would have reached if the question initially had arisen in a judicial proceeding."[9] *Chevron*'s two-step framework took for granted a series of complex questions: What does it mean for a law to be "ambiguous"? How do we know when a statute presents an explicit "gap"? When is "silence" simply silence, as opposed to an implicit grant of authority?

Unsurprisingly, the Supreme Court continued to tinker with *Chevron* as it tried to clarify when deference was required,[10] or when it should never apply.[11] Yet none of those efforts, which glossed over the fictious nature of *Chevron*'s justifying presumption of implied delegation, could overcome the deeper problem with *Chevron* deference: its distortion of the separation of powers. The Framers of the Constitution expected the legislative branch to write the laws, the executive to enforce them, and the judiciary to resolve disputes over the law's meaning. *Chevron* distorted that balance of powers by mandating judicial abdication to the executive branch, thus effecting a transfer of judicial power *from* courts *to* agencies. And *Chevron* intruded upon Congress's legislative authority by creating incentives for agencies to push increasingly adventurous interpretations of pre-existing statutes. These constitutional concerns (and others) were only compounded by practical problems. For example, the courts of appeals never consistently or uniformly applied *Chevron*. This helped foster a regulatory environment favorable to the government and which regulated people found difficult to navigate, especially if they lacked the resources to retain legal counsel.

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[7] *Id.* at 843–44.

[8] *Id.* at 843 n.9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.")

[9] *Id.* at 843 n.11.

[10] *See, e.g.*, *U.S. v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (creating "Step Zero," under which *Chevron* only applied if Congress had "delegated authority to [an] agency generally to make rules carrying the force of law" and when an agency interpretation "was promulgated in the exercise of that authority"); *see also Encino Motocars, LLC v. Navarro*, 579 U.S. 211, 220 (2016) (no deference if a regulation is "procedurally defective"); *City of Arlington v. Fed. Commcns. Comm'n*, 569 U.S. 290, 296–97 (2013) (deference to an agency about the scope of its own lawful powers or "jurisdiction"); *Nat'l Cable & Telecom. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (deference required even if a pre-existing judicial precedent has construed an ambiguous provision to mean something else).

[11] For example, *Chevron* would not apply in cases where the Major-Questions Doctrine could resolve the case. *See W. Va. v. Envtl. Prot. Agency*, 597 U.S. 697 (2022); *King v. Burwell*, 576 U.S. 473 (2015). Nor would it apply to agency interpretations of judicial-review provisions, *see Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990), or to regulatory schemes not administered by the agency seeking deference. *See Epic Sys. Corp. v. Lewis*, 584 U.S. 497 (2018).

II. *Loper Bright* and the Historic Overruling of *Chevron* Deference

"*Chevron* is overruled."[12] With these words, the Supreme Court ended its forty-year experiment in judicial deference to agencies' legal interpretations. Not only is *Loper Bright* a return to a proper ordering of our constitutional system—one where legislators write the law, but judges construe its meaning—it also presents an opportunity for Congress to reassert its exclusive legislative powers and to conduct more searching oversight of the administrative state.

The *Loper Bright* case was ideal for overturning *Chevron* deference.[13] It involved family-owned commercial fishing firms based in Cape May, New Jersey. A federal regulation required those fishermen, who prosecuted Atlantic herring, to carry third-party at-sea monitors on their boats to watch them fish. Adding insult to injury, the regulation mandated the fishermen to pay the monitors' salary at costs upwards of $710 per day. By the government's own estimates, industry-funded monitoring would cause a 20% reduction in annual "returns-to-owner" (*i.e.*, revenue). Such adverse economic impact would severely restrict the profitability of many fishermen.

Nothing in the Magnuson-Steven Act—the law governing commercial fishing—expressly provided for shifting monitoring costs onto industry outside a few limited instances. The government tried to justify its novel funding scheme as a type of "compliance cost" or, alternatively, as a "necessary and appropriate" regulatory measure. In any event, the government insisted the absence of an explicit statutory prohibition on its claimed power amounted to an implied delegation of regulatory authority. The courts, bound by *Chevron*, accepted that nothing-equals-something argument.[14]

As Chief Justice Roberts explains in *Loper Bright*, the Framers "envisioned that the final 'interpretation of the laws' would be 'the proper and peculiar province of the courts,'" and that it would proceed "independent of influence from the political branches."[15] Although courts might have afforded "respect" to the executive's construction of a statute, such respect never required displacing a court's best judgment of meaning with the views of a coordinate branch.[16] This understanding of the judicial role hardly changed when Congress enacted the APA. Section 706 plainly directs a "reviewing court" to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[17] *Chevron*, by contrast, "triggered a marked departure from the traditional approach" to statutory understanding, as well as the plain meaning of Section 706.[18]

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[12] *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024).

