



POLICY BRIEF

Reforming Executive Discretion, Part I: The End of *Chevron* Deference

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Executive Summary

In 1984, the United States Supreme Court ruled in *Chevron U.S.A. v. Natural Resources Defense Council*, that when Congress does not directly speak to an issue in a given federal statute, courts must defer to federal regulators' interpretation of that law, provided an agency operates under a "permissible construction of the statute." That is, with a sufficiently clever legal theory, an executive agency can impose on the American people laws that the people's elected representatives never actually pass.

Whatever speculative value this "*Chevron* deference" standard may have as a legal theory, in practice it has become a direct threat to the rule of law and the moral underpinnings of America's constitutional order.

For three decades, *Chevron* deference has helped to midwife a kind of shadow government operating within the federal Executive. This "Fourth Branch" of government imposes and enforces the vast majority of new federal laws without being subject to public consent or checks and balances.

Chevron deference empowers this government-without-consent. It conveniences lazy and accountability-resistant politicians and power-hungry bureaucrats at the expense of the American people's rights. And so *Chevron* must go.

The Article I Project was formed to develop a policy agenda to reclaim congressional powers today being wielded by the executive branch. The lawmaking power today exercised by the Administrative State – protected and enhanced by the *Chevron* deference

standard – is one such power. Reforming *Chevron* deference is an essential part of A1P’s agenda to reform executive discretion more broadly.

Chevron deference is hardly the only problem with the Administrative State, nor is it the biggest. But it is one of the least defensible problems, with a clear and obvious fix.

The “Separation of Powers Restoration Act of 2016” is that fix. The bill would scrap the artificial and extra-constitutional deference standard set in *Chevron* and replace it with traditional judicial review of administrative actions. It would require courts to review challenges to agency interpretations of statutes or regulations “*de novo*” – that is, starting fresh from the text of the law or regulation itself, rather than preemptively deferring to the agency’s lawyers.

The only controversial aspect of this legislation is the unfair and un-American status quo it would reform. After all, interpreting the law, and ensuring it conforms with the Constitution, is not a novel understanding of the Judiciary’s role in our system of government. It’s what federal judges are *for*.

So A1P’s work to make members of Congress once again do their job begins with our work – and unanimous endorsement of this reform – to allow federal judges to once again do theirs.

The Danger of Government Without Consent

Republican government depends on clear lines of accountability connecting policy, policymakers, and the people. Citizens must be able to identify the government officials responsible for unpopular policies, and be able to change those policies by voting those officials out of office. Otherwise, the political system would lose its moral credibility.

That is why the Framers of our Constitution made the most powerful branch of the federal government – Congress – also the most accountable to the people. They understood that for all their carefully considered checks and balances and enumerated powers, the new American republic’s stability rested on a moral foundation of public trust.

The greatest institutional threat to that trust today is the Administrative State – the seemingly endless array of rule-writing departments, agencies, and bureaus that make up the federal government’s Executive Branch. The “laws” they write – tens of thousands of pages of do’s and don’ts every year – are never passed by the people’s elected representatives in Congress at all, but imposed unilaterally by anonymous bureaucrats within this shadowy “Fourth Branch” of the government.

These bureaucrats never stand for election. All but a handful of them keep their jobs regardless of who controls Congress or the White House. It’s almost

impossible for them to be fired, even in cases of gross misconduct.

But of course, the great scandal of the Administrative State is not its *misconduct*, but its *conduct*.

Thanks to the current interpretation of the regulatory state's governing statute – the Administrative Procedure Act of 1946 – federal agencies enjoy an array of powers no one branch of government ever should. Under the Constitution, the executive branch is supposed to *enforce* the law. But under the APA today, executive bureaucrats also write their own laws. Then, after they charge, fine, and threaten their oftentimes innocent targets, the agencies even serve as quasi-courts adjudicating citizens' challenges to agency decisions.

When the Administrative State makes mistakes – as all human institutions do – members of Congress routinely fire off letters and press releases condemning executive overreach and urging the president to rein in his out-of-control bureaucracy.

But such protests, however sincere, are misdirected.

The dirty little secret of the Administrative State is that it exists primarily for the convenience of members of Congress themselves. It seems counterintuitive, but it's true. The Administrative State only makes laws because Congress – the most accountable and therefore politically vulnerable of the three branches – tells it to.

Congress deliberately delegates its legislative powers to the Administrative State because it affords senators and representatives the luxury of passing vague laws with unobjectionable goals, while passing the burden of actual policymaking on to the agencies. Today, bills passed by Congress are peppered with gauzy provisions that begin with phrases like, “The Secretary shall determine...” or “The Administrator will establish...”

