

1 NATIONAL CAPITOL CONTRACTING
2 RPTS DAVIES
3 HJU160000

4 MARKUP ON:
5 H.R. 4768, THE "SEPARATION OF POWERS
6 RESTORATION ACT OF 2016"
7 Wednesday, June 8, 2016
8 House of Representatives,
9 Committee on the Judiciary,
10 Washington, D.C.

11 The committee met, pursuant to call, at 10:00 a.m., in
12 Room 2141, Rayburn House Office Building, Hon. Bob Goodlatte
13 [chairman of the committee] presiding.

14 Present: Representatives Goodlatte, Smith, Chabot,
15 Issa, Forbes, Franks, Gohmert, Jordan, Chaffetz, Marino,
16 Labrador, Farenthold, Collins, DeSantis, Buck, Ratcliffe,
17 Trott, Bishop, Conyers, Jackson Lee, Cohen, Johnson,
18 DelBene, Cicilline, and Peters.

19 Staff Present: Shelley Husband, Staff Director; Branden
20 Ritchie, Deputy Staff Director/Chief Counsel; Zachary
21 Somers, Parliamentarian & General Counsel; Daniel Flores,

22 Counsel, Subcommittee on Regulatory Reform, Commercial and
23 Antitrust Law; Alley Adcock, Clerk; Danielle Brown, Minority
24 Parliamentarian and Chief Legislative Counsel; Aaron Hiller,
25 Minority Chief Oversight Counsel; Joe Graupensperger,
26 Minority Chief Counsel, Subcommittee on Crime, Terrorism,
27 Homeland Security and Investigations; and Veronica Eligan,
28 Minority Professional Staff.

29 Chairman Goodlatte. Good morning. The Judiciary
30 Committee will come to order. And without objection, the
31 chair is authorized to declare a recess of the committee at
32 any time. Pursuant to notice, I now call up H.R. 4768 for
33 purposes of markup and move that the committee report the
34 bill favorably to the House. The clerk will report the
35 bill.

36 Ms. Adcock. H.R. 4768, to amend title 5, United States
37 Code, with respect to the judicial review of agency
38 interpretations of statutory and regulatory provisions.

39 [The bill follows:]

40 ***** INSERT 1 *****

41 Chairman Goodlatte. Without objection, the bill is
42 considered as read and open for amendment at any point, and
43 I will begin by recognizing myself for an opening statement.

44 The modern Federal administrative state is an
45 institution unforeseen by the Framers of our Constitution,
46 and rapidly mushrooming out of control. The Separation of
47 Powers Restoration Act of 2016 takes square aim at one of
48 the biggest roots of this problem, the Chevron doctrine,
49 under which Federal courts regularly defer to regulatory
50 agencies' self-serving interpretations of the statutes that
51 they themselves administer.

52 Similarly, the bill takes on the related Auer doctrine,
53 under which courts defer to agencies' interpretations of
54 their own regulations. In perhaps the most famous of the
55 Supreme Court's early decisions, *Marbury v. Madison*, Chief
56 Justice Marshall declared for a unanimous court that, "It is
57 emphatically the province and duty of the judicial
58 department to say what the law is."

59 Since the Chevron doctrine allows judges to evade
60 interpreting the law, instead to defer to agencies'
61 interpretations, one must ask is Chevron faithful -- pardon
62 me -- to *Marbury* and the separation of powers?

63 In the Administrative Procedure Act of 1946, often

64 called the Constitution of Administrative Law, Congress
65 provided for judicial review of agency actions in terms that
66 were plain and direct. It stated that the reviewing court
67 shall decide all relevant questions of law and interpret
68 constitutional and statutory provisions. That standard is
69 consistent with Marbury and the separation of powers. But
70 since Chevron allows judges to escape interpreting the
71 statutory provisions themselves, one must ask, is Chevron
72 unfaithful, not only to Marbury and the separation of
73 powers, but also to the Administrative Procedure Act?

74 These are not just academic questions. They are
75 fundamental questions that go to the heart of how our
76 government works and whether the American people can still
77 control it. Judicial deference under Chevron weakens the
78 separation of powers, threatening liberty. It bleeds out of
79 the judicial branch power to interpret the law, transfusing
80 that power into the executive branch; and it tempts Congress
81 to let the hardest work of legislating bleed out of Congress
82 and into the executive branch, since Congress knows judges
83 will defer to agency interpretations of ambiguities and gaps
84 in statutes Congress did not truly finish.

