

1 EXAMINING THE FEDERAL REGULATORY SYSTEM TO IMPROVE  
2 ACCOUNTABILITY, TRANSPARENCY, AND INTEGRITY

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4 WEDNESDAY, JUNE 10, 2015

5 United States Senate,  
6 Committee on the Judiciary,  
7 Washington, D.C.

8 The Committee met, pursuant to notice, at 10:00 a.m.,  
9 in room SD-226, Dirksen Senate Office Building, Hon. Charles  
10 E. Grassley, Chairman of the Committee, presiding.

11 Present: Senators Grassley, Hatch, Cornyn, Flake,  
12 Perdue, Tillis, Whitehouse, Coons, and Blumenthal.

13 OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S.  
14 SENATOR FROM THE STATE OF IOWA

15 Chairman Grassley. Good morning, everybody. The  
16 Senate has a constitutional duty to conduct oversight, and,  
17 of course, that is oversight of the executive branch, and in  
18 doing that, we want to ensure that the Federal regulatory  
19 system remains accountable, and, of course, transparency  
20 brings about accountability. Today's hearing gives us a  
21 chance to take a broad look at where things stand.

22 We all remember from civics classes that under our  
23 constitutional separation of powers, Congress makes the  
24 laws, the executive branch enforces, and the judicial branch  
25 interprets.

1           If only it were that straightforward.

2           According to Professor of Law Jonathan Turley, "Our  
3 carefully constructed system of checks and balances is being  
4 negated by the rise of a fourth branch, an administrative  
5 state of sprawling departments and agencies that govern with  
6 increasing autonomy and decreasing transparency."

7           The Federal Register indicates that there are over 430  
8 departments, agencies, and sub-agencies in the Federal  
9 Government. And the pronouncements of this ever-expanding  
10 administrative state impact nearly every aspect of  
11 Americans' daily lives.

12           Data support this. The 113th Congress enacted just  
13 under 300 laws. Over the same 2-year period, the Federal  
14 bureaucracy finalized 7,000 regulations. Just looking at  
15 these numbers, there is no denying that unelected  
16 bureaucrats are the real law-making force in our country.

17           If you remember, in 1946, Congress passed the  
18 Administrative Procedure Act because of growing power of the  
19 Federal bureaucracy, and they did this to help ensure that  
20 regulations are crafted in an open, accountable, and  
21 transparent manner, and that agency actions are reviewable  
22 by the courts to ensure compliance.

23           Among the protections built into the APA is the public  
24 notice-and-comment rulemaking process, whereby Americans can  
25 weigh in on regulations, and agencies must objectively take

1 those concerns into account before finalizing. This process  
2 is supposed to provide a meaningful opportunity for the  
3 public to hold regulators accountable and to help insure  
4 that regulations are crafted in the public interest and  
5 according to law rather than tailored to special interests.  
6 The Judiciary Committee has primary jurisdiction over the  
7 Administrative Procedure Act, and we need to improve our  
8 oversight of it.

9       Unfortunately, we see repeated efforts today by  
10 agencies to undermine the public's role in rulemaking and  
11 tactics that render the notice-and-comment process a  
12 formality.

13       Some agencies resort to litigation tactics like sue and  
14 settle to speed up the rulemaking process and to keep  
15 affected members of the public--and even the States--away  
16 from the table when key regulatory decisions are being  
17 negotiated behind closed doors.

18       These tactics often result in consent decrees or  
19 settlement agreements between an agency and like-minded  
20 interest groups, committing the agency to actions that have  
21 not been publicly scrutinized. So, in February, I  
22 introduced the Sunshine for Regulatory Decrees and  
23 Settlements Act, a bill that would shine light on these  
24 tactics and provide much needed transparency.

25       But that is just one part of the issue.

1           We also see agencies going through the motions of  
2 notice-and-comment rulemaking, yet the public's role in the  
3 process appears to be anything but meaningful. The EPA's  
4 recently finalized Waters of the U.S. rule stands out as a  
5 sweeping example of that problem.

6           Instead of attempting to address the legitimate  
7 concerns raised during the open comment period, the EPA and  
8 its allies in the professional advocacy community pushed a  
9 narrative that portrayed critics of the rule as misinformed,  
10 nutty, or in favor of water pollution.

11           Agencies are supposed to remain objective during the  
12 notice-and-comment period. But the EPA's efforts to drive  
13 support for its own rule--while belittling the concerns of  
14 the public--indicate that it had a clear end goal in mind,  
15 regardless of public opinion or the rule of law.

16           According to the New York Times--now, take this into  
17 consideration. In the New York Times, "the EPA's tactics in  
18 supporting the rule are clearly designed to move public  
19 opinion, at a time when Congress was considering legislation  
20 to block the agency from putting the rule into effect."

21           I share the concerns of folks in my State of Iowa with  
22 the Waters of the U.S. rule. Its sweeping scope has left  
23 farmers in limbo about what they can and cannot do on their  
24 own land. And the indifferent attitude the EPA took toward  
25 agriculture is a real concern for my constituents who

1 understand the impact that agriculture has on the State's  
2 economy. It is just like the EPA does not know that only  
3 God determines if it rains 10 minutes or 10 inches in one  
4 night.

5 More broadly, it is a real concern for just how  
6 unaccountable our regulatory system has become.

7 Congress recognized early on the threat of agency  
8 overreach. And, accordingly, the APA provides for judicial  
9 review.

10 However, as the influence and reach of the  
11 administrative state grows, it seems like the ability and  
12 willingness of the Federal courts to hold it accountable has  
13 diminished. Over 30 years ago, the Supreme Court  
14 articulated the now famous Chevron doctrine, whereby Federal  
15 courts largely defer to an agency's legal interpretation of  
16 a statute it administers.

17 And, recently, the Supreme Court determined that such  
18 heavy deference extends even to an agency's interpretation  
19 of the scope of its own jurisdiction.

20 Placing such questions of law into the hands of those  
21 who also write and enforce laws raises serious concerns. I  
22 often quote James Madison, so let me do it again: "The  
23 accumulation of all powers, legislative, executive, and  
24 judiciary, in the same hands, whether of one, a few, or  
25 many...may justly be pronounced the very definition of

1 tyranny."

2           So it is important that we consider these issues  
3 carefully. It is equally important that Congress recognize  
4 its own responsibility in the expansion of rulemaking. For  
5 too long, Congress has delegated in broad strokes, asking  
6 the agencies to sort out details. If Congress is going to  
7 ask courts to tackle the tough questions, it needs to be  
8 willing to do so itself by reasserting its lawmaking power  
9 and by speaking clearly and precisely when it chooses to use  
10 that power.

11           What is clear is that the status quo is not acceptable.  
12 Today small businesses and entrepreneurs operate in a  
13 regulatory environment that provides little relief from  
14 excessive red tape, and one that offers little certainty  
15 upon which to base risk and investment. Agencies are  
16 falling far short of their duties to weigh the costs and  
17 benefits of new regulations, and there is little the courts  
18 seem to want to do to hold them accountable. And  
19 regulations with hundreds of millions--and even billions--of  
20 dollars in impact are being imposed on the U.S. economy, all  
21 without a sufficient check.

22           So we have this hearing, and I call on my Ranking  
23 Member, who may have different views on this issue, but he  
24 and I get along very well. I hope you understand that.

25           OPENING STATEMENT OF HON. SHELDON WHITEHOUSE, A U.S.

1 SENATOR FROM THE STATE OF RHODE ISLAND

2 Senator Whitehouse. I understand it very well, Mr.  
3 Chairman. I enjoy working with you, but as you predicted,  
4 we do have very different views on this particular topic.

5 I thank the witnesses for joining us, and I thank  
6 Chairman Grassley for calling attention to the important  
7 topic of Federal regulation.

8 The title of this hearing sounds neutral enough. Who  
9 can argue against transparency and integrity? But I am  
10 concerned that its purpose is simply to further my  
11 Republican colleagues' relentless and extreme anti-  
12 regulatory, pro-big-business polluter agenda. It is an  
13 agenda with which, according to polls, most Americans  
14 disagree but which special interests love. Whether we are  
15 talking about environmental or health or consumer or  
16 financial regulations, today's Republican Party, unlike  
17 previous Republican Parties, seems determined to roll back  
18 important public protections, and often in very misleading  
19 terms.

20 Over in another room in this building today, we are  
21 marking up what is Orwellianly called the "Federal Water  
22 Quality Protection Act," a bill whose purpose is to take  
23 down Federal water quality protections.

24 The arguments tend to be one-sided, highlighting  
25 potential jobs lost, while completely ignoring potential

1 jobs created and economic and health gains, and railing  
2 against overzealous regulation while never acknowledging the  
3 role of overly lax regulation in contributing to recent  
4 crises and disasters.

5 Regulatory agencies have through our lifetimes provided  
6 vital protection to the American people, and we in Congress  
7 should exercise our oversight responsibly, focusing on  
8 realities rather than on rhetoric.

9 One of the majority's case studies for overzealous  
10 regulation today is the rule recently finalized by EPA and  
11 the Army Corps of Engineers to define Waters of the United  
12 States under the Clear Water Act. This rule was developed  
13 over many months, following more than 400 meetings across  
14 the country, review of over 1 million public comments, and  
15 vigorous grassroots outreach.

16 In my home State of Rhode Island, this rule is going to  
17 protect small streams and wetlands that are vital for our  
18 fish and wildlife. Rhode Island residents and non-residents  
19 spend hundreds of millions yearly on wildlife recreation,  
20 including \$130 million on fishing alone. More than 400,000  
21 Rhode Islanders participated in wildlife recreation  
22 activities in 2011 when the sample was taken. This rule is  
23 good economic news in Rhode Island, and actually probably  
24 good economic news in most places around the country. That  
25 is why the American Sustainable Business Council, which

1 represents 200,000 businesses that rely on clean water,  
2 supports the clean water rule. A polling commissioned by  
3 the council found that 89 percent of small business owners,  
4 including 78 percent of Republicans, favor Federal rules  
5 like those proposed by the EPA to protect upstream  
6 headwaters; 71 percent of small business owners agree that  
7 clean water is necessary for jobs and the economy; 67  
8 percent are concerned that water pollution could hurt their  
9 business in the future. And, of course, others pushing for  
10 this clean water rule are the American Fisheries Society,  
11 the American Fly Fishing Trade Association, Back Country  
12 Hunters and Anglers, the Berkley Conservation Institute, the  
13 Bull Moose Sportsmen's Alliance, the Dallas Safari Club, the  
14 Izaak Walton League of America, the National Wildlife  
15 Federation, Theodore Roosevelt Conservation Partnership, and  
16 Trout Unlimited.

17 Attacks on this rule often seem based more in terms of  
18 conspiracy theory than factual accuracy. Here is just a  
19 sampling of what some Republican colleagues have said about  
20 the proposed rule.

21 Here is one: "Under this plan, there would be no body  
22 of water in America, including mud puddles and canals, that  
23 would not be at risk from job-destroying Federal  
24 regulation." That is former Representative Doc Hastings.

25 House Small Business Committee Chairman Sam Graves:

1 "Permits may be required for activities such as removing  
2 debris and vegetation from a ditch, applying pesticides,  
3 building a fence, or pond, or discharging pollutants"--well,  
4 maybe discharging pollutants.

5 Republican Representative Glenn Thompson of  
6 Pennsylvania calls the rule "a historic power grab that  
7 poses," get this, "a fundamental threat to our economy and  
8 way of life."

9 "Brazen effort" is another phrase that has been used.  
10 "Gross Federal overreach"; "would require cost-prohibitive  
11 Federal permits for any proposal tangentially affecting  
12 virtually any body of water in the United States." We have  
13 even heard from colleagues on the EPW Committee that the  
14 rule might jeopardize fireworks on the 4th of July.

15 In fact, the rule maintains the exclusion of prior  
16 converted cropland, meaning over 50 million acres of Clean  
17 Water Act permitting is still not required. It excludes the  
18 vast majority of roadside ditches and ditches on  
19 agricultural lands. It eliminates jurisdiction over  
20 artificially irrigated areas, constructed stock watering  
21 ponds, irrigation basins, and the like. It fully preserves  
22 the permitting exemptions for farming, ranching, and  
23 forestry, and it clearly states that the Clean Water Act  
24 does not apply to groundwater.

25 But, unfortunately, this does not stop the histrionics.

1 When the final rule came out, House Speaker Boehner said  
2 this rule "is a raw and tyrannical power grab that will  
3 crush jobs," and that "the rule is being shoved down the  
4 throats of hardworking people with no input"--no input.  
5 What was it, 400 million outreaches, meetings? "...and  
6 places landowners, small businesses, farmers, and  
7 manufacturers on the road to a regulatory and economic  
8 hell."

9 Mr. Chairman, the only people who think clean streams  
10 and rivers are economic hell are deep-pocketed polluters,  
11 and I am confident that there will be fireworks on the 4th  
12 of July after this rule goes into effect.

13 Thank you.

14 Chairman Grassley. We are not going to put you down on  
15 the undecided list.

16 [Laughter.]

17 Chairman Grassley. Thank you.

18 Senator Whitehouse. Thank you, sir.

19 Chairman Grassley. Normally I do not call on other  
20 members, but I want to call on Senator Cornyn because he has  
21 had an interest in this for a long time and helped us get  
22 this moving.

23 Senator Cornyn. Thank you, Mr. Chairman, and I promise  
24 to be brief.

25 Senator Whitehouse. Would the Senator yield just for

1 one moment? The EPW is marking up the humorously called  
2 "Federal Water Quality Protection Act," so I have to go back  
3 and forth. So forgive me if I get up and come back and  
4 forth. It has nothing to do with what any Senator or any  
5 witness has said.

6 Chairman Grassley. Thank you.

7 Go ahead.

8 OPENING STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR

9 FROM THE STATE OF TEXAS

10 Senator Cornyn. Thank you, Mr. Chairman. I think this  
11 is perhaps one of the most profound and least well  
12 understood issues confronting our self-governing democracy  
13 today, and I realize that is a dramatic statement, but I  
14 believe it is actually true. Increasingly, as you point  
15 out, regulatory agencies have become the lawmaker, the  
16 judge, the jury, and the executioner, rhetorically speaking,  
17 when it comes to the administrative state.

18 I am particularly troubled, as you pointed out, with  
19 the decisions by the courts which have shown deference to  
20 the legal interpretation of the agencies' own jurisdiction  
21 and own authorities. That is a power, I believe, reserved  
22 to the judiciary and not to an administrative agency.

23 As you point out, this has become a fourth branch of  
24 Government which serves very useful purposes if kept within  
25 its proper bounds. But, unfortunately, it has become a

1 runaway train with no accountability and the kind of  
2 accountability that we experience, which is entirely  
3 appropriate, that when people disagree with us and what we  
4 do, they vote us out of office. They vote against us. But  
5 you cannot do that to a nameless and faceless bureaucrat.

6 So most recently this has come to my attention when, of  
7 course, the Securities and Exchange Commission decided to  
8 take its administrative appeals in-house because of their  
9 losing streak in the courts. And recently a Federal judge  
10 ruled this decision likely--to move in-house to more  
11 favorable circumstances and venue for the administrative  
12 agency, one Federal judge said that that was likely  
13 unconstitutional.

14 So there is an important role that the regulatory  
15 agencies play in our lives, and contrary to Senator  
16 Whitehouse's statements, this is not about no regulation or  
17 overregulation. This is about keeping it within its proper  
18 bounds.

19 And so I very much appreciate your holding this hearing  
20 because I think this is one of the most profound issues  
21 confronting our self-governing democracy today, and,  
22 unfortunately, it is one of the least well understood. So  
23 thank you for giving me a chance.

24 Chairman Grassley. I am about ready to introduce the  
25 witnesses, but a couple housekeeping matters.

1 I will be here for about half of this hearing, and then  
2 Senator Hatch is going to take over because I have  
3 constituent meetings. And, of course, as always, the record  
4 will remain open 1 week for the submission of written  
5 questions and other materials, and we would appreciate the  
6 witnesses' responding to those.

7 I will now introduce William Kovacs, senior vice  
8 president for Environmental, Technology & Regulatory  
9 Affairs, Chamber of Commerce. He leads the Chamber's  
10 efforts on comprehensive energy legislation, environmental  
11 rulemaking, telecommunications reform, emergency  
12 technologies, and the application of sound science to the  
13 Federal rulemaking process.

14 Robert Weissman is president of Public Citizen, a  
15 consumer and public interest advocacy group, very well noted  
16 here on the Hill and throughout the country. He is also co-  
17 chair of the Coalition of Sensible Safeguards.

18 Ellen Steen, general counsel and secretary of the  
19 American Farm Bureau Federation. Prior to Farm Bureau  
20 affiliation, she was a partner in the Environmental and  
21 Natural Resource Group of the law firm of Crowell and  
22 Moring. Her practice primarily focused on policy  
23 litigation, enforcement defense, administrative advocacy  
24 concerning Federal water quality, particularly issues  
25 involving the validity and interpretation of the Clean Water

1 Act.

2 Professor Patrick Parenteau, who is professor of law  
3 and senior counsel, Environmental and Natural Resources Law  
4 Clinic at Vermont Law School, previously serving as vice  
5 president for conservation with National Wildlife  
6 Federation, regional counsel to New England Regional Office  
7 of the EPA, and commissioner of the Vermont Department of  
8 Environmental Conservation.

9 Charles Cooper is a founding member and chairman of  
10 Cooper & Kirk, a litigation firm specializing in commercial,  
11 regulatory, and constitutional disputes. He has over 35  
12 years of legal experience, both Government and private  
13 practice, with several appearances before the Supreme Court.  
14 In 1985, President Reagan appointed him to the position of  
15 Assistant Attorney General, Office of Legal Counsel, U.S.  
16 Department of Justice.

17 I welcome all of you, and most importantly, thank you  
18 all for the long statements that you are submitting for the  
19 record and the 5 minutes in which you are testifying and  
20 being here to answer questions. We will start as I  
21 introduced you, from my left to my right. Mr. Kovacs?

1           STATEMENT OF WILLIAM L. KOVACS, SENIOR VICE  
2           PRESIDENT, ENVIRONMENT, TECHNOLOGY & REGULATORY  
3           AFFAIRS, U.S. CHAMBER OF COMMERCE, WASHINGTON,  
4           D.C.

5           Mr. Kovacs. Senator Grassley and members of the  
6           Committee, thank you for inviting me to testify today on  
7           examining the Federal regulatory system to improve  
8           accountability, transparency, and integrity. These are  
9           perhaps the three most essential characteristics for the  
10          proper functioning of the regulatory process.

11          While we have interest groups and, frankly, Members of  
12          Congress fighting every day over the benefits and costs of  
13          specific regulation, there is an unfortunately little amount  
14          of attention paid to how the process works and how  
15          regulations are developed.

16          The rule book, as Senator Grassley stated, was written  
17          in 1946 by Congress when it enacted the Administrative  
18          Procedure Act. At that time, there were very few agencies  
19          and far less complexity.

20          How rules are developed should be the absolute top  
21          priority of Congress since how regulations are developed is  
22          essential to ensuring that the powers Congress delegates to  
23          agencies are used to achieve congressional intent.

24          The regulatory process is massive with almost 200,000  
25          regulations that impact every sector of society. However,

1 when the Chamber did an analysis of all of what we would  
2 call the regular rules, the major impact rules, and the high  
3 impact rules, we came to the conclusion that the rulemaking  
4 process works reasonably well for what we would call routine  
5 matters. However, there are deficiencies in the process  
6 that allow agencies to enact very broad and costly  
7 regulations that are not based on the words of a statute but  
8 are considered by the courts to be "permissible" in the  
9 reading of a statute. These regulatory laws, such as net  
10 neutrality or Waters of the U.S., are far broader than  
11 Congress could ever enact in this present political  
12 environment. Yet they are imposed upon us by heads of  
13 agencies with little effort.

14 Our Founders intended the lawmaking process to be  
15 difficult for Congress, but with Congress passing these  
16 broad and vague laws that delegate great discretion to  
17 agencies to enact wide-ranging laws through regulation,  
18 lawmaking has become extraordinarily easy.

19 Adding to the ease of lawmaking through regulations,  
20 the courts have extended deference to agency action, thereby  
21 insulating agency decisions from stringent judicial review  
22 needed as a check on the abuse of power. So it has been  
23 recognized that Congress can delegate, and that when it  
24 delegates, whatever interpretation the agency does is  
25 permissible; and then you add deference to the court, you

1 have completely taken the checks out of the system.

2 The challenge, therefore, is for Congress to preserve  
3 the efficiency of the informal rulemaking structure for the  
4 vast bulk of the 4,000 regulations issued every year while  
5 ensuring that when agencies engage in broad-based lawmaking,  
6 the agencies establish that rule in a way in which Congress  
7 intended.

8 Several suggestions for achieving the accountability,  
9 transparency, and integrity of the regulatory process.

10 First, we highly support and urge you to support the  
11 Regulatory Accountability Act, which has already passed the  
12 House of Representatives, but it skillfully addresses the  
13 few regulations a year costing over \$1 billion and having  
14 nationwide impact. And I say a few, because out of the  
15 4,000, when you analyze it, you have about 3,700 that are  
16 what we would call run-of-the-mill, standard-setting, and  
17 routine. You have about 300 that are what we would call  
18 major and significant in the sense that they cost over \$100  
19 million or more. And then you have literally three or four  
20 that are what we call the high impact. These are Waters of  
21 the U.S., regulatory net neutrality, the Power Plan. These  
22 are the ones that it is nationwide rulemaking, and they need  
23 different attention. And over the last 15 years, there have  
24 only been 30 of these. And it accomplishes this goal by  
25 requiring more disclosure up front, integrating the

1 Information Quality Act as part of the rulemaking process,  
2 and imposing the same requirements on independent agencies  
3 as executive agencies. It also establishes requirements for  
4 a more stringent administrative record and sets a higher  
5 standard for court review.

6 We would also recommend passage of the Federal  
7 Permitting Improvement Act of 2015, which was passed out of  
8 committee by a vote of 12-1, and it provides timelines for  
9 agencies for reviewing permits and reduces the statute of  
10 limitations for bringing a lawsuit from 6 years to 2 years.

11 We also strongly support S. 378, Senator Grassley's  
12 Sunshine for Regulatory Decrees, which addresses the sue-  
13 and-settle issue, which I am sure I will have questions on.

14 And we would also recommend that you take the citizen  
15 suits which are scattered throughout the entire code and  
16 codify them in Title 28, and the purpose of codifying them  
17 there is so you can have the kind of oversight that you  
18 really need on citizenship because they have greatly changed  
19 who has access to the courts and who has standing to be in  
20 court.

21 Thank you very much.

22 [The prepared statement of Mr. Kovacs follows:]

1 Chairman Grassley. Thank you, Mr. Kovacs.

2 Now, Mr. Weissman.

1                   STATEMENT OF ROBERT WEISSMAN, PRESIDENT, PUBLIC  
2                   CITIZEN, WASHINGTON, D.C.

3           Mr. Weissman. Thank you very much, Mr. Chairman.

4           I think the starting point for a discussion about the  
5 regulatory process should be a recognition of how important  
6 regulation is in preserving our standard of living. Much of  
7 what we take for granted on a day-to-day basis is due to  
8 effective regulation. As a result of regulations adopted  
9 over the last many decades, our food is safer, our air is  
10 cleaner to breathe, our water safe to drink; the disabled  
11 have better access to facilities across the country;  
12 consumers have been saved countless billions of dollars;  
13 workers are guaranteed a minimum wage, safe workplaces. The  
14 benefits of regulations adopted over the last decade as well  
15 as earlier vastly outweigh the costs even by corporate-  
16 friendly accounting measures.

17           These are not just historic gains. These are ongoing  
18 gains. Recent rules have benefited consumers and the  
19 environment by improving auto fuel efficiency. Rules have  
20 been adopted to implement your very important Physician  
21 Payments Sunshine Act, and many other developments in the  
22 last several years.

23           We know as well that regulatory failure comes with  
24 enormous costs, both through deregulation, the failure to  
25 adopt appropriate regulation, and especially the failure to

1 enforce existing regulatory rules. There are different  
2 stories for what caused the Great Recession, but they all  
3 essentially involve massive abuse by Wall Street and the  
4 failure of regulators to control Wall Street.

5 It is important to recognize the costs associated.  
6 Millions of people were thrown out of work; millions lost  
7 their homes. The economy lost \$20 trillion, according to  
8 the GAO, a number that vastly exceeds anything that could  
9 ever be attributed to the cost of regulation with reasonable  
10 accounting measures.

11 We have a whole series of recent disasters that should  
12 be properly understood as regulatory failures: the BP oil  
13 blowout; the GM ignition switch disaster, killing more than  
14 100 people; the Takata air bag scandal; the New England  
15 Compounding pharmacy disaster; and many others. That is  
16 what happens when we do not have a properly functioning  
17 regulatory system.

18 Now, as those comments suggest, underscoring the  
19 importance of regulation does not mean that the regulatory  
20 system is working effectively as it is. And in my written  
21 testimony, I outline a number of areas for improvement. I  
22 wanted to focus just briefly in my oral comments on two  
23 crucial areas.

24 The first is the need to improve regulatory enforcement  
25 in a variety of ways. Various inspection agencies are

1 massively underresourced and cannot possibly do their job of  
2 protecting workers, the food supply, the safety of our  
3 medicines, and many others.

4         Additionally, I think we have seen in the last decade a  
5 very disturbing trend regarding criminal prosecution for  
6 corporate wrongdoing, or I should better say criminal non-  
7 prosecution for corporate wrongdoing. The Justice  
8 Department has evolved a pattern over the last decade or  
9 more of entering into deferred and non-prosecution  
10 agreements with corporate wrongdoers basically engaging in  
11 regulatory-type violations but violations of the criminal  
12 law. And so these giant corporations, large banks  
13 especially but not only, are able to escape the kinds of  
14 criminal penalties that would apply to a street criminal.

15         We have also seen, particularly in the last few weeks,  
16 some criminal prosecutions, but the accompaniment of those  
17 criminal prosecutions by waivers of the sanctions that would  
18 normally apply--the Securities and Exchange Commission and  
19 potentially elsewhere. And I hope the Committee can focus  
20 great attention on this. It is really a double standard  
21 that has now become systemic to favor large businesses, not  
22 available to small companies, not available to individuals.

23         A second area that I wanted to focus on of a serious  
24 problem in the current regulatory system is delay. It takes  
25 a long time to issue regulations. Regulatory delay is

1 pervasive in the system, and agencies, moreover, routinely  
2 fail to meet congressional directives for specific deadlines  
3 to issue rules. The submitted testimony from the Chamber of  
4 Commerce says that the EPA misses targeted deadlines more  
5 than 90 percent of the time. Five years after the passage  
6 of Dodd-Frank, more than a third of the required rules with  
7 targeted deadlines have not been met. It routinely takes  
8 the Occupational Safety and Health Administration 8 or 12  
9 years to get rules out. We were involved in a case  
10 discussed in my testimony that it has taken 20 years to get  
11 a rule for truck driver safety training that is still not  
12 issued.

13 Now, this delay leads to both regulatory uncertainty  
14 and lost benefits to society. Its causes, I think, are  
15 excessive industry influence at the agencies, but also too  
16 many analytic requirements imposed on the agencies, and I  
17 think the one thing Congress should not do in this regard is  
18 impose additional requirements that would certainly mean  
19 additional delay at the agencies.

20 There is much more to be said, as you indicated in your  
21 opening remarks. This is a very broad topic, and we look  
22 forward to further conversation. Thank you very much.

23 [The prepared statement of Mr. Weissman follows:]

1 Chairman Grassley. Thank you, Mr. Weissman.

2 Now, Ms. Steen.

1           STATEMENT OF ELLEN STEEN, GENERAL COUNSEL AND  
2           SECRETARY, AMERICAN FARM BUREAU FEDERATION,  
3           WASHINGTON D.C.

4           Ms. Steen. Chairman Grassley and members of the  
5           Committee, thank you for the opportunity to testify on  
6           behalf of the American Farm Bureau Federation and the  
7           Nation's farmers and ranchers. My name is Ellen Steen, and  
8           I am the general counsel and secretary of AFBF. I have  
9           spent roughly two decades immersed in the development,  
10          implementation, and judicial review of EPA rules and  
11          policies under the Clean Water Act. I have been involved in  
12          dozens of agency rulemakings, litigated the validity and  
13          interpretation of EPA rules, and experienced firsthand the  
14          deference that courts extend to agency regulations and to  
15          agency interpretations of their rules.

16          I am here today because of my organization's experience  
17          over the past year with a major new Clean Water Act  
18          rulemaking by PA and the U.S. Army Corps of Engineers. This  
19          is a rule of extraordinary practical importance for farmers,  
20          ranchers, and most anyone else who grows, builds, or makes  
21          anything in this Nation. After carefully studying the  
22          proposed rule about a year ago, we at AFBF concluded that  
23          the rule's vague and broad language would define Waters of  
24          the United States to include countless land areas that are  
25          common in and around farm fields and ranches across the

1 countryside. These are areas that do not look a bit like  
2 water. They look like land, and they are farmed. But by  
3 defining them as Waters of the U.S., the rule would make it  
4 illegal to farm, yes, build a fence, cut trees, build a  
5 house, or do most anything else there without first  
6 navigating a costly and complex permitting regime.

7 From the day it first issued the proposed rule, EPA  
8 behaved like an advocate for a decision that was already  
9 made, willing to say most anything to achieve the desired  
10 result. It waged a public relations campaign aimed directly  
11 at farmers and ranchers, providing false and misleading  
12 assurances in speeches and in blogs that the rule will not  
13 increase permitting requirements for farmers or get in the  
14 way of farming.

15 But those of us who have litigated agency rules and  
16 agency interpretations of their rules know that courts will  
17 not give weight to today's speeches and blogs. Our  
18 experience is that EPA and the Corps will interpret their  
19 rules broadly, not narrowly. And in the enforcement  
20 proceedings that are sure to come, with an agency, a judge,  
21 and an ambiguous regulation, the agency's interpretation  
22 will be unassailable.

23 EPA also engaged in an extraordinary social media  
24 campaign aimed at a different audience: the broader public.  
25 That campaign consisted almost entirely of non-substantive

1 platitudes about the importance of clean water, which no one  
2 disputes. It used simplistic blogs, tweets, and YouTube  
3 videos to generate purported support for the rule among  
4 well-intended people who have absolutely no idea what the  
5 rule would actually do or what it will cost.

6 EPA later claimed public support for the rule, even  
7 though the vast majority of those who actually read the  
8 rule--State and local governments, businesses, and  
9 organizations representing virtually every sector of the  
10 American economy--vehemently opposed it.

11 Regardless of whether you support it, oppose, or never  
12 heard of the Waters rule, I would hope that many of you  
13 would agree that this is not how rulemaking should be  
14 conducted. Call me old-fashioned, but I believe agencies  
15 should try to keep an open mind or at least the appearance  
16 of an open mind during rulemaking. They should try to be  
17 honest and transparently account for the regulatory impact  
18 and the cost of their actions, even when they expect  
19 opposition. I hope this Committee's efforts will lead us in  
20 that direction.

21 Thank you.

22 [The prepared statement of Ms. Steen follows:]

1 Chairman Grassley. Thank you, Ms. Steen.

2 Now, Professor Parenteau.

1           STATEMENT OF PATRICK PARENTEAU, PROFESSOR OF LAW  
2           AND SENIOR COUNSEL, ENVIRONMENTAL AND NATURAL  
3           RESOURCES LAW CLINIC, VERMONT LAW SCHOOL, SOUTH  
4           ROYALTON, VERMONT

5           Mr. Parenteau. Thank you, Mr. Chairman and members of  
6           the Committee. I appreciate the opportunity to be here. I  
7           would note the irony. I am going to address specifically  
8           the Waters of the U.S. rule. The irony here is that the  
9           Supreme Court refused to give the agencies deference under  
10          Chevron and also was unable to come to any consensus on the  
11          Supreme Court as to where the limits of Federal jurisdiction  
12          were. And that is why it fell to EPA to write the rule.  
13          Chief Justice Roberts was very pointed in his concurring  
14          opinion in Rapanos, saying the agencies have the discretion  
15          to write a rule, you should do such a thing. That  
16          recommendation was joined by Justice Breyer. It was joined  
17          by Justice Alito in a subsequent case.

18          EPA and the administration went to Congress, asked for  
19          a bill to clarify the scope of Federal jurisdiction under  
20          the Clean Water Act to address the concerns raised by the  
21          Supreme Court in the Rapanos case, but, of course, those  
22          bills went nowhere.

23          So it is a real irony that the responsibility for  
24          resolving what has been a very, very unfortunate 10 years of  
25          confusion, uncertainty, and frustration has fallen to EPA.

1 And in my judgment, EPA has made a good-faith effort, has  
2 gone well beyond any standard under the Administrative  
3 Procedure Act that you could possibly require an agency to  
4 do.

5 You might think of a benchmark. In response to the  
6 Rapanos decision, the George W. Bush administration issued a  
7 set of guidance documents. There was no public  
8 participation on that guidance. There were no meetings, no  
9 outreach, no public comments, no scientific analysis. The  
10 guidance was issued, and the response from nearly everyone  
11 was: We do not need guidance; we need a rule. And we need  
12 a rule that is based on science. We need a rule that takes  
13 account of the unintended consequences that might occur if  
14 it is not well crafted. We need you to take the time to do  
15 it right.

16 In my judgment, Mr. Chairman, that is exactly what EPA  
17 has done here. Nothing in the law requires 400 meetings  
18 across the country with stakeholders, with local officials,  
19 with farmers, and others concerned about this rule. Nothing  
20 in the Administrative Procedure Act or law requires 207 days  
21 of public comment. That is 4 times the amount of public  
22 comment period that is the standard under the Administrative  
23 Procedure Act.

24 Nothing in the Administrative Procedure Act, the Clean  
25 Water Act, or any other law required EPA to commission a

1 300-page scientific assessment of where to draw some of  
2 these very complicated, difficult lines. Nothing in the law  
3 required EPA to have that scientific study peer-reviewed by  
4 the Scientific Advisory Board, which is a body that exists  
5 for that purpose but does not usually do that for rules like  
6 this.

7 EPA in every measure went beyond what the law requires,  
8 what history and practice had been, and did the very best  
9 job it possibly could. It is not surprising that not  
10 everybody is satisfied with it. There are many in the  
11 environmental community that are not satisfied with it, I  
12 can assure you. In many respects, EPA listened to what  
13 people were saying, the criticisms that it got. It made  
14 major changes in the final rule. I can say this after 40  
15 years of dealing with this statute, I have never seen the  
16 agency be clearer and more quantitative and draw brighter  
17 lines on the limits of Federal jurisdiction than what I see  
18 in this final rule. I will now be subject to judicial  
19 review, and there will be a number of challenges. And those  
20 who say that it is an overreach by the agency, that it is a  
21 violation of the Clean Water Act, that it is a violation of  
22 the Constitution, that it is confiscating people's private  
23 property, that it is regulating puddles, whatever it is that  
24 they say and have said consistently through the comment  
25 period, now they will have their day in court. Now they

1 will have the opportunity to put on the record the facts and  
2 the law to back up the allegations that have been made about  
3 the deficiencies in this rule. That is our system. For  
4 better or for worse, that is our system.

5 I have been on both sides of the deference issue. I  
6 have argued in favor of it; I have argued against it. I  
7 have won some; I have lost some. That is the way it works  
8 in our system of three-part Government.

9 But I think it says something when three former EPA  
10 Administrators of different administrations, bipartisan, all  
11 three of them--Christie Todd Whitman, Carol Browner, Bill  
12 Reilly--all three of them said EPA in this instance has gone  
13 above and beyond what EPA has done before in outreach to the  
14 public. The group that is the advisory group to EPA on  
15 local--consultation and outreach with local officials  
16 praised EPA for its collaborative partnership approach, and  
17 that began in 2013, long before the formal rulemaking  
18 process began.

19 I think it is time to let this rule work. You could  
20 have had 401 meetings. You could have had 500 meetings. It  
21 would not have satisfied those that are opposed to broad  
22 Federal jurisdiction. It is time to give EPA's rule a  
23 chance to work.

24 Thank you, Your Honor.

25 [The prepared statement of Mr. Parenteau follows:]

1 Chairman Grassley. And thank you.

2 Mr. Cooper, now go ahead.

1                   STATEMENT OF HON. CHARLES J. COOPER, FOUNDING  
2                   PARTNER AND CHAIRMAN, COOPER & KIRK, PLLC,  
3                   WASHINGTON, D.C.

4           Mr. Cooper. Good morning, Chairman Grassley and  
5   Senator Hatch and other distinguished members of the  
6   Committee, and thank you for inviting me to appear in this  
7   important hearing.

8           As Chief Justice Roberts has recently lamented, "The  
9   Framers could hardly have envisioned today's `vast and  
10  varied Federal bureaucracy' and the authority administrative  
11  agencies now hold over our economic, social, and political  
12  activities." The modern administrative state has become a  
13  sovereign unto itself, a one-branch Government whose  
14  regulatory grasp reaches virtually into every human  
15  activity.

16          The focus of my remarks this morning will be on the  
17  Chevron doctrine, a judge-made rule of judicial deference to  
18  agencies that, when it was decided in 1984, placed the  
19  administrative state's regulatory power on steroids.

20          Chevron requires courts to read any ambiguity in a  
21  Federal statute as an implicit congressional delegation  
22  authorizing the administering agency to fill a gap left open  
23  by Congress with the agency's own interpretation of the  
24  statute, an interpretation that the courts are bound to  
25  accept and to enforce, so long as it is reasonable.

1           In the three decades since Chevron was decided, Chevron  
2     and its progeny have transformed the administrative state  
3     into a kind of super court, vested with the last word,  
4     binding even on the United States Supreme Court as to the  
5     meaning of ambiguous statutory and regulatory provisions.

6           Since the early part of the 20th century, the  
7     administrative state has been permitted to accumulate and  
8     exercise legislative, executive, and judicial power, despite  
9     the Constitution's careful allocation of these powers  
10    exclusively in the Congress, the President, and the courts.  
11    And although the powers wielded by the administrative state  
12    are vast, it is politically accountable neither to the  
13    Congress nor, for the most part, to the President. And  
14    Chevron exacerbates these serious separation of powers  
15    concerns by ensuring that the administrative state also  
16    largely escapes legal accountability to the courts.

17           I believe that Chevron's doctrine of deference is at  
18    war both with the Administrative Procedure Act itself and  
19    with the Constitution's separation of powers.

20           Turning first to the APA, Chevron is flatly  
21    inconsistent with the plain text of Section 706, which  
22    instructs the reviewing court to decide all relevant  
23    questions of law and to interpret any statutory provisions.  
24    The language is imperative, commanding that courts shall  
25    decide all questions of law. But under Chevron, the agency

1 under review, not the reviewing court, authoritatively  
2 decides the relevant questions of law. Chevron simply  
3 cannot be squared with this language in Section 706.

4 Nor can Chevron be squared with our constitutional  
5 structure. It has been clear since Marbury v. Madison that  
6 the authority conclusively to say what the law is is a  
7 judicial power, one that Article III vests exclusively in  
8 the judicial department, not the executive. And since the  
9 Constitution also does not give the legislative branch any  
10 share of the judicial power, Congress cannot delegate that  
11 power to an agency.

12 It follows, I would submit, that courts must retain the  
13 sole authority to issue binding interpretations of law, not  
14 only by Congress' express direction in the APA itself, but  
15 by constitutional command. Chevron, by licensing the  
16 wholesale transfer of this authority to agencies, is at war  
17 with both.

18 I want to close by urging Congress to act to abrogate  
19 Chevron and enforce our Constitution's fundamental design.  
20 Of course, abrogating Chevron will not alone reform the  
21 administrative state. A broader reform effort is required  
22 and should be undertaken, an effort that should include  
23 careful consideration of pending legislation like the SCRUB  
24 Act, the REINS Act, the Sunshine Act, Senator Grassley, all  
25 of which seek to curb different pathologies of the fourth

1 branch. But no reform of the administrative state will be  
2 adequate without addressing Chevron. Congress has the power  
3 to abrogate Chevron simply by amending Section 706 of the  
4 APA to add language making explicit--I should say, rather,  
5 making even more explicit that reviewing courts must decide  
6 all questions of law without according any deference to an  
7 agency, and by further providing that any ambiguity in a  
8 statute shall not be construed as a delegation to an agency  
9 of either lawmaking or interpretive power. By abrogating  
10 Chevron in this way, Congress not only would reaffirm its  
11 original command in the APA that reviewing courts rather  
12 than the agencies under review decide all questions of law,  
13 but it would also restore one of our Nation's most basic  
14 constitutional principles.

15 Thank you.

16 [The prepared statement of Mr. Cooper follows:]

1 Chairman Grassley. Before I start my questioning, I  
2 announced that Senator Hatch was going to take over because  
3 I had constituent meetings. I just want to thank Senator  
4 Hatch--he is so busy as Chairman of the Finance Committee--  
5 that he would do that, so thank you very much, Senator.

6 Also, before I question, I would like to back up to  
7 what Mr. Cooper said by quoting Senator McCarran's remark  
8 about Section 706, which reads--this is what comes from, I  
9 think, the Congressional Record: "To the extent necessary  
10 to decision, and when presented the reviewing court shall  
11 decide all relevant questions of law, interpret  
12 constitutional and statutory provisions, and determine the  
13 meaning for the applicability of the terms of an agency  
14 action." So that goes back to when the Act was passed.

15 Mr. Kovacs, I am particularly concerned about the  
16 practice of sue and settle. It is a litigation process to  
17 negotiate agreements behind closed doors, as I have said. I  
18 am concerned that the practice keep affected parties away  
19 from the process. Could you speak specifically to the ways  
20 that sue-and-settle tactics undermine the transparency and  
21 accountability built into the APA? And I think more  
22 importantly than that question is how the practice of sue  
23 and settle is inconsistent with how the APA was envisioned  
24 to work.

25 Mr. Kovacs. Yes, Senator, the APA, after having been

1 fought out in Congress for almost 18 years, really was an  
2 attempt to have the agencies for the first time become  
3 transparent and to put the regulated industries on an equal  
4 footing, not only with that but with the agencies, that  
5 information was to be disclosed.

6 What sue and settle does, it does not just affect the  
7 agencies in APA. It literally affects all of federalism.  
8 For example, if an agency--when sue and settle occurs, you  
9 have a private party dealing with an agency, and it says you  
10 have missed a deadline, or we think you ought to do this  
11 particular statute.

12 What happens in that situation is when you have an  
13 agency like EPA, which Mr. Weissman says--and he quotes our  
14 testimony--"misses the deadline 98 percent of the time," the  
15 sue and settle, once you come into that agreement, you take  
16 one of the 400 rules that EPA may issue in a year, one of  
17 the 400 or two of the 400, five of the 400, and you put  
18 them, because they are now under court supervision with a  
19 consent decree, at the top of the list. So what you are  
20 doing at that point is, rather than having the agency acting  
21 as an independent neutral party, deciding it has got a lot  
22 of duties from Congress and it has to prioritize those  
23 duties in what it thinks important. Now with sue and  
24 settle, you have interest groups coming in and getting the  
25 court to sign off the consent decree and prioritize it.

1           So the interest groups have actually taken control over  
2 the agency through this process.

3           Chairman Grassley. Ms. Steen, I have had the same  
4 concerns about Waters of the U.S. expressed by my  
5 constituents, and under current judicial deference  
6 doctrines, agencies have wide discretion interpreting their  
7 own regulations. So, question: Are you concerned that  
8 courts will grant broad deference to EPA's interpretation of  
9 its own rules and then for your members and even business  
10 owners and others who are not your members will be left with  
11 little certainty about whether their actions are in  
12 compliance with the law?

13           Ms. Steen. Yes, sir, that is a huge concern of ours,  
14 because this new rule is going to get a lot of deference  
15 from the courts. EPA's interpretation of the rule is going  
16 to get almost complete deference from the court. And the  
17 traditional agricultural exemptions that EPA keeps referring  
18 to throughout this rulemaking process have been extremely  
19 limited by the agencies and their interpretations of the law  
20 over the years. That is why we know, we read this rule, and  
21 we can see--anyone who practices law in this area can see  
22 where this train is headed, and it is headed toward wide-  
23 scale permitting requirements for farmers and ranchers. Any  
24 practitioner under the Clean Water Act knows that. EPA  
25 officials in this town will acknowledge it in private

1 conversations, and yet the talking points and the speeches  
2 by the agency in this rulemaking have denied it. They have  
3 denied it to farmers and ranchers. They have provided  
4 misleading assurances that farmers and ranchers are not  
5 going to face increased permit requirements.

6 Those statements are not going to be before the court.  
7 What is going to be before the court is the text of the  
8 rule, the Federal Register preambles, and all of those  
9 documents have been carefully set up to invite--not just  
10 allow but invite the interpretation that land that is farmed  
11 today can be farmed no longer without a Federal permit for  
12 farmers and ranchers.

13 And if you think that is a good idea, if you want wide-  
14 scale permitting, Federal permitting under the Clean Water  
15 Act for farming activities, fine, let us have that  
16 discussion. Let us look at the cost. Let us look at the  
17 impact on the 96 percent of U.S. farmers who are family-  
18 owned and -operated small businesses. Let us look at the  
19 effect on those operations. Let us look at the effect.  
20 What will the effect be on forcing consolidation within  
21 agriculture, forcing larger farms? Because small farms have  
22 very little ability to deal with these types of regulatory  
23 programs. But EPA has refused to look at those costs and to  
24 look at those impacts, denying that they exist, and going  
25 forward with a rule that they know is going to have that

1 result. And that is infuriating to me.

2 Chairman Grassley. I am going to yield the floor, the  
3 chairmanship, to Chairman Hatch.

4 I am sorry I did not do this before. I have a  
5 statement by the Ranking Member, Senator Patrick Leahy, to  
6 put in the record. Without objection.

7 [The prepared statement of Senator Leahy follows:]

1 Chairman Grassley. Thank you, Senator Hatch.

2 Senator Hatch. Well, thank you.

3 Chairman Grassley. And I will have questions to submit

4 to the rest of you. I am sorry I did not get further.

5 [The questions of Chairman Grassley follow:]

6 / COMMITTEE INSERT

1 Chairman Grassley. Go ahead.

2 Senator Hatch. [Presiding.] Let me ask this of you,  
3 Mr. Cooper. Federal regulations today impose by some  
4 estimates a burden of \$1.86 trillion on the economy. Now,  
5 that is roughly \$15,000 per household and more than  
6 corporate and individual income taxes combined. Now, too  
7 much regulation, especially too much outdated regulation,  
8 means higher prices, lower paychecks, and fewer jobs for  
9 hardworking Americans.

10 Now, every President since Jimmy Carter has agreed on  
11 the need to review our existing regulations to make sure  
12 that they are efficient and are no more intrusive and  
13 burdensome than is absolutely necessary. Nevertheless, the  
14 regulatory burden keeps growing year after year. The Code  
15 of Federal Regulations, now more than 175,000 pages long,  
16 contains more than 200 volumes.

17 And according to the study by the American Action  
18 Forum, the Obama administration's efforts to review old  
19 rules actually added more than \$23 billion in costs on the  
20 economy and nearly 9 million hours of paperwork.

21 Now, to turn this longstanding bipartisan commitment  
22 into a reality, we need to take the responsibility of  
23 reviewing old rules away from the bureaucrats who keep  
24 failing at that task. That is why I introduced the SCRUB  
25 Act, which uses the successful model of the independent BRAC

1 commission and applies it to our existing regulatory burden.

2 Now, Mr. Cooper, as an expert on administrative law, do  
3 you agree that it is time we take a different approach to  
4 tackling this problem with outdated red tape burdening our  
5 economy so that we can actually get some things done in this  
6 country and get some of this regulatory burden off our  
7 backs?

8 Mr. Cooper. Senator Hatch, I very much agree with  
9 those propositions. I think there may be some irony, I  
10 guess, in someone who decries, as I do, the breadth and the  
11 growth of the administrative state to support the addition  
12 of another commission to that body. But the purpose of this  
13 commission, as I understand it, under the SCRUB Act would be  
14 to examine the administrative state, examine retroactively,  
15 which has never been done, examine retroactively in a  
16 systematic fashion the regulatory burdens that these  
17 thousands and thousands, 176,000 pages, as I understand it,  
18 of regulations imposed upon our economy and the American  
19 people. And so I think that would be an excellent place to  
20 start anyway with regulatory reform.

21 It also, I think, respects our constitutional system of  
22 separation of powers. Nothing would come out of this  
23 commission, as I understand it, without--its actions would  
24 be recommendations, just like the BRAC commission, as you  
25 said, Senator Hatch. They would come to the Congress, and

1 they would be enacted under fast-track procedures, to be  
2 sure, but enacted or not enacted. And so the Constitution's  
3 structure is respected.

4 So, yes, Senator Hatch, I do certainly embrace that  
5 reform.

6 Senator Hatch. Well, thank you.

7 Mr. Kovacs, your testimony identified a whole range of  
8 ways in which the current process by which agencies make  
9 regulations is utterly broken, from curtailing the  
10 opportunity for meaningful input from the public to flouting  
11 the legal requirements for transparency and accountability.  
12 Given this mess, the courts are often the only practical  
13 means of holding this out-of-control bureaucracy  
14 accountable.

15 But does not excessive deference by the courts to the  
16 agencies critically--does that not critically limit the  
17 opportunity to hold the agencies accountable and instead has  
18 not this deference allowed the agencies to expand the scope  
19 of their power dramatically?

20 Mr. Kovacs. Well, certainly, Senator Hatch, once you  
21 have deference, the agency really does not have a check on  
22 it. I mean, I think most of us would agree with that. But  
23 it would be unfair to say that getting rid of deference  
24 would solve all the problems. Congress has delegated very  
25 broad authorities to the agencies. The Supreme Court has

1 recognized the delegation. Congress has imposed or has  
2 legislated citizen suits and really since the time they were  
3 enacted has not had any oversight on them. The standing  
4 provisions, because of the citizen suit and who can get into  
5 court, are substantially different for the business  
6 community than they are for the environmental community.  
7 There have been statistics showing that it is about a 2:1  
8 ratio in terms of who has standing. And then on top of  
9 that, you add deference.

10 So this hearing is very important because there are  
11 ways in which we could begin to address this, especially  
12 with--and I keep on saying--the Regulatory Accountability  
13 Act.

14 Senator Hatch. Thank you. My time is up.

15 Senator Perdue, we will turn to you next.

16 Senator Perdue. Thank you, Mr. Chairman.

17 You know, the U.S. economy has actually shrunk in the  
18 first part of this year. The liberal economic policies of  
19 this administration, which includes the most draconian  
20 overreach of the regulator force, regulator agencies, that  
21 have occurred in my lifetime, have absolutely served to  
22 destroy this economy. This administration is failing the  
23 very people it champions--the middle class--the working  
24 middle class it claims to champion.

25 I can tell you from my trips home that bankers,

1 farmers, manufacturers, doctors, retailers, anybody that I  
2 talk to tells me the number one issue in Washington is not  
3 their dysfunction, not their gridlock, but the effects of  
4 this dramatic and combative and punitive overreach of  
5 Federal regulators. We have created the fourth arm of  
6 Government: the regulators. They create more laws than we  
7 do in Congress. And the economy, our free enterprise  
8 system, is the one that is being impacted the most, and the  
9 people who work in that economy.

10 It is hard to underestimate--or overestimate the burden  
11 that the Federal regulators are putting on our economy  
12 today. We do not have the luxury in a competitive world to  
13 do this. Nobody wants to destroy our water, our air, our  
14 environment. And the people, in my experience, who do the  
15 best job of protecting that are the farmers, and they are  
16 the ones that are out crying the most right now about this  
17 overreach on the U.S. Waters Act, and I have a question  
18 about that for Ms. Steen.

19 According to a recent study, a very respected study  
20 done by a national association, our regulation costs our  
21 businesses \$2.1 trillion annually. That is almost 12  
22 percent of our GDP, or \$10,000 for every employee in America  
23 per year. Of course we want rules. We have had those since  
24 our beginning. Of course we want regulation. But this  
25 dramatic overreach is killing American business and our

1 ability to compete abroad.

2 It is just a fact that Federal regulation  
3 disproportionately hurts small businesses. It takes 17  
4 percent of small businesses' revenue right now just to deal  
5 with Federal regulation. That does not account for State  
6 regulation. Those are just the economic burdens. The loss  
7 of productive man-hours and associated drag on innovation  
8 and entrepreneurial energy and to push companies to leave  
9 our country for this very reason.

10 These side effects and unintended consequences are  
11 unimaginable. When I was a kid working on a farm growing  
12 up, the ag agent would show up and actually help us  
13 understand how to comply. I actually worked in a dairy for  
14 a while, and they showed us how to comply. Today those same  
15 agents are looking to put people out of business. The  
16 punitive nature is unacceptable. More than 40 years I have  
17 worked in the private sector, and I have dealt firsthand  
18 with this overreach. But I have never seen it to be more  
19 aggressive, more punitive, more combative than it is today  
20 in the last 5 or 6 years.

21 I have seen what excessive Federal regulation can do to  
22 a business' productivity, profitability, and its job-  
23 creating ability. And right now we have had for a few years  
24 the most overreaching impact on our businesses due to our  
25 regulators.

1           Combating this enormous regulatory burden and actually  
2 shrinking it is one of the main reasons I personally came to  
3 Washington and give up my life to do this.

4           So I want to thank the chairman for holding this  
5 hearing. I think this is the single most important issue  
6 and poses the biggest threat to our free enterprise system  
7 today, second probably only to our national debt.

8           Now, turning to Waters of the U.S., Ms. Steen, very  
9 quickly, I am very concerned about this. This is  
10 unprecedented. It is a radical assertion of agency  
11 jurisdiction and would have a dramatic impact on my State,  
12 Georgia farmers particularly. But this is a letter that I  
13 received from a Board of Commissioners of one of the largest  
14 counties in our State. These are not radical people, and  
15 the sarcasm from the other side that tells me that--or tells  
16 the public that anybody that disagrees with the Waters of  
17 the U.S. impending regulation is ignorant and self-serving  
18 and, you know, just the marginalizing condescension is  
19 intellectually insulting to me.

20           This is a very well thought out letter. They have over  
21 3,000 miles of roads in that county, 1,500 miles of streams,  
22 almost 1,000 miles of ditches on the right-of-ways of those  
23 roads, and 1,400 miles of additional drainage ditches that  
24 would come under the purview of this law. And, frankly, the  
25 way the EPA marketed--you mentioned this earlier, Ms. Steen-

1 -and promoted this rule in social media just boggles my  
2 mind. This was not notice-and-comment rulemaking. Yeah,  
3 they talked to 400 people out there--400 meetings, and then  
4 they promptly ignored most of it. This was not notice and  
5 comment at all. This was a political campaign that the  
6 Obama administration was running from the very get-go  
7 through the EPA, just like when they could not get cap and  
8 trade, they told the EPA to kill coal, and they did it in a  
9 year.

10 Ms. Steen, about the Waters of the U.S., have you seen  
11 other agencies behave like this in your career? You have  
12 got a long, distinguished career. Can you put in context  
13 for us these actions and the dramatic broad-reaching impact  
14 with respect to this rulemaking?

15 Ms. Steen. I would like to be able to do that more  
16 broadly beyond EPA, but my career has focused on EPA. What  
17 I can say is that throughout my career of dealing with EPA  
18 regulations--and I have always been on the industry side. I  
19 have always been on the regulated side of the issues, and  
20 many of those issues and rulemakings have been very hotly  
21 contested over the years. But what I have never seen even  
22 from EPA is the level of gamesmanship and deception that I  
23 have seen going on in this rulemaking. And for those who  
24 believe that there should be an open and honest discussion  
25 with the public, with Congress, an open and honest analysis

1 on the front end of the cost and the impact of new  
2 regulations, it is frightening, and it is disheartening, and  
3 it is disillusioning. And, no, I have never seen anything  
4 like it before.

5 Senator Perdue. Well, thank you.

6 Mr. Kovacs, I would like to go back to sue and settle.  
7 This is a question that I think bears a lot of comment and  
8 thought. I would like to address how litigants are able to  
9 game the regulatory system by using citizen suits and, as  
10 has recently been the case, work with sympathetic agency  
11 officials, sometimes past co-workers, who are not interested  
12 in normal notice-and-comment procedures. Do we have any  
13 idea what the overall impact of these types of sue-and-  
14 settle cases is on the regulatory framework?

15 Mr. Kovacs. Well, certainly, just--and this sort of  
16 dovetails nice with Ellen's comments. We went back and did  
17 an analysis of all the--what we call the high-impact rules,  
18 those over \$1 billion, and over the last 12--between 2000  
19 and 2013, there were 30 of them through all of the Federal  
20 agencies; 17 of them came out of EPA, and most of them were  
21 related to sue and settle. So that is the impact. They are  
22 able to begin prioritizing the agency, and that I think is a  
23 much bigger problem than anything else, because they  
24 literally not only own the agency and their priorities, but  
25 they also have a court that is supervising the agency, and

1 the only party that can actually intervene into the court  
2 proceeding is either the environmental group or the agency.  
3 We are locked out because we do not have standing.

4 Senator Perdue. Thank you.

5 Mr. Chairman, I am over my time, but I just want to  
6 make one last comment. I really applaud the Chairman for  
7 conducting this hearing. I think we need to have further  
8 hearings on this. I will submit other questions, but I  
9 would love to talk about not just the EPA but what the NLRB  
10 is doing, the CFPB, and other regulators out there. This is  
11 having a dramatic impact on our ability to drive a recovery  
12 and get people back to work again.

13 [The questions of Senator Perdue follow:]

14 / COMMITTEE INSERT

1 Senator Perdue. Thank you, Mr. Chairman.

2 Senator Hatch. Well, I sure agree with you.

3 Senator Tillis?

4 Senator Tillis. Thank you, Mr. Chair.

5 While the Senator from Rhode Island was reading his  
6 statement, I almost felt guilty because I realized that I  
7 have made some statements and not properly attributed the  
8 other Senators who had used the comments before, because I  
9 associate myself with a lot of the concerns that other  
10 Senators have expressed about regulatory overreach.

11 I was the Speaker of the House down in North Carolina  
12 for 4 years before I came into the Senate back in January,  
13 and we in four successive years implemented regulatory  
14 reform that has, I think, been one of the single greatest  
15 stimulators for our economy. Now we are outperforming  
16 almost every other State in the Southeast as a result of  
17 right-sizing reforms. We did simple things like saying you  
18 cannot promulgate new regulations in excess of Federal  
19 standards unless you consult with the legislature, have a  
20 business case, demonstrate the environmental or other  
21 benefit for the regulation versus the cost, common-sense  
22 reforms like that that I think this Congress needs to take a  
23 look at.

24 I have just a few brief questions. I think the first  
25 one may be most appropriate for Ms. Steen or Mr. Kovacs.

1 You know, I think the other thing that is lost in the  
2 discussion, we talk about regulatory abuse and corporate  
3 greed. In North Carolina, 80 percent of the jobs that are  
4 created are created by small businesses. A lot of these are  
5 mom-and-pop shops that do not have the advantage of large  
6 departments of regulatory affairs.

7 Now, a lot of the jobs that have been created over the  
8 past couple of years have been hundreds of thousands of jobs  
9 in regulatory affairs departments. Not a single hour of  
10 productivity is created by these jobs. So we all high-five  
11 and we say hundreds of thousands of jobs have been created.  
12 But go take a look at those jobs and understand why we are  
13 not increasing productivity, why we are not seeing capital  
14 investments, why we are not seeing savings applied to  
15 productive ends.

16 Now, back in these small businesses, the thing that I  
17 worry about when I talk to farmers and I talk to small  
18 businesses, they do not have the benefit--Ms. Steen, I will  
19 star with you. They do not really have the benefit to  
20 engage on a proactive basis in the public comment period to  
21 really be able to articulate at their level the damaging  
22 effects, depending upon where you go with regulation, some  
23 of which are needed. Do you--and, Mr. Kovacs, you can chime  
24 in as well. Do you all have any suggestions on ways that we  
25 could really improve more genuine and meaningful input of

1 these folks that oftentimes do not even hear about the  
2 regulations or the promulgation or the potential  
3 implementation of the regulations until it is too late for  
4 them to provide meaningful, practical input? Any  
5 suggestions on the process? We will start with you, Ms.  
6 Steen, and then we will come to Mr. Kovacs.

7 Ms. Steen. Well, I wish I could think of a fantastic  
8 new idea for how to improve the voice of those ordinary  
9 Americans in the process. I think with respect to farmers  
10 and ranchers, many of them rely on groups like ours to  
11 dissect the new regulations, to make sense of it, to  
12 translate it into terms that a non-Clean Water Act  
13 practitioner can understand, and then to help them have that  
14 voice. And we try to do a good job of that.

15 What is so frustrating is that--and we had a really  
16 important conversation with our stakeholders, with farmers  
17 and ranchers across the country during this process, and  
18 many of them did get very active, very vocal to try to speak  
19 out on the rule. But when you speak out and the response  
20 back from the agency is, "That is silly," "That is  
21 ludicrous," "You do not need a permit now, you are not going  
22 to need one later," what do you, an ordinary person, say  
23 when the Administrator of the EPA says that to you?

24 Senator Tillis. Mr. Kovacs?

25 Mr. Kovacs. Senator, this is truly one area where

1 Congress has really tried to get the input. If you go  
2 through--for example, you set up the Regulatory Flexibility  
3 Act, which was specifically to empanel businesses for the  
4 agencies to--for SBA to empanel businesses and to have them  
5 talk to the agency, and for both Waters of the U.S. as well  
6 as the others, the agency refused to go through this panel  
7 process.

8 To involve States, you have set up the--you passed the  
9 Unfunded Mandates Reform Act, anything over \$100 million  
10 they have to determine whether it is an unfunded mandate on  
11 the State. The agencies have refused to undertake this  
12 process. Thirty-five years ago, Congress was so concerned  
13 about the regulatory impact on jobs that it mandated that  
14 EPA do a continuing evaluation of the impact on employment,  
15 and it has never done one in 35 years.

16 So you have got a process where the agencies have  
17 completely separated themselves from Congress, and they  
18 really do not feel as though they have to do this for you.  
19 And because the courts, unlike with NEPA where the courts  
20 have actually grafted on a private right of action, the  
21 courts have not grafted on a private right of action for  
22 UMRA or Regulatory Flexibility or for the employment  
23 impacts.

24 So it is much deeper. This is some kind of a disregard  
25 where they do not even attempt to do what you have asked

1 them to do so that they get all the facts as part of the  
2 process.

3       Senator Tillis. Thank you. And thank you, Mr. Chair.  
4 I have several questions that I am going to submit, and  
5 hopefully we can get your feedback. One that I find  
6 particularly disturbing or offensive as a non-lawyer is the  
7 sue-and-settle practice and some ideas on how we may be able  
8 to get more active involvement and other third parties or  
9 the courts in that. But I will submit those for the record  
10 and look forward to all of your feedback. We submit it to  
11 each and every one of you for your feedback.

12       [The questions of Senator Tillis follow:]

13       / COMMITTEE INSERT

1 Senator Tillis. Thank you.

2 Thank you, Mr. Chair.

3 Senator Hatch. Thank you, Senator.

4 Senator Whitehouse?

5 Senator Whitehouse. Thank you very much. Sorry I have  
6 had to be in and out. We have actually been marking up the  
7 bill that is to some degree the subject of this hearing over  
8 in the EPW, so I have had to be back and forth.

9 Professor Parenteau, could you just give us a quick  
10 overview on the Clean Waters rule, the backdrop from the  
11 United States Supreme Court that constrains and informs what  
12 EPA is obliged to do under this rule and how that has played  
13 out in the rule? Sometimes people commenting on this rule  
14 act as if the EPA had a free hand to do anything, to ignore  
15 certain types of pollution, to ignore certain types of  
16 effects on waterways and so forth. But, in fact, the  
17 Supreme Court has spoken pretty strongly about this, and  
18 under our system of Government, administrative agencies are  
19 obliged to follow what the United States Supreme Court has  
20 said.

21 Mr. Parenteau. Correct, Senator Whitehouse, and the  
22 seminal decision is the Riverside Bayview case from 1985.  
23 That is the first time the United States Supreme Court  
24 squarely addressed the question of what did Congress intend  
25 to cover when it enacted the 1972 Clean Water Act. It was a

1 unanimous decision. You do not see that very often anymore-  
2 -a unanimous decision 9-0 from the United States Supreme  
3 Court, authored by Justice White, a Westerner, who  
4 understands water, if anybody did. And the decision is  
5 worth reading, and I commend it to every member of the  
6 Committee, because the United States Supreme Court read and  
7 interpreted Congress' intent in 1972 to give a very broad  
8 definition to the term "Waters of the United States" and  
9 grounded that interpretation on science.

10       The opinion really was a foreshadowing of what we now  
11 think of as more of the ecological age. Justice White went  
12 on about the functions and values of streams and wetlands to  
13 public health, to recreation, to fisheries, to economic  
14 interests, to the national interest, and it is a ringing  
15 endorsement of strong Federal involvement in the effort to  
16 restore and maintain the chemical, physical, biological  
17 integrity of the Nation's waters.

18       From that very high point of jurisprudence under the  
19 Clean Water Act in 1985, we go to the 2001 decision in  
20 SWANCC, in the Rehnquist Court, and in that decision Justice  
21 Rehnquist was able to garner a majority, 5-4, a narrow  
22 decision, to say we are not going to give Chevron deference  
23 to the agency's interpretation of the scope of the Clean  
24 Water Act. We cannot decide for ourselves exactly what the  
25 scope of that Act is, but we know that whatever the Corps is

1 using at the time is not it. So then we had a hiatus period  
2 between 2001 and 2006 when the Rapanos case came down where  
3 people were trying to figure out what is the meaning of the  
4 SWANCC decision? It dealt with a very atypical situation of  
5 an abandoned sand and gravel pit in northern Cook County,  
6 Illinois, and no hydrologic connection to any other water,  
7 totally intrastate, non-navigable, and the Corps had  
8 asserted jurisdiction based on migratory bird use. So a  
9 very narrow decision by the Court.

10 In Rapanos, once again you had another wetlands  
11 question, and once again a narrow--this time actually a  
12 fractured decision where no majority of the Court could  
13 agree on where the line should be drawn. Again, refusing to  
14 grant the agency's interpretation any deference, but unable  
15 to come up with a judicial definition and a default. And  
16 that is where Chief Justice Roberts squarely said to the  
17 agencies you have to engage in a rulemaking. Justice  
18 Kennedy said that rulemaking has to be grounded in science.  
19 It has to be grounded in the functions and values of the  
20 streams and wetlands you are talking about. It has to be  
21 qualitative. It has to be rigorous. EPA has picked up that  
22 challenge. That is what they have done in this rule.

23 Senator Whitehouse. And did the Supreme Court give any  
24 instructions about the extent to which economic  
25 considerations had to be balanced into that equation?

1           Mr. Parenteau. Of course, the Supreme Court is always  
2 saying Congress has more than one purpose in mind with every  
3 statute, including the Clean Water Act, and the EPA has to  
4 take into account the impacts on the regulated community and  
5 others from rules that are adopted in interpreting the law.  
6 EPA is always caught in the middle. There are people  
7 pushing EPA to restrict the jurisdiction of the Act, people  
8 pushing EPA to extend it, people saying, "I rely on clean  
9 water." We had testimony before EPW, as you will recall,  
10 Senator Whitehouse, from the brewing industry saying, "God  
11 help us if we do not have clean water to make beer." We had  
12 testimony from the fishing industry saying, "God help us if  
13 we do not have clean water to support our fisheries and if  
14 we do not have streams where the fish can spawn and if we do  
15 not have wetlands that provide the nutrients for the  
16 fisheries to grow. So please protect these economic assets  
17 for our business interests."

18           So these are complex issues. There are a lot of  
19 winners and losers if you want to look at it that way. Some  
20 people benefit from strong regulation; some people benefit  
21 from weak regulation. The agency is caught in the middle  
22 always in trying to balance these competing concerns. There  
23 is no perfect outcome, there is no formula for this. You do  
24 the best that you can, and I think EPA did.

25           Senator Hatch. Thank you, Senator.

1           The Senator from Arizona.

2           Senator Flake. Thank you. I also am very concerned  
3 about the EPA's Waters of the U.S. rule. Coming from  
4 Arizona, we have a lot of dry river beds that have somehow  
5 been caught up in this as well, and the logic just seems  
6 beyond most of us for this.

7           I recently introduced the Defending Rivers from  
8 Overreaching Politics Act of 2015 with Senator McCain and  
9 Senator Fischer. I think the bill is necessary because the  
10 science behind the rule is essentially unfinished.

11          The Assistant Secretary of the Army Corps, I think it  
12 was Jo-Ellen Darcy, stated the regulations were based on the  
13 Scientific Connectivity Report. They claimed the report  
14 showed connections between nearly all water bodies, but the  
15 proposed rule was drafted before the science on which the  
16 proposed rule was based had been reviewed by the Scientific  
17 Advisory Board of the EPA. I do not think it makes sense to  
18 most of us to promulgate a rule before the science is more  
19 settled in this regard.

20          Do you want to comment on that, Ms. Steen? Have they  
21 gotten ahead of some of the science here?

22          Ms. Steen. Well, I think they have taken a very  
23 aggressive approach to the science, and I think they have  
24 done it--of course, science is relevant to the question of  
25 what is a jurisdictional water, and this report's cases

1 support that. But I think the agency has taken the  
2 opportunity to take the science and use it to extend the law  
3 right back to where it was before those Supreme Court  
4 decisions to encompass essentially any water, any water  
5 feature within the United States if the agency chooses to do  
6 that. I do not think that is what Congress meant in 1972,  
7 and I do not think that any amount of science about the  
8 interconnectedness of things would persuade anyone that in  
9 1972, when it wrote the Clean Water Act, Congress had in  
10 mind that you might take that and regulate a small dip in  
11 the landscape where water simply channels and flows when it  
12 rains and at no other time. But in my opinion, the agency  
13 has taken the opportunity to cloak the rule in science  
14 because science is very difficult to challenge in court.

15 Senator Flake. Mr. Cooper, do you have any thoughts on  
16 this with regard to science?

17 Mr. Cooper. Senator Flake, I am going to defer to Ms.  
18 Steen's response to the specific study on that question.

19 Senator Flake. All right. A question for you, Mr.  
20 Cooper. As everybody here has testified to, there are a  
21 number of requirements on agencies to improve transparency  
22 and accountability when issuing regulations such as the  
23 notice-and-comment process. However, we are seeing a  
24 practice among agencies of pursuing quasi-regulatory  
25 strategies such as memoranda, policy statements, and

1 guidance in an attempt to effect policy change without  
2 triggering some of the requirements with regard to notice.  
3 Do you want to comment on that? Is that a real problem?

4 Mr. Cooper. It is a very serious problem, Senator  
5 Flake. Just in the context of my own experience as a  
6 practitioner and litigator, I am involved in a lawsuit  
7 challenging what is called Operation Choke Point, a  
8 situation in which the banking regulatory agencies along  
9 with the Department of Justice have sought very aggressively  
10 to try to cut off, to choke off the financial access of  
11 certain disfavored businesses, perfectly lawful but  
12 disfavored businesses in this country. And they have done  
13 that not through notice-and-comment rulemaking but through  
14 back-room types of pressure on the banks, the banks they  
15 regulate, to try to terminate the relationships that the  
16 banks have and the access to critical financial services of  
17 these disfavored businesses that the banks have banking  
18 relationships with.

19 Senator Flake, I would also add that the authority that  
20 the regulators have, the administrative state has, not only  
21 to interpret the statutes under which they are authorized,  
22 but to also interpret authoritatively the regulations that  
23 they then enact under those provisions creates a kind of a  
24 domino effect, giving them just enormous, enormous powers.  
25 They get not only to write the rules; they can interpret the

1 rules that they actually write.

2 Senator Flake. Thank you, Mr. Chairman.

3 Senator Hatch. Thank you.

4 The Senator from Delaware.

5 Senator Coons. Thank you, Senator Hatch. To the  
6 witnesses today and Senators, I come to the Senate with  
7 myself having some experience in business, having spent 8  
8 years as in-house counsel at a company, a multinational  
9 where compliance with regulations was a challenge for us and  
10 was a cost and something that we wrestled with at times.  
11 And as a Senator and former county executive, I have heard  
12 complaints from businesses large and small about compliance  
13 costs, complexity, difficulty, whether EPA or OSHA. So I am  
14 well aware that regulations sometimes cause a cost and  
15 headaches and concerns that corporations would rather not  
16 pay.

17 But I have also had the opportunity just as a citizen  
18 as well as an elected official to see instances where  
19 corporations cut corners and ruined lives, and we are all  
20 aware of the regulatory capture that facilitated some of the  
21 Deepwater Horizon disaster which fouled the gulf coast and  
22 caused more than \$50 billion in damages and closed thousands  
23 of small businesses. So I am wary of legislative proposals  
24 that try to roll back agency action on the basis that  
25 industry does not have enough say in rules. I think we need

1 to both respect the needs of business and their legitimate  
2 concerns, but not lose sight of the fact that the first goal  
3 of regulations ought to be to protect the public health and  
4 safety.

5 So, Mr. Weissman, if I might, I just wanted to open  
6 with a question about the cost of regulation, which is a  
7 common complaint that I have heard and experienced. An OMB  
8 analysis suggested in 2013 regulatory benefits for major  
9 rules exceeded total regulatory costs by several multiples,  
10 somewhere between 2 and 14 times. Can you talk to how  
11 Federal regulatory agencies consider costs and benefits when  
12 deciding whether to go forward with a regulation? And how  
13 does that assessment of costs and benefits differ from how a  
14 business might look at it?

15 Mr. Weissman. Thank you very much, Senator Coons. I  
16 would say as a starting point that agencies by and large are  
17 deeply sensitive to compliance costs of the rules they  
18 issue, in our view often too sensitive and often too close  
19 to the industries that are complaining about it.

20 For rule from the executive branch, they are subjected  
21 to review by the OMB through the OIRA office, and they go  
22 through one or another version of cost-benefit analysis  
23 where there is very careful consideration of costs and  
24 actually, I must say, less careful consideration of  
25 benefits. And I detail the disparity between the two in my

1 written testimony.

2 But looking at the aggregate picture, as you point out,  
3 the actual documented cost of significant rules versus the  
4 actual documented benefit of significant rules over the last  
5 decade, the benefits vastly exceed the cost. You take the  
6 low-end benefit and the high-end cost, it is about 2-1/2  
7 times. If you go to the other spectrum, it is now 15 times  
8 in the last report from OMB. So the benefits of rulemaking  
9 using narrow accounting measures really are significant for  
10 society. Those I think undercount--they overcount costs  
11 because they often rely on cost estimates from industry that  
12 do not take into account technological dynamism, economies  
13 of scale, the ability to adapt, and retrospectively costs  
14 are usually far less than they were predicted to be. They  
15 also undercount on the benefits side second-order effects,  
16 but also all kinds of things that are not quantitative. It  
17 is hard to reduce health, safety, privacy, democracy,  
18 fairness, sense of community to dollar terms, but that is  
19 what they are forced to do when they are looking across  
20 that. So I think from a social point of view, there is no  
21 question about this.

22 You are correct that businesses may look at the cost  
23 issue differently. So a technological standard that may  
24 impose a cost on one firm, say \$1 million, that firm might  
25 reasonably just look at it as a \$1 million cost. And that

1 is, in fact, how it will be counted in a cost-benefit  
2 analysis. But from a social point of view, there may be so  
3 many offsetting benefits just from that cost, which is to  
4 say they are investing, they are buying some new technology,  
5 someone is innovating to respond to that technology. There  
6 may be all kinds of economic benefits--even though there is  
7 a cost to the firm, there may be offsetting social benefits,  
8 social and economic benefits for society.

9 Senator Coons. Well, and I would assume that all of us  
10 would agree that a Federal agency, when going through  
11 rulemaking, should consider the costs and benefits to all  
12 affected Americans, not just or solely the corporations that  
13 are affected.

14 Just as a closing comment, with the indulgence of the  
15 Chair, my twins just turned 16. I am particularly sensitive  
16 to the fact that automobile accidents claim 30,000 lives a  
17 year and are the leading cause of death for young people.  
18 As a perhaps overly concerned parent, Public Citizen was  
19 founded in large part to promote common-sense automobile  
20 regulations in the face of strong resistance because of  
21 implementation costs. But since Public Citizen's founding,  
22 automobile deaths have declined 60 percent. This is a per  
23 capita population basis. Is that an example of regulatory  
24 success or failure?

25 Mr. Weissman. Well, I would say that is an example of

1 enormous regulatory success, but there are some failures  
2 that are worth pointing out. The GM ignition switch  
3 failure, which has cost more than 100 lives, that is an  
4 example of regulatory failure. The agency should have done  
5 a better job, and it is now saying so in a recent report.

6 I also detail in my testimony the failure of the agency  
7 to adhere to congressionally mandated deadlines to impose a  
8 back-over rule that would prevent accidents where people are  
9 unable--drivers are unable to see what is behind them and  
10 back into usually small children or sometimes the elderly.  
11 We had to sue the agency to get a rule out of the Department  
12 of Transportation. The effect of that delay was about 100  
13 lives a year or more because the agency failed to act. Why  
14 did the agency fail to act? Partly because of misguided  
15 cost-benefit analysis and maybe especially because of undue  
16 political interference from the auto industry.

17 Senator Coons. Thank you, Mr. Weissman. I see I have  
18 exceeded my time. Thank you for your work.

19 Senator Hatch. Thank you, Senator.

20 Senator Blumenthal?

21 Senator Blumenthal. Thank you, Mr. Chairman.

22 You know, when I think about rulemaking, I often think  
23 about the tragedy that occurred at L'Ambiance Plaza in  
24 Bridgeport, Connecticut. I do not know how many of you are  
25 familiar with what happened in 1987 or with the 28 men who

1 never came home that day, men like Mike Adona, who left his  
2 wife and his three daughters to go to work. He never came  
3 home. Like 27 of his co-workers, he was killed when a half-  
4 finished structure that he was building collapsed on him,  
5 killing 28 of them. His employer had been using a method  
6 known as "lift slab construction." The Occupational Safety  
7 and Health Administration knew that lift slab construction  
8 was dangerous. In 1982, in fact, it initiated a rulemaking  
9 designed to strictly regulate that process. 1982. And it  
10 knew that similar use of that construction process had led  
11 to deaths around the country, but it did nothing, partly  
12 because of burdensome procedural requirements. Partly  
13 because of special interest pushback, partly because of a  
14 lack of will on the part of the agency, those regulations  
15 had not been finalized on the day that Mr. Adona lost his  
16 life in 1987. That death--his death--was preventable, so  
17 were the deaths of 27 of his co-workers, if the regulatory  
18 process had worked.

19 Regulations have real-life consequences. They have  
20 real-life costs in dollars and lives. And delay has costs  
21 as well when agencies have to jump through hoop after hoop  
22 after hoop and fail to do their job.

23 I have just come from a hearing of the Commerce  
24 Committee where we were discussing the issue of positive  
25 train control, a technology that has been in existence for

1 years and years and years. The deadline for implementing it  
2 is approaching at the end of 2015. But most railroads will  
3 have failed to adopt it, and the FRA, a Federal agency, has  
4 failed to take sufficient action to enforce that deadline,  
5 as well as some 60 or 70 other recommendations from the NTSB  
6 for rail safety.

7 I think that the blame will be on Congress as well as  
8 the FRA and the railroads for failing to implement stronger  
9 measures that will impose fines and penalties for failure to  
10 meet regulatory deadlines.

11 I would like to ask, Mr. Weissman, if your authority to  
12 implement citizen suits is taken away, will there be a  
13 sufficient check on the Government to meet these deadlines?

14 Mr. Weissman. Well, I should say, first of all, we do  
15 not have nearly the authority as a public interest advocacy  
16 group that has been characterized here. In contrast to what  
17 Mr. Kovacs said, in general, regulated industry has standing  
18 always to bring challenges. Public interest groups have a  
19 difficult time bringing cases on behalf of a general public  
20 interest rather than a particularized one. But exactly as  
21 you say, regulatory delay has real human cost, and I think  
22 we cannot do enough to tell the stories that you are telling  
23 because they remove us from the statistical abstractions  
24 that make it easy to avoid the real-life consequences.

25 But the cases that we bring or the cases that are

1 really regulatory accountability, agency accountability  
2 cases that are misnamed "sue and settle," those are cases  
3 designed to force agencies to comply with deadline as  
4 Congress has instructed them to do overwhelmingly. And what  
5 we see in case after case is that the agencies feel free to  
6 ignore congressional deadlines until there is a subsequent  
7 judicial order. And the agencies will tell you that. So  
8 those cases are really vital.

9       The examples you highlighted--and just to go back to  
10 this back-over rule case, which you know a great deal about,  
11 and I think is really infuriating, congressional mandate to  
12 take action, and the regulators were slow-walking it. They  
13 did not like the cost-benefit analysis. They were not  
14 thinking about the real lives at stake. And had we not  
15 brought litigation to force a rule out, we would still be  
16 waiting for that rule, and we would probably be waiting for  
17 that rule in 2020.

18       Senator Blumenthal. I appreciate that excellent  
19 answer.

20       Mr. Kovacs, can you discuss the contention that sue-  
21 and-settle lawsuits undermine public participation in  
22 rulemaking?

23       Mr. Kovacs. Certainly. The issue is that EPA--and I  
24 think there is agreement on it--misses somewhere between 85  
25 percent and 98 percent of all of its deadlines. And so what

1 happens when you have a sue and settle and you have a court  
2 order ordering the agency to do a certain thing, those rules  
3 actually then become the priority. So what happens is the  
4 agency itself, instead of being this independent actor  
5 deciding what the priorities are based on what you in  
6 Congress give them as a budget and what they think you are  
7 directing them to do, are now pigeonholed into dealing with  
8 a certain group of cases because they have a court order.  
9 And in the Administrative Procedure Act, we all should have  
10 an equal access to both the agency as well as to the court.

11 And the second point there is a law review article  
12 where they did a statistical analysis, and we are denied  
13 standing 50 percent more of the time than you are, than the  
14 public side.

15 Senator Blumenthal. Any other comments in response to  
16 that questions?

17 [No response.]

18 Senator Blumenthal. Thank you, Mr. Chairman.

19 Senator Hatch. Thank you, Senator--did you want to say  
20 something?

21 Mr. Weissman. I would like to say something, if I  
22 might, Mr. Chair. It is not the case that the agency has  
23 discretion to choose to follow congressional orders. There  
24 is no discretion in these cases. The agency does not get to  
25 choose its priorities. The agencies are supposed to do what

1 Congress has instructed them to do.

2 Senator Blumenthal. Because it is the law of the land.

3 Mr. Weissman. Because it is the law. So the lawsuits  
4 are intended to enforce congressional will. There is no  
5 agencies run amok. There are no special powers conferred on  
6 public interest groups. We are trying to help enforce  
7 congressional will on the agencies.

8 Senator Blumenthal. And, essentially, the lack of  
9 Federal enforcement means that either citizens or State  
10 Attorneys General or others take the place of those Federal  
11 agencies that are neglecting their duty.

12 I think there was one more comment.

13 Mr. Parenteau. Thank you, Senator Blumenthal. Just a  
14 very quick one, and that is to say that in no circumstance  
15 could a court ever enter an order that would bind an agency  
16 in a future rulemaking, period. Under the Meese memorandum,  
17 the Department of Justice incorporates--and I have seen  
18 every one of them. The Department of Justice incorporates  
19 in every single decree a requirement that if rulemaking is  
20 anticipated as a result of the settlement agreement, that  
21 rulemaking will be conducted under the Administrative  
22 Procedure Act. Nothing that is done in the consent decree  
23 can bind the agency in any way, shape, or form, so public  
24 participation is protected in these decrees.

25 Senator Blumenthal. And I think that answers the

1 question that I raised about the effect on public  
2 participation. Thank you.

3 Senator Hatch. Thank you, Senator.

4 Mr. Cooper, in his seminal opinion in Marbury v.  
5 Madison that secured the principle of judicial review, Chief  
6 Justice John Marshall wrote, "It is emphatically the  
7 province and duty of the judicial department to say what the  
8 law is." Is Chevron compatible with Justice Marshall's  
9 words? Or is Chevron better described as commanding the  
10 judiciary to say that the law is almost anything that a  
11 Federal agency wants the law to be?

12 Mr. Cooper. Senator Hatch, Chevron is not at all  
13 compatible with Marbury v. Madison. That was one of the  
14 opening points I tried to emphasize in my statement. The  
15 Court made clear that it is the province, peculiar province,  
16 of the judiciary to say what the law is, and in that regard  
17 they were relying on Alexander Hamilton's famous statement  
18 in Federalist No. 78.

19 Now, contrast that with the Chevron doctrine where,  
20 despite the language of Section 706 of the APA which directs  
21 consistent with the separation of powers that the reviewing  
22 court rather than the reviewed agency, the reviewing court  
23 shall decide all questions of law and, therefore, to  
24 interpret the statutes before them. Contrast that with  
25 Chevron, which demands that the courts actually accept

1 agency interpretations notwithstanding the fact that they  
2 think they are wrong, they think they are wrong, they are  
3 not the best understanding using the traditional tools of  
4 statutory construction, the best understanding of Congress'  
5 meaning, the meaning of the statute, Congress' intent. So  
6 long as the agency is somewhere on the target--somewhere on  
7 the target--Senator Hatch, the courts must defer to that  
8 even though, again, they believe they are wrong. And that  
9 includes the United States Supreme Court. It is the  
10 reviewing--it is now the agency that has the last word, and  
11 that cannot be squared with Marbury v. Madison or our  
12 separation of powers.

13 Senator Hatch. Mr. Kovacs, and also you, Mr. Cooper,  
14 would you identify some of the most unreasonable cases that  
15 you have encountered over the years in which Chevron is used  
16 as an excuse to allow an agency to defy the law? One  
17 example that readily comes to my mind is the King v. Burwell  
18 case that is before the Supreme Court right now, which is  
19 heard by the Court this term, and which the Fourth Circuit  
20 below ratified HHS' effort to rewrite what I consider to be  
21 the unambiguous text of the Obamacare statute using Chevron  
22 deference. So I will turn to you first, Mr. Kovacs.

23 Mr. Kovacs. Well, I think when you get into the  
24 deference issue, it is more of--yes, it is case by case and  
25 it is what the courts are doing, but it is more of the

1 psychology of the agency. There is no check in the system.  
2 And some courts do not always apply deference but most do.  
3 But what happens is the agency knows that they can push the  
4 limits of their rulemaking and there is really not going to  
5 be a check because the agency knows that the court is  
6 generally going to apply the deference, and I think that is  
7 the bigger problem that is driving this. It just unlocks  
8 any inhibitions they have of implementing congressional  
9 intent.

10 Senator Hatch. Could you list a few unreasonable  
11 cases?

12 Mr. Kovacs. I will send you a response to that in  
13 writing, and we will give you three or four of them.

14 Senator Hatch. That would be fine.

15 [The information follows:]

16 / COMMITTEE INSERT

1           Mr. Cooper. Senator Hatch, let me give you a concrete  
2 example of the liberating effect that I would submit to you  
3 Chevron has on the administrative state and all of the  
4 agencies within it. In a case called Utility Air Regulatory  
5 Group v. EPA, decided just, I guess, last term actually, the  
6 term before, perhaps, the issue was whether the EPA could  
7 effectively and, you know, quite straightforwardly ignore  
8 numerical requirements in a statute. The statute itself  
9 imposed permitting requirement on all stationary sources  
10 emitting 100 or 250 tons of air pollutants per year. Well,  
11 the EPA, in regulating greenhouse gas emissions, could not  
12 live with those numerical requirements, and so it simply  
13 rewrote them to require permit applications relating to  
14 82,000 tons of air pollution a year.

15           The Supreme Court rejected that use of the agency's  
16 interpretive authority saying now they have gone beyond even  
17 where Chevron allows them to go. But that case was 5-4.  
18 There were four Justices prepared to accept under Chevron  
19 deference an agency's actually rewriting interpreting  
20 numerical requirements to be something other than what they  
21 are.

22           There are legions of cases, Senator Hatch, that show  
23 the agency is quite understandably extending their  
24 interpretive authority to the very extent of its limits, and  
25 its limits are very wide--anything that is reasonable, any

1 interpretation that is within the permissible scope of  
2 Congress' possible meaning.

3       It is hard enough, Senator Hatch, when an agency or a  
4 court attempts in good faith using the traditional tools of  
5 statutory construction to discern the meaning as best they  
6 can, the best meaning of a statute. With the agencies being  
7 given essentially carte blanche authority to get anywhere on  
8 the target, they will always get as close to the edge as  
9 they can that advances their particular bureaucratic agenda.  
10 And that is understandable, and I do not blame them for  
11 that. The problem is there is no judicial check on that  
12 activity.

13       Senator Hatch. Well, Mr. Kovacs, proponents of  
14 increased regulation frequently frame their efforts as an  
15 attack on big business. But isn't it true that a lot of  
16 small businesses are affected and that many of these  
17 expensive new rules hurt small businesses the most, and  
18 farmers and ranchers and others, because they cannot afford  
19 the expensive compliance infrastructure of larger  
20 businesses? Moreover, isn't it worth considering how the  
21 costs of regulations get passed on to ordinary Americans in  
22 the form of higher prices, smaller paychecks, fewer job  
23 opportunities? I could go on and on.

24       Mr. Kovacs. Well, Senator, as you know, Congress in  
25 the passage of the Regulatory Flexibility Act required the

1 Small Business Advocacy Group to meet with the agencies on  
2 regulations that have a substantial impact on a large number  
3 of small businesses, and, for example, in the WOTUS rule,  
4 EPA refused to meet with any of the panels. They did the  
5 same thing in the Clean Power Act, and they did the same  
6 thing with ozone. They took the position that there was  
7 absolutely no cost on small business.

8 So, again, going back to Chevron and the psychology,  
9 you have an agency that says, "We just do not have to  
10 comply," and that is a little bit different than saying that  
11 they should care.

12 And the second part is, you know, 35 years ago Congress  
13 in all of the environmental statutes put in this requirement  
14 on EPA to do this continuous evaluation on employment and  
15 job impacts. And for 35 years, the agency has refused. And  
16 so what happens is when you go back to the 1970s and you  
17 look at what really the structure of the deal with between  
18 Congress--Congress recognized that regulations would have an  
19 impact on jobs, and it would have an impact on industry  
20 because they were going to be expensive. But in return, it  
21 asked for this continuing evaluation. You got the  
22 regulations. You never got the evaluation. So to some  
23 extent, you are dealing without the information you have  
24 asked for 35 years to have.

25 And the second thing in terms of the modeling, we did a

1 very extensive study on how EPA uses modeling, and out of  
2 the 56 rules that would have had to be modeled just because  
3 of their cost, 54 of the rules used what they call the  
4 "partial economic analysis," and that partial analysis only  
5 estimates how many new jobs you would put into a facility  
6 just to comply with the regulation. They did not use the  
7 whole economy modeling, which would have actually looked at,  
8 well, what is the cost of the new jobs, what is the cost of  
9 the new product, and how does that translate through  
10 society?

11 And one quick example. On the utility map, for  
12 example, EPA estimated, I believe, that there were going to  
13 be 8,000 jobs created by the regulation; they would be the  
14 consultants. When we did the whole economy modeling and we  
15 actually took EPA's numbers and just ran it with the whole  
16 economy modeling, it came out to, I think, about 85,000 lost  
17 jobs.

18 So even in the model--and the Senate has taken care of  
19 a lot of that. I think it was you and Senator Vitter have  
20 got the SAB doing now this whole economy modeling to find  
21 out why the agency is not using it more.

22 Senator Hatch. Thank you.

23 Mr. Cooper, just another question to you. Would you  
24 discuss your views on the Skidmore decision? Compare it to  
25 the Chevron deference. Is Skidmore an improvement over

1 Chevron, or does it suffer from the same faults?

2 Mr. Cooper. Senator Hatch, I believe Skidmore is a  
3 large improvement over Chevron. Chevron essentially  
4 liberated the agencies from Skidmore. Skidmore had been the  
5 governing standard of judicial review of agency action.

6 Do not misunderstand me, though. Skidmore was framed  
7 in vague enough language that it, too, obscured what in my  
8 opinion should be the goal of any agency and should be the  
9 standard of review of any court reviewing agency  
10 interpretation of ambiguous statutory provisions, which is:  
11 What is the right answer? What is the answer that, again,  
12 using the traditional tools of statutory construction, best  
13 captures the meaning of the provision that Congress  
14 intended?

15 Skidmore essentially says to put it in bottom-line  
16 terms. The Court will review anything that the agency  
17 considered, including its consistency with its own prior  
18 practices, that is persuasive to the Court that the agency  
19 got it right. That is an improvement on Chevron, but it is  
20 not, in my opinion, the right standard.

21 Senator Hatch. Well, there are a whole bunch of other  
22 questions I would like to ask, but I think we have kept you  
23 all here long enough, so I will submit those in writing.

24 [The questions of Senator Hatch follow:]

25 / COMMITTEE INSERT

1           Senator Hatch. This is an important hearing, and, of  
2 course, we are trying to find some effective solutions that  
3 will work for everybody rather than just one side or the  
4 other, because right now it is not working. Right now,  
5 bureaucracy tends to engulf everything in our lives, and  
6 somehow or other we have got to get back to where statutes  
7 mean what they say and we do not have unelected bureaucrats  
8 deciding all these laws the way they are today and imposing  
9 them upon everybody at a cost of trillions of dollars over  
10 the years.

11           So this is important stuff, and I just want to thank  
12 all of you for being here and for taking time off of your  
13 busy schedules to help us on the Committee to understand a  
14 little bit more about what this is all about.

15           Thanks for your time, and we appreciate your effort,  
16 and with that--I do not see anybody else here--we will  
17 adjourn until further notice. Thank you.

18           [Whereupon, at 11:52 p.m., the Committee was  
19 adjourned.]

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