

**ON THE NOMINATION OF JUDGE BRETT KAVANAUGH TO SERVE
AS AN ASSOCIATE JUSTICE ON THE SUPREME COURT OF THE UNITED STATES**

**Testimony of
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Committee on the Judiciary

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Chairman Grassley, Ranking Member Feinstein, and members of the Committee, thank you for inviting me to testify in support of the President’s nomination of Judge Brett Kavanaugh to serve as an Associate Justice on the Supreme Court of the United States.

Judge Kavanaugh would bring great integrity, independence, and intellect to the court, as exemplified by his twelve years of service as a federal judge. For that reason, I urge the Senate to give its advice and consent to his nomination.

My purpose in this testimony is to focus special attention on Judge Kavanaugh’s deep record of thoughtful judicial opinions and legal scholarship on matters of administrative law—that is, on the relationship between administrative agencies and the courts, the Congress, and the president.

Other scholars already have catalogued Judge Kavanaugh’s impressive record of opinions and scholarship on administrative law and related matters, and I highly recommend their summaries.² In my testimony, I want to focus your attention on the constitutional underpinnings of four major aspects of Judge Kavanaugh’s record:

- (1) his method of interpreting laws;

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² See especially Prof. Christopher Walker, “Judge Kavanaugh on Administrative Law and Separation of Powers,” *SCOTUSblog.com* (July 26, 2018); Prof. Aaron Nielson, “Judge Kavanaugh and Justiciability,” *SCOTUSblog.com* (Aug. 14, 2018); Prof. Jennifer Mascott, “Judge Kavanaugh: Interpretive Principles as a Way of Life,” *Yale Journal on Regulation: Notice & Comment* (July 2, 2018).

- (2) his implementation of the Supreme Court’s doctrines of judicial “deference” to agencies’ legal interpretations;
- (3) his careful maintenance of constitutional limits on the use of judicial power to resolve legal cases and controversies; and
- (4) his particular attention to the profound constitutional ramifications of administrative agencies’ structure.

It is important to note at the outset that these aspects of administrative law have always been the subject of ongoing reform and recalibration. Many of the principles on which Judge Kavanaugh has written, including “*Chevron* deference” and “independent agencies,” reflect efforts by the Supreme Court to strike a balance between competing constitutional priorities—balances that the Justices have then gone on to reform and recalibrate in light of the nation’s subsequent experience in self-governance, as both Justices Scalia and Breyer observed in their early writings on *Chevron*.³

On the D.C. Circuit, Judge Kavanaugh has worked diligently to implement the Supreme Court’s doctrines, pursuant to the Constitution and Congress’s laws, even at times when the Supreme Court’s own precedents are less than clear. It is hard to imagine a judge better suited than Judge Kavanaugh to join the Justices in the work of maintaining and modernizing administrative law.

I. Judge Kavanaugh interprets the Constitution and statutes according to the text’s original meaning, as informed by canons of construction, structure, and history.

To understand Judge Kavanaugh’s approach to administrative law, it is important to begin with his approach to law in general. For Judge Kavanaugh, “the neutral and impartial rule of law” depends on judges

³ Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 (1989); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 363–372 (1986). I explored this theme, with respect to the late Justice Scalia’s writings, in “Scalia and *Chevron*: Not Drawing Lines, But Resolving Tensions,” *Yale Journal on Regulation: Notice and Comment* (Feb. 23, 2016). For a more detailed overview, see Adam J. White, “The Administrative State and the Imperial Presidency,” in Gary J. Schmitt *et al.* eds., *The Imperial Presidency and the Constitution* (2017); and Adam J. White, “Reforming Administrative Law to Reflect Administrative Reality,” in *Policy Reforms for an Accountable Administrative State* (National Affairs 2017).

approaching the interpretation of legal texts in the spirit of a neutral umpire, to the maximum extent possible.⁴

Of course, a text does not interpret itself; this requires not just an awareness of contemporaneous dictionaries, but also an understanding of the given constitutional or statutory term’s use in its broader constitutional or statutory context.⁵

This can be challenging. “To be sure, the constitutional text does not answer all questions,” he once observed. “Sometimes the constitutional text is ambiguous, such as the Equal Protection and Due Process Clauses.” But, he stressed, genuine ambiguity is found “in far fewer places than one would think,” and judges “should not strain to find ambiguity in clarity.”⁶ The same is true for statutes.

As his judicial opinions show, he interprets statutes by employing the “traditional tools of statutory interpretation” — namely, “the statute’s text, history, structure, and context.”⁷ This approach is rooted deeply in our constitutional republic’s founding; as Alexander Hamilton observed in *Federalist 83*, “[t]he rules of legal interpretation are rules of COMMONSENSE, adopted by the courts in the construction of the laws.”⁸

And Judge Kavanaugh relies on these principles precisely because they reflect the appropriately limited role of a federal judge in our constitutional republic—as he explained a decade ago, before this Committee: “I believe very much in interpreting text as it is written and not seeking to impose one’s own personal policy preferences into the text of the document. *I believe very much in judicial restraint, recognizing the primary policymaking role of the legislative branch in our constitutional democracy.*”⁹

⁴ Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2121–22 (2016).