85 This leads us down the dangerous slope James Madison
86 warned against in Federalist 47, when he said the
87 accumulation of all powers, legislative, executive, and
88 judiciary in the same hands: "that may justly be pronounced

89 the very definition of tyranny."

90 The Separation of Powers Restoration Act of 2016 is
91 timely, bold legislation, directed straight at stopping our
92 slide down that dangerous slope. In one fell swoop, it
93 restores the separation of powers by legislatively
94 overturning the Chevron doctrine and the related Auer
95 doctrine. This is reform that we must make reality for the
96 good of the people.

97 I want to thank Representative Ratcliffe for his
98 introduction of this important legislation. I thank
99 subcommittee Chairman Marino for his work on the bill in the
100 subcommittee, and I thank all of the bill's co-sponsors. I
101 urge passage of the bill. At this time it is my pleasure to
102 recognize the ranking member, the gentleman from Michigan,
103 Mr. Conyers, for his opening statement.

104 [The statement of Chairman Goodlatte follows:]

105 ***** COMMITTEE INSERT *****

106 Mr. Conyers. Thank you so much, chairman. Members of
107 the committee, H.R. 4768, the Separation of Powers
108 Restoration Act, would eliminate judicial deference to
109 agencies, and require Federal courts to review all agency
110 rulemakings and interpretations of statutes on a de novo
111 basis.

112 As a result, the bill would empower a judge to override
113 the determinations of agency experts, and to substitute his
114 or her judgment, regardless of the judge's technical
115 knowledge and understanding of the underlying subject
116 matter. This legislation, in my view, is harmful for
117 several reasons.

118 To begin with, 4768 would make the Federal rulemaking
119 process even more time consuming and more costly. This
120 process is already severely ossified. As the Nation's
121 leading administrative law scholars observed, agency
122 rulemaking is hampered by many burdens imposed by both the
123 courts and Congress alike.

124 By eliminating any deference to agencies, H.R. 4768
125 would exacerbate this problem by forcing agencies to adopt
126 even more detailed factual records and explanations, which
127 would further delay the finalization of critical life-saving

128 regulations.

129 We are talking about regulations that protect the
130 quality of the air we breathe, the water we drink, and the
131 food we consume. Slowing down the rulemaking process means
132 that rules intended to protect the health and safety of
133 American citizens will take longer to promulgate and become
134 effective, thereby putting us all at risk.

135 And H.R. 4768 could also have the perverse effect of
136 undermining agency accountability and transparency by
137 encouraging clandestine rulemaking through civil enforcement
138 actions, for instance.

139 I am also concerned that 4768 will deter public
140 participation in the rulemaking process. As the
141 Congressional Research Service, non-partisan, has observed,
142 public participation in agency decision-making is highly
143 sensitive to cost and delay. By imposing greater scrutiny
144 of agency rulemaking, the bill will skew the fact-finding
145 process in favor of those with significant resources. Large
146 corporate interests, devoted only to maximizing profits for
147 the benefit of their shareholders, already have the edge
148 with their vast resources to weaken regulatory standards by
149 burying an agency with paperwork demands and litigation.

150 Rather than giving more opportunities for corporate
151 interests to prevail, we should be evaluating ways to ensure
152 that the voices of the public have a greater role in the

153 rulemaking process. And finally, H.R. 4768 would encourage
154 judicial activism. What do I mean by that? By eliminating
155 judicial deference, the bill would effectively empower the
156 courts to make public policy from the bench, even though
157 they may lack the specialized expertise that agencies
158 possess.

159 Although the Supreme Court has had numerous
160 opportunities to expand judicial review of rulemaking, the
161 court has rejected this approach in recognition of the fact
162 that generalist courts simply lack the subject matter
163 expertise of agencies, are politically unaccountable, and
164 should not engage in making substantive determinations from
165 the bench.

166 It is somewhat ironic that some of those who have long
167 decried judicial activism would now support facilitating a
168 greater role for the judiciary in agency rulemaking. So,
169 given these concerns and others presented by the bill, I
170 accordingly urge you to join with me in opposing H.R. 4768.
171 I thank the chairman and return any unused time.

172 [The statement of Mr. Conyers follows:]

173 ***** COMMITTEE INSERT *****

174 Chairman Goodlatte. The chair thanks the gentleman.
175 For what purpose does the gentleman from Texas seek
176 recognition?