By writing these airy “laws,” politicians can take credit for “doing something” about political problems, while skirting responsibility if and when things go wrong.

That's why, amid all the howls of “overreach,” every year Congress not only funds these agencies (usually with increased budgets), but delegates to them more and more of its own constitutional powers. The Administrative State is only ever as arbitrary, unaccountable, and abusive as Congress tolerates.

***Chevron* Deference Compounds the Problem**

The core problem of the Administrative State, then, is not necessarily that it creates bad laws. The problem is that the laws it makes are not subject to the checks and balances the Founders installed in the constitutional legislative process to protect the American people's rights and freedom.

As we have seen, Congress bears primary responsibility for this extra-

constitutional state of affairs. But not sole responsibility.

For the Supreme Court, too, has often facilitated rather than checked the Executive Branch's forays into lawmaking. As far back as 1928, it held that, separation of powers notwithstanding, Congress could delegate legislative power to an agency so long as Congress provided an "intelligible principle" on which the agency could base its regulatory action. The Court has not struck down any law for excessive delegation of legislative power since 1935, during which time it has affirmed such nebulous "intelligible principles" as "in the public interest" and "just and reasonable."

And then, in 1984, the Supreme Court went a step further. In *Chevron U.S.A. v. Natural Resources Defense Council*, the majority held that in cases of ambiguous language in the law, courts must defer to the agencies' interpretation of the statute rather than come to its own, provided the agency advances a "permissible construction of the statute." In effect, *Chevron* deference allows an administrative agency with a sufficiently clever legal argument to pass and enforce any law it wants, and deprives the American people of both popular and institutional checks on that lawmaking. It tilts the playing field against the American people in the very institutions – our courts – where equal justice under the law is most sacrosanct.

Unsustainable is one of the politest adjectives one can use to describe this state of affairs.

The Constitution was not written for the convenience of careerist politicians, or to facilitate "government by expert." It was written to protect the American people from the relentless temptation of government officials to put their own interests ahead of the nation's.

Rather than checking this impulse, the *Chevron* deference standard encourages and rewards it.

The Separation of Powers Restoration Act

That is why reforming – which is to say, ending – *Chevron* deference was a founding priority for the Article I Project. Happily, we found it was also a priority for the House and Senate Judiciary Committee Chairmen, Bob Goodlatte (R-Va.) and Chuck Grassley (R-Iowa), and former Senate Judiciary Chair Orrin Hatch (R-Utah).

The result of our partnership is the "Separation of Powers Restoration Act of 2016," which is being introduced in the House and Senate today with 56 co-sponsors, including all ten members of the Article I Project.

The bill would restore federal judges to their proper role in interpreting executive-branch regulations on their own, rather than meekly deferring to the agency's own legal theories. Specifically, it would amend the Administrative Procedure Act and require judges

hearing challenges to agency actions to review “*de novo* all relevant questions of law, including the interpretation of constitutional and statutory provisions and rules.” That is, it would end the dysfunctional status quo that tilts the legal playing field in favor of federal bureaucrats and against the citizens they target.

Under the “Separation of Powers Restoration Act,” federal judges will be able to begin fresh and weigh agency rules and decisions against the text of the law or the regulation itself – not an arbitrary and extra-constitutional standard of deference.

Thanks to this reform, federal courts will again be able to check the “Fourth Branch” of government. Federal rules and regulations that go beyond – or sneakily read between the lines of – the actual law would be struck down. Federal law would be put back into the hands of the legislators empowered to write it and judges empowered to interpret it, just as the Constitution lays out.

The American people would thereby win back a vital constitutional protection – that of judicial review over executive lawmaking – which they are denied today because of *Chevron*.

Under this reform, congressional silence on a question of policy would once again signal a lack of intent to make policy, whether out of lack of consensus or a conscious choice not to act. Senators and Representatives would once again be able to forge legislative

compromise without the fear that the Administrative State reserves the right to “put in” what Congress “left out.”

(Or, in some cases, without the *hope*. For with *Chevron* abrogated, Congress would once again be forced to clearly make hard policy choices themselves and be held accountable for them.)

And finally, Congress will have taken an important first step toward restoring constitutional order among the three branches of our government, and thereby restoring the constitutional rights of the American people.

Chevron deference is hardly the only problem with the Administrative State; nor is it the largest. But it is one of the hardest to defend and easiest to fix.

So – from A1P’s perspective – it is an excellent place to begin the work of giving back to the American people their God-given right to government by consent.