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House Judiciary Committee
Subcommittee on Crime, Terrorism, Homeland Security, and Investigations

OPENING REMARKS

MARKUP OF H.R. 4768, THE "SEPARATION OF POWERS RESTORATION ACT OF 2016"

WEDNESDAY, JUNE 8, 2016

10:00 A.M., 2141 RAYBURN

- Good morning and thank you Mr. Chairman.

- We are here today to markup H.R. 4768, the *Separation of Powers Restoration Act of 2016*, a bill to address purported constitutional and statutory deficiencies in the judicial review of agency rulemaking.

- I am opposed to H.R. 4768 because this bill is unfortunately deeply flawed and harmful to our nation's fundamental and well-established federal rulemaking process.

- Specifically, H.R. 4768 would abruptly shift the scope and authority of judicial review of agency actions away from federal agencies by amending Section 706 of the Administrative Procedures Act (APA) to "require that courts decide all relevant questions of law, including all questions of interpretation of constitutional, statutory, and regulatory provisions, on a de novo basis without deference to the agency that promulgated the final rule".

- Effectively, H.R. 4768 would abolish judicial deference to agencies' statutory interpretations in federal rulemaking and create harmful and costly burdens to the administrative process.

- Enacted in 1946, the APA establishes the minimum rulemaking and formal adjudication requirements for all administrative agencies.

- And for the past 70 years the APA has served and guided administrative agencies and the affected public in a manner that is flexible enough to accommodate the variety of agencies operating under it inclusive of changes through time.

- In addition to the APA, numerous other procedural and analytical requirements have been imposed on the rulemaking process by Congress and various presidents.

- Generally, agencies' development of new rules is an extensive process that is fully vetted with appropriate avenues for judicial relief where necessary.

- Namely, Section 702 of the APA in its current form subjects agency rulemaking to judicial review for "any person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute."

- Courts in particular retain an important role in determining whether an agency action is permissible, arbitrary, or capricious.

- And while, the APA requires reviewing courts to decide all relevant questions of law, interpret statutes, and determine the meaning of agency action, it is well-established that courts "must give substantial deference to an agency's interpretation of its own regulations."

- Indeed, the Supreme Court has routinely observed that the scope of judicial review is narrow and a court is not to substitute its judgment for that of the agency.

- Rather, it is well-settled that courts must give considerable weight to an agency's construction of a statute it administers.

- Such deference was established as bedrock administrative law in the 1984 Supreme Court case *Chevron v. Natural Resources Defense Council*, now known as the Chevron deference.

- *Chevron deference* has been upheld by hundreds of federal courts since and has been endorsed by both conservative and liberal Supreme Court justices and federal court judges.

- H.R. 4768 would override the Chevron doctrine enabling courts to ignore administrative records and expertise and to substitute their own inexpert views and limited information.

- Such a measure would radically transform the judicial review practice and make the rulemaking process more costly and time-consuming by forcing agencies to adopt more detailed factual records and explanations, effectively imposing more procedural requirements on agency rulemaking.

- This cumulative burden would have the effect of further ossifying the rulemaking process or dissuading agencies from undertaking rulemakings altogether.

- H.R. 4768 marks an unprecedented and dangerous move away from traditional judicial deference towards a system of that would enhance powers for corporate lobbyists and weaken protections for consumers and working families.

- Congressional consideration for an enhanced judicial review standard or a legislative override of judicial deference is not one we are unfamiliar with – but it is a matter we have long ago rejected along with our nations leading administrative law scholars and experts.

- H.R. 4768 is an unnecessary and misguided bill that would burden the rulemaking process and not simplify it.

- For these reasons, I am opposed to H.R. 4768.