177 Mr. Ratcliffe. Move to strike the last word.

178 Chairman Goodlatte. The gentleman is recognized for 5
179 minutes.

180 Mr. Ratcliffe. Thank you, Chairman. You know, when
181 our Founding Fathers established this great Nation, they
182 instituted a delicate balance of power to ensure a fair and
183 long-standing system of governance. They wisely recognized
184 that if too much power was concentrated in any one branch,
185 that tyranny would soon follow.

186 That is why early in life, every student in America
187 learns about the three coequal branches of government that
188 our Founders intended; and they learn that the Constitution
189 solely tasks Congress as the legislative branch, with making
190 the laws. The executive is tasked with enforcing the laws,

191 the judiciary with resolving disagreements about the meaning
192 of these laws.

193 But if we fast-forward to 2016, unfortunately, things
194 look very different. There is an uninvited fourth party now
195 on the scene, the unelected bureaucrat, working for
196 executive agencies. These bureaucrats take laws passed by
197 Congress, interpret them to mean whatever they want, and use
198 them to issue sweeping regulations under the guise of
199 executing the laws. And it is the American people who
200 ultimately lose out by this circumvention of our
201 Constitution.

202 Now, Congress is partly to blame. We have delegated
203 too much of our lawmaking authority to Federal agencies,
204 allowing the executive branch, under both political parties,
205 to expand its role. This practice of administrative
206 agencies engaging in de facto law-making has been
207 exacerbated by a 1984 Supreme Court case, Chevron v. Natural
208 Resources Defense Council.

209 The so-called Chevron doctrine that ensued says the
210 courts defer to agencies' interpretation of the law as long
211 as they are deemed reasonable. This low bar has given the
212 agencies the liberty to play fast and loose with the laws
213 that have been passed by Congress in order to achieve their
214 own political goals.

215 In the years following the Chevron decision, court

216 deference to agencies has certainly proved to be politically
217 expedient for Republican presidents and Democrat presidents
218 alike. The problem is, this has come at the expense of the
219 separation of powers, and at the neglect of the boundaries
220 that are set forth in our Constitution. Chevron basically
221 allows agencies to grade their own papers. This is totally
222 unacceptable, and it has to be stopped.

223 We have to shift the balance of power back to what is
224 clearly defined in our Constitution. Let me be clear. This
225 is not a Republican or Democrat issue. This is not about
226 partisan politics. This is about the three branches of
227 government respecting the lanes of constitutional authority.
228 In Congress, we have had vigorous and often politically-
229 charged policy debates on issues ranging from healthcare,
230 education, National security, and Federal spending. This
231 bill does not address any of those.

232 Instead, it addresses and restores the separation of
233 powers to ensure that these rightful policy debates manifest
234 themselves in laws that follow the confines of the
235 Constitution, not a process that rubber-stamps its abuse.
236 Because this is a constitutional issue, it is something that
237 all American can agree on, because when the Constitution is
238 trampled on, America loses.

239 That is why I am grateful for the opportunity to
240 introduce this bill, the Separation of Powers Restoration

241 Act. This bill clarifies the judicial branch, not unelected
242 bureaucrats, should settle any disputes about congressional
243 intent. It restores the proper separation of powers that
244 has been eroded by the unintended consequences of the
245 Chevron decision.

246 My colleagues on both sides of the aisle may not always
247 agree with me about agency actions which are good -- which
248 are bad. But if you agree that having three coequal
249 branches of government is vital and essential to preserving
250 democracy, then you should support this bill. I thank you
251 and yield back.

252 Chairman Goodlatte. The chair thanks the gentleman. I
253 now recognize myself for purposes of offering an amendment
254 in the nature of a substitute. Does the gentleman from
255 Georgia seek recognition?

256 Mr. Johnson. I do.

257 Chairman Goodlatte. The gentleman is recognized for 5
258 minutes.

259 Mr. Johnson. Thank you, Mr. Chairman. Mr. Chairman, I
260 rise in opposition to this legislation. Judicial review of
261 final agency action is a hallmark of administrative law and
262 is critical to ensure that agency action does not harm or
263 adversely affect the public.

264 But as the Supreme Court held in *Chevron v. Natural*
265 *Resources Defense Council*, reviewing courts may only

266 invalidate an agency action when it violates a
267 constitutional provision, or when an agency exceeds its
268 statutory authority as clearly expressed by Congress.