[13] "*Loper Bright* Supreme Court Case," https://www.loperbrightcase.com (last visited Dec. 17, 2024).

[14] *See Loper Bright Enters. v. Raimondo*, 45 F.4th 359 (D.C. Cir. 2022); *see also Loper Bright Enters. v. Raimondo*, 544 F. Supp. 3d 82 (D.D.C. 2021). Although *Chevron* deference is overruled, the *Loper Bright* case continues. A new opinion on remand from the D.C. Circuit is expected in the coming months.

[15] *Loper Bright*, 144 S. Ct. at 2257.

[16] *Id.* at 2258; *see generally Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

[17] 5 U.S.C. § 706.

[18] *Loper Bright*, 144 S. Ct. at 2264; *see id.* at 2265 ("*Chevron* . . . . [never] attempted to reconcile its framework with the APA.").

Again, one of the most serious problems with *Chevron* deference was that it mandated judicial abdication. After identifying "ambiguity" or "silence" in a statute, a court would "mechanically afford *binding* deference to agency interpretations," even when such interpretations conflicted with the court's best reading of the law,[19] as it might reach in cases not involving an agency.[20] *Chevron* "turn[ed] the statutory scheme for judicial review . . . upside down."[21] Courts neglected the commonsense starting points for statutory interpretation—"What is the best reading of the law? Is the challenged agency action lawful on that reading?"—and replaced them with an often-convoluted inquiry into whether a particular statutory provision was ambiguous—or at least ambiguous enough—to find an implied delegation triggering deference to the government.[22]

The end of *Chevron* deference does not mean agencies will never enjoy regulatory discretion. Congress can expressly direct an agency to "exercise a degree of discretion" by defining a "particular statutory term," or "prescrib[ing] rules to fill up the details of a statutory scheme," or even regulating "subject to the limits imposed by a term or phrase," including such inherently capacious terms like "reasonable" or "appropriate."[23] But judicial recognition of an *express delegation* of policymaking authority hardly entails deference to legal determinations made by an agency as part of a rulemaking. This is especially true when an agency attempts to delineate the "scope of [its] own power—perhaps the occasion on which abdication in favor of the agency is *least* appropriate."[24] Courts, in other words, must still police the "outer statutory boundaries" of Congress's delegations and "ensure that agencies exercise their discretion consistent with the APA."[25] In all other instances, courts will simply ensure an agency's assertion of power conforms with the best reading of the law.[26]

III. ***Chevron*** **Deference at the Department of Veterans Affairs**

The VA has long relied on *Chevron* deference to defend its legal interpretations of allegedly ambiguous statutory texts. Although veterans challenging those interpretations might often have had better legal arguments, the VA still prevailed. In this way, *Chevron* acted as a thumb on the scale in

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[19] *Id.* at 2265.

[20] *Id.* at 2271 ("[T]he basic nature and meaning of a statute does not change when an agency happens to be involved.").

[21] *Id.*

[22] This aspect of *Chevron*'s Step One was a major reason the methodology was "unworkable." *Id.* at 2270 ("The defining feature of [*Chevron*'s] framework [was] the identification of statutory ambiguity, which require[d] deference at the doctrine's second step. But the concept of ambiguity has always evaded meaningful definition.").

[23] *Id.* at 2263.

[24] *Id.* at 2266.

[25] *Id.* at 2268. If an agency seeks to rely on an express delegation, courts will face a four-fold interpretative responsibility: *First*, they must determine whether a delegation exists. *See id.* at 2263. *Second*, they must ensure the delegation is constitutional. *See id. Third*, they will need to "fix[] the boundaries of [the] delegated authority," *id.*, and "defin[e] the range of permissible criteria" according to which the agency may act. *See* Henry Monoghan, Marbury *and the Administrative State*, 83 Colum. L. Rev. 1, 27 (1983). *Fourth*, they must ensure the agency "engage[s] in reasoned decision making" within those "boundaries." *Loper Bright*, 144 S.Ct. at 2263 (cleaned up); *cf. Michigan v. Envtl. Prot. Agency*, 576 U.S. 743, 750 (2015).

