NOTES

When Clarity Means Ambiguity: An Examination of Statutory Interpretation at the Environmental Protection Agency

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INTRODUCTION

At a 2007 speech at Georgetown University Law Center, D.C. Circuit Court of Appeals Judge Brett Kavanaugh stated, in reference to statutory interpretation, that judges should not strain to find ambiguity in clarity, but that is what lawyers do.[1] While, in a sense, Judge Kavanaugh was jesting, he pointed to the reality that, in pursuit of their clients' ends, lawyers regularly strain to convince courts that a fairly clear law is ambiguous. Exploring four such cases involving the Environmental Protection Agency (EPA) before the D.C. Circuit Court of Appeals, this Note asks whether agencies should strain to find ambiguity in clarity in support of their policy goals and concludes that, for several reasons, they should not. When agencies strain to find ambiguity in clarity, they usurp the legislative role in our divided system of government, delay regulations and waste resources, and put their credibility with courts and the public at risk.

The EPA is a particularly good agency to examine because virtually all major rules promulgated by the EPA will be subject to litigation, and thus the Agency must anticipate judicial review when formulating its regulations and prepare arguments in support of the lawfulness of its proposals. Another reason the EPA makes an interesting case study is that most environmental laws have not changed substantially in the last fifteen years, and during the time period in which the EPA promulgated the challenged rules under review in this Note, there was little hope of congressional action on major environmental proposals. Thus, the EPA is often stuck trying to address new circumstances and policy preferences within the framework of old statutory language.

Although a large body of literature has developed on how courts should interpret statutes, there has been little focus on how agencies do and should interpret statutes. This is a mistake. Agencies exercise incredible powers in making law and there should be a healthy debate about the appropriate role of agency actors in statutory interpretation. Further, virtually no attention has been paid to how agencies do and should interpret whether (or how much) ambiguity is contained in a statutory directive. This question is particularly interesting because one of the foundational reasons for giving deference to agencies—their substantive expertise—is irrelevant to the question of whether language is ambiguous. This Note focuses not on individuals but on cultures. It does not suggest that agency lawyers should defy decisions made by their superiors at the agency or by the President; instead, it suggests how the President and agency heads should direct agency lawyers to perform their jobs.

Part I of this Note briefly addresses the recent history of EPA statutory interpretation in the federal courts of appeals and advances explanations for the EPA's methods of statutory interpretation. Part II presents four recent EPA cases from the D.C. Circuit that presented the question of whether statutory language

1. The Honorable Brett Kavanaugh, Address to the Georgetown University Law Center Federalist Society: Judging on the D.C. Circuit (March 25, 2007).

is ambiguous. These cases are not outliers; rather, they are representative examples used to give a fuller picture of the EPA's methods of statutory interpretation. They are used throughout the Note to explore concerns about, and possible constraints on, agency statutory interpretation. Part III argues that, for four reasons, agencies should not strain to find ambiguity in clarity, and it explores potential constraints on agency statutory interpretation. These reasons are jurisprudential, constitutional, prudential, and professional.

I. HISTORY

Federal agencies are charged with implementing many statutes. Implementation often requires agencies to interpret Congress's language. The legal standard for how courts review agency interpretations of statutes is set out in the famous case, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*.[2] In that case, the Court held:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[3]

From this language, the *Chevron* two-step process was born. At *Chevron* step one, the court inquires into whether the congressional language is clear.[4] Only if the language is ambiguous will the court then move on to step two, where it inquires into whether the agency's interpretation of the statute is based on a permissible construction of that statute.[5]

Since January 1, 2002, the D.C. Circuit has struck down the EPA's interpretations of statutes at least eleven times, primarily at step one of the *Chevron* inquiry.[6] In almost all of these cases, the Agency has attempted to convince the

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2. 467 U.S. 837 (1984).
3. *Id*. at 842–43.
4. *See, e.g.*, Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 986 (2005).
5. *See, e.g.*, *id.*
6. *See* Sierra Club v. EPA, 479 F.3d 875, 880–81 (D.C. Cir. 2007) (holding that the EPA could not redefine "best performing" to mean those sources with emission levels achievable by all sources); S. Coast Air Quality Mgmt. Dist. v. EPA, 472 F.3d 882, 895 (D.C. Cir. 2006) (holding that the EPA's interpretation of the Clean Air Act in a manner maximizing its own discretion was unreasonable because the clear intent of Congress was to the contrary); Envtl. Def. v. EPA, 467 F.3d 1329, 1335–36 (D.C. Cir. 2006) (holding that the EPA regulation establishing interim tests for demonstrating confor-

court that relatively clear language is ambiguous, and the court has disagreed. The pattern of losing cases at step one of *Chevron* is not unique to the last five years. In fact, in 2001 Christopher Schroeder and Robert Glickman published a study of how the EPA had fared in all of the federal courts of appeals between 1991 and 1999. They found that, in cases analyzed under the *Chevron* framework, the EPA lost almost half of the time (forty-seven percent) and lost most often at step one.[7] Schroeder and Glickman posited that the EPA's losses at step one may have been due to administrative incentives to find ambiguity in statutes. They explained that attorneys operate within the norms of the institution in which they work and so, to the extent that these norms internalize a desire to see the agency's views effectuated, these views in turn motivate attorneys to find ambiguity.[8]

In Chevron *Matters: How the* Chevron *Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*,[9] Donald Elliot, who was the EPA's General Counsel between 1989 and 1991, described with approval how *Chevron* changed the way the EPA Office of General Counsel operated.[10] He explained that, before *Chevron*, the Office of General Counsel gave its legal advice as a point estimate (that is, the statute means this).[11] After *Chevron*, by

mity to newly revised ground-level ozone air quality standards was based on an unreasonable interpretation of the Clean Air Act: "Given the plain language of [the Clean Air Act provision] we need not reach beyond the first step of *Chevron*'s inquiry."); Friends of the Earth, Inc. v. EPA, 446 F.3d 140, 144–45 (D.C. Cir. 2006) (holding that the Clean Water Act unambiguously required daily loads and so the EPA could not set annual or seasonal loads); New York v. EPA, 443 F.3d 880, 883 (D.C. Cir. 2006) (holding that the EPA's interpretation of "any physical change" to exclude changes of up to twenty percent of replacement was contrary to the language of the Clean Air Act); New York v. EPA, 413 F.3d 3, 39 (D.C. Cir. 2005) (holding that the EPA improperly provided for use of "clean unit" status, rather than actual emissions, as a means of measuring emissions: "[W]e conclude that the [Clean Air Act] unambiguously defines 'increases' in terms of actual emissions."); Am. Chemistry Council v. Johnson, 406 F.3d 738, 739, 743 (D.C. Cir. 2005) (holding that the EPA's listing of methyl ethyl ketone as a toxic chemical under the Emergency Planning and Community Right-to-Know Act was based upon an impermissible construction of the statute: "Although EPA argues that the statute should be liberally construed to effect the purpose of the statute, its own proposed removal of virtually any constraints on the discretion of the Administrator would hardly serve that purpose."); Nuclear Energy Inst., Inc. v. EPA, 373 F.3d 1251, 1270 (D.C. Cir. 2004) (holding that the EPA's interpretation of "based upon and consistent with" the National Academy of Sciences' report in the Energy Policy Act to allow an action that sharply differed from the report represented an unreasonable construction of the statute); Ne. Md. Waste Disposal Auth. v. EPA, 358 F.3d 936, 955 (D.C. Cir. 2004) ("EPA has once again improperly invoked achievability (incorrectly relying on the emission variability of *all* municipal waste combustors that use the technology rather than on the variability of the *best performing* unit) to gloss over the actual achievement requirement."); Sierra Club v. EPA, 294 F.3d 155, 160 (D.C. Cir. 2002) ("We agree with the Sierra Club that the plain terms of the Act preclude an extension of the sort the EPA granted here."); Am. Corn Growers Ass'n v. EPA, 291 F.3d 1, 6 (D.C. Cir. 2002) ("The Haze Rule's splitting of the statutory factors is consistent with neither the text nor the structure of the statute.").

7. Christopher H. Schroeder & Robert L. Glickman, Chevron, State Farm*, and EPA in the Courts of Appeals During the 1990s*, 31 ENVTL. L. REP. 10,371, 10,374 (2001).

8. *Id*. at 10,381.

9. E. Donald Elliot, Chevron *Matters: How the* Chevron *Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENVTL. L.J. 1 (2005).

10. *See id.* at 12–13.