⁵ Kavanaugh, *The Courts and the Administrative State*, 64 CASE WESTERN L. REV. 711, 717 (2014).

⁶ Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 NOTRE DAME L. REV. 1907, 1926–27 (2014).

⁷ *Loving v. IRS*, 742 F.3d 1013, 1021–22 (D.C. Cir. 2014). See also *PHH Corp. v. CFPB*, 839 F.3d 1, 43 (D.C. Cir. 2016) (“the statute’s text, history, context, and purposes”), vacated by 881 F.3d 75 (D.C. Cir. 2018); *Coalition for Responsible Regulation, Inc. v. EPA*, No. 09-1322, 2012 WL 6621785, slip. op. at 12 (D.C. Cir. 2012) (Kavanaugh, J., dissenting from denial of rehearing *en banc*) (“the text, context, and structure of the . . . statute as a whole”).

⁸ *Federalist No. 83*.

⁹ Senate Judiciary Committee, *Confirmation Hearing on the Nomination of Brett Kavanaugh to be Circuit Judge for the District of Columbia Circuit*, S. Hrg. 109-435, at 45 (May 9, 2006) (emphasis added).

Indeed, “this goal is not merely personal preference but a constitutional mandate in a separation of powers system. . . . When courts apply doctrines that allow them to rewrite the laws (in effect), they are encroaching on the legislature’s Article I power.”¹⁰ As Alexander Hamilton warned in Federalist 78, the federal judiciary’s credibility and constitutional legitimacy depends on this judicial self-restraint.¹¹

II. On questions of judicial “deference” to agencies’ legal interpretations, Judge Kavanaugh has followed the Supreme Court’s own reform of the doctrine, with careful attention to constitutional principle.

Some of Judge Kavanaugh’s most significant work has involved the interpretation of statutes in light of the Supreme Court’s doctrine of “*Chevron* deference,” under which judges defer sometimes to agencies’ interpretations of statutes. Before examining some of his major *Chevron* cases, let me place his work in the context of the Supreme Court’s own shifting current of precedents that lower-court judges have been tasked with applying.

A. *Chevron*’s judicial critics—liberal and conservative

Courts have long grappled with the extent to which they should “defer” to federal agencies’ interpretations of the laws that the agencies administer.¹² Before *Chevron*, the Supreme Court justified a measure of deference to agencies’ interpretations in light of an agency’s “thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”¹³ But this vague and seemingly circular approach provided little guidance to lower-court judges, legislators, regulators, and the public.

Then, in the *Chevron* case thirty-four years ago, the Court reformulated earlier doctrine into a seemingly straightforward two-step framework, which may be summarized briefly as this: if Congress’s statute is clear (unambiguous), then the courts should interpret it without deference to the agency interpreting it; but if a statute is ambiguous, then the courts

¹⁰ Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. at 2120.

¹¹ Federalist No. 78 (“The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.”)

¹² See Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2017).

¹³ *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

should defer to an agency’s interpretation as long as the interpretation is reasonable. The Court adopted this approach, ceding significant policymaking discretion to the agencies, for two reasons: *first*, because ambiguous statutes generally leave room for policymaking discretion, and agencies tend to have better regulatory subject-matter expertise than courts do; and *second*, because in our constitutional system policymaking is the province of officials who are accountable to the people, and agency policymakers are at least somewhat more accountable to the people (through the President) than unelected and life-tenured federal judges are.¹⁴

For decades, the *Chevron* framework’s staunchest defender was Justice Scalia.¹⁵ And for decades, Justice Scalia found himself defending *Chevron* against colleagues who sought to mitigate *Chevron* deference—such as Justice Souter,¹⁶ and Justice Breyer,¹⁷ and even *Chevron*’s own original author, Justice Stevens.¹⁸ And the risk of stating the obvious, *Chevron*’s early critics and reformers were not mainly conservatives.

Such efforts by Justice Breyer and the others to reform, recalibrate, and constrain *Chevron* deference eventually prevailed. First, in *Mead*, the Court limited the types of agency actions that can receive *Chevron* deference.¹⁹ Later, during the second Bush Administration, the Supreme Court issued significant opinions rejecting the Environmental Protection Administration’s self-restrained interpretation of the Clean Air Act as to greenhouse gas emissions,²⁰ and rejecting the Justice Department’s broad interpretation of the Controlled Substances Act as to physician-assisted suicide.²¹ Justice Scalia dissented from these opinions, criticizing efforts to reduce or sidestep *Chevron* deference.²² But the Court’s changes to the

¹⁴ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984).

¹⁵ See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511 (1989); *U.S. v. Mead Corp.*, 533 U.S. 218, 239 (2001) (Scalia, J., dissenting).

¹⁶ *U.S. v. Mead Corp.*, 533 U.S. 218 (2001).

¹⁷ *Christensen v. Harris County*, 529 U.S. 576, 596–97 (2000) (Breyer, J., dissenting).

¹⁸ *Id.* at 595 n.2 (Stevens, J., dissenting).

¹⁹ *Mead*, 533 U.S. at 227–31.

²⁰ *Massachusetts v. EPA*, 549 U.S. 497 (2007).

²¹ *Gonzales v. Oregon*, 546 U.S. 243 (2006).

²² *Massachusetts*, 549 U.S. at 552–53, 558–60; *Gonzales*, 546 U.S. at 294.

Chevron approach won praise from scholars who saw the Court as reducing deference in order to promote technocratic expertise.²³

In recent years, however, *Chevron* deference has come under increasing fire not just from liberal judges, but also from conservative judges such as Justice Thomas. Where others sought to reform *Chevron* to promote technocratic expertise, Justice Thomas and others now seek to reform *Chevron* to promote the rule of law and judges' duty to interpret the law independently and neutrally.²⁴

In sum, *Chevron's* critics have been found across the entire spectrum of judicial ideology. Even Justice Scalia, *Chevron's* staunchest defender, expressed late in life some public and private doubts about *Chevron's* sustainability. As his friend Ronald Cass wrote recently, “[m]uch as he admired the framework *Chevron* should have been, he had come to be more skeptical of the benefit of the decision, and colleagues whose views on separation of powers closely aligned with his have clearly called for abandonment of *Chevron*.”²⁵

Arguably the Court's most significant modification of *Chevron* came in a recent case involving the Obama Administration's Affordable Care Act subsidies: in *King v. Burwell*, the Supreme Court affirmed the Administration's policy but rejected the use of *Chevron* deference in the case. As the Court's majority opinion explained, the legal issue at hand (regarding the availability of subsidies for insurance purchased on federal insurance exchanges) was a statutory issue of such “deep ‘economic and political significance[,]” and so “central to this statutory scheme,” that the Court

²³ Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 Sup. Ct. Rev. 51, 66 (2007) (“for the current Court insulating expertise from politics is a greater imperative than forcing democratic accountability”).

²⁴ See, e.g., *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (“*Chevron* deference precludes judges from exercising that judgment, forcing them to abandon what they believe is ‘the best reading of an ambiguous statute’ in favor of an agency’s construction. . . . It thus wrests from Courts the ultimate interpretative authority to ‘say what the law is,’ [citing *Marbury v. Madison*], . . . and hands it over to the Executive. . . . Such a transfer is in tension with Article III’s Vesting Clause, which vests the judicial power exclusively in Article III courts, not administrative agencies. U.S. Const., Art. III, § 1.”).

²⁵ Ronald A. Cass, *Administrative Law in Nino’s Wake: The Scalia Effect on Method and Doctrine*, 32 J.L. & Pol. 277, 288 (2017).

would not presume that Congress had “wished to assign that question to an agency” rather than to judges.²⁶

This was seen immediately as a significant new limitation of *Chevron* deference.²⁷ And this reform of *Chevron*, like several before, came primarily from the Court’s liberal justices, not its conservatives: Justices Ginsburg, Breyer, Sotomayor, and Kagan all joined the Chief Justice’s majority opinion, along with Justice Kennedy; Justices Scalia, Thomas, and Alito did not.

Given the context of these hearings, it is fitting to observe that one of Justice Kennedy’s last judicial opinions focused on precisely the need to significantly reform *Chevron*, to reorient it back toward the Constitution and the rule of law. Surveying recent cases in which the Court deferred to agencies’ statutory interpretations, Justice Kennedy wrote:

*The type of reflexive deference exhibited in some of these cases is troubling. And when deference is applied to other questions of statutory interpretation, such as an agency’s interpretation of the statutory provisions that concern the scope of its own authority, it is more troubling still. . . . Given the concerns raised by some Members of this Court . . . it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie Chevron and how courts have implemented that decision. The proper rules for interpreting statutes and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles and the function and province of the Judiciary.*²⁸

I offer this background information to illustrate the legal context surrounding Judge Kavanaugh’s recent years on the D.C. Circuit. In faithfully applying the Supreme Court’s binding precedents on *Chevron*, Judge Kavanaugh’s responsibility has been to apply *Chevron* in light of the Court’s own shifting justifications for the doctrine—especially *King*’s prominent withholding of *Chevron* deference from statutory questions of

²⁶ *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015). And, the Court added, “[i]t is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort.” *Id.* at 2489 (emphasis in original).

²⁷ See, e.g., Adam J. White, “Defining Deference Down,” *SCOTUSblog* (June 25, 2015) (“After *King v. Burwell*, the ‘major questions’ doctrine is emphatically a *Chevron* Step Zero question – a welcome development in and of itself. Before even beginning to apply *Chevron*’s two-step approach, the courts will need to ask whether the policy matter at hand is of such economic or political significance that it cannot be presumed to have been committed to the agency’s discretion by Congress.”).

²⁸ *Pereira v. Sessions*, 138 S. Ct. 2105, 2120–21 (2018) (emphasis added).

“deep ‘economic and political significance’ . . . central to [the] statutory scheme.”

B. Judge Kavanaugh’s application of *Chevron* pursuant to the Supreme Court’s precedents

As Judge Kavanaugh conceded frankly in his recent *Harvard Law Review* article, one of the challenges of applying *Chevron* is that its two-step framework requires judges to draw lines between “ambiguous” and “unambiguous” statutes, leaving a lot of room for judicial discretion and disagreement: “the doctrine is so indeterminate—and thus can be antithetical to the neutral, impartial rule of law—because of the initial clarity versus ambiguity decision.”²⁹

Because he is a textualist, Judge Kavanaugh “tend[s] to be a judge who finds clarity more readily than some of my colleagues.”³⁰ When he explained this to the Heritage Foundation, he was echoing Justice Scalia’s own seminal explanation of *Chevron*, in which Scalia stressed that textualist judges are more likely to find statutes to be clear and unambiguous, and thus more likely to decide statutory cases in *Chevron*’s “Step One,” rather than proceeding to *Chevron*’s deferential “Step Two” in which the judge will more often defer to an agency’s “reasonable” interpretation.³¹

Judge Kavanaugh’s application of *Chevron* seems also guided in part by his awareness that judges are often at risk of being intimidated or overwhelmed by the executive branch and its agencies. As he has explained, there are times “when judges need to show some fortitude and backbone in those cases where the independent judiciary has to stand up to the mystique of the presidency and the executive branch.”³² His warning echoes Alexander Hamilton’s own warning, in *Federalist 78*, that the judiciary branch “is in continual jeopardy of being overpowered, awed, or influenced by its coordinate branches,” which is why judicial independence may “be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.”³³ The Constitution gives judges independence so that they may judge cases independent of political pressure.

²⁹ 129 HARV. L. REV. at 2152–54.

³⁰ Kavanaugh, “The Role of the Judiciary in Maintaining the Separation of Powers,” Heritage Foundation Lecture No. 1284 (Oct. 25, 2017), at 5.

³¹ Scalia, 1989 DUKE L.J. at 520–21

³² Kavanaugh, 64 CASE WESTERN L. REV. at 713–14.

³³ *Federalist No. 78*.

Kavanaugh’s most significant regulatory cases exemplify these principles, in terms of his interpretive integrity and independence.

In *Coalition for Responsible Regulation v. EPA*, where Judge Kavanaugh dissented from the Court’s denial of *en banc* rehearing, he wrote an opinion involving the EPA’s unprecedented assertion of regulatory power to impose its permit-based regulatory regime on greenhouse gases from “stationary sources”—*i.e.*, manufacturing plants, power plants, but also small businesses that the Clean Air Act’s drafters explicitly stated would be exempt from this form of regulation. The EPA asserted that all of them were subject to the EPA’s new permitting regime (tempered only by the EPA’s own exclusive enforcement discretion), but Judge Kavanaugh concluded that this was a violation of the agency’s own statutory limits. Applying a variety of statutory tools and canons of construction—“statutory text, the absurdity principle, the statutory context as demonstrated by related statutory provisions, the overarching objectives of the statute, the major unintended consequences of a broader interpretation”—he concluded that the relevant Clean Air Act provision as a whole “overwhelmingly indicates that the” agency’s program was unlawful. He did not need to reach the *Chevron*’s deferential second step, because he concluded that the statute clearly did not support the EPA’s assertion of power.³⁴ His approach reflected the same approach employed by the Supreme Court in *Brown & Williamson*, a famous decision rejecting the FDA’s assertion of regulatory power over tobacco products: “Courts do not lightly conclude that Congress intended such major consequences absent some indication that Congress meant to do so,” he wrote. “Here, as elsewhere, we should not presume that Congress hid an elephant in a mousehole.”³⁵

While Judge Kavanaugh’s analysis did not persuade his D.C. Circuit colleagues (it was, after all, his dissenting opinion), he was quickly vindicated by the Supreme Court, which subsequently heard the case and ruled against the EPA. The Supreme Court’s majority opinion (written by Justice Scalia) ultimately decided the case in *Chevron*’s second step rather than its first step—that is, the Court concluded that the statute was ambiguous but that the EPA’s interpretation was patently unreasonable. Yet, like Kavanaugh, the Supreme Court concluded that EPA’s interpretation of the Clean Air Act was unreasonable “because it would bring about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization. When an agency claims to discover in a long-

³⁴ *Coalition for Responsible Regulation, Inc. v. EPA*, No. 09-1322, 2012 WL 6621785, at *18 (D.C. Cir. 2012) (Kavanaugh, J., dissenting from reh’g en banc). In the interests of disclosure, I note that I was a co-author of briefs filed in this litigation.

³⁵ *Id.* (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–161 (2000)).

extant statute an unheralded power to regulate ‘a significant portion of the American economy,’ . . . we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’”³⁶

Judge Kavanaugh demonstrated a similar approach in his opinion in the FCC’s “net neutrality” litigation. Once again dissenting from the D.C. Circuit denial of *en banc* rehearing, Judge Kavanaugh wrote at length to explain why the FCC’s sudden discovery of vast power, asserting unprecedented regulatory authority over broadband Internet access companies, lacked basis in the FCC’s statutes.³⁷ In his opinion, he highlighted many of the Supreme Court precedents mentioned above, including *Gonzales*, *Brown & Williamson*, *Utility Air Regulatory Group*, and *King v. Burwell*, in which the Court either refused to apply the *Chevron* framework or applied the framework in such a way as to not defer to an agency’s implausible statutory interpretation attempting to justify an assertion of immense regulatory power.³⁸

These are perhaps Judge Kavanaugh’s two most significant regulatory cases involving the interpretation of a statute, but there are others. In *Loving v. IRS*, Judge Kavanaugh wrote for the majority striking down the IRS’s assertion of authority to regulate tax-preparers; he held that the relevant statute, which only authorizes the IRS to regulate taxpayers’ “representatives . . . before the Department of the Treasury,” did not reach professionals who merely fill out tax forms. Much like the net neutrality and greenhouse gas cases, Judge Kavanaugh’s majority opinion reiterated the Supreme Court’s instruction in *Brown & Williamson*: courts should not lightly presume that Congress uses vague statutes to subtly vest agencies with immense power to decide matters of major economic or political significance.³⁹

And, of course, there are cases in which he ruled in favor of regulatory power, sometimes even over the agency’s attempt to under-enforce a statute. In *Center for Biological Diversity v. EPA*, Judge Kavanaugh joined the majority opinion and wrote a concurring opinion concluding that the EPA’s statute required the agency to regulate “biogenic carbon dioxide” in the

³⁶ *Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014) (quoting *Brown & Williamson*, 529 U.S. at 159).

³⁷ *U.S. Telecom. Ass’n v. FCC*, 855 F.3d 381, 417–25 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from reh’g en banc). In the interests of disclosure, I note I was a co-author of briefs filed in this litigation.

³⁸ *Id.* at 420–21 & n.2.

³⁹ *Loving v. IRS*, 742 F.3d 1013, 1021 (D.C. Cir. 2014).

course of the agency’s broader greenhouse gas regulatory program (that is, the limited portions of the program that had survived the Supreme Court’s decision striking much of the program down). “As a policy matter, EPA may have very good reasons to temporarily exempt biogenic carbon dioxide from the . . . permitting programs,” he wrote. “But Congress sets the policy in the statutes it enacts; EPA has discretion to act only within the statutory limits set by Congress.”⁴⁰

In fact, Judge Kavanaugh has actually been *more* favorable to agencies’ statutory interpretations than other judges. Drawing from their ongoing and exhaustive study of over 1,600 appellate cases, Professors Kent Barnett, Christina Boyd, and Christopher Walker recently reported that “Kavanaugh’s overall 75 percent rate of support for agencies in these cases was slightly above the overall average for all judges in our data at 71 percent.”⁴¹

Judge Kavanaugh’s judicial opinions applying *Chevron* and the tools of statutory interpretation, and his legal scholarship and speeches highlighting some of the challenges inherent in *Chevron*’s current state, have attracted criticism from some who attempt to characterize him as anti-regulatory. But the historical background to his decisions and articles—namely, the evolving body of Supreme Court precedents that Judge Kavanaugh and other lower-court judges are bound to obey—makes clear what Judge Kavanaugh actually has done. In an era when *Chevron* already was being reformed and questioned by conservative and liberal Justices and scholars alike, Judge Kavanaugh applied the Court’s precedents and concluded that some significant assertions of unprecedented regulatory powers by administrative agencies were not plausibly rooted in the decades-old statutes that agencies were citing to justify their newly-discovered vast regulatory powers.

It is, in the end, an approach to administrative law that focuses first and foremost on *Congress*, trusting it to remain the branch of government vested by the Constitution with our government’s legislative powers. Judge Kavanaugh himself put this point best, on the second day of these hearings, in response to a question from Senator Hatch:

[M]y administrative law jurisprudence is rooted in respect for Congress: have you passed the law to give the authority [to the

⁴⁰ *Ctr. for Biological Diversity v. EPA*, 722 F.3d 401, 413 (D.C. Cir. 2013) (Kavanaugh, J., concurring).

⁴¹ Kent Barnett, Christina L. Boyd, & Christopher J. Walker, “Judge Kavanaugh, *Chevron* Deference, and the Supreme Court,” *The Regulatory Review* (Sept. 3, 2018). The authors conclude that Judge Kavanaugh was slightly more deferential to conservative agency interpretations than to liberal ones, but they note that this slight difference was consistent with the similar trends for both conservative and liberal judges.

agency]? I’ve heard it said that I’m a skeptic of regulation. I am not a skeptic of regulation at all. I am a skeptic of *unauthorized* regulation, of illegal regulation, of regulation that’s outside the bounds of what the laws passed by Congress have said. *And that is what is at the root of our administrative law jurisprudence.*

III. Judge Kavanaugh respects the courts’ crucial but limited power to resolve policy-related disputes.

Like all parts of our government, the judicial branch can only exercise the powers that have been granted to it by our Constitution. This means, most importantly, that courts cannot singlehandedly reach out to decide legal issues by their own volition; instead, courts can only decide legal issues in the course of deciding the “cases” and “controversies” committed to their jurisdiction by the Constitution and statutes.⁴²

In recent decades, the Supreme Court applied this principle especially through the rule of “standing,” by which a plaintiff can bring a lawsuit in the federal courts only if he has suffered an actual injury that has been caused by the defendant and which can be remedied by the court.⁴³

This, too, embodies and reinforces our Constitution’s separation of powers. As Judge Kavanaugh has emphasized in various judicial opinions, “[t]he standing doctrine helps ensure that the Judicial Branch does not perform functions assigned to the Legislative or Executive Branch and ‘that the judiciary is the proper branch of government to hear the dispute.’”⁴⁴ The standing doctrine “protects democratic government by requiring citizens to express their generalized dissatisfaction with government policy through the Constitution’s representative institutions, not the courts.”⁴⁵

“To be sure,” he has observed, “courts may not shirk their duty to ‘say what the law is’ in cases that are properly before them,” but “history and precedent counsel caution before reaching out to decide difficult constitutional questions too quickly, especially when the underlying issues are of lasting significance.”⁴⁶

At the same time, Judge Kavanaugh has also voiced concerns in the other direction—namely, that the standing doctrine, as elaborated in the D.C. Circuit, has become so esoteric that it risks closing courthouse doors to

⁴² See U.S. Const., art. III, § 2.

⁴³ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

⁴⁴ *Pub. Citizen, Inc. v. NHTSA*, 489 F.3d 1279, 1289 (D.C. Cir. 2007)

⁴⁵ *Coalition for Mercury-Free Drugs v. Sebelius*, 671 F.3d 1275, 1278–79 (D.C. Cir. 2012).

⁴⁶ *Seven-Sky v. Holder*, 661 F.3d 1, 53 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

genuinely injured parties. In *Morgan Drexen v. CFPB*, for example, he dissented from the majority’s conclusion that a party directly regulated by the agency lacked standing to challenge the agency’s constitutionality. “We have a tendency to make standing law more complicated than it needs to be. When a regulated party . . . challenges the legality of the regulating agency or of a regulation issued by that agency, ‘there is ordinarily little question’ that the party has standing, as the Supreme Court has indicated.”⁴⁷

Questions of court jurisdiction can require judges to draw precise lines, often requiring highly fact-specific judgments. Judge Kavanaugh has been particular attentive to these rules. I know firsthand; in one case, for which I was on the plaintiffs’ legal team, Judge Kavanaugh wrote the majority opinion affirming a plaintiff’s standing to litigate one claim, but denying the same plaintiff’s standing to litigate another claim.⁴⁸ Needless to say, I think that he got that case just half-right. But I remain impressed by the amount of care he dedicated to the jurisdictional issues in that case. It was characteristic of his career on the D.C. Circuit, taking care to maintain the Constitution’s limited grant of power to courts, preserving the courts’ crucial constitutional role while not allowing the courts to encroach upon the legislative and executive branches’ own constitutional powers and duties.⁴⁹

IV. Judge Kavanaugh has dedicated particular attention to the profound constitution ramifications of agency structure.

Finally, Judge Kavanaugh’s record on administrative law reflects the great attention he pays to questions of constitutional structure. Just as the Constitution vests legislative powers in Congress and judicial powers in the courts, it vests the executive power in the President and also imposes upon the President the constitutional duty to “take Care that the Laws be faithfully executed.”⁵⁰

No president can accomplish this singlehandedly, so these constitutional powers and duties necessarily require that that the President retain sufficient control of agency personnel. Thus, in *Myers v. United States* (1926), the Supreme Court—in an opinion written by Chief Justice Taft, who knew the presidency firsthand—held that the Constitution prohibited

⁴⁷ *Morgan Drexen v. CFPB*, 785 F.3d 684, 698 (D.C. Cir. 2015) (Kavanaugh, J., dissenting). See also *Grocery Mfrs. v. EPA*, 693 F.3d 169, 318–28 (D.C. Cir. 2012) (Kavanaugh, J., dissenting).

⁴⁸ *State Nat’l Bank of Big Spring v. Lew*, 795 F.3d 48 (D.C. Cir. 2015).

⁴⁹ Again, Judge Kavanaugh’s record on these and related issues is detailed by Professor Nielson, in “Judge Kavanaugh and Justiciability,” *SCOTUSblog.com* (Aug. 14, 2018).

⁵⁰ U.S. Const. art. II.

Congress from legislating statutory restrictions on the president's ability to fire executive officers at-will.⁵¹

But a decade later, in *Humphrey's Executor* (1935), the Court prescribed a different standard for the FTC and other "independent" regulatory commissions: when Congress creates a commission whose "duties are neither political nor executive, but predominantly quasi judicial and quasi legislative," the commission's "members are called upon to exercise the trained judgment of a body of experts 'appointed by law and informed by experience,'" and therefore Congress can lawfully prescribe at least some statutory limitations on the President's power to fire the commissioners.⁵²

Still more decades later, when the Supreme Court held in *Morrison v. Olson* that the Constitution leaves room for Congress to place similar limitations on the removal of the "Independent Counsel," the Court downplayed *Humphrey's Executor's* use of categories such as "purely executive," "quasi legislative," or "quasi judicial," and concluded that statutory removal restrictions should be evaluated in light of their encroachment upon the President's authority or their burdening of the President's power to control the particular officer.⁵³

As a lower-court judge, Judge Kavanaugh has been tasked with following these precedents. (And, as I indicate below, he has followed them.)

But while following those precedents, he has recognized that Congress's imposition of statutory limitations on a President's power to remove officers comes at a cost: it mitigates officers' accountability to the President, and thus mitigates their accountability to the people. "Independent agencies are constitutional under *Humphrey's Executor v. United States*," he observed in one article, "[b]ut what is constitutional is not always wise. . . . [T]his independence has clear costs in terms of democratic accountability."⁵⁴ He stressed that "in some situations it may be worthwhile to insulate particular agencies from direct presidential oversight or control," particularly the Federal Reserve Board of Governors, but "independent agencies arguably should be more the exception, as they are in considerable tension with our nation's longstanding belief in accountability and the

⁵¹ *Myers v. U.S.*, 272 U.S. 52 (1926).

⁵² *Humphrey's Executor v. U.S.*, 295 U.S. 602 (1935).

⁵³ *Morrison v. Olson*, 487 U.S. 654, 689–94 (1988).

⁵⁴ Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454, 1472 (2009).

Framers' understanding that one person would be responsible for the executive power."⁵⁵

He reiterated these fundamental constitutional concerns in a case involving the Nuclear Regulatory Commission, but recognized that the Court had long ago settled the question. As he put it, *Humphrey's Executor* "lives on."⁵⁶

To summarize, *Myers*, *Humphrey's Executor*, and *Morrison* strike a delicate balance between the President's powers and responsibilities, and the goal of insulating certain classes of officers from direct and unconstrained presidential control. In two particular cases, Judge Kavanaugh worked to apply these precedents' principles to novel agency structures presented by recent legislation.

In the first case, Judge Kavanaugh evaluated the constitutionality of the Sarbanes-Oxley Act's "Public Company Accounting Oversight Board," an independent regulatory body subject to the limited oversight of the Securities and Exchange Commission, which in turn has long been assumed to enjoy an FTC-like degree of independence from the President's control. As he described it, the PCAOB presented a "case of *Humphrey's Executor* squared"—that is, one independent agency created inside of another.⁵⁷

Because the PCAOB's double-independence went beyond the FTC single-layer of independence affirmed in *Humphrey's Executor*, and it also went beyond the impositions on presidential control affirmed in *Morrison*, Judge Kavanaugh and his colleagues were left to conclude whether this novel arrangement was constitutional. His colleagues concluded that the statutory structure was constitutional, but Judge Kavanaugh disagreed. As he explained, "*Humphrey's Executor* and *Morrison* represent what up to now have been the outermost constitutional limits of permissible congressional restrictions on the President's removal power," and when presented with statutory structures for agency independence going beyond what the Supreme Court has allowed, the lower courts should "hold the [Supreme Court's] line and not allow encroachments on the President's removal power beyond what *Humphrey's Executor* and *Morrison* already permit."⁵⁸

⁵⁵ *Id.*

⁵⁶ *In re Aiken*, 645 F.3d 428, 439-42 (D.C. Cir. 2011) (Kavanaugh, J. dissenting).

⁵⁷ *Free Enterprise Fund v. PCAOB*, 537 F.3d 667, 686 (D.C. Cir. 2008) (Kavanaugh, J., dissenting).

⁵⁸ *Id.* at 698.

His colleagues on the D.C. Circuit disagreed, but the Supreme Court vindicated his analysis. It adopted Judge Kavanaugh’s approach in a decision declaring the PCAOB’s double-layer of statutory independence unconstitutional.⁵⁹

The same principles informed Judge Kavanaugh’s more recent opinion involving the Dodd-Frank Act’s Consumer Financial Protection Bureau—an agency whose director (like the FTC) enjoys independence from the President, but who is (unlike the FTC) a single director instead of a multimember commission. In *PHH v. CFPB*, Judge Kavanaugh wrote the D.C. Circuit’s initial majority opinion holding this novel combination to be unconstitutional. As Judge Kavanaugh recognized, the CFPB’s structure satisfied neither *Morrison*’s nor *Humphrey’s Executor*’s exceptions to the Constitution’s general rule of presidential control: unlike *Morrison*, the CFPB Director’s powers go far beyond the limited powers of the old Independent Counsel, limits that were central to the Supreme Court’s affirmance of the Counsel’s independence. And unlike *Humphrey’s Executor*, the CFPB Director was not created to be the kind of “quasi legislative” or “quasi judicial” multimember body—precisely the grounds for the Court allowing the FTC to enjoy independence that it had previously withheld from traditional executive officers in *Myers*.⁶⁰

Just as he did in the PCAOB litigation a few years earlier, Judge Kavanaugh’s majority opinion concluded that because the CFPB’s structure and powers differed significant from the independent commissions and officers previously affirmed by the Supreme Court, the appropriate course of action would be to maintain the lines already drawn by the Supreme Court, and declare the CFPB’s independence an unconstitutional violation of the Constitution’s vesting of executive power and responsibilities in the President.⁶¹

The D.C. Circuit subsequently reheard the case *en banc*, vacated the original majority opinion, and affirmed the CFPB’s constitutionality.⁶² I think this was a mistake. Judge Kavanaugh’s original majority opinion had the better of the argument, because it respected the original lines drawn by the Supreme Court—it recognized that the categories of agency “independence” allowed by the Court in *Humphrey’s Executor* and *Morrison* were intended to be limited exceptions to the Constitution’s overarching vesting of executive

⁵⁹ *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010).

⁶⁰ *PHH Corp. v. CFPB*, 839 F.3d 1, 17–21 (D.C. Cir. 2016). In the interests of disclosure, I note that was a co-author of a brief filed in this litigation.

⁶¹ *Id.* at 21–36.

⁶² *PHH Corp. v. CFPB*, 881 F.3d 75, (D.C. Cir. 2018).

power and responsibility in the President, and that to affirm such independence to the significantly different CFPB would strike a very different balance to the detriment of fundamental constitutional principles.

Despite the Supreme Court’s vindication of Kavanaugh’s approach in the PCAOB litigation, and other courts’ adoption of his approach in the CFPB litigation,⁶³ some critics still attack Judge Kavanaugh’s opinion in the CFPB case—his attempt to preserve the balance that the Supreme Court struck in *Myers*, *Humphrey’s Executor*, and *Morrison*, and that it refused to extend still further in *Free Enterprise Fund*). Such criticism reflects the critics’ misjudgment, not Judge Kavanaugh’s.

Even when particular Presidents are willing to sign legislation ceding their power (and transferring their responsibility) to independent officers like the CFPB Director, the courts must take special care to preserve the Constitution’s structure.

Judge Kavanaugh’s critics on this point forget the warning of Justice Robert Jackson, in one of his most famous opinions—the “Steel Seizure Case,” in which the President attempted to wrest power away from the Congress. Justice Jackson recognized that Congress itself might not be willing to “prevent power from slipping through its fingers.”⁶⁴ The same can be said, at other moments in our history, of Presidents—as Chief Justice Roberts’s majority opinion in the PCAOB case observed.⁶⁵

But as Justice Jackson urged, when faced with threats to the Constitution’s structural institutions, “*it is the duty of the Court to be last, not first, to give them up.*”⁶⁶

* * *

Judge Kavanaugh’s administrative law opinions and other writings embody Justice Jackson’s famous warning in *Youngstown*.⁶⁷ True,

⁶³ *CFPB v. RD Legal Funding, LLC*, --- F. Supp. 3d ---, 2018 WL 3094916 (S.D.N.Y. 2018); *Collins v. Mnuchin*, 896 F.3d 640 (5th Cir. 2018) (regarding the FHFA).

⁶⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

⁶⁵ *Free Enter. Fund*, 561 U.S. at 497 (“Perhaps an individual President might find advantages in tying his own hands. But the separation of powers does not depend on the views of individual Presidents . . . nor on whether ‘the encroached-upon branch approves the encroachment.’”).

⁶⁶ *Youngstown*, 343 U.S. at 655 (Jackson, J., concurring).

⁶⁷ See also Kavanaugh, 64 CASE WESTERN L. REV. at 714 (“Fortitude and backbone are important characteristics, I think, for our court and courts generally in our separation of

administrative law often involves the striking of pragmatic balances between the Constitution's grants of judicial power, legislative power, and executive power. But judges and justices must always interpret the law with an eye to the constitutional principles that undergird our republic.

As a lower-court judge, Judge Kavanaugh has faithfully applied the Supreme Court's precedents. And in cases where those precedents are not squarely on-point, he has exercised his discretion in light of deeper constitutional principle. Indeed, in cases such as the PCAOB litigation, or the greenhouse gas litigation, his opinion pointed the way toward the Supreme Court Justices' own eventual decision.

If he is appointed to the Supreme Court, then I expect that he will continue the Court's efforts to maintain a body of administrative law that obeys the Constitution's text, and that is mindful of our Constitution's principles, institutions, and history.

Thank you for the opportunity to testify today.

powers structure. Of course, we all think of Justice Robert Jackson in the *Youngstown* case, a role model for all executive branch lawyers turned judges.”).