269 For the past 30 years, this seminal decision has
270 required deference to the substantive expertise and
271 political accountability of Federal agencies. Judicial
272 deference is borne from principles of political
273 accountability and separation of powers.

274 As the court explained in Chevron, "Federal judges who
275 have no constituency have a duty to respect legitimate
276 policy choices made by those who do. The responsibilities
277 for assessing the wisdom of such policy choices and
278 resolving the struggle between competing views of the public
279 interest are not judicial ones. Our Constitution vests such
280 responsibilities in the political branches."

281 H.R. 4768, the so-called Separation of Powers
282 Restoration Act of 2016, would eliminate this long-standing
283 tradition of judicial deference to agencies' interpretation
284 of statutes and rules by requiring courts to review all
285 agency interpretations of statutes and rules on a de novo
286 basis -- de novo meaning there would be a trial, and the
287 court would decide, after hearing evidence on the merits of
288 a particular code and/or a particular rule. A very
289 cumbersome process.

290 This misguided legislation is not the majority's first

291 attempt to come up the rulemaking process through enhanced
292 judicial review. Since the 112th Congress, a number of de-
293 regulatory bills that we have considered, such as H.R. 185,
294 the Regulatory Accountability Act, would require generalist
295 courts to supplant the expertise and political
296 accountability of agencies in the rulemaking process with
297 their own judgments.

298 Compare this approach with other de-regulatory bills
299 passed this Congress that would greatly diminish judicial
300 review over deregulatory actions by dramatically shortening
301 the statute of limitations for judicial review, sometimes to
302 just 45 days.

303 In other words, the majority is trying to gut
304 rulemaking in this Nation by Federal agencies. It wants to
305 do it in any way that it can: first, by closing the
306 courthouse doors if it benefits their interest; or, on the
307 other hand, if it benefits their interest, they want to gum
308 up the process with a judicial de novo hearing. It is
309 really threatening to impose years of delay, untold costs on
310 the public, and it hurts the health, safety, and wellbeing,
311 and welfare of the people of this country.

312 When it benefits the public or our environment,
313 Republican legislation closes the courthouse door through
314 sweeping restrictions on the court's ability to protect
315 public health or the environment. When it benefits

316 corporate interests, Republican legislation heightens
317 scrutiny of agency rulemaking, threatening to impose years
318 of delay and, again, untold costs. That is exactly what
319 this legislation would do.

320 These proposals, which are transparently the design of
321 the donor class to minimize their exposure to legal
322 accountability, are just another example of how some not
323 only want the fox to guard the henhouse, they want to make
324 sure that the fox constructs the henhouse in a way that has
325 a trap door available for him.

326 H.R. 4768 is just more of the same type of impediment
327 to protecting health, welfare, and safety of Americans. And
328 in closing, I strongly oppose this bill and urge that my
329 colleagues do the same. And with that, I yield back.

330 Chairman Goodlatte. The chair thanks the gentleman.
331 The chair would advise members of the committee that we are
332 going to recognize the gentleman from Pennsylvania, the
333 subcommittee chairman, for his statement, and then we are
334 going to recess for the prime minister of India's address to
335 the Joint Session of Congress.

336 We will reconvene at 1:00 and move forward then. And
337 then we will try to also get this done before the second
338 series of votes late afternoon. That is our plan at this
339 point. So, if you all cooperate and show up back up at
340 1:00, we will get that done. But at this time, the chair

341 recognizes the gentleman from Pennsylvania for 5 minutes.

342 Mr. Marino. I thank the chairman, and I will be very
343 brief. I thank Chairman Goodlatte and Congressman Radcliffe
344 for this piece of legislation. I am amazed but not
345 surprised that my Democrat colleagues so often use the word
346 "transparency" or variations of it, as though they invented
347 it. I assume that, as we all have seen, now on almost a
348 weekly basis, how the Obama administration has been anything
349 but transparent.

350 Obviously, the IRS is not transparent. The State
351 Department is not transparent. EPA is not transparent. The
352 Justice Department is not transparent. And last but not
353 least, the White House, itself, is not transparent -- just
354 to name a few. They delete information from computers.
355 They lose it. They do not follow subpoenas when we asked
356 information to be turned over to us. And again, that is
357 just a small example of what they mean by transparency.