[26] *Loper Bright*, 144 S.Ct. at 2266 ("It makes no sense to speak of a 'permissible' interpretation that is not the one the court, after applying all relevant interpretative tools, concludes is best. In the business of statutory interpretation, if it is not the best, it is not permissible.").

favor of the government. The following examples demonstrate how *Chevron* could be especially pernicious and how it was used at the VA to defend rules and policies that ultimately hurt veterans.

a. *Buffington v. McDonough*

Thomas Buffington was a disabled Air Force veteran. He served on active duty for roughly eight years, during which time he endured a facial scar, back injury, and tinnitus. After an honorable discharge, Mr. Buffington joined the Air National Guard and the VA awarded him disability benefits for injuries sustained serving our country.[27] At some later point, Mr. Buffington's Guard unit was mobilized and he found himself again on active duty. The VA suspended Mr. Buffington's benefits during this period of active service, as required by law,[28] but problems arose after his demobilization.

Upon leaving active duty again in 2005, the VA failed to resume the payment of Mr. Buffington's disability benefits. When he finally realized this oversight four years later, in 2009, the agency acknowledged its duty to resume payment of *future* benefits but refused to pay all benefits *retroactively*. The sole basis for the VA's decision was a regulation that not only required veterans to ask affirmatively for disability payments to resume after any period of active-duty service, but which limited the payment of retroactive benefits to a one-year period prior to any reinstatement request.[29]

Mr. Buffington filed a lawsuit and argued the VA had deviated from Congress's clear command to suspend benefits only during periods of active service. But the Court of Appeals for Veterans Claims rejected that argument. It accepted the VA's position, which depended on a "gap" or "silence" in the law. According to the VA, although Congress established a requirement that the agency pay out benefits—as well as a requirement to suspend them during active-duty service—it failed to address the restarting of benefits and therefore impliedly gave discretion to the VA to set its own reasonable rules.[30] One judge dissented, describing the court's decision as "nothing more than a rubber stamping of the Government's attempt to misuse its authority[.]"[31]

On appeal, the Federal Circuit similarly ruled in favor of the VA, deferring under *Chevron* to the agency's reading of the law: "Congress did not establish when or under what conditions compensation recommences once a disabled veterans leaves active service . . . [n]owhere . . . did Congress speak directly to that issue."[32] Consequently, the VA enjoyed discretion to "'prescribe all

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[27] *See* 38 U.S.C. § 1131 (assuring basic entitled to disability benefits); *see also id.* § 1110 (2021).

[28] *Id.* § 5304(c) ("Pension, compensation, or retirement pay on account of any person's own service shall not be paid to such person for any period for which such person receives active service pay.").

[29] 38 C.F.R. § 3.654(b)(2) (2021) ("Payments . . . will be resumed effective the day following release from active duty *if claim for recommencement of payments is received within 1 year from the date of such release*: otherwise payments will be resumed effective 1 year prior to the date of receipt of a new claim.") (emphasis added).

[30] *Buffington v. Wilkie*, 31 Vet. App. 293, 300 (Vet. App. 2019) ("The Court thus agrees with the Secretary that . . . there is a gap in the statute[.]"); *id.* at 302 (holding the rule reasonable based on the VA's "broad authority" to regulate and manage "compensation benefits").

[31] *Id.* at 308 (Greenberg, J., dissenting) ("The Secretary has exceeded his statutory authority here at the expense of service-connected veterans who were called back to active duty.").

[32] *Buffington v. McDonough*, 7 F.4th 1361, 1365 (Fed. Cir. 2021).

rules and regulations . . . necessary or appropriate to carry out the law[],'" and "to fill gaps in the veterans' benefits scheme" with "reasonable" rules.[33] A dissenting judge, however, explained how the majority misapplied *Chevron*:

> The majority puts the cart before the horse in its *Chevron* analysis. Rather than apply traditional tools of statutory construction to determine whether there is an ambiguity in § 5304(c), it fast-tracks past this step and finds what it believes is a statutory gap that the agency may fill. . . . [A] plain reading of the relevant portions of the governing statute and careful consideration of the context in which they appear demonstrate that there is no statutory gap to fill.[34]

This critique of "*Chevron* maximalism" is important. It illustrates the tendency of some judges to give Step One short shrift and to treat *any* instance of "silence" as an implied delegation of broad policymaking discretion. That kind of maximalism was particularly egregious in Mr. Buffington's case because the deciding courts also disregarded one of the traditional tools of statutory interpretation, the "pro-veteran canon of construction,"[35] which instructs judges to interpret laws concerning veterans benefits "in the beneficiaries' favor."[36]

Although the Supreme Court decided not to hear Mr. Buffington's case, Justice Gorsuch's dissent from that denial of certiorari sounded a clarion call against *Chevron* deference. Justice Gorsuch emphasized how *Chevron* had long been weaponized against veterans by both the VA and, even more troublingly, judges:

> Nothing in the statute requires a veteran to ask the agency to resume benefits it is already legally obligated to pay. . . . Even more troubling than the answer the lower courts reached in this case, however, is *how* they got there. Neither [court below] . . . offered a definitive and independent interpretation of the law Congress wrote. Instead, both courts simply deferred to the agency's (current) regulations as "reasonable" ones and said . . . *Chevron* required them to do so. That kind of judicial abdication disserves both our veterans and the law.[37]

Perhaps aware of the absurdity of its position and the harm it was causing to veterans like Mr. Buffington, the VA recently changed its regulations.[38] Servicemembers released from active duty are no longer required to proactively notify the VA of the obligation to resume payment of benefits.[39]

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[33] *Id.* at 1366–67.

[34] *Id.* at 1368 (O'Malley, J., dissenting).

[35] *Id.* at 1374–75 ("[W]e must apply the *Gardner* presumption . . . . [as the canon] remains an interpretive tool in the court's statutory construction toolbox that is to be employed before resorting to *Chevron* deference[.]").

[36] *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 441 (2011) (cleaned up); *see Brown v. Gardner*, 513 U.S. 115, 118 (1994).

[37] *Buffington v. McDonough*, 143 S. Ct. 14, 15–16 (2022) (Gorsuch, J., dissenting).

[38] Active Service Pay, 88 Fed. Reg. 86,058, 86,059–60 (Dec. 12, 2023) (to be codified at 38 C.F.R. pt. 3).

[39] *See* 38 C.F.R. § 3.654(b)(2).

b. *Haas v. Peake*

Mr. Haas served in the Navy during the Vietnam War aboard the U.S.S. *Mount Katmai*, an ammunition supply ship. Notably, the *Mount Katmai* never docked in any Vietnamese ports, and Mr. Haas never set foot on Vietnamese soil. In 2001, Mr. Haas applied for compensation under the Agent Orange Act of 1991, claiming a statutory presumption that his disabilities were the result of exposure to herbicides during his military service. Congress created that presumption for veterans with conditions incurred or aggravated by tours "in the Republic of Vietnam."[40] But the VA denied Mr. Haas's claim. According to its interpretation of the Act, the phrase "in the Republic of Vietnam" required a servicemember to have been physically present on Vietnamese soil.[41]

Mr. Haas's challenge to the VA's "foot-on-land" requirement initially met with some success. At the Court of Appeals for Veterans Claims, a three-judge panel agreed with his reading of the law. That court explained that, despite some statutory ambiguity, the VA had adopted inconsistent regulatory constructions and could not receive any deference,[42] whether under *Chevron* or with respect to the agency's understanding of its own regulations.[43] Looking to the text and legislative history, the panel concluded the VA's position was "misguided and plainly erroneous" and, ultimately, its legal interpretation unreasonable.[44]

The Federal Circuit reversed. It agreed the phrase, "served in the Republic of Vietnam," was ambiguous at *Chevron* Step One, but it concluded VA had reasonably exercised its "general rulemaking authority" to interpret the law to require some physical presence "on the landmass of Vietnam,"[45] even though the relevant implementing regulations were themselves ambiguous.[46]

Thankfully, the *Haas* decision is no longer good law. The Federal Circuit revisited the precedent *en banc* in 2019 in *Procopio v. Wilkie*.[47] Reinterpreting the Agent Orange Act at *Chevron* Step One, the court concluded "in the Republic of Vietnam" had a clear meaning buttressed by international law, which "confirms that the 'Republic of Vietnam,' like all sovereign nations, include[s]

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[40] 38 U.S.C. § 1116(a)(1)(A) (2002); *see generally id.* § 1116(d)(1).

[41] *See* 38 C.F.R. § 3.307(a)(6)(iii) (2004) ("service in the waters offshore" only qualifies if such service "involved duty or visitation in the Republic of Vietnam").

[42] *Haas v. Nicholson*, 20 Vet. App. 257, 269 (Vet. App. 2006) ("[T]he Secretary merely has replaced statutory ambiguity with regulatory ambiguity and *Chevron* deference will not be afforded."); *cf. id.* at 270 ("[T]he interpretation offered . . . by VA . . . is inconsistent with prior, consistently held agency views, plainly erroneous in light of its interpretation of legislative history, and unreasonable as an interpretation of VA's own regulations.").

[43] Deference to an agency's interpretation of its regulations is known as *Auer* or *Seminole Rock* deference. *See generally Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). *Auer* remains good law, although the Supreme Court clarified its application in a case involving the VA and the reopening of disability claims. *See generally Kisor v. Wilkie*, 588 U.S. 558 (2019).

[44] *Id.* at 279.

[45] *Haas v. Peake*, 525 F.3d 1168, 1186 (Fed. Cir. 2008).

[46] *Id.* at 1187.

[47] 913 F.3d 1371 (Fed. Cir. 2019).

its territorial sea."[48] Any ambiguity injected by the VA itself via promulgation of conflicting regulations and sub-regulatory guidance did not trigger deference.[49] Congress has now codified this result with the Blue Water Navy Vietnam Veterans Act,[50] but the VA has yet to finalize new regulations.[51]

c. *Chevron*'s Displacement of the "Veteran's Canon"

The "veteran's canon" is a substantive canon of interpretation that directs judges to resolve statutory ambiguities in a veteran-beneficiary's favor. Although commonly called the "*Gardner* presumption" after the Supreme Court's 1994 decision in *Brown v. Gardner*,[52] its place in American jurisprudence dates back decades earlier.[53] This rule favoring veterans has traditionally been justified in terms of congressional intent, but more importantly on normative grounds considering the great sacrifice that servicemembers make for the sake of the entire political community.[54]

One of the longstanding debates in veteran's law has always been whether the *Gardner* presumption ought to have taken precedence over *Chevron*. In other words, were courts supposed to use *Gardner* to resolve questions of statutory meaning at *Chevron* Step One (or under *Auer* vis-à-vis regulations) *before* moving to deference and any inquiry into the reasonableness of the VA's legal interpretations?[55] This conflict was never satisfactorily resolved by the courts.[56] And in countless cases like *Buffington*, *Haas*, *Procopio*, and others, the canon tended to be ignored and only ever used as a last resort when deference was ultimately withheld under *Chevron* or *Auer*.[57] That may be unsurprising; taking the veteran's canon seriously would have undermined the legal fiction essential to *Chevron* deference, namely, that statutory ambiguities ought to be understood as implied delegations.

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[48] *Id.* at 1375.

[49] *See id.* at 1376–78.

[50] Pub. L. No. 116-23, 133 Stat. 966 (2019).

[51] *See generally* Updating VA Adjudication Regulations for Disability or Death Benefit Claims Related to Exposure to Certain Herbicide Agents, 89 Fed Reg. 9803-01 (Feb. 12, 2024) (to be codified at 38 C.F.R. pt. 3).

[52] 513 U.S. at 118 (discussing the "rule that interpretive doubt is to be resolved in the veteran's favor").

[53] *See, e.g.*, *Boone v. Lightner*, 319 U.S. 561, 575 (1943) ("The Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation."); *see also Henderson v. Shinseki*, 562 U.S. 428, 441 (2011); *King v. St. Vincent's Hosp.*, 502 U.S. 215 (1991); *Coffy v. Rep. Steel Corp.*, 447 U.S. 191, 196 (1980) ("The statute is to be liberally construed for the benefit of the returning veteran."); *Fishgold v. Sullivan Drydock & Repair Co.*, 328 U.S. 275, 285 (1946).

[54] *See Fishgold*, 328 U.S. at 285 (benefits statutes should be "liberally construed for the benefit of those who left private life to serve their country in its hour of great need").

[55] *See generally* Chadwick J. Harper, Note: *Give Veterans the Benefit of the Doubt:* Chevron*,* Auer*, and the Veteran's Canon*, 42 Harv. J. L. & Pub. Pol'y 931 (2019).

[56] *But see id.* at 947 ("Given that the *Gardner* court twice cited *Chevron* . . . [the case arguably] suggests that courts should apply the veteran's canon before finding ambiguity sufficient for deference to an agency.").

[57] *See, e.g.*, *Hudgens v. McDonald*, 823 F.3d 630 (Fed. Cir. 2016).

With *Chevron* deference gone, the veteran's canon could very well regain its place as a traditional tool of statutory interpretation.[58] As one scholar notes, the canon has always reflected a better, more accurate "presumption about how Congress legislates," at least in the veteran's law space.[59] It captures the spirit of congressional "solicitude" to veterans and constitutes an interpretative backdrop against which Congress has long legislated.[60] But the revitalization of the veteran's canon may be even more impactful within the VA, which will now need to consider how ambiguities in the law—whether in statutes or regulations—will be interpreted by courts in favor of beneficiaries as a default rule, so long as *Gardner* remains good law. Quite apart from judicial use of the canon, the VA should endeavor to regulate in line with the veteran's canon in the first instance, even to the point of applying it in its own rulemakings and adjudications. That would simplify bureaucracy, especially in claims adjudications involving complicated evidentiary questions. It would also help foster a regulatory apparatus that prioritizes veterans and advances *their* interests, rather than the interests of the administrative state.

IV. Conclusion

The impact of *Loper Bright* at the VA likely will closely track the consequences of ending *Chevron* deference across the entire executive branch. The VA will no longer be able to expect deference to its interpretations of the law. In the immediate term, this will mean more cautious rulemaking. But it could also mean a shift to the use of sub-regulatory guidance. Certainly, the veteran's canon is likely to again be an important consideration, both in the drafting of regulations and during judicial review. Some further development in the courts may be required to eliminate vestiges of *Chevron* in the context of as-applied benefits challenges, but that seems certain to happen.[61]

The Committee should explore two areas to ensure full implementation of *Loper Bright*. *First*, it is likely the VA will claim Congress has expressly delegated broad regulatory authority to the Secretary under 38 U.S.C. § 501 to "prescribe all rules and regulations which are necessary or appropriate,"[62] and that under *Loper Bright* the VA's rulemakings should only be subject to *State Farm* arbitrary-and-capricious review as "policymaking." Of course, that position ignores the judicial role in giving meaning to words like "necessary" and "appropriate," but it does highlight the need for Congress to tighten its delegations and, ultimately, to legislate with greater specificity, especially when benefits for our country's veterans are concerned.

Second, the VA is likely to claim that its administration of veteran's benefits statutes implicates a certain technical expertise that ought to be persuasive before judges under some revitalized *Skidmore*

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[58] *See Loper Bright*, 144 S. Ct. at 2266. Some jurists question whether substantive canons (as opposed to linguistic canons) are compatible with textualism, or if they instead preclude a judge from determining the "best" reading of the law, at least without a compelling justification based on "background constitutional principles or long-settled judicial understandings of congressional practice." *See Rudisill v. McDonough*, 601 U.S. 294, 314 (2024) (Kavanaugh, J., concurring). That is no less the case with the veteran's canon. *See id.* at 314–18 (2024) (Kavanaugh, J., concurring); *id.* at 329 (Thomas, J., dissenting). *But see id.* at 958 ("If the statute were ambiguous, the pro-veteran canon who favor [the veteran][.]").

[59] *See* Harper, *supra* note 55 at 955–56.

[60] *See id.*

[61] As-applied challenges to benefits challenges are technically reviewed under 38 U.S.C. §§ 7261 and 7292, but the language of these provisions is effectively identical to Section 706 of the APA.

[62] 38 U.S.C. § 501(a).

"deference" standard. As the *Loper Bright* court explained, however, "respect" for the executive branch's legal interpretations is one thing—deference is another. A claim of technical expertise is not a blank check, nor is it a promise of faithful execution of the law. This is especially borne out by the stories of veterans denied care or benefits in cases like *Buffington* and *Haas*.

The end of *Chevron* deference opens the door to an exciting period in administrative law. The time has come for a reevaluation of how and why unelected bureaucrats at agencies have come to regulate so many aspects of Americans' daily lives, and what can be done to avoid another forty-year period of distortion of our constitutional order.

Thank you again for the opportunity to share these thoughts with the Committee.

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