11. *Id*. at 11–12.

contrast, the General Counsel instructed lawyers to "attempt to describe a permissible range of agency policy-making discretion that arises out of statutory ambiguity."[12] He further directed attorneys that, post-*Chevron*, statutes do not possess a "single prescriptive meaning" on many questions and instead describe a "policy space" within which a variety of different options would be "legally defensible to varying degrees."[13] So, instead of defining the meaning of statutes, the job of Office of General Counsel lawyers became defining the boundaries of legal defensibility.[14] The creative arguments advanced by the EPA in the cases discussed in this Note may stem directly from this view that it is not the role of agency lawyers to attempt to give effect to congressional intent but only to estimate the likely legal defensibility of the agency's preferred approach.

Elliot argues that this change is normatively a good thing. He asserts that *Chevron* moved the debate from a "sterile, backward-looking conversation about Congress' [sic] nebulous and fictive intent" to a more "forward-looking" dialogue about the likely future effects of a proposal.[15] This question, he says with clear disapproval of the legislative process, is "ultimately more important than courts imagining what some inexperienced congressional staffer might or might not have intended when writing the legislative history."[16] This Note will argue that the shift Elliot encouraged is normatively a *bad* thing.

II. CASE STUDIES FROM ENVIRONMENTAL PROTECTION AGENCY LITIGATION IN THE D.C. CIRCUIT COURT OF APPEALS

In each of the following cases, one relating to water quality and the others to air quality, the EPA argued to the reviewing court that the relevant statutory language was ambiguous on its face and that the EPA's interpretation thus deserved deference. And in each case, an ideologically diverse panel of the D.C. Circuit held that the statute was not ambiguous and that the EPA interpretation was not lawful under the statute. These cases are not outliers,[17] nor is creative statutory interpretation limited to the current EPA Administration (in fact, the EPA promulgated the rule challenged in the third case discussed in this Note under the Clinton Administration). These cases have been chosen to illustrate the arguments the EPA has made about ambiguity and to explore the tools the agency has used in making these arguments.[18]

12. *Id.*

13. *Id*. In fact, Elliot asserts, "most of a statute is ridden with gaps and ambiguities. Most of a statute is empty." *Id*. at 18.

14. Elliot's view is reminiscent of Justice Holmes's "bad man theory," which holds that the law is only about predicting how a court will use its power. *See* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

15. Elliot, *supra* note 9, at 13.

16. *Id*.

17. *See supra* note 6 and accompanying text.

18. In all four of the cases that this Note discusses, and in the vast majority of the cases listed at *supra* note 6, the EPA's interpretation has been less protective of the environment than the clear language of the statute would indicate. My arguments also apply, however, to the case where an agency

A. "DAILY" MEANS EVERY DAY: *FRIENDS OF THE EARTH V. EPA*

Friends of the Earth, Inc. v. EPA[19] presents a case in which the EPA stressed the purpose of a statute in its efforts to find discretion-conferring ambiguity. The Clean Water Act states: "Each State shall establish for [certain waters] the total maximum daily load, for those pollutants which the Administrator identifies . . . as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards . . . ."[20] The total maximum daily load (TMDL) program was born of this statutory directive and aims to assist localities in achieving water quality standards by limiting pollutant discharges that may be made into certain waterbodies.[21] In *Friends of the Earth*, Friends of the Earth challenged an EPA decision to set total maximum *daily* loads, the statutory term,[22] for two pollutants in the Anacostia River as a total maximum *seasonal* load in one case and a total maximum *annual* load in the other.[23]

This case arose from the violation of two of the water quality standards previously set for the Anacostia River. First, because of pollutants that consume oxygen, the river's dissolved oxygen level was too low, placing the river's aquatic life at risk of suffocation.[24] Second, the river was murkier than the standard allows, so plants that require sunlight were not able to grow and people were not recreating on the river.[25] To fix these violations, the EPA issued two TMDLs, the first limiting the *annual* discharge of oxygen-depleting substances and the second limiting the *seasonal* discharge of the pollutants that cause turbidity.[26] While providing a more flexible regulatory approach because pollutant discharges could be averaged over a larger period of time, these averages would also allow significant pollution events to occur within the legal standard. In 2003, Friends of the Earth petitioned the D.C. Circuit for review of the two TMDLs, alleging, among other things, that the Clean Water Act requires *daily* and not *annual* or *seasonal* loads.[27]

In order to pursue its preferred approach, the EPA had to convince the court,

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strains to find ambiguity in a clear statute in order to implement a more protective environmental policy. This Note does not address what the EPA should do when confronted with truly ambiguous statutory language.

19. 446 F.3d 140 (D.C. Cir. 2006).

20. 33 U.S.C. § 1313(d)(1) (2000). In 1978, the EPA published its finding that all pollutants were suitable for calculation as daily loads. *See* Total Maximum Daily Loads Under Clean Water Act, 43 Fed. Reg. 60,662, 60,665 (Dec. 28, 1978).

21. 33 U.S.C. § 1313.

22. *See id.* § 1313(d)(1).

23. 446 F.3d at 142–44.

24. *Id*. at 143.

25. *Id.*

26. *Id.* (citing Letter from Rebecca Hammer, Dir., Water Prot. Div., EPA, to James R. Collier, Chief, Bureau of Envtl. Quality (Dec. 14, 2001) (approving TMDL for oxygen-depleting substances); ENVTL. PROT. AGENCY, TOTAL SUSPENDED SOLIDS, TOTAL MAXIMUM DAILY LOADS FOR THE ANACOSTIA RIVER, D.C. (Mar. 2002) (approving TMDL for suspended solids)).

27. *Id.* at 143.

under the *Chevron* framework, that the word "daily" is ambiguous and that the agency's interpretation thus deserved deference. In finding ambiguity, the EPA first looked to *FDA v. Brown & Williamson*,[28] which instructs courts to examine statutory provisions not in isolation, but in the context of the statute.[29] Second, the EPA looked at the context of the Clean Water Act, which directs that TMDLs should be designed to meet water quality standards. The EPA argued: "That Congress took the step of elaborating on what a TMDL should be is a strong indication that it was not using the word 'daily' as the exclusive expression of its intent on the question of how a TMDL should be established."[30] Thus, the EPA argued, the term "daily" should not be read in isolation and does not necessarily mean daily.[31]

Third, the EPA cited its "experience" to explain why setting a daily TMDL is not always the best policy—according to the EPA, the time period should be that which is best suited to the specific waterbody and pollutant.[32] Specifically, the two pollutants at issue in this case enter the water primarily through rainstorms so that discharges vary widely, and the effects are not felt immediately but instead over time as the pollutants accumulate.[33] Thus, the EPA argued, because the purpose of TMDLs is to meet water quality standards and because of the complexity of the circumstances in which water pollution problems are presented, "it is plain that Congress has not, by the use of the term 'daily,' expressed an unambiguous intent that all TMDLs should be expressed as daily loads. Accordingly, this Court should review the EPA's interpretation under a *Chevron* step two analysis."[34]

At oral argument, the ideologically diverse panel of Judges Tatel, Brown, and Griffith was immediately skeptical of the EPA's arguments and challenged the Department of Justice (DOJ) lawyer who was representing the EPA to explain how the term "daily" is ambiguous.

> Judge Tatel: My question is, how is the term "total maximum daily load" ambiguous?
>
> DOJ Attorney: You have to look at the language of the statute but also the context and that is the teaching of the Supreme Court especially in the, most recently in the tobacco context [in *Brown & Williamson*] . . . . But even if you start at the beginning with, literally, the daily, if you look at appellant's brief at page twelve, he relies on a dictionary definition that says "daily" means either reckoned by the day or covering the period of a day or based on a day. There's a lot of play in there about how you would . . .

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28. 529 U.S. 120 (2000).
29. Brief of Respondent at 25, *Friends of the Earth*, 446 F.3d 140 (D.C. Cir. 2006) (No. 05-5015) (quoting *Brown & Williamson*, 529 U.S. at 132).
30. *Id*. at 26.
31. *Id*.
32. *Id*. at 27.
33. *Id*. at 28–29.
34. *Id*. at 29.

Judge Tatel: Yes, but they're all a day.[35]

Later in the argument, Judge Tatel asked how Congress could have been more clear than using the term "daily."

> Judge Tatel: Suppose Congress wanted to make it crystal clear that the agency had to use daily standards. How would it do that? What else would it have to say?
>
> DOJ Attorney: Well, I think it would have to, I mean, one way it could do that is to say that the total maximum daily load shall be expressed as a quantity per day or average per day or something like that. I mean it left a lot of things unclear and . . .
>
> Judge Tatel: Wait, wait. But why would that be more precise than this? . . . How would the definition you just gave me make it any clearer that it's daily?
>
> DOJ Attorney: Because it would say that the load itself has to be expressed in these particular terms—by day, average by day, reckoned by day . . .
>
> Judge Tatel: So if it uses the word day instead of daily, is that the difference?[36]

The other judges on the panel were equally skeptical. Judge Griffith asserted, "What you're telling us is that it's hard for EPA to do this . . . but that's not the inquiry we're doing. You haven't come up with any arguments to show us Congress didn't mean daily." And Judge Brown queried, "we're just trying to find how you find ambiguity here."[37]

In a unanimous decision, the court rejected the EPA's argument that the word "daily" is ambiguous: "This case poses the question whether the word 'daily,' as used in the Clean Water Act, is sufficiently pliant to mean a measure other than daily . . . . Daily means daily, nothing else."[38] The opinion continued:

> Nothing in this language even hints at the possibility that EPA can approve total maximum "seasonal" or "annual" loads. The law says "daily." We see nothing ambiguous about this command. "Daily" connotes "every day." . . . Doctors making daily rounds would be of little use to their patients if they appeared seasonally or annually. And no one thinks of "[g]ive us our daily bread" as a prayer for sustenance on a seasonal or annual basis.[39]

Citing *New York v. EPA*,[40] the court further stated, "we have never held that Congress must repeat itself or use extraneous words before we acknowledge its

35. Audio tape: Oral Argument, Friends of the Earth, Inc. v. EPA, 446 F.3d 140 (D.C. Cir. 2006) (No. 05-5015) (on file with Judge Tatel's chambers).

36. *Id.*

37. *Id.*

38. *Friends of the Earth*, 446 F.3d at 142.

39. *Id.* at 144.

40. 443 F.3d 880, 883 (D.C. Cir. 2006).

unambiguous intent[,]"[41] and "EPA may not 'avoid the Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy.'"[42]

B. "ANY" DOES NOT MEAN SOME: *NEW YORK V. EPA*

New York v. EPA[43] presents a case in which the EPA used creative textual arguments in its efforts to find discretion-conferring ambiguity. In this case, a coalition of states and environmental groups challenged an EPA rule exempting many equipment replacements from New Source Review.[44] The New Source Review program under the Clean Air Act requires new sources of pollution to meet certain standards of performance in terms of emissions (that is, to adopt modern pollution controls).[45] Sources in existence in 1970 are exempt from this requirement unless they modify. A modification is defined as "*any physical change* in, or change in the method of operation of, a stationary source *which increases the amount of any air pollutant* emitted by such source . . . ."[46] Since passage of the Clean Air Act, the EPA has excepted a category of modifications dubbed "routine maintenance, repair and replacement" (RMRR) from this rule on a case-by-case basis.[47]

The rule at issue in this case created the "Equipment Replacement Provision," which stated categorically that the replacement of components with identical or functionally equivalent components that does not exceed twenty percent of the replacement value of the process unit and does not change its basic design parameters is not a physical change and is within the RMRR exception.[48] From a policy perspective, the EPA argued that the rule would promote the safe, reliable, and efficient operation of facilities by removing obstacles to replacing old equipment with safer and more efficient equipment.[49] State and environmental petitioners challenged this rule, alleging that the EPA's interpretation failed step one of the *Chevron* analysis.[50]

To find ambiguity, the EPA took the approach of separating the terms "any," "physical change," and "which increases the amount of any air pollutant" and analyzing each in isolation. The EPA first addressed the term "physical change" and explained that it is ambiguous because, "on its face, the term 'physical

41. *Friends of the Earth*, 446 F.3d at 144.
42. *Id*. at 145 (quoting Engine Mfrs. Ass'n v. EPA, 88 F.3d 1075, 1089 (D.C. Cir. 1996)).
43. 443 F.3d 880.
44. *Id*.
45. *See* 42 U.S.C. § 7411(a)(4) (2000).
46. *Id*. (emphasis added).
47. *See* 40 C.F.R. § 52.01 (2007).
48. Final Rule, Equipment Replacement Provision of the Routine Maintenance, Repair and Replacement Exclusion, 68 Fed. Reg. 61,248, 61,270 (2003).
49. ENVTL. PROT. AGENCY, FACT SHEET, EPA COMPLETES RECONSIDERATION OF NEW SOURCE REVIEW EQUIPMENT REPLACEMENT PROVISION 1 (2005), *available at* http://epa.gov/nsr/documents/fs20050606.pdf.
50. *See* New York v. EPA, 443 F.3d 880, 883 (D.C. Cir. 2006).

change'—or 'change' alone—could have a number of different meanings."[51] The EPA cited to a number of dictionaries, including online dictionaries, to demonstrate that the definition of "change" may range from "to replace" to "to make radically different."[52] Second, the EPA argued that the fact that a modification is defined as any physical change that *increases emissions* does not eliminate the ambiguity in "physical change" because both a physical change and an emissions increase are required to find that something is a modification.[53]

Finally, the EPA argued that the modifier "any" did not limit its discretion in defining "physical change."[54] The EPA argued: "The use of the modifier 'any,' however, merely means that once you have decided what is and is not a 'physical change,' then 'any' such change may require [New Source Review] permitting if it increases emissions."[55] The EPA concluded: "In sum, the term 'physical change' is ambiguous, and the use of the modifier 'any' does not eliminate that underlying ambiguity, nor can it remove EPA's interpretive authority. Petitioners' argument that the [Equipment Replacement Provision] Rule fails the first step of *Chevron* is thus without merit."[56]

Again, a unanimous and ideologically diverse panel of the D.C. Circuit struck down the EPA's regulation under *Chevron* step one. The court held that,

> [T]he differences between the parties' interpretation of the role of the word "any" are resolved by recognizing that "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind'" . . . . Because Congress used the word "any," EPA must apply NSR wherever a source conducts an emission-increasing activity that fits within one of the ordinary meanings of "physical change."[57]

The court held that "the sort of ambiguity giving rise to *Chevron* deference 'is a creature not of definitional possibilities, but of statutory context.'"[58] Noting that Congress would have trouble finding a word clearer than "any," the court stated,

> EPA's approach would ostensibly require that the definition of "modification" include a phrase such as "regardless of size, cost, frequency, effect," or other

51. Brief of Respondent at 20, New York v. EPA, 443 F.3d 880 (D.C. Cir. 2006) (No. 03-1380).

52. *Id*. The EPA conceded that the mere presence of different dictionary definitions did not render a term ambiguous, but it implied that this circumstance was limited to cases in which one dictionary contradicts virtually every other dictionary. *See id.*

53. *Id.* at 26.

54. *Id.* at 34.

55. *Id.* at 34–35.

56. *Id.* at 35–36.

57. New York v. EPA, 443 F.3d 880, 885 (D.C. Cir. 2006) (quoting U.S. v. Gonzales, 520 U.S. 1, 5 (1997)).

58. *Id*. at 884 (quoting Am. Bar Ass'n v. FTC, 430 F.3d 457, 469 (D.C. Cir. 2005)).

> distinguishing characteristic. Only in a Humpty Dumpty world would Congress be required to use superfluous words while an agency could ignore an expansive word that Congress did use.[59]

Once again, the court chided the EPA for ignoring the words of Congress in pursuit of its preferred policy approach: "Absent a showing that the policy demanded by the text borders on the irrational, EPA may not 'avoid the Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy.'"[60]

C. "ACHIEVABLE" DOES NOT MEAN ACHIEVED: *CEMENT KILN RECYCLING COALITION V. EPA*

Cement Kiln Recycling Coalition v. EPA[61] begins a line of cases in which the EPA continued to strain to find discretion-conferring ambiguity in the face of court holdings that the statutory language did not confer such discretion. In this case, environmentalists challenged an EPA rule setting Maximum Achievable Control Technology (MACT) standards for hazardous waste combustors.[62] MACT standards are required for sources of listed hazardous (toxic) air pollutants, in this case dioxins, mercury, lead, and chromium, among others.[63] Section 7412(d)(2) of the Clean Air Act requires the EPA to set standards at the maximum degree of reductions that the EPA Administrator deems achievable (taking into account several factors).[64] Section 7412(d)(3) then states:

> The maximum degree of reduction in emissions that is deemed achievable . . . shall not be less stringent than the emission control that is achieved in practice by the best controlled similar source . . . . Emissions standards . . . shall not be less stringent than the average emission limitation achieved by the best performing 12 percent of existing sources . . . .[65]

This calculation is termed the "MACT floor."[66]

The Sierra Club challenged the way that the EPA rule had calculated the MACT floor. The EPA had identified the control technology used by the median source of the top twelve percent, which it then called the "MACT technology," as the average emission limitation of the best performers.[67] However, the EPA next identified the worst performing source out of all of the sources using the MACT technology and set the emissions standard at the level achieved by that

59. *Id.* at 887.
60. *Id.* at 889 (citing Engine Mfrs. Ass'n v. EPA, 88 F.3d 1075, 1089 (D.C. Cir. 1996)).
61. 255 F.3d 855 (D.C. Cir. 2001) (per curiam).
62. *Id.* at 859.
63. *See id.* at 858.
64. *See* 42 U.S.C. § 7412(d)(2) (2000).
65. *Id.* § 7412(d)(3).
66. *See Cement Kiln*, 255 F.3d at 859.
67. *See id.* at 859–60.

worst-performing source.[68] The EPA argued that it would not be appropriate to force utilities already using the technology that achieved the best performance to implement new or additional technologies because of the variability in the effectiveness of that best-performing technology.[69]

The Sierra Club argued that the EPA had violated the statutory command that the emissions limit reflect the emissions actually "achieved" by the best-performing sources.[70] The EPA argued that the provision setting the floor in section (d)(3) was merely a gloss on the section (d)(2) command to set achievable emissions standards.[71] The D.C. Circuit, in a per curiam opinion, rejected the EPA's argument, holding the statutory language unambiguous: "Section 7412(d)(3) . . . limits the scope of the word 'achievable' in section 7412(d)(2). . . . EPA may not deviate from section 7412(d)(3)'s requirement that floors reflect what the best performers actually achieve . . . ."[72]

D. "ACHIEVABLE" DOES NOT MEAN ACHIEVED REVISITED: *SIERRA CLUB V. EPA*

Cement Kiln was just the first in a line of cases in which the D.C. Circuit has instructed the EPA that section 7412(d)(3) of the Clean Air Act precludes the EPA's interpretation that "achieved" means "achievable."[73] The issue arose again recently in *Sierra Club v. EPA*,[74] in which the Sierra Club challenged the EPA's MACT standards for brick and ceramic kilns. These kilns emit over 6,440 tons of hazardous air pollutants each year, "including hydrofluoric acid, hydrochloric acid, and particulate matter containing toxic metals."[75] In this case, the EPA had set floors for several categories of sources based on the pollution control devices used by the second-best performers.[76] The Sierra Club argued that the EPA had violated the plain language of the Clean Air Act as interpreted by the court in *Cement Kiln*.[77] The EPA argued that it had reasonably defined the ambiguous term "best performing" to mean those sources that used a particular technology that it deemed technologically feasible for retrofits to all sources.[78]

In an unusual oral argument, Judge Williams briefly asked the attorney representing the Sierra Club to confirm the Judge's understanding of the issues

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68. *Id.* at 859.

69. *See id.*; NESHAPS: Final Standards for Hazardous Air Pollutants for Hazardous Waste Combustors, 64 Fed. Reg. 52,828, 52,852 (Sept. 30, 1999).

70. *Cement Kiln*, 255 F.3d at 861.

71. *Id.*

72. *Id.*

73. *See* Sierra Club v. EPA, 479 F.3d 875 (D.C. Cir. 2007) (per curiam); Mosseville Envtl. Action Now v. EPA, 370 F.3d 1232 (D.C. Cir. 2004); Ne. Md. Waste Disposal Auth. v. EPA, 358 F.3d 936 (D.C. Cir. 2004); Nat'l Lime Ass'n v. EPA, 233 F.3d 625 (D.C. Cir. 2000).

74. 479 F.3d 875.

75. *Id.* at 879.

76. *Id.* at 879–80.

77. *Id.* at 880.

78. Final Brief of Respondents U.S. Envtl. Prot. Agency at 27, Sierra Club v. EPA, 479 F.3d 875 (D.C. Cir. 2007) (No. 03-1202).

in the case, and then Chief Judge Ginsburg suggested to the environmental advocate that his time was best saved for rebuttal.[79] The panel then proceeded to question the DOJ attorney at length about how the statutory language could possibly be sufficiently unclear to encompass the EPA's interpretation, and why the court's previous decisions did not decide the issue in this case.[80] When it came time for rebuttal, Chief Judge Ginsburg asked the environmental advocate if he had anything else to add, and after a short response, the case was adjourned.[81]

Not surprisingly, the court struck down the EPA rule in a unanimous per curiam opinion. The court reiterated its *Cement Kiln* holding and stated that:

> EPA cannot circumvent *Cement Kiln*'s holding that section 7412(d)(3) requires floors based on the emission level actually *achieved* by the best performers (those with the lowest emissions levels), not the emission level achievable by all sources, simply by redefining "best performing" to mean those sources with emission levels *achievable* by all sources.[82]

The opinion concludes with the following recommendation: "If the Environmental Protection Agency disagrees with the Clean Air Act's requirements for setting emissions standards, it should take its concerns to Congress."[83]

III. WHAT IS WRONG WITH THIS PICTURE?

The cases described in Part II demonstrate the lengths to which the EPA has gone to find ambiguity in statutory text. The history in Part I begins to explain why. In all four cases, and in many others, the EPA's strained attempts to find ambiguity have been struck down by the D.C. Circuit as impermissible readings of the governing statute.[84] One might argue that this proves the system is working. The courts are constraining the EPA by not allowing these strained interpretations. But this view is too simplistic.

Jurisprudential, constitutional, prudential, and professional reasons counsel that these kinds of interpretations should not even be making it into the courtroom. This Part first addresses the jurisprudential and constitutional concerns, which indicate that there should be no creativity in the EPA's interpretations of clear language because such creativity usurps the role of the Congress in our constitutional system of law. This Part then addresses the prudential and

79. Oral Argument, Sierra Club v. EPA, 479 F.3d 875 (D.C. Cir. 2007) (No. 03-1202) (on file with author).

80. *See id.*

81. *See id.*

82. *Sierra Club*, 479 F.3d at 880–81.

83. *Id*. at 884.

84. This Note addresses only the appropriate role of the agency at *Chevron* step one, when there is little or no ambiguity in a statute. Many of the concerns discussed may also be relevant, however, to the situation where a statute does contain ambiguity but an agency's interpretation does not fall within the reasonable range of discretion conferred by that ambiguity.

professional concerns, which indicate that there should be less creativity in the EPA's interpretations and that such creativity must be balanced against the competing concerns of delay, cost, and loss of credibility.

A. JURISPRUDENTIAL CONSTRAINTS

Jurisprudential constraints include those constraints that relate to the fundamental elements of a legal system—that is, the rule of law. The rule of law is basically an expression of belief in "[t]he supremacy of regular as opposed to arbitrary power."[85] In our system, regular power is divided among the three branches of government. When branches of government overstep the authorities granted to them, they violate the rule of law:

> An important feature of the rule of law in our constitutional system—a system characterized by careful allocation of powers to separate and independent branches of government—is that each participant in the system should defer to the legitimate exercise of authority by other participants. For any branch or officer of government to pursue its own prerogatives without restraint would undermine the allocation of powers . . . . The functionally distinct roles of legislature, executive, and judiciary can be blurred if legislatures use their lawmaking power to invade the powers of law execution or the decision of cases [, or] if executive officers use their law execution power to usurp . . . lawmaking . . . . Under our system the rule of law entails more than a substantively correct interpretation and enforcement; it requires scrupulous observation of the metes and bounds of authority.[86]

The Framers saw legislative power as particularly powerful and thus set up two important safeguards to ensure that it would be used in a deliberative and measured fashion—bicameralism (passage of a law by both the House of Representatives and the Senate) and presentment (presentation of the law to the President for his signature or veto).[87]

When agencies strive to find ambiguity in clarity, they bypass these safeguards and exceed the bounds of their authority. This is because, by creatively interpreting clear statutes, the agencies in effect repeal or amend a duly enacted law without bicameralism or presentment. The lack of these safeguards lends particular importance to the idea that the Executive Branch should "defer to the legitimate exercise of authority" by the legislative branch.[88] Furthermore, while the President, like the Congress, is elected, "[t]he President does not become the interchangeable stand-in for Congress as domestic policy maker simply because

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85. BLACK'S LAW DICTIONARY 1359 (8th ed. 2004).

86. Michael W. McConnell, *The Rule of Law and the Role of the Solicitor General*, 21 LOY. L.A. L. REV. 1105, 1113 (1988).

87. *See* U.S. CONST. art. I, § 7 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it . . . .").