358 Therefore, this legislation is required to preserve the
359 separation of powers, and I yield back.

360 Chairman Goodlatte. The chair thanks the gentleman,
361 and the committee will stand in recess until 1:00 p.m.

362 [Recess.]

363 Chairman Goodlatte. Before we last recessed, we were
364 considering H.R. 4768. And I now recognize myself for
365 purposes of offering an amendment in the nature of a

366 substitute. And the clerk will report the amendment.

367 Ms. Adcock. Amendment in the nature of a substitute to
368 H.R. 4768, offered by Mr. Goodlatte of Virginia. Strike all
369 that follows --

370 [The amendment of Chairman Goodlatte follows:]

371 ***** INSERT 2 *****

372 Chairman Goodlatte. Without objection, the amendment
373 in the nature of a substitute is considered as read and I
374 will recognize myself for an opening statement. On May 17,
375 2016, the Sub-Committee on Regulatory Reform Commercial and
376 Anti-Trust Law held a productive hearing on H.R. 4768, the
377 Separation of Powers Restoration Act of 2016. This
378 substitute amendment refines and improves H.R. 4768 based on
379 the expert feedback received at that hearing.

380 The amendment makes three principal changes. First, it
381 adds language to make crystal clear that under the bill,
382 judges must stop deferring to administrative agency
383 interpretations, not only in cases brought under the
384 Administrative Procedures Act's judicial review chapter, but
385 also under the various so-called mini-APA regimes that
386 appear elsewhere in the U.S. Code. These include, for
387 example, the Clean Air Act's mini-APA codified at 42 U.S.C.
388 7607.

389 In addition, the long title of the bill is revised to
390 make clear that the bill's true intent is not to modify the
391 substance of current APA language that supports de novo
392 review, but to clarify that language so the courts stop
393 ignoring it.

394 Lastly, the amendment modifies the ordering and
395 terminology of the bill's provisions to further clarify the
396 bill. The amendment strengthens the bill, and I urge my

397 colleagues to support it. At this time, the chair
398 recognizes the gentleman from Georgia, Mr. Johnson, for his
399 statement in response.

400 [The statement of Chairman Goodlatte follows:]

401 ***** COMMITTEE INSERT *****

402 Mr. Johnson. Thank you, Mr. Chairman. I rise in
403 opposition to the amendment in the nature of a substitute.
404 It appears that this amendment is intended to clarify that
405 H.R. 4768 would apply in all instances unless otherwise
406 expressly provided by statute. And it specifies that the de
407 novo standard review applies to all questions pertaining to
408 the interpretation of constitutional, statutory, and
409 regulatory provisions. Unfortunately, this amendment does
410 nothing to address the overarching concerns that I have with
411 H.R. 4768, as I expressed in my opening statement.

412 In fact, this amendment may raise additional concerns.
413 This amendment is effectively a super mandate that will
414 undermine areas where Congress has clearly intended courts
415 to defer to agencies' reasonable statutory interpretations,
416 such as under the Clean Air Act. Furthermore, the amendment
417 may also have the effect of creating needless confusion and
418 uncertainty surrounding legislative intent.

419 For example, at the legislative hearing on this bill,
420 the majority's own witness, Professor Jack Beermann, warned
421 that such mandates could be very complicated, as it would
422 make it difficult for Congress to indicate situations in
423 which it intends deference to agency statutory construction.
424 Given these serious concerns, I must oppose the amendment
425 and restate my opposition to this misguided legislation.

426 And with that, I yield back.

427 Chairman Goodlatte. The chair thanks the gentleman.

428 Are there any amendments to the amendment?

429 Mr. Johnson. Mr. Chairman, I do have an amendment at
430 the desk.

431 Chairman Goodlatte. The clerk will report the
432 amendment.

433 Ms. Adcock. Amendment to the amendment in the nature
434 of a substitute to H.R. 4768 offered by Mr. Johnson. Page
435 1, Line 9 --

436 [The amendment of Mr. Johnson follows:]

437 ***** INSERT 3 *****

438 Chairman Goodlatte. Without objection, the amendment
439 is considered as read and the gentleman is recognized for 5
440 minutes on his amendment.

441 Mr. Johnson. Thank you, Mr. Chairman. My amendment
442 exempts from the bill rules issued by agencies pursuant to
443 their expressed statutory authority. H.R. 4768 is a
444 misguided and dangerous bill that simply does not comprehend
445 the well-settled principle that courts must always give
446 effect to clearly expressed congressional intent under
447 current law.

