Center for Progressive Reform | CPR

June 8, 2016

Chairman Bob Goodlatte
Ranking Member John Conyers, Jr.
U.S. House Committee on the Judiciary

Re: Concerns with H.R. 4768

Dear Chairman Goodlatte and Ranking Member Conyers,

As individual academics who specialize in administrative law and regulatory policy, we are writing to express our concerns with H.R. 4768, the "Separation of Powers Restoration Act of 2016," which purports to eradicate the doctrine set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[1] As you know, the bill would amend section 706 of the Administrative Procedure Act (APA) to require a *de novo* standard of review for "all relevant questions of law, including the interpretation of constitutional and statutory provisions and rules." As explained below, this change would jettison the existing carefully calibrated system of judicial review, eliminating the many institutional advantages it offers.

Judicial review of federal agencies plays a visible and crucial role in our system of government and is therefore the subject of considerable scrutiny. 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.[2]

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. When courts review agencies' interpretations of statutes they administer, *Chevron*'s two-step test effectively promotes all of these considerations. And any

[1] 467 U.S. 837 (1984).
[2] *See* Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749 (2007); Emily Hammond, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733 (2011).

constitutional requirement that courts say what the law is[3] are met by *Chevron* step one, which requires courts to apply their independent judgment in determining whether Congress has clearly spoken. It is well to remember that deferential review comes into play only if Congress has not been clear.

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 the kinds of complex scientific or technical matters that are at the heart of many agency actions. 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 them to use procedures that are more transparent. Finally, *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.[4]

In light of the discussion above, we identify the following five broad criticisms of H.R. 4768:

It is motivated by dissatisfaction with substantive agency outcomes rather than with legitimate concerns about judicial practice. Support for H.R. 4768 seems motivated by dissatisfaction with the substance of several of President Obama's regulatory policies—especially things like the Clean Power Plan and the Waters of the United States rule. We cannot predict whether courts will uphold these regulations, and attempts to preemptively control the courts for political purposes are sure to backfire.

Chevron ***does not prevent courts from reining in agencies.*** The short-sighted remedy offered by H.R. 4768 would give the courts more power—but it ignores that courts already decline to extend deference on a case-by-case basis, as exemplified by cases like *King v. Burwell*,[5] *Utility Air Regulatory Group v. EPA*,[6] and *Massachusetts v. EPA*.[7]

[3] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
[4] *See, e.g.*, Mark Seidenfeld, Chevron*'s Foundation*, 86 NOTRE DAME L. REV. 273 (2011).
[5] 135 S. Ct. 2480 (2015).
134 S. Ct. 2427 (2014).
[7] 549 U.S. 497 (2007).

It is motivated by a misplaced concern that* Chevron *undermines legislative authority. Much of the criticism of the *Chevron* doctrine seems rooted in concerns that it allows agencies to run amok, rewriting decades-old statutes at will. The simple truth is that *Chevron* instructs courts at step one to always give effect to clearly expressed congressional intent. *Chevron*'s deference is strictly bounded by congressional will.

It presents separation-of-powers problems. H.R. 4768 is disruptive to the careful equilibrium that the full body of administrative law doctrine seeks to achieve. Administrative law is not perfect, but this bill tilts too strongly in favor of judicial power, at the expense of the other two branches.

It risks creating unnecessary confusion. It is hard to predict the precise effect H.R. 4768 would have in practice. Consider, for example, that *Chevron* includes a component of *de novo* review, which takes place at "step one." If Congress has spoken clearly, it is up to the courts to independently recognize and enforce that clarity. But step one is already the focus of much debate regarding *how* this *de novo* step should be conducted.[8] In addition, it is not always easy to separate questions of law from questions of fact. Courts grappled with that problem prior to *Chevron*,[9] and will continue to do so in the future—regardless of the applicable reviewability standard's verbal formulation.

Sincerely,

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[8] EMILY HAMMOND ET AL., *Judicial Review of Statutory Issues Under the* Chevron *Doctrine*, *in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES (2015).
[9] *See, e.g.*, Skidmore v. Swift & Co., 323 U.S. 134 (1944); NLRB v. Hearst, 322 U.S. 111 (1944).