

Questions for the Record from Senator Thom Tillis

“Examining the Federal Regulatory System to Improve Accountability, Transparency and Integrity”

June 10, 2015

Honorable Charles J. Cooper, Founding Partner and Chairman, Cooper & Kirk, PLLC,  
Washington, D.C.

Ms. Ellen Steen, General Counsel and Secretary, American Farm Bureau Federation and  
Affiliates, Washington, D.C.

Professor Patrick Parenteau, Professor of Law and Senior Counsel, Environmental and Natural  
Resources Law Clinic, Vermont Law School, South Royalton, Vermont

Mr. Robert Weissman, President, Public Citizen, Washington, D.C.

Mr. William L. Kovacs, Senior Vice President, Environment, Technology and Regulatory  
Affairs, U.S. Chamber of Commerce, Washington, D.C.

- 1. 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?**

My testimony discussed how Congress delegated vast powers to regulatory agencies through broad statutes that allow agencies to use this discretion to fill in many legislative gaps. Congress attempted to guide the development of regulations by requiring agencies to provide analyses of how their rules impact affected entities and the economy, but the agencies simply ignore these requirements which would address the impact of a regulation on state and local government, small business, jobs, communities, and the use of high quality data.

Perhaps the clearest example can be found within the Clean Air Act. While Congress delegated substantial authority to the U.S. Environmental Protection Agency (EPA) to improve and protect air quality across the country (including, in some cases, imposing regulatory requirements without having to consider the costs of compliance), Congress at the same time requires EPA to continuously evaluate the impact that its air quality programs have on employment and job displacement (section 321(a) of the Act) and to analyze adverse social and

economic effects brought about by its standards (section 109(d) of the Act). Congress clearly made EPA responsible for gathering this critical information and reporting it. By having this information available to it, Congress could see whether air quality requirements were working properly, or whether they were having unintended impacts—causing jobs to be lost disproportionately in one region of the country, or needlessly shuttering entire industries. Congress could subsequently take corrective action, thereby preventing air regulations from imposing more harm than good at the local community level.

EPA, however, has never conducted the analysis required by section 321(a)<sup>1</sup> or requested the analysis available to it under section 109(b). Thus, EPA has deprived Congress of critical information that otherwise could have been used to improve the management of environmental protection efforts.

Congress also required agencies to perform analyses under the Unfunded Mandates Reform Act (UMRA) and Regulatory Flexibility Act (RFA) in order to provide information on impacts of regulations on state and local governments and small businesses. The reason for this requirement was because agencies were shifting regulatory burdens to states, which, for instance, lack sufficient budgets to undertake implementation of the 96.5% of all EPA delegated programs for which they are responsible.

In addition, the 1996 RFA amendments require EPA to establish a small business panel to gather information about a regulation before it is proposed from impacted small firms. EPA failed to conduct these small panels on a number of occasions, leaving Congress without the proper data and analysis on small business impacts and potential job losses. The Information Quality Act (IQA) was passed to rein in agency claims of using valid science when in fact they were using flawed studies and methodology. In all of these cases, the EPA was a main offender that helped spur Congress to action, and yet the agency remains an offender today after these attempts at improving oversight.

Between 2000 and 2013 the executive branch federal agencies created 30 new regulations that each cost over \$1 billion annually, and EPA alone was responsible for 17 of the 30 rules, accounting for 82.5% of the total costs. In promulgating all of those major regulations the EPA seldom did more than insert boilerplate language as a response to its requirements under these analytical statutes.

In the past year, EPA has proposed and/or finalized three of the most significant regulations in history: the Clean Power Plan (CPP), Waters of the U.S. (WOTUS), and Ozone NAAQS. The agency failed to perform proper analyses for UMRA and the RFA in all three rules, and its lack of compliance with the IQA is an ongoing concern, largely because much of EPA's analysis for all of its rules is done using scientific data and analyses that cannot be examined or validated by the public. Further, the agency has never conducted an analysis of job loss and displacement as Congress required of it in § 321(a) of the Clean Air Act which was enacted in 1977.

---

<sup>1</sup> Provisions that mirror section 321(a) were included in each of the major environmental statutes (e.g., Clean Air Act, Clean Water Act, RCRA, Superfund, TSCA, etc.).

It is difficult to understand how Congress or the public could ever have confidence that the EPA is balancing all necessary concerns in the rulemaking process when the agency absolutely refuses to provide significant information that would allow such assessment to take place. Meanwhile, the EPA marches on creating ever larger and more intrusive regulations that affect virtually the entire U.S. economy.

- 2. 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?**

The Chamber believes that the courts must have a more active role in consent decrees in which the agency and a private party agree to implement public policy through rulemaking. Currently, the courts treat sue-and-settle agreements the same as agreements between private parties and sign them as if they are simple settlement agreements. Sue and Settle amounts to a policy decision and as such it must be open to public involvement including notice to the public of the settlement and the right to comment to the court as well as the right to intervene if parties' interests are not protected. Moreover, courts need to evaluate draft settlement agreements concerning agency rulemakings with a critical eye, and inquire whether the agency has been realistic in agreeing to a deadline (e.g., is there sufficient time to comply with procedural requirements under the APA, the RFA, the IQA, and UMRA?). Similarly, courts need to inquire whether the agency has the statutory authority to enter into the settlement, and whether the agency has improperly surrendered its discretion to the special interest group. Finally, before signing on consent decrees the court must explore the impact of its order on agency resources and other programs.

- 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?**

A statutory solution does exist for stakeholders shut out of court. The sue-and-settle problem is exacerbated by the fact that there is a relaxed view of standing for environmental plaintiffs which does not extend to business groups. In a 2011 article<sup>2</sup>, Christopher Warshaw and Gregory Wannier analyzed every environmental law decision by an appellate court between 1976 and 2009, and found about 50% more business cases were dismissed for lack of standing than cases brought by environmental advocacy groups. In the D.C. Court of Appeals, business groups are frequently denied standing on the basis that (a) they cannot show a particularized

---

<sup>2</sup> *Business as Usual? Analyzing the Development of Environmental Standing Doctrine Since 1976*, 6 Harv. L. & Pol'y Rev. 289.

injury different from that of other interests (“injury-in-fact”), (b) they cannot show that agency action caused their injury, or (c) they cannot show that their injury could be redressed through judicial action. Businesses are also denied standing for “prudential” standing reasons. Prudential standing requires that the claim fall within the “zone-of-interest” of the statute in question. Courts often find that purely economic injury claims fall outside the zone-of-interest protected by environmental statutes. The Sunshine for Regulatory Settlements and Decrees Act would afford affected parties an opportunity to intervene prior to the filing of a consent decree which goes toward leveling the playing field even for the regulated community to have a say in the settlement process.

**b. Should Congress consider reforms to make settlements and consent decrees achieved through “sue-and-settle” tactics more transparent? If so, how?**

Congress should enact the Sunshine for Regulatory Decrees and Settlements Act in order to bring about transparency in the settlement process. The Act would require agencies to give notice to the public when they receive notices of intent to sue from private parties and publish notice of a proposed consent decree or settlement in the *Federal Register*, and take (and respond to) public comments at least 60 days prior to the filing of the decree or settlement. The bill would also require agencies to do a better job showing that a proposed agreement is consistent with the law and in the public interest.

**3. 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?**

Congress should enact legislation which reins in agency overreach enabled by generous judicial deference. *Chevron* deference is required by neither the Constitution nor statute. In fact, Section 706 of the Administrative Procedure Act states that reviewing courts “shall decide all relevant questions of law.” The deference provided in *Chevron* can be largely described as judicial legislating because it grants agencies expanded powers by enabling them to fill in the gaps of ambiguous and vague statutes. In essence, when courts grant deference to agency actions, the court abdicates its constitutional obligation to interpret the law and serve as a check on the actions of federal agencies. Congress has primary authority and responsibility to legislate and when delegating it must clearly restrain the agency and conduct oversight to assure that agency legislating conforms to congressional intent. Likewise, courts have the primary authority to interpret the law and should not merely rubber-stamp agency interpretations of statutes. The Chamber believes that the Regulatory Accountability Act (RAA) would greatly alleviate many of the problems and massive rules imposed as a result of *Chevron* deference. The RAA defines a “high-impact” rule as a way to distinguish the few rulemakings each year that would impose more than \$1 billion a year in compliance costs. These high-impact rules would be required to undergo on-the-record administrative hearings to verify that the proposed rule is fully thought out and well-supported by good scientific and economic data. Regulations deemed “high-impact”

would undergo a substantial evidence standard of review.

- 4. 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?**
  - a. 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?**
  - b. Alternatively, should agencies be required to make systematic reviews of their own rules to determine if there are any duplicative or outdated rules?**

There should be a process to review existing regulations and ensure that old rules that are no longer needed, have been superseded by technological progress or changes in the economy, or are found to duplicate or overlap other rules are modified or eliminated. However, because businesses continuously attempt to comply with all laws, past regulations become part of their business practices and eliminating them can sometimes cause as much uncertainty as implementing a new regulation. Therefore, it is and will always be the case that businesses are most concerned about new regulations. Changing the regulatory process to ensure that new regulations are created in a more transparent and accountable way using all necessary and relevant information is the best approach to minimizing the economic harm done by overzealous federal regulators.

The current regulatory process consists of Congress delegating broad and vague powers to agencies and courts granting deference to agency decisions on how to implement those powers through regulation. This process allows agencies to regulate aggressively since there are few checks in the system. Once agencies have these delegated powers they fill in the gaps in the legislation and then further interpret the meaning of the law while being given deference to do so by the courts. This makes it hard to restrain agency action. Moreover, agencies like the EPA routinely ignore the Unfunded Mandates Reform Act (UMRA) and Regulatory Flexibility Act (RFA) analytical requirements, the mandates of the Information Quality Act (IQA), and has to date never performed its duty to analyze job loss and displacement as Congress required in section 321(a) of the Clean Air Act.

Congress should commit to reviewing the regulatory system, but not by establishing a committee to review old regulations. Instead, Congress should review the statutes that delegate broad authorities to federal agencies and determine whether or not such delegation is necessary and beneficial, or whether agencies should be given more narrow mandates with greater guidance and oversight. As long as agencies like the EPA have free reign under, for instance, the

Clean Air Act to ignore analytical mandates and continuously expand their authority under the cover of data and analysis that the public is not allowed to review or validate, they will continue to run free of constitutional checks and balances.

Requiring agencies to periodically review their own rules has been tried and has failed. Section 610 of the Regulatory Flexibility Act (RFA) requires agencies to perform an analysis of all regulations ten years after they have been enacted, and every ten years thereafter, and nominate for review and reform any that are duplicative or overlapping, or otherwise no longer relevant. The RFA has been on the books for over thirty years. However, agencies have seldom (if ever) undertaken even a nominal review, and mostly comply with the Sec. 610 requirement the same way they comply with other statutory analytical mandates: by cut-and-pasting boilerplate language asserting that they have performed the analysis and that they found nothing.

Additionally, the Office of Information and Regulatory Affairs (OIRA) has undertaken numerous retrospective regulatory reviews since the 1990s asking for nominations from the public of regulations to review and potentially change or repeal. This effort has been largely unsuccessful, as ultimately the process depended upon vetted nominations being handed back to agencies wherein the agency that promulgated the regulation had the ultimate responsibility of analyzing it and determining whether modification or repeal was warranted. Unsurprisingly, the agencies seldom found any reason to change or eliminate even their most burdensome and controversial regulations. In essence, asking agencies to review their own regulations is like putting the proverbial fox in charge of the henhouse. Agency overreach under insufficient oversight is the problem with the regulatory system, and we should not expect the agencies to begin policing themselves, even if required by statute.

- 5. 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?**

The Chamber commends the efforts of North Carolina to promote regulatory transparency and accountability through its Rules Review Commission and legislative review of regulations. Unfortunately, given the unique position of the federal government, determining whether programs administered by states are transferable to a federal context may prove to be difficult.

Specifically, after a regulation is in effect for years, it may become a business practice and eliminating the regulation may be as disruptive as implementing the rule years before. In addition, some statutes mandate the promulgation of regulations and provide private parties with the ability to sue if the regulation is not implemented. While the Chamber disagrees with the prudential standing imposed by citizen suits, it would be difficult to eliminate these regulations resulting from such lawsuits without repealing the statute mandating the regulation. Also, the Administrative Procedure Act allows for the petition of regulations to implement laws, so merely adding some regulations and removing others could become a regulatory merry-go-round.

The Chamber continues to recommend passage of: (1) the Regulatory Accountability Act in order to provide heightened scrutiny in the rulemaking process for major and high-impact rules; (2) the Sunshine for Regulatory Settlements and Decrees Act in order to bring greater transparency and access for parties aggrieved by sue-and-settle tactics; and (3) the creation of a private right of action under the Information Quality Act (IQA).