448 H.R. 4768 would dismantle decades of judicial practice
449 and establish generalist courts as super-regulators, with
450 sweeping authority over the outcome, and perhaps even
451 substance of agency rulemaking, even where Congress
452 expressly grants authority for agency action.

453 At the subcommittee hearing on the bill, the majority's
454 own witness, Professor Jack Beermann, testified that the
455 bill may "go too far," by disabling, "reviewing courts from
456 taking into account the views of an administering agency on
457 questions of statutory interpretation."

458 Professor Beermann expressed additional concerns that
459 H.R. 4768 may frustrate Congress's intent for highly
460 technical areas in which Congress expects an agency to apply

461 its expertise. Furthermore, as Professor Beermann
462 testified, in areas where Congress expressly grants
463 authority for an agency to undertake an action, such as
464 defining a term, H.R. 4768 would represent a fundamental
465 shift in authority while making it difficult for Congress to
466 allow deference where appropriate.

467 The late Justice Scalia held a similar view on judicial
468 deference. Writing for the majority in *City of Arlington v.*
469 *FCC*, Justice Scalia argued that requiring a *de novo* review
470 of every agency rule without any standards to guide this
471 review, would result in an "open-ended hunt for
472 congressional intent," rendering the binding effect of
473 agency rules unpredictable and eviscerating, "the whole
474 stabilizing purpose of *Chevron*. The excessive agency power
475 that the dissent fears would be replaced by chaos."

476 In recognition of these concerns, my amendment would
477 exempt from the bill agency rules promulgated in response to
478 a clear and unequivocal mandate from Congress. Without my
479 amendment, and notwithstanding the endearing title of the
480 bill, H.R. 4768 would create countervailing separation of
481 powers concerns by casting aside Congress' role in shaping
482 agency rules in favor of judicial intervention.

483 As a group of our Nation's leading administrative law
484 experts have observed, "H.R. 4768 is disruptive to the
485 careful equilibrium that the full body of administrative law

486 doctrine seeks to achieve. Administrative law is not
487 perfect, but this bill tilts too strongly in favor of
488 judicial power at the expense of the other two branches."
489 In other words, the likely outcome of enacting this unwise
490 proposal would be more power in the hands of single branch
491 of government that is unelected and unaccountable to the
492 public.

493 This policy concern is the very foundation of the
494 Chevron doctrine. As the court noted in Chevron, judges,
495 "are not experts in the field and are not part of either
496 political branch of the government."

497 In closing, H.R. 4768 is not a new idea. Congress
498 considered and rejected a similar proposal over three
499 decades ago. It was not a good idea then and it is a worse
500 idea now. I urge my colleagues to support my amendment to
501 oppose this dangerous bill and yield back the balance of my
502 time.

503 Chairman Goodlatte. For what purpose does the
504 gentleman from Texas seek recognition?

505 Mr. Ratcliffe. I move to strike the last word.

506 Chairman Goodlatte. The gentleman is recognized for 5
507 minutes.

508 Mr. Ratcliffe. Mr. Chairman, I oppose this amendment.
509 The gentleman from Georgia's amendment carves out of the
510 bill agency actions based on statutes that expressly grant

511 agency discretion. But as agencies seek to act within areas
512 of statutory discretion, courts are more than able to
513 determine responsibly whether the agencies have, in fact,
514 acted within their discretion.

515 Furthermore, I think it is imperative that courts no
516 longer defer to agencies in defining as a matter of
517 statutory interpretation precisely what the limits of that
518 discretion are. Otherwise, self-serving, unelected, and
519 unaccountable bureaucrats will continue to interpret
520 statutes to empower agency overreach, and the courts will
521 continue to stand idly by and let them get away with it. I
522 urge my colleagues to oppose the amendment and I yield back.

523 Chairman Goodlatte. Thank you very much. For what
524 purpose does the gentlewoman from Washington seek
525 recognition?

526 Ms. DelBene. I move to strike the last word.

527 Chairman Goodlatte. The gentlewoman is recognized for
528 5 minutes.

529 Ms. DelBene. Thank you, Mr. Chair. I rise in support
530 of Mr. Johnson's amendment. Demand for wireless broadband
531 service is growing exponentially as society becomes
532 increasingly dependent on mobile devices, only becoming more
533 dependent with the growth of the Internet of things. