

Charles J. Cooper
“Examining the Federal Regulatory System
to Improve Accountability, Transparency and Integrity”
Written Responses to Senator David Vitter’s Questions for the Record
July 10, 2015

1. **QUESTION:** In *Marbury v. Madison*, the Supreme Court held that “[i]t is emphatically the province and duty of the judicial department to say what the law is.” Although cases like *United States v. Mead Corp.* softened some of the blow from the decision in *Chevron v. NRDC* by increasing the formality standards for statutory interpretations by Federal agencies, the so-called “Chevron deference” created by the case still gives great authority to these agencies that should rest in the hands of the judicial branch regarding statutory interpretation. What are some of the more egregious examples that you can recall of this judicial power being abused by Federal agencies?

ANSWER: *Chevron* has led to much mischief. The most extreme examples fall into one of two categories: some cases are *structurally* unreasonable, pressing *Chevron*’s own reasoning to the limits of its logic and demonstrating just how impossible it is to square *Chevron*’s explicit abdication of the judicial role with the enduring structural principles of our Constitution. A prime example of this type of abuse is the *Brand X* case I mentioned in my testimony, which gives agencies the authority to essentially overrule a federal court’s prior interpretation of a statute—even the *Supreme Court*’s interpretation. *National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005). Another troubling example is the line of circuit court cases that have deferred to agency statutory interpretations even in *criminal prosecutions*, under statutes like the Securities and Exchange Act, *United States v. Royer*, 549 F.3d 886, 899 (2d Cir. 2008), and the Federal Election Campaign Act, *United States v. Kanchanalak*, 192 F.3d 1037, 1047 (D.C. Cir. 1999).

A second set of cases are *substantively* unreasonable, upholding agency interpretations under *Chevron* that are obviously at war with the text both the agency and the court are purporting to construe. Examples of this type of abuse abound. The example on everyone’s mind right now is the IRS’s interpretation of the Affordable Care Act which the Supreme Court just upheld in *King v. Burwell*, 2015 WL 2473448 (U.S. June 25, 2015). In establishing a system of subsidies for individuals who purchase health insurance from government-operated insurance exchanges, Congress could not have been clearer that those subsidies were available only for insurance purchased on “an Exchange established by [a] State under 1311”—the statutory section governing state, not federal, exchanges. But, as is well known, the IRS ignored this clear limit, promulgating regulations that make subsidies available also to individuals who purchase insurance on a *federal* exchange and thus essentially rewriting the clear language chosen by Congress. And based on ephemeral inferences from the general purpose, context, and structure of the ACA, the Supreme Court last month upheld the IRS’s interpretation. Though the Court’s opinion expressly eschewed reliance on *Chevron*, the Fourth Circuit, in the opinion affirmed by the Supreme Court, explicitly relied on *Chevron* deference to uphold the IRS’s re-write, and the IRS, like all administrative agencies, undoubtedly was

emboldened in drafting the rule by the Court’s longstanding *Chevron* doctrine requiring deference to agency interpretations.

Another particularly vivid example of *Chevron*’s susceptibility to abuse is the D.C. Circuit’s interpretation of the Brady Act in *NRA v. Reno*, 216 F.3d 122 (D.C. Cir. 2000). That statute created a National Instant Criminal Background Check System (the “NICS”) that allowed the FBI to instantly search the backgrounds of prospective gun purchasers. Congress was particularly worried that the government might use the information generated by NICS background checks to compile identifying information on legal gun owners, so it forbade the Attorney General from retaining such information. In fact, it forbade retention of this information *in three separate places* of the statute: first, by requiring the NICS to “destroy all records” relating to each background check upon completion of the check, 18 U.S.C. § 922(t)(2); second, by barring any federal agency or employee from “requir[ing] that any record . . . generated by the [NICS] be recorded,” Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, § 103(i)(1), 107 Stat. 1536, 1542 (1993); and finally, by emphatically forbidding the government from “us[ing] the [NICS] system . . . to establish any system for the registration of firearms, firearm owners, or firearm transactions,” *id.* § 103(i)(2). Notwithstanding this prohibition *in triplicate*, the Justice Department promulgated a regulation permitting the FBI to “retain records of all NICS background searches—including names and other identifying information about prospective gun purchasers” for a period of six months. *NRA*, 216 F.3d at 125. And the D.C. Circuit upheld this interpretation 2-1, straining to find each of these three clear-as-day provisions somehow “ambiguous” and thus susceptible to *Chevron* deference. *Id.* at 126–32.

The D.C. Circuit’s interpretation of the 1984 Cable Act in *American Scholastic TV Programming Foundation v. FCC*, 46 F.3d 1173 (D.C. Cir. 1995), is almost as egregious an example of *Chevron* deference. In 1984, Congress enacted “a series of media cross-ownership restrictions,” including 47 U.S.C. § 533(b), which prohibited a telephone company from “provid[ing] video programming directly to subscribers in its telephone service area.” (Congress ultimately repealed this provision in 1996). On the face of the text, this provision barred cross-ownership of *any* “video programming”—a term that Congress, as though to underscore the point, defined expansively as “programming provided by, or generally considered comparable to programming provided by, a television broadcast station,” *id.* § 522(20). Congress did not refer in any fashion to the medium through which such video programming was transmitted. But the FCC thought this blanket prohibition should apply only to video programming delivered through a physical cable, and interpreted it as allowing cross-ownership of programming transmitted through wireless cable. And undeterred by the plain text of Congress’s statute, the D.C. Circuit upheld the FCC’s interpretation, finding sufficient ambiguity in “the underlying purposes of the Cable Act,” along with its “structure and legislative history,” to justify deference under *Chevron*. *American Scholastic*, 46 F.3d at 1179–81.

Cases like these dramatically illustrate just how loose the judicial reins on agency authority are after *Chevron*. Indeed, some agencies have even *invoked Chevron in their own deliberations* as giving them *carte blanche* to adopt freewheeling interpretations of

the statutes that are meant to constrain them. See Gary Lawson, *Dirty Dancing – The FDA Stumbles with the Chevron Two-Step: A Response to Professor Noah*, 93 CORNELL L. REV. 927, 933–35 (2008) (noting the FDA’s reliance on *Chevron* during a 2003–04 rulemaking as giving it substantial discretion to adopt a “reasonable” interpretation of a statute’s use of the term “food”). *Chevron* sanctions—indeed, *encourages*—basically unreviewable agency behavior, and it is time for Congress to make the judicial check on agency action meaningful again.

2. **QUESTION:** Under the final rule in WOTUS, ponds, ditches, and ephemeral drainages may now come under federal jurisdiction. Everything from golf courses to farmland that have these waters on them or near them will likely be required to obtain costly, federal permits for any land management activities or land use decisions in, over or near them such as pesticide and fertilizer applications and stream bank restorations and the moving of dirt.
- Please explain Congress’ constitutional authority to regulate such waters.
 - Chief Justice Marshall in *McCulloch v. Maryland* proclaimed that our federal government is one of enumerated powers and, “this principle is now universally admitted.” Does the “substantial effect test” laid out in *Wickard v. Filburn* comport with this principle?

ANSWER: There can be little doubt that the Supreme Court’s current Commerce Clause jurisprudence—and *Wickard v. Filburn* in particular—eviscerates the limitations placed on Congress’s authority by the Constitution. Article I’s vesting clause makes clear that Congress only has those legislative powers “herein granted,” and Section 8 enumerates specific powers given to Congress. “The Constitution’s express conferral of some powers makes clear that it does not grant others. And the Federal Government can exercise only the powers granted to it.” *NFIB v. Sebelius*, 132 S. Ct. 2566, 2577 (2012) (opinion of Roberts, C.J.) (quotation marks omitted). If there were any doubt on that point, the Founders made it explicit in the Tenth Amendment: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X. The Tenth Amendment, as a rule of construction, instructs us that we are to read a negative implication against Congress’s powers. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 867–77 (1995) (Thomas, J., dissenting); *NFIB*, 132 S. Ct. at 2578.

Despite these clear textual commands, Congress now relies on the Commerce Clause to wield power far surpassing the clause’s original meaning. At the Founding, the term “commerce” meant “selling, buying, and bartering, as well as transporting for these purposes.” *United States v. Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J., concurring). Congress’s power under the Commerce Clause, therefore, did not reach activities such as manufacturing or agriculture. *Id.* at 586.

But in *United States v. Darby*, the Supreme Court expressly rejected the distinction between commerce and manufacturing in sustaining a Federal minimum-wage and maximum-hours law that regulated the manufacturing of goods intended for interstate commerce. 312 U.S. 100, 113 (1941). The Court extended *Darby* in *Wickard v. Filburn*, which upheld the Agricultural Adjustment Act’s regulation of the amount of wheat grown

by a farmer exclusively for use on his own farm. 317 U.S. 111, 118–19 (1942). *Wickard* is often seen as “perhaps the most far reaching example of Commerce Clause authority over intrastate activity,” *Lopez*, 514 U.S. at 560, but, as the joint dissent in *NFIB v. Sebelius* pointed out, the Federal Government attempted to go beyond even *Wickard* when it enacted the individual mandate as part of the Affordable Care Act, 132 S. Ct. at 2588 (opinion of Scalia, Kennedy, Thomas, and Alito, JJ.). The basis for the Government’s assertion of power in *NFIB* was the so-called “substantial effects test,” announced in *Wickard*, by which Congress can regulate any activity that has a “substantial economic effect on interstate commerce.” 317 U.S. at 125. As Justice Thomas observed in *United States v. Lopez*, “This test, if taken to its logical extreme, would give Congress a ‘police power’ over all aspects of American life.” *Lopez*, 514 U.S. at 584. This is a clear violation of the Constitution’s system of enumerated powers.

The real question, then, in assessing Congress’s authority to regulate on the scale of the proposed WOTUS rule, is whether the constitutional analysis is governed by the original meaning of the Commerce Clause or by current Supreme Court jurisprudence. I have not studied the WOTUS rule sufficiently to render an opinion on its constitutionality under current Commerce Clause doctrine, but I am confident that it far exceeds Congress’s authority under the original meaning of the Commerce Clause. Waters that exist entirely within a state and that do not serve as a means of transporting goods between states cannot plausibly be regulated as a form of *interstate* commerce under the Commerce Clause’s original meaning.

I would also note that, even if Congress had the power to regulate the waters of the United States to the extent contemplated by the WOTUS rule, there would be the separate problem that this rule is *not* being enacted directly by Congress. Rather, it is being promulgated by an agency pursuant to a delegation of lawmaking authority. As I explained in my written testimony, such delegations raise serious constitutional questions under the nondelegation doctrine. There are, therefore, good reasons to doubt the constitutionality of a regulation like the WOTUS rule under the original meaning of the Constitution.

3. **QUESTION:** On June 15, 2012, former DHS Secretary Napolitano issued a memorandum entitled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children” (DACA Memorandum). The DACA Memorandum initiated the Administration’s grant of deferred action against aliens who were illegally present in the United States but met certain criteria, namely age of arrival, justifying their non-removal from the United States. On November 20, 2014, current DHS Secretary Johnson issued a memorandum entitled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents” (DAPA Memorandum), which further eased DACA requirements for illegal childhood arrivals and established deferred action standards for the parents of those children. As Judge Andrew S. Hanen from the District Court of the Southern District of Texas said in his opinion in *Texas v. U.S.*, the Government violated the Administrative Procedure Act by failing to provide the public with notice and an opportunity to comment

on the DAPA and expanded DACA programs. Do you support Judge Hanen's opinion and his call for greater Federal agency accountability? Why or why not?

ANSWER: As you know, the U.S. Court of Appeals for the Fifth Circuit recently affirmed Judge Hanen's preliminary injunction, and I agree with the Fifth Circuit's reasoning. Judge Jerry Smith, writing for the Court, held that the Government was unlikely to succeed in showing that the plaintiffs lacked standing. Judge Smith pointed out that at least one plaintiff, the State of Texas, had shown that it would be obligated to issue driver's licenses to illegal aliens under DAPA and would lose at least \$130.89 on each license. That was sufficient to confer standing.

Critically, the Fifth Circuit then held that DAPA is not a mere act of non-enforcement—the kind of traditional prosecutorial discretion that courts often find unreviewable. As the Fifth Circuit said,

If [nonenforcement] were all DAPA involved, we would have a different case. DAPA's version of deferred action, however, is more than nonenforcement: It is the affirmative act of conferring 'lawful presence' on a class of unlawfully present aliens. Though revocable, that new designation triggers eligibility for federal and state benefits that would not otherwise be available.

Texas v. United States, 2015 WL 3386436, at *9 (5th Cir. Mar. 26, 2015). This key insight explains why the Fifth Circuit correctly held that DAPA was justiciable under the APA.

Finally, Judge Smith explained that, because DAPA imposes rights and obligations and does not leave government officials genuinely free to deport qualifying aliens, the Government did not make a strong showing that DAPA was immune from notice-and-comment rulemaking procedures. Here, the Fifth Circuit relied on the district court's factual finding that the Administration's repeated emphasis on the discretionary and case-by-case nature of DAPA was mere pretext. The Government has represented that DAPA is a discretionary policy when it is, in fact, an across-the-board grant of lawful presence to qualifying aliens. Because the Government did not show that it was likely to succeed on the merits of the APA argument, the Fifth Circuit affirmed the district court's grant of a preliminary injunction.

Again, I believe that the Fifth Circuit's reasoning is sound.

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Written Responses to Senator Orrin G. Hatch’s Questions for the Record
July 10, 2015

1. **QUESTION:** Courts have demonstrated their competence in handling highly technical areas of law in a broad array of contexts, from evaluating the reliability of expert testimony to tackling technologically complex patent cases.
 - a. Given these comparisons, is there a reasonable justification for doubting the competence of courts in the particular context of administrative law?

ANSWER: The supposed policy expertise of agencies, as compared to Courts, has long been relied upon by *Chevron*’s supporters. As an initial matter, I think it is important to note that this argument for freeing agencies from any judicial check is wholly based on policy considerations, and thus does little to answer the severe *constitutional* concerns with *Chevron* that I highlighted in my testimony. If agency expertise really is a strong, overriding policy reason for courts to defer to agency interpretations of law, then we should amend the Constitution to allow the practice, not pretend that the separation-of-powers constraints on government action that that document imposes do not exist.

But in truth, I do not even think *Chevron* has that much going for it as a policy matter, in part for the reasons your question suggests. To be sure, one of the chief premises of the New Deal expansion of the administrative state was that agency expertise justified the delegation of substantial policy-making authority to the “experts.” But as you point out, digesting highly difficult scientific or technological arguments is part of a judge’s ordinary diet. Indeed, we even entrust judges with this technically complex and demanding role *in administrative law*, under the “hard look” review of agency action that the Supreme Court directed in *Motor Vehicles Manufacturers Ass’n v. State Farm*, 463 U.S. 29 (1983).

Moreover, I think it is important to emphasize that agencies simply are *not* experts at matters of statutory interpretation—at least as compared to courts. Judges spend pretty much every day of their judicial career scrutinizing, analyzing, and interpreting legal texts; it is hard to imagine a branch of government more “expert” in answering questions of statutory interpretation and meaning. And when judges defer to an agency under *Chevron*, they are deferring to its conclusion about how to *interpret the law*. The judiciary has built up a body of expertise on *that* type of question over the course of *centuries*.

2. **QUESTION:** Given how judicial deference to the agencies tends to get attention in the context of high-profile challenges to a presidential administration’s signature regulatory efforts, many argue that observers’ views on the merits of judicial deference change based on which party controls the White House. While that may accurately characterize a small set of cases, the sheer size of the federal bureaucracy casts significant doubt on the

ability of a President or any politically accountable administration official to exert active control over the federal leviathan.

- a. Instead of focusing solely on the abuses of any particular administration, should we also think about judicial deference to agencies as a limit on the courts' ability to check the power a giant, unaccountable bureaucracy that presidential administrations of both parties frequently struggle to control?

ANSWER: Yes, we certainly should think about the way judicial deference removes a crucial check on the Administrative State. The problem of unaccountable agencies began with the Supreme Court's decision in *Humphrey's Executor v. United States*, which largely freed so-called "independent agencies" from presidential control. 295 U.S. 602, 624, 631 (1935). By restricting the President's power to remove the heads of such agencies—in violation of Article II's vesting of all executive power in the President—*Humphrey's Executor* removed the President's ability to effectively oversee some of the most powerful agencies in the Government, such as the National Labor Relations Board or the Federal Communications Commission.

But even apart from the problem of independent agencies, the sheer scale of the Administrative State makes it impossible for the President to closely supervise the Federal bureaucracy. The Administrative State issues as many as 4,500 final rules *every year*. MAEVE P. CAREY, CONG. RESEARCH SERV., R43056, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE *FEDERAL REGISTER* 1 (2014). In 2013 alone, 3,659 final rules were issued, adding 26,417 pages to the Federal Register. *Id.* at 19. All told, the Code of Federal Regulations contains 175,496 pages of regulations spread out over 235 volumes as of 2013. Clyde Wayne Crews, *New Data: Code of Federal Regulations Expanding, Faster Pace under Obama*, Competitive Enter. Inst. (March 17, 2014), <https://cei.org/blog/new-data-code-federal-regulations-expanding-faster-pace-under-obama>. As Chief Justice Roberts observed in his dissenting opinion in *City of Arlington v. FCC*, "[W]ith hundreds of federal agencies poking into every nook and cranny of daily life, th[e] citizen might . . . understandably question whether Presidential oversight—a critical part of the Constitutional plan—is always an effective safeguard against agency overreaching." 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting). In the words of then-Professor Elena Kagan, "[N]o President (or his executive office staff) could, and presumably none would wish to, supervise so broad a swath of regulatory activity." Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2250 (2001).

"The declared purpose of separating and dividing the powers of government, of course, was to diffus[e] power the better to secure liberty." *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (alteration in original) (quotation marks omitted). By giving to each branch the power to check the others, the Founders intended to create "security against a gradual concentration of the several powers in the same department." THE FEDERALIST NO. 51, at 321 (James Madison) (C. Rossiter ed., 1961). With Congress having delegated enormous power to agencies and the President having very little ability to oversee them, the only remaining effective check on the power of the Administrative State is the judiciary. Within the scheme of separated powers, "the power of [t]he interpretation of the laws [is] the proper and peculiar province of the courts." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S.

211, 222 (1995) (second alteration added) (quotation marks omitted). But *Chevron* removes this last restraint on agency power by allowing *agencies* to issue interpretations of Federal statutes binding even on the Supreme Court. The result is essentially a massive and powerful one-branch government that answers to no one—precisely what the Constitution is designed to avoid. That is a problem that *any* administration—regardless of political party—should find alarming.

3. **QUESTION:** In your testimony, you identified one of the opinions in *Utility Air Regulatory Group v. EPA* as a particularly egregious application of *Chevron* deference.
 - a. Would you identify some other examples of the most unreasonable cases that you have encountered over the years in which *Chevron* deference or its progeny allowed an agency to defy the law as written?

ANSWER: *Chevron* has led to much mischief. The most extreme examples fall into one of two categories: some cases are *structurally* unreasonable, pressing *Chevron*'s own reasoning to the limits of its logic and demonstrating just how impossible it is to square *Chevron*'s explicit abdication of the judicial role with the enduring structural principles of our Constitution. A prime example of this type of abuse is the *Brand X* case I mentioned in my testimony, which gives agencies the authority to essentially overrule a federal court's prior interpretation of a statute—even the *Supreme Court*'s interpretation. *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005). Another troubling example is the line of circuit court cases that have deferred to agency statutory interpretations even in *criminal prosecutions*, under statutes like the Securities and Exchange Act, *United States v. Royer*, 549 F.3d 886, 899 (2d Cir. 2008), and the Federal Election Campaign Act, *United States v. Kanchanalak*, 192 F.3d 1037, 1047 (D.C. Cir. 1999).

A second set of cases are *substantively* unreasonable, upholding agency interpretations under *Chevron* that are obviously at war with the text both the agency and the court are purporting to construe. Examples of this type of abuse abound. The example on everyone's mind right now is the IRS's interpretation of the Affordable Care Act which the Supreme Court just upheld in *King v. Burwell*, 2015 WL 2473448 (U.S. June 25, 2015). In establishing a system of subsidies for individuals who purchase health insurance from government-operated insurance exchanges, Congress could not have been clearer that those subsidies were available only for insurance purchased on "an Exchange established by [a] State under 1311"—the statutory section governing state, not federal, exchanges. But, as is well known, the IRS ignored this clear limit, promulgating regulations that make subsidies available also to individuals who purchase insurance on a *federal* exchange and thus essentially rewriting the clear language chosen by Congress. And based on ephemeral inferences from the general purpose, context, and structure of the ACA, the Supreme Court last month upheld the IRS's interpretation. Though the Court's opinion expressly eschewed reliance on *Chevron*, the Fourth Circuit, in the opinion affirmed by the Supreme Court, explicitly relied on *Chevron* deference to uphold the IRS's re-write, and the IRS, like all administrative agencies, undoubtedly was emboldened in drafting the rule by the Court's longstanding *Chevron* doctrine requiring deference to agency interpretations.

Another particularly vivid example of *Chevron*'s susceptibility to abuse is the D.C. Circuit's interpretation of the Brady Act in *NRA v. Reno*, 216 F.3d 122 (D.C. Cir. 2000). That statute created a National Instant Criminal Background Check System (the "NICS") that allowed the FBI to instantly search the backgrounds of prospective gun purchasers. Congress was particularly worried that the government might use the information generated by NICS background checks to compile identifying information on legal gun owners, so it forbade the Attorney General from retaining such information. In fact, it forbade retention of this information *in three separate places* of the statute: first, by requiring the NICS to "destroy all records" relating to each background check upon completion of the check, 18 U.S.C. § 922(t)(2); second, by barring any federal agency or employee from "requir[ing] that any record . . . generated by the [NICS] be recorded," Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, § 103(i)(1), 107 Stat. 1536, 1542 (1993); and finally, by emphatically forbidding the government from "us[ing] the [NICS] system . . . to establish any system for the registration of firearms, firearm owners, or firearm transactions," *id.* § 103(i)(2). Notwithstanding this prohibition *in triplicate*, the Justice Department promulgated a regulation permitting the FBI to "retain records of all NICS background searches—including names and other identifying information about prospective gun purchasers" for a period of six months. *NRA*, 216 F.3d at 125. And the D.C. Circuit upheld this interpretation 2-1, straining to find each of these three clear-as-day provisions somehow "ambiguous" and thus susceptible to *Chevron* deference. *Id.* at 126–32.

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Cases like these dramatically illustrate just how loose the judicial reins on agency authority are after *Chevron*. Indeed, some agencies have even *invoked Chevron in their own deliberations* as giving them *carte blanche* to adopt freewheeling interpretations of the statutes that are meant to constrain them. See Gary Lawson, *Dirty Dancing – The FDA Stumbles with the Chevron Two-Step: A Response to Professor Noah*, 93 Cornell L. Rev. 927, 933–35 (2008) (noting the FDA's reliance on *Chevron* during a 2003–04

rulemaking as giving it substantial discretion to adopt a “reasonable” interpretation of a statute’s use of the term “food”). *Chevron* sanctions—indeed, *encourages*—basically unreviewable agency behavior, and it is time for Congress to make the judicial check on agency action meaningful again.

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Written Responses to Senator Thom Tillis’s Questions for the Record
July 10, 2015

1. **QUESTION:** During the hearing, much was said regarding efforts to improve accountability, transparency, and the integrity of our federal regulatory system. In determining how we might best accomplish those objectives, it would be helpful for us to agree on the appropriate markers we could use to measure the current regulatory environment and the effectiveness of any ensuing reforms. How might we, as members of the Congress charged with continually evaluating the regulatory landscape, quantify the current volume or level of regulations in play in the federal regulatory system? In other words, what metrics could or should Congress use to determine whether the administrative rulemaking process is appropriately balanced? What are the correct indicators for us to use to evaluate whether things truly are out of balance at this point in time as opposed to at prior points in the modern era of administrative law generally?

ANSWER: There are several ways in which we might try to quantify and measure the growing impact of the administrative state. One would be to look purely at volume. For example, in 2013, 3,659 final rules were issued, adding 26,417 pages to the Federal Register. MAEVE P. CAREY, CONG. RESEARCH SERV., R43056, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE *FEDERAL REGISTER* 19 (2014). By contrast, in 1976, less than half this number of pages were added. *Id.* at 18. A second, perhaps more finely-grained measure would look at the rough *proportion* of federal lawmaking done by agencies. The 26,000 pages that agencies added to Federal Register in 2013 outnumbers on the order of 21-to-1 the 1,208 pages that *Congress* added to the Statutes at Large in the 2013–2014 session, VITAL STATISTICS ON CONGRESS tbl. 6-4 (Norman J. Ornstein, et al. eds.), <http://goo.gl/AmNwgT>; that is starkly higher than the corresponding 3-to-1 ratio between the 1976 Federal Register and the output of Congress in the 1975–1976 session, *cf. id.* with CAREY, COUNTING REGULATIONS at 18.

But I want to emphasize that this exponential growth is baked into the very nature of the Administrative State. As is often the case, Publius put the point best. “[P]ower,” Madison noted in *Federalist 48*, “is of an encroaching nature.” THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961). And while the framers most feared that the legislative branch would “draw[] all power into its impetuous vortex,” *id.* at 309, this equally describes the inevitable growth of administrative state, once that unaccountable Fourth Branch is *armed with legislative* as well as executive power. Indeed, the Framers also foresaw the danger that lies in “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands.” THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961). Possessing all three types of power comingled, and loosed from the reins that the Constitution imposes on the lawmaking process that *it* envisions, we should not be surprised to find that the Administrative State’s appetite is voracious.

2. **QUESTION:** The use of “sue-and-settle” tactics creates a significant loophole in the legislative process that can allow special interest groups to unfairly influence rule-making decisions without the open and transparent notice and comment period. In terms of addressing “sue-and-settle,” is there an argument that the courts should actually have a more active role in this, perhaps by being more liberal with intervention rights of third parties or perhaps with statutorily defined time limitations as to how quickly an agency may formally settle after publicly disclosing the terms of such a settlement?
- a. Is there a statutory solution that would make this process less likely to shut out stakeholders with a different viewpoint than those espoused by a hypothetical plaintiff and sympathetic or collusive agency-defendant?
 - b. Should Congress consider reforms to make settlements and consent decrees achieved through “sue-and-settle” tactics more transparent? If so, how?

ANSWER: Other witnesses before this Committee have specifically addressed the many problems posed by “sue and settle” and the most promising ways of potentially curbing its abuses. I have not studied this issue closely, but based on what I do know, it certainly seems clear to me that sue-and-settle too often allows an end-run around the modest constraints that the APA imposes on the notice-and-comment rulemaking process. And this is all the more alarming given that the courts’ lopsided prudential standing rules give special interest groups, rather than regulated entities, disproportionate opportunities to affect the regulatory agenda in this way. The Sunshine for Regulatory Decrees and Settlements Act, by ensuring that the settlement agreements or consent decrees that agencies seek to enter in sue-and-settle lawsuits are aired publicly before they are entered, would go far toward restoring some necessary transparency to the agency lawmaking process.

3. **QUESTION:** Currently, under *Chevron*, if a statute is deemed ambiguous, an agency must merely show that their interpretation of the statute was reasonable and, in the words of Chief Justice Roberts, within “the bounds of the permissible.” In your expert opinion, should Congress consider raising this bar in an effort to reduce judicial deference to agencies’ rule-making authority? If so, what should the standard be?

ANSWER: As I stated in my testimony to the Committee, I believe that Congress should abrogate *Chevron* in its entirety, both because it contradicts the plain text of the Administrative Procedure Act and because there are serious questions about *Chevron*’s constitutionality. Congress has the authority to abrogate *Chevron* legislatively, and it should do so.

Short of full abrogation, congressional efforts to replace *Chevron* with a standard of judicial review that is less deferential to agency statutory interpretations would certainly be a positive development. One way to do that would be to replace *Chevron* deference with what the Court calls *Skidmore* deference. *Skidmore* deference holds that “[t]he

weight of such [an agency's interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). I tend to agree with Justice Scalia that *Skidmore* boils down to this: "A judge should take into account the well-considered views of expert observers." *United States v. Mead Corp.*, 533 U.S. 218, 250 (2001) (Scalia, J., dissenting).

4. **QUESTION:** Given the current vast and expanding bureaucratic structure of the federal agencies, most, if not all, of their current focus is placed on the promulgation of new rules. There are over 176,000 pages of regulations which some sources have stated amount to a regulatory burden of \$1.6 trillion. This regulatory effect is increasingly frustrating for business owners of all sizes, including farmers and ranchers. In your opinion, do you feel there should be a process to retroactively review rules to eliminate any excessive or duplicative rules to help simplify the current regulatory scheme and reduce the current regulatory burden felt by so many businesses and farmers?
 - c. Further, should Congress create a commission to review and recommend the elimination of outdated, ineffective, and duplicative regulations in an effort to reduce the current regulatory burden?
 - d. Alternatively, should agencies be required to make systematic reviews of their own rules to determine if there are any duplicative or outdated rules?

ANSWER: I strongly believe that reforming the Administrative State requires a review of current regulations. To that end, I think Senator Hatch's SCRUB Act is an important step in the right direction. The SCRUB Act would create an independent commission—modeled on the BRAC commissions—to review all current regulations with a goal of eliminating 15% of their total cost. In accordance with the Constitution's bicameralism and presentment requirements, the Act would require Congress to enact a joint resolution approving of the Commission's recommended regulatory repeals before they could go into effect. *See* U.S. CONST. art. I, § 7, cl. 3 (requiring joint resolutions to be presented to the President for signature); *Clinton v. City of New York*, 524 U.S. 417, 436–41 (1998); Although I suspect that more than 15% of the cost of current regulations is unjustified, the 15% goal is a reasonable starting point.

The SCRUB Act also contains a provision requiring agencies to review new rules ten years after the rules' enactment. I think it is a healthy exercise to require agencies to conduct such a review, but given that agencies have little incentive to repeal their own regulations, I think the Act rightly places more emphasis on the Commission's retrospective review. If the Commission were successful, it could be reauthorized every few years, as with the BRAC Commissions. That would decrease reliance on agency reviews and revisions of their own regulations.

5. **QUESTION:** Many states have implemented policies aimed at reviewing regulations and removing those that increase regulatory burden without accomplishing net positives for the public. For example, in 2013, North Carolina passed a comprehensive regulatory reform measure that slated all regulations for sunset in 10 years if they were not reviewed by their originating agency before that period. Further, the process includes significant public comment periods to ensure transparency and accountability. In addition, North Carolina has a Rules Review Commission to ensure rules are promulgated with appropriate authority, clarity, and necessity. Are these types of reforms transferrable to the federal level? Said differently, is the regulatory environment of the federal government too leviathan to be improved by similar, incremental reforms? What other reforms would you recommend we consider?

ANSWER: I think North Carolina should be applauded for its pioneering efforts at regulatory reform. By subjecting all state regulations not required by federal law to a thorough, structured, and publicly accountable process of review, it has done much to rid the books of burdensome regulations *that even the agency that promulgated them no longer thinks necessary*. As I noted in response to your first question, the growth of the administrative state is by its very nature exponential, and part of the reason for this is the influence of special interest groups and administrative inertia. Once an agency has put a regulation on the books, it can be very difficult for it to wipe the slate clean even after the cause that supposedly justified the regulation has come and gone. By enacting the Regulatory Reform Act of 2013, North Carolina has taken a significant step towards freeing its citizens of the burden built up by special interests and regulatory inertia on the state level. The rest of the nation also stands to gain. As Justice Brandeis famously noted, “It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). North Carolina is acting as such a laboratory, here, and the rest of the country would do well to study its example.

Which brings me to the question whether North Carolina’s reforms are transferrable to the federal leviathan, as you aptly put it. I think they are, to a great extent. I have already noted that the federal rulebooks are filled with obsolete, costly regulations. Congress should act, just as North Carolina has, to require a comprehensive view of the C.F.R. for such outdated regulations. The SCRUB Act, which Senator Hatch recently introduced in the Senate, is designed to do just that. While its details differ somewhat from North Carolina’s Act, its goal is the same: making sure that only those regulations that are justified by some *current* need remain on the books.

Of course, no one piece of legislation can solve all of the pathologies of the Administrative State. The SCRUB Act is just one among a larger suite of promising regulatory reform bills that Congress currently has before it, and it should give all of these bills careful consideration. In addition to the SCRUB Act and the sue-and-settle reform I mentioned earlier, I think Congress should give close attention to the Regulatory Accountability Act, which among other things would eliminate the courts’ dangerous practice of deferring to agencies’ interpretations of their own regulations, and also the

REINS Act, which would restore Congress's constitutional role in approving all *future* regulations that have a major impact on the economy. And of course, I also strongly believe that Congress should consider amending the APA, along the lines I recommended in my written testimony, to repudiate the *Chevron* doctrine. The constitutional and practical difficulties posed by the administrative state are all-encompassing, and any adequate response by Congress will have to be equally comprehensive.

Charles J. Cooper
“Examining the Federal Regulatory System
to Improve Accountability, Transparency and Integrity”
Written Responses to Chairman Charles E. Grassley’s Questions for the Record
July 10, 2015

1. **QUESTION:** It’s often argued that agencies are the real policy experts, and that because of their objective expertise in specific areas, it only makes sense to largely let them interpret laws they administer—particularly on questions involving complex, technical matters.
 - a. Assuming agencies are full of policy experts, does that justify the level of deference that federal courts give to agencies?

ANSWER: The supposed policy expertise of agencies, as compared to Courts, has long been relied upon by *Chevron*’s supporters. As an initial matter, I think it is important to note that this argument for freeing agencies from any judicial check is wholly based on policy considerations, and thus does little to answer the severe *constitutional* concerns with *Chevron* that I highlighted in my testimony. If agency expertise really is a strong, overriding policy reason for courts to defer to agency interpretations of law, then we should amend the Constitution to allow the practice, not pretend that the separation-of-powers constraints on government action that that document imposes do not exist.

But in truth, I do not even think *Chevron* has that much going for it as a policy matter, in part for the reasons your question suggests. To be sure, one of the chief premises of the New Deal expansion of the administrative state was that agency expertise justified the delegation of substantial policy-making authority to the “experts.” But digesting highly difficult scientific or technological arguments is part of a judge’s ordinary diet. Indeed, we even entrust judges with this technically complex and demanding role *in administrative law*, under the “hard look” review of agency action that the Supreme Court directed in *Motor Vehicles Manufacturers Ass’n v. State Farm*, 463 U.S. 29 (1983).

Moreover, I think it is important to emphasize that agencies simply are *not* experts at matters of statutory interpretation—at least as compared to courts. Judges spend pretty much every day of their judicial career scrutinizing, analyzing, and interpreting legal texts; it is hard to imagine a branch of government more “expert” in answering questions of statutory interpretation and meaning. And when judges defer to an agency under *Chevron*, they are deferring to its conclusion about how to *interpret the law*. The judiciary has built up a body of expertise on *that* type of question over the course of *centuries*.

2. **QUESTION:** Some have argued that agencies actually rely on *Chevron* deference as a sort of get-out-of-jail-free card when stretching the interpretation of federal laws, and that they may be taking advantage of statutory ambiguities to further their agendas.
 - a. Do you believe *Chevron* deference influences the behavior of agencies, or of agency staff? Do you believe it creates an incentive for agencies to take advantage of ambiguous terms or phrases in the statutes they administer?

ANSWER: *Chevron* certainly incentivizes agencies to push the limits of their authority as far as possible to achieve their policy objectives. If there is a non-frivolous argument in favor of an agency-empowering interpretation, the agency has every reason to adopt that interpretation and take its chances in court.

Few cases so vividly illustrate this problem as *Utility Air Regulatory Group v. EPA*, which I mentioned in my oral testimony but which merits mention here. In that case, the EPA interpreted the Clean Air Act (CAA) to impose permitting requirements on all stationary sources emitting 100 or 250 tons of greenhouse gases per year, depending on the permitting requirement in question. 134 S. Ct. 2427, 2436 (2014). The 100- and 250-ton figures were in the statute itself; EPA was simply applying them to greenhouse gases. However, EPA recognized that its decision to interpret the CAA in this fashion would have “calamitous consequences,” such as increasing permit applications from 800 per year to nearly 82,000 and “causing construction projects to grind to a halt nationwide.” *Id.* at 2442–43. To remedy this problematic consequence—one that resulted from the EPA’s own agency-empowering interpretation of the statute—the EPA announced that it would “tailor” the statute by replacing the 100- and 250-ton statutory thresholds with a 100,000-ton threshold of its own invention. *Id.* at 2444–45. The EPA literally rewrote numerical requirements specified in the statute to suit its own policy purposes.

Fortunately, a majority of the Supreme Court held that even *Chevron* deference cannot authorize such an effort. It affirmed that “[a]n agency has no power to ‘tailor’ legislation to bureaucratic policy goals by rewriting unambiguous statutory terms.” *Id.* at 2445. “It is hard to imagine a statutory term less ambiguous than the precise numerical thresholds at which the Act requires . . . permitting. When EPA replaced those numbers with others of its own choosing, it went well beyond the bounds of its statutory authority.” *Id.* (quotation marks omitted). The Court noted that, instead of changing the statute’s requirements—requirements to which Congress and the President had agreed—the agency should have realized that its need to do so signaled “that it had taken a wrong interpretive turn.” *Id.* at 2446.

Yet, had just one Justice switched his vote, the EPA would have succeeded in its brazen attempt to rewrite an Act of Congress. Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, would have permitted the EPA to read an “implicit exception” into the “less important language” of the statute—that is, “the particular number used by the statute.” *Id.* at 2454. In doing so, Justice Breyer noted that the EPA was merely “exercising the legal authority to which it is entitled under *Chevron*.” *Id.* at 2453.

The EPA rewrote the indisputable, numerical requirements of a statute, and, because of *Chevron*, its gamble almost paid off. When an agency regulation directly contradicts its authorizing statute, and yet the Court still comes within one vote of sustaining the agency’s action, the lesson to the administrative agencies is to seize as much power as possible, confident that they will have a fighting chance in court.