88. *See* McConnell, *supra* note 86, at 1113.

he is also elected. On the most pragmatic level, the Chief Executive reflects a very different political base, and speaks with a very different political voice, than does the legislature."[89]

In the cases discussed in Part II, the EPA actively argued that fairly clear statutes were ambiguous in order to assert its policy preferences. In effect, the EPA attempted to repeal duly enacted provisions of statutes. For example, in *New York v. EPA*,[90] Congress had provided that the requirement to add modern pollution controls to a plant was triggered by "any physical change . . . which increases the amount of any pollutant emitted."[91] By attempting to create binding law that this provision excludes all physical changes of under 20% of the replacement cost, the EPA attempted to repeal this provision, which had undergone bicameralism and presentment, and replace it with new statutory language reading "any physical change (constituting greater than 20% of replacement costs) which increases the amount of any pollutant emitted." In *Cement Kiln*,[92] the EPA essentially tried to delete an express provision of the Clean Air Act, which required standards to be no less stringent than the average of the top 12% of best performers, and its technology-forcing mandate.[93] In doing so, again, the EPA essentially rewrote the bargains struck by Congress without the safeguards of bicameralism and presentment. As Professor Farina has asserted, "[t]he prospect that regulatory statutes will routinely be amended or even repealed by 'interpretation' should at least give us pause."[94]

The EPA's actions are arguably legitimate in light of the *Chevron* doctrine, which recognizes that, as a politically accountable branch, the Executive Branch is better suited to develop law than are the courts. However, it is a mistake to read *Chevron* to legitimate the EPA's behavior. In *Chevron*, the Supreme Court created a presumption that when a statute is actually ambiguous, a court must defer to an agency's reasonable construction of that statute.[95] The *Chevron* decision was based upon two principles of separation of powers and legitimacy. First, courts must defer to the legislature's decision to delegate regulatory responsibilities to agencies.[96] Second, the policy choices inherent in interpreting statutes are better placed in the hands of the democratically accountable Executive Branch than in those of unelected judges.[97] However, what *Chevron* does not do, and what is contrary to both of these principles, is empower agencies to override congressional direction because the democratically accountable President prefers a different policy approach. *Chevron* states: "If a court, employing

89. Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 514–15 (1989).

90. 443 F.3d 880 (D.C. Cir. 2006).

91. 42 U.S.C. § 7411(a)(4) (2000), *cited in* New York v. EPA, 443 F.3d at 883.

92. 255 F.3d 855 (D.C. Cir. 2001) (per curiam).

93. *See id.* at 859.

94. *See* Farina, *supra* note 89, at 500.

95. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

96. *See id.* at 843–44.

97. *Id.* at 864–66.

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."[98] Thus, to be in compliance with the rule of law, an agency should defer to clear congressional direction.[99] A fair question is how agencies should figure out when Congress has been clear.

The description by Elliot in Part I makes clear that EPA lawyers are instructed to look affirmatively for ambiguity in statutes.[100] Elliot states that, instead of saying what the law means, EPA lawyers are encouraged to describe a "policy space" within which a variety of options would be "legally defensible to varying degrees."[101] This is consistent with a finding by Jerry Mashaw that, when responding to comments about the EPA's legal authority during the rulemaking process, the EPA generally moves quickly away from step one (intent inquiry) to step two (reasonableness inquiry).[102] Thus, it seems, EPA lawyers are discouraged from seeking out congressional direction. This is contrary to the rule of law.[103] Instead, EPA lawyers should be instructed to try first to discern what Congress intended and to figure out the "policy space" only when they discover that Congress did not consider the question or did not resolve it adequately.

Perhaps even though *Chevron* makes clear that agencies cannot go against clear congressional intent, it is the role of the courts and Congress, and not the Executive Branch, to safeguard Congress's legislative supremacy.[104] In this view, it is appropriate for agencies to strain against their statutory ties and for courts to corral them in if they occasionally break free. After all, in the cases

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98. *Id.* at 843 n.9. While *Chevron* is founded on the concepts of legislative delegation and political accountability, a flavor of the importance of expertise remains nonetheless. This is no doubt one reason why courts defer only to agency interpretations of their governing statutes, and not to executive interpretations in general. *See* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What the Law Is*, 83 GEO. L.J. 217, 334 (1994). At *Chevron* step one, an agency does not exercise any expertise greater than that of a court. The decision as to whether the language of a statute is ambiguous does not benefit from technical or scientific knowledge; it is a strictly legal question.

99. Some scholars argue that language is always ambiguous. *Chevron* clearly contemplates that Congress can speak clearly; otherwise, the doctrine would be unnecessary. *See, e.g.*, Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1158 (1985). The cases discussed in this Note are examples of Congress speaking clearly.

100. *See supra* notes 9–16 and accompanying text.

101. *See* Elliot, *supra* text accompanying notes 12–13.

102. Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV 501, 533 (2005).

103. An interesting question to explore is whether the courts' practice of conflating steps one and two of *Chevron* encourages agencies to do the same. Note that in the EPA's *Friends of the Earth* argument, *see supra* text accompanying notes 32–34, the EPA argues that the provision is ambiguous in part because its policy will produce better outcomes, essentially a conflation of steps one and two. While it may make sense for courts to conflate the two steps because the question presented is essentially whether the scope of ambiguity of the statute is large enough to encompass the agency's approach, this method may have a negative effect on agencies by discouraging them from first seeking out congressional intent.

104. *See* Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1296 (1987).

discussed in this Note, the court did invalidate the EPA's exercises of authority as contrary to clear congressional language. This view has several problems. With respect to the courts, recall the prudential concerns discussed above. In addition to the waste of public monies and delay of important health and environmental standards, it is also a waste of the judiciary's limited resources to have to instruct agencies on the plain meaning of a statute. Further, not every agency action is reviewable by the courts.[105] If no party has standing, an agency action may go unreviewed.[106] This does not mean, however, that it conforms to the rule of law.

Congress also retains power to check agency attempts to override congressional intent in the form of oversight, the power of the purse, and the power of revision.[107] However, at least three problems emerge with relying on Congress to protect its legislative prerogatives. First, because of Congress's vast power, the Framers set it up to move more slowly than the Executive Branch.[108] As a 535-member deliberative body with a complex set of procedures and high turnover, Congress is at a considerable structural disadvantage in terms of responding to presidential assertions of power.[109] Second, often a future Congress will not want to defend the duly enacted laws of a previous Congress. Those laws remain valid, however, until they are repealed through a statute that undergoes bicameralism and presentment. Just because the current Congress does not exercise its monetary, oversight, and revision powers does not mean a duly enacted law may be effectively repealed by an administrative agency.

Third, the cases discussed in this Note demonstrate that it is sometimes difficult for Congress to speak any more clearly than it has.[110] Recall the interchange between Judge Tatel and the DOJ attorney in *Friends of the Earth*.[111] When Judge Tatel asked how Congress could have been any more clear than its use of the word "daily," the DOJ attorney suggested that Congress could have said "expressed by day."[112] Judge Tatel rightly queried how this expression would be any clearer.[113] Further, the provision at issue in *Cement Kiln* bears out a history of Congress attempting to be clearer and thus constrain the EPA in the face of the EPA's resistance to executing the law—the pre-1990 provision merely directed EPA to regulate hazardous air pollutants according to

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105. *See, e.g.*, Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 63 (2004) (holding that only "discrete" and "required" agency actions are reviewable).

106. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (applying standing requirements).

107. *See* COLIN S. DIVER ET AL., ADMINISTRATIVE LAW: CASES AND MATERIALS 15 (2006).

108. *See* THE FEDERALIST NO. 70 (Alexander Hamilton).

109. Farina, *supra* note 89, at 508.

110. *See, e.g.*, Friends of the Earth, Inc., v. EPA, 446 F.3d 140, 142 (D.C. Cir. 2006).

111. *See supra* text accompanying notes 35–36.

112. *See* Audio tape: Oral Argument, *Friends of the Earth*, 446 F.3d 140 (D.C. Cir. 2006) (No. 05-5015) (on file with Judge Tatel's chambers).

113. *See id.*

risk.[114] When the EPA tied itself in knots over how to determine appropriate risk standards and did little to regulate hazardous air pollutants, Congress clarified the law.[115] The 1990 standard, requiring that emission limitations "shall not be less stringent than the average emission limitation achieved by the best performing 12 percent of existing sources[,]"[116] is an exceedingly detailed and specific direction.

B. CONSTITUTIONAL CONSTRAINTS

"The executive power shall be vested in the President of the United States of America."[117] "[H]e shall take care that the Laws be faithfully executed."[118] What does this mean the President should do when interpreting statutes? By its terms, this constitutional directive seems to contemplate something beyond the President interpreting statutes to conform to his policy preferences. If all that the constitutional requirement that the President "faithfully execute the laws" means is that he is to execute the laws as he interprets them, then having to do so faithfully loses its import.[119] In fact, by its very terms, the Take Care Clause speaks not of an authorization, but of a duty: "The principal purport of the clause, no doubt, was that the President shall be a loyal agent of Congress to enforce its laws."[120] Since the early days of our nation, the Supreme Court has held that executive officers must obey statutory directives.[121]

Much debate in recent years has focused on whether our constitutional

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114. Clean Air Act Amendments of 1970, Pub. L. No. 91-604, § 4, 84 Stat. 1676, 1678 (1970) (creating new § 112(b)(1)(B)) .

115. In *National Lime Ass'n v. EPA*, the D.C. Circuit described Congress's frustration with the EPA's progress. 233 F.3d 625, 634 (D.C. Cir. 2000). In eighteen years, the EPA had regulated only some sources of only seven chemicals. *See id.* (citing S. REP. NO. 101-228, at 128 (1989); H.R. REP. NO. 101-490, pt. 1, at 322 (1990)). The new provisions, which listed 180 hazardous air pollutants, directed the EPA to establish emissions standards for each of these pollutants, and detailed specific minimum standards, was designed to restructure existing law so that toxins would be adequately regulated. *See* 42 U.S.C. §§ 7412(b), (c)(2), (d)(3) (2000).

116. 42 U.S.C. § 7412(d)(3).

117. U.S. CONST. art. II, § 1, cl. 1.

118. U.S. CONST. art. II, § 3.

119. In fact, if the President takes action at odds with congressional intent, the President is squarely in Justice Jackson's Zone Three—and the action is presumptively unconstitutional. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 638 (1952) (Jackson, J., concurring).

120. LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 50 (1996). Justice Black echoed this view in *Youngstown*, noting that "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Youngstown*, 343 U.S. at 587 (majority opinion). More recent pronouncements from the Executive Branch in connection with domestic wiretapping, military commissions, and torture suggest that executive action constitutes law unto itself; therefore, when the President authorizes an action, it becomes legal under the President's constitutional powers. *See* Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350, 2356–57 (2006). However, this view was firmly rejected by the Supreme Court in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). In that case, the Court placed the Executive Branch military commissions within the third *Youngstown* category, in which "the President takes measures incompatible with the expressed or implied will of Congress." Koh, *supra*, at 2361–62 (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)).

121. *See* Kendall v. United States *ex rel.* Stokes, 37 U.S. 524, 612–614 (1838).

separation of powers has been knocked out of kilter by a too-powerful Executive Branch, "the most dangerous branch."[122] In fact, "given [that] the Framers [obviously understood] the difficulty of controlling political passions, it is . . . paradoxical that the Constitution [expects] the President to honor his oath by upholding . . . constitutional principles," such as the Take Care Clause, "when they come into conflict with [his] political objectives."[123] The ease with which the Executive Branch can act quickly and unitarily to take advantage of opportunities to expand its power base in the face of a more deliberative and slow Congress exacerbates this imbalance.[124] Further, Congress is inherently constrained because laws are not self-executing and so it must rely on the Executive Branch to execute the laws it passes.

Scholars have advanced a number of ways in which balance could be restored to our constitutional system. For example, Neal Katyal has called for an internal separation of powers within the Executive Branch, executive-versus-executive constraints, as a "second-best" solution due to the failure of the "first-best" solution of legislative-versus-executive constraints.[125] Such executive-versus-executive constraints would include "separate and overlapping cabinet offices, mandatory review of government actions by different agencies, civil service protections for agency workers, reporting requirements to Congress, and an impartial decision-maker to resolve interagency conflicts."[126] Jonathan Macey suggests that the imbalance of separation of powers can be counteracted only by a concerted effort on the part of the judiciary to rein in executive power that improperly usurps Congress's lawmaking authority.[127]

By the terms "faithfully execute," the Constitution provides another way by which executive power should be constrained. There has been great debate over how courts should be constrained in interpreting statutes.[128] There has been almost no debate over how agencies should be constrained in interpreting statutes. In fact, Professor Mashaw has called this "the missing debate."[129] In principle, according to Professor Gregory, "the concerns that have prompted

122. *See generally* Symposium, *The Most Dangerous Branch? Mayors, Governors, Presidents, and the Rule of Law: A Symposium on Executive Power*, 115 YALE L.J. 2215 (2006).

123. John O. McGinnis, *Principle Versus Politics: The Solicitor General's Office in Constitutional and Bureaucratic Theory*, 44 STAN. L. REV. 799, 808 n.49 (1992).

124. Jonathan Macey, *Executive Branch Usurpation of Power: Corporations and Capital Markets*, 115 YALE L.J. 2416, 2418 (2006).

125. Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch From Within*, 115 YALE L.J. 2314, 2316 (2006).

126. *Id*. at 2318.

127. Macey, *supra* note 124, at 2418–19 ("If the executive branch is more powerful than the Framers intended, then something should be done to redress this constitutional disequilibrium and reduce the probability that such concentrated power will be abused.").

128. *See generally* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59 (1998); William N. Eskridge, *The New Textualism*, 37 UCLA L. REV. 621 (1990); John F. Manning, *What Divides Textualists from Purposivists*, 106 COLUM. L. REV. 70 (2006); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1 (2006).

129. Mashaw, *supra* note 102, at 521.

scholars and jurists to seek legitimacy in the . . . interpretations of courts should apply with equal force to . . . agencies."[130] In making law, neither courts nor agencies face the constraints of bicameralism and presentment faced by Congress. While agencies are certainly more politically accountable than courts, this does not equate their lawmaking legitimacy with that of Congress. Both the Take Care Clause and *Chevron* make clear that agencies should, at least when it is discernable, seek to give effect to congressional intent.[131] In a similar vein, Henry Monaghan wonders "whether administrative authority [may] remain legitimate once administrators cease to serve as agents of Congress."[132]

Michael Paulsen argues for the extreme view that the "Executive's power to interpret the law should be exercised *independently* of the interpretations of other branches, including those of the federal courts."[133] However, along with this power, Paulsen argues, are constraints.[134] Just as a court must constrain its interpretations because it is composed of unelected officials, administrative agency interpretations should also be constrained because the administrative agencies are not as directly accountable as the legislature and their statements of the law need not undergo the checks of bicameralism and presentment. "The idea of 'executive restraint,' like that of judicial restraint with respect to the courts, is designed to preserve the distinction between law-interpreting and law-making."[135] Paulsen argues that such

> a theory of executive restraint [should be] similar to that . . . associated with judicial restraint—according primacy to the text, original meaning, and structure of the document . . . following precedent . . . whenever possible . . . and avoiding interpretations based upon the executive's individual policy preferences.[136]

In the cases discussed in this Note, the EPA exercises little or no executive restraint. It uses a whole range of interpretive tools. The EPA's interpretation in *Friends of the Earth* can fairly be understood as an attempt at purposivist

130. Robert J. Gregory, *When Delegation Is Not a Delegation: Using Legislative Meaning to Define Statutory Gaps*, 39 CATH. U. L. REV. 725, 731 (1990).

131. In this way, the jurisprudential and constitutional constraints discussed in this Note overlap. It is still useful, however, to separate the arguments based on the *Chevron* doctrine from those based on the "faithfully execute" directive of the Constitution.

132. Jonathan T. Molot, *Reexamining* Marbury *in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1243 (2002) (quoting Professor Monaghan).

133. Paulsen, *supra* note 98, at 221.

134. *See id.* at 332, 341.

135. *Id*. at 341.

136. *Id*. *But see* Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1, 3–4 (2004) ("A judge who announces deference is approving a shift in interpretive method . . . . What is more, the methods that agencies employ are entirely sensible ones."); Mashaw, *supra* note 102, at 504 (noting that there are "persuasive grounds for believing that legitimate techniques and standards for agency statutory interpretation diverge sharply from the legitimate techniques and standards for judicial statutory interpretation," creating "something like a paradox of deference").

interpretation (because our interpretation conforms with the goals of the law, it is a correct interpretation).[137] By contrast, the EPA's interpretation in *New York v. EPA* can fairly be understood as an attempt at textualist interpretation, invoking dictionaries to construe the statute creatively.[138] These findings are consistent with an investigation conducted by Professor Mashaw of approximately a dozen rules from the EPA and the Department of Health and Human Services that involved statutory interpretation. He found that both textualism (including "highly formalistic plain meaning arguments") and use of legislative history were in evidence, and that "drafters seemed to use whatever methods came to hand and suited their goal in addressing the questions before them."[139] Importantly, note that while a court is expected to use these tools to discern congressional intent, the EPA uses them as tools to find ambiguity. Recall the D.C. Circuit's admonition that "the sort of ambiguity giving rise to *Chevron* deference 'is not a creature of definitional possibilities . . . .'"[140]

This Note does not seek to put forward a theory of agency statutory interpretation. In fact, there is good reason to believe that the constraints that should be placed on an agency's statutory interpretation should not be identical to those placed on a court's statutory interpretation.[141] It seeks only to propose that agencies should face some constraint in their interpretation, short of judicial review, because agencies, like courts, are not as democratically accountable and are not constrained by the same constitutional safeguards when they make law as is Congress.

C. PRUDENTIAL CONSTRAINTS

Perhaps the most compelling reasons to be concerned about agencies striving to find ambiguity in clarity are prudential or practical. Agencies are funded with public monies and are charged by our elected representatives with executing many important functions, including protecting people's health and safety. When an agency's rule is struck down by a court, money is wasted and the fulfillment of important functions may be delayed. Most rules take several years to promulgate. They require large amounts of lawyers', scientists', and policymakers' time, as well as the use of expensive private contractors and model runs to analyze the effects of various proposals.[142] If the agency is sent back to the drawing board, much of this time and money is wasted. Furthermore, many statutes authorize the courts to award attorneys' fees to the litigants who have

137. *See supra* notes 29–34 and accompanying text.

138. *See supra* notes 51–56 and accompanying text.

139. Mashaw, *supra* note 102, at 528–31.

140. *See* New York v. EPA, 443 F.3d 880, 884 (D.C. Cir. 2006) (quoting Am. Bar Ass'n v. FTC, 430 F.3d 457, 469 (D.C. Cir. 2005)).

141. *See supra* note 136.

142. Because this Note focuses on public monies, it does not address the money spent by private interests to participate in the notice and comment period and litigation, but these expenditures too can be substantial.

successfully challenged the EPA's rules, further draining public monies.[143] And perhaps of greatest importance, standards required by Congress to protect the public health and welfare may be delayed.

New York v. EPA presents a compelling picture of the effect that these strained interpretations may have on the quality of the air. In the late 1990s, the EPA and the DOJ filed seven enforcement actions under the Clean Air Act in U.S. district courts against nine of the country's largest coal fired power companies, alleging widespread violations of the New Source Review (NSR) provisions.[144] The EPA further issued an administrative compliance order to the Tennessee Valley Authority alleging violations at nine of its plants, and the DOJ filed an additional NSR enforcement action against Duke Energy in 2000.[145] As a result of these and other enforcement actions, as of 2005, nine companies were subject to consent decrees requiring them to eliminate a total of 940,000 tons-per-year of harmful air emissions.[146]

The regulation at issue in *New York v. EPA*, promulgated by the EPA in 2003, exempted any physical change that was under 20% of the cost of equipment replacement and met other criteria.[147] According to officials from the EPA's Office of Enforcement and Compliance Assurance (OECA), while the proposed regulation excluded any change under 20% of the replacement cost of the process unit, even a 3% cut-off would have resulted in about 90 to 95% of the NSR enforcement cases disappearing, and even more cases would disappear if the level were set higher than 3%.[148] Further, in November 2003, the Assistant Administrator for OECA told the enforcement staff that they should stop enforcing NSR unless a utility violated the new rule.[149] Following a stay of the new rule by the D.C. Circuit in December 2003, the EPA Administrator announced that the EPA would continue enforcing the old rule. However, the Inspector General found that, despite the stay, between November 2003 and June 2004 "the only new NSR enforcement efforts involved those few facilities that violated the new rule."[150] Therefore, a program that had achieved large reductions in air pollution was essentially placed on hold during the litigation of

143. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1365(d) (2000); Clean Air Act, 42 U.S.C. § 7607(f) (2000). Note that when the EPA pays the attorneys' fees of the opposing parties, this money generally comes not from the EPA's budget but from the Treasury, thus eliminating any constraint that having to pay such fees might place on the agency.

144. U.S. DEP'T OF JUSTICE, AN ANALYSIS OF THE CONSISTENCY OF ENFORCEMENT ACTIONS WITH THE CLEAN AIR ACT AND IMPLEMENTING REGULATIONS 13–17 (2002).

145. *See id.*

146. Press Release, U.S. Dep't of Justice, U.S. Announces Settlement of Landmark Clean Air Act Case Against Ohio Edison (Mar. 18, 2005), *available at* http://www.usdoj.gov/opa/pr/2005/March/05_enrd_129.htm.

147. Equipment Replacement Provision of the Routine Maintenance, Repair and Replacement Exclusion, 68 Fed. Reg. 61,248, 61,251 (Oct. 27, 2003).

148. ENVTL. PROT. AGENCY OFFICE OF INSPECTOR GEN., NEW SOURCE REVIEW RULE CHANGE HARMS EPA'S ABILITY TO ENFORCE AGAINST COAL-FIRED ELECTRIC UTILITIES 10–11 (2004).

149. *Id*. at 18.

150. *Id*. at 19.

the EPA's strained interpretation, an interpretation that was eventually deemed unlawful.

Furthermore, the new rule created great uncertainty and undermined the EPA's ongoing enforcement of cases already brought: "The October 2003 NSR rule change has seriously hampered OECA settlement activities, existing enforcement cases, and the development of future cases."[151] In the face of regulatory uncertainty, the incentives for companies to comply voluntarily with the existing NSR rules or enter into settlements with the EPA decreased considerably. For example, in 2000 the DOJ announced a settlement-in-principle with Cinergy over NSR violations based on an enforcement action brought against Cinergy in November 1999.[152] EPA estimated that the settlement would have cut sulfur dioxide and nitrogen oxide emissions by two-thirds at ten coal-fired plants.[153] However, Cinergy has yet to finalize this settlement.[154] It is not a stretch to suggest that a company might not want to settle with the EPA for violations that would not, in fact, be violations under a proposed new rule.

In the total maximum daily load (TMDL) decision under dispute in *Friends of the Earth*, the District of Columbia first identified the levels of dissolved oxygen as impairing the Anacostia River in its 1996 section 303(d) list, a list required under the Clean Water Act, and it identified excessive total suspended solids in its 1998 update.[155] In May 2001, the District of Columbia submitted its TMDL report, designating TMDLs for the two pollutants, to the EPA for final review.[156] The EPA issued its decisions in December 2001 (for oxygen-depleting substances)[157] and March 2002 (for total suspended solids).[158] The decision in *Friends of the Earth* was issued in April 2006, and certiorari was denied in January 2007.[159] Thus, over a decade after the District of Columbia identified the need for these TMDLs, lawful TMDLs do not exist. And in the *Cement Kiln* case, litigated before the D.C. Circuit in 2001, the EPA did not issue new standards on remand until December 2006.[160]

To be sure, some prudential concerns weigh in favor of the EPA's strained interpretations. First, agencies have subject-matter expertise that Congress does

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151. *Id.*

152. *See* NAT'L RESEARCH COUNCIL, INTERIM REPORT OF THE COMMITTEE ON CHANGES IN NEW SOURCE REVIEW PROGRAMS FOR STATIONARY SOURCES OF AIR POLLUTANTS 42–43 (2005).

153. *See* Darren Samuelsohn, *Air Pollution: Settlement Talks Resume in Cinergy's NSR Case*, GREENWIRE, Apr. 11, 2002, http://eenews.net/Greenwire/print/2002/4/11/5.

154. Cinergy litigated the enforcement action in this case, and the enforcement action was recently upheld in United States v. Cinergy Corp., 458 F.3d 705 (7th Cir. 2006).

155. *See generally* ENVTL. PROT. AGENCY, TOTAL SUSPENDED SOLIDS, TOTAL MAXIMUM DAILY LOADS FOR THE ANACOSTIA RIVER, D.C. (Mar. 2002).

156. *Id.* at 2.

157. *Id.* at 10.

158. *Id.* at 1.

159. Friends of the Earth, Inc. v. EPA, 446 F.3d 440 (2006), *cert. denied*, 127 S. Ct. 1121 (2007).

160. *See* Final Rule, National Emissions Standards for Hazardous Air Pollutants From Portland Cement Manufacturing Industry, 71 Fed. Reg. 76,518, 76,518 (Dec. 20, 2006) (to be codified at 40 C.F.R. pt. 63).

not. Thus, in *Friends of the Earth*, the EPA argued that seasonal or annual loads are better policy than daily loads and will produce better results.[161] While in that case the environmental plaintiffs disagreed, this argument retains force. In addition, agencies must continue to implement statutes long after they have been passed, often under changed circumstances. Both of these concerns support the EPA's attempts to find ambiguity in order to insert its preferred policy. They also indicate that, from a prudential standpoint, there may be some room for creative interpretations in the quest for the best policies. However, these concerns do not override the prudential concerns of money and time wasted, and delay of environmental, health, and safety measures when too-creative interpretations are struck down in court. Further, it is an open question as to whether the EPA's preferred policy approaches in fact make better policy than do Congress's commands.

D. PROFESSIONAL CONSTRAINTS

On February 11, 1931, as the power of the administrative state was becoming clear, Chief Justice Hughes addressed the Federal Bar Association in Washington, D.C. He stated:

> As Uncle Sam's lawyers, you reflect the extraordinary development of the administrative agencies of government . . . . I think that [if], in your special tasks, representing the greatest of all clients, you are true to the standards of your profession, you may well turn out to be the protectors of society from bureaucratic excess.[162]

Chief Justice Hughes warned that we escape the unbridled discretion of rulers only by the restrictions that constitute the reign of law, and he instructed the government lawyers: "You are the servants of the laws and not of men. It is not your privilege to bend or distort the law to serve either public or private ends but to administer the law as it is."[163] Such loyalty to the law, he stated, was the "saving salt of administration, the protecting against those stretchings of the law . . . and against the abuses deflecting administration through political policy or favor."[164] He went on to praise the solicitors for "keeping down the volume of litigation by not attempting to force statutes to an extreme construction and by a willingness to take a reasonable measure of responsibility and thus avoid placing an unnecessary burden on the courts."[165]

The extent and power of the administrative state has grown immensely in the time since Chief Justice Hughes' remarks. The emergence of Legal Realism also questioned the assumption that the law has a single discernable meaning—what

161. *Friends of the Earth*, 446 F.3d at 145.
162. Charles Evans Hughes, *Important Work of Uncle Sam's Lawyers*, 17 A.B.A. J. 237, 237 (1931).
163. *Id.* at 238.
164. *Id.*
165. *Id.*

Justice Hughes called "the law as it is."[166] Today most lawyers, including Executive Branch lawyers, subscribe to a very different view of their role—that of a zealous advocate for their client. In its extreme version, termed the liberal advocacy model, lawyers need only avoid committing crimes or helping their clients to plan crimes and follow clearly expressed ethical rules. Otherwise, this model suggests, lawyers must exploit any gap, ambiguity, technicality, or loophole, and "not-obviously-and-totally-implausible interpretation of the law or facts" in support of their client.[167] Good reasons certainly exist for lawyers to be zealous advocates. Our adversary system depends on lawyers making the best cases for their clients. But perhaps we have strayed too far in this direction and the alternative view provided by Chief Justice Hughes should be reconsidered.

Contrast Chief Justice Hughes's conception of the role of the government attorney with Elliot's direction to EPA attorneys affirmatively to seek out ambiguity in the law, what he terms "policy space."[168] Such efforts surely seek to exploit gaps and ambiguities in the law to serve policy ends rather than to discern Congress's intent. Elliot derides such intent as "nebulous and fictive," but the cases explored in this Note demonstrate that Congress is often considerably clearer than the agency wants to admit.

Even in the context of private attorneys, scholars have argued that legal professionals have responsibilities to the law beyond their clients' goals. In the "republican" ideal, lawyers were seen as the guardians of the long-term values of legalism.[169] They were to use the authority and influence derived from their professional skill to create a culture of respect for and compliance with the purposes of the law.[170] This required some degree of independence from clients so that lawyers could support the rules and institutions of the framework, even when doing so would hurt their clients.[171]

Robert Gordon argues that our system of adversary representation can work only if it is carried out within the framework of law and regulation. Our system depends on compliance with the laws. For example, he posits, suppose a legal rule is clear but the chance of detecting violations low and the penalties small in relation to the gains from noncompliance. The lawyer who advises and then assists with noncompliance in such a situation could, in the vigorous pursuit of his client's interests, effectively nullify the law.[172]

This alternate conception of the role of the lawyer is often termed that of an "officer of the court."[173] Such a title suggests that lawyers owe a special duty to

166. *See id.*
167. Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 20–21 (1988). The lawyer under this regime essentially helps his or her client find a way around the law.
168. Elliot, *supra* note 9, at 12.
169. *See* Gordon, *supra* note 167, at 14.
170. *See id.*
171. *Id.* at 17.
172. *Id.* at 72.
173. *See id.* at 12.

the judicial system. At least implicitly, this special duty elevates the interests of the judicial system or the general public above those of the client or the lawyer.[174] In fact, the ABA Commission on Professionalism's 1986 report asserts, "where the two conflict, the lawyer's duty to the system of justice must transcend the lawyer's duty to the client."[175]

Within the government, such a role is seen, most prominently, in the Office of the Solicitor General (SG):

> The SG often declines to make particular arguments in briefing and may even confess error, abandoning the government's victory in a lower court. If the SG's own analysis disagrees with the judgment of the lower court that sustained the government's position, he can choose not to defend the favorable decision against the opposing party's appeal or effort to obtain Supreme Court review. Giving up a victory already in hand is virtually unheard of in the private bar, but is an established practice by the SG, occurring on average two to three times per year. Each of these ways through which the SG checks client initiatives—rejecting requests to appeal or petition, declining to make certain proposed arguments in briefs to the court, and even confessing error—might be thought to illustrate the law's capacity to constrain politics within the executive branch.[176]

The SG is arguably in a special position and perhaps, in a system of checks and balances, it is not the responsibility of an agency attorney to represent the interests of Congress or the courts because those branches have their own means of protecting their prerogatives.[177] However, even this conception assumes some level of compliance. The courts do not have the power to enforce their decrees and Congress does not have the power to execute its own laws. If agencies do not have any responsibility to the laws of Congress or the decrees of the courts, the Executive Branch could effectively render these institutions obsolete. This Note does not argue that government lawyers represent the "public interest" rather than the agency for which they work. It suggests only that the President and agency heads should encourage lawyers to think independently and read the law faithfully.

For the EPA, a further professional concern is losing credibility with the courts, such that in the future a court may not defer to the agency when deference is due. Courts have criticized government lawyers for defending certain cases. For example, one frustrated court criticized the government, saying, "If the United States Attorney's Office would be more discriminating in the social security cases it was willing to defend, it would be of great service to

174. Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39, 43 (1989).

175. AM. BAR ASS'N COMM'N ON PROFESSIONALISM, ". . . IN THE SPIRIT OF PUBLIC SERVICE:" A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 30 (1986).

176. Nina Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 709 (2005).

177. Miller, *supra* note 104, at 1296.

the already overburdened courts, and would enhance the government's credibility in those cases it did choose to defend."[178]

In its per curiam opinion in *Sierra Club*, the D.C. Circuit concluded with unusually strong language:

> If the Environmental Protection Agency disagrees with the Clean Air Act's requirements for setting emissions standards, it should take its concerns to Congress. If EPA disagrees with this court's interpretation of the Clean Air Act, it should seek rehearing en banc or file a petition for a writ of certiorari. In the meantime, it must obey the Clean Air Act as written by Congress and interpreted by this court.[179]

This language suggests the kind of frustration that undermines the credibility of the agency with the court. Part of what gives bureaucracy power is a reputation for competence over a particular problem. By losing so many cases at *Chevron* step one, the EPA risks undermining its credibility not only with the courts but also with the industries that it regulates. This could diminish the voluntary compliance on which any legal system depends.

CONCLUSION

When duly enacted law is not a method for Congress to prescribe how the will of the people shall be executed, but is instead either a tool to achieve Executive Branch policy preferences or an obstacle to overcome in that pursuit, our system of government is seriously out of kilter. The question of how agencies should interpret statutes is ripe for debate. This debate is also necessary in an era in which agencies possess vast amounts of lawmaking power. This Note has sought to explain why it is a problem for agencies to strain to find ambiguity in clear statutes. It has also sought to put forth certain constraints that agencies should feel when interpreting statutes. To bring our system back into kilter, the EPA and other Executive Branch agencies should heed these suggestions and view their roles as giving effect to duly enacted laws, not shaping the laws to suit their own preferences.

178. Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 1001 (1991) (quoting Ceglia v. Schweiker, 566 F. Supp. 118, 125 n.7 (E.D.N.Y. 1983)).

179. Sierra Club v. EPA, 479 F.3d 875, 884 (D.C. Cir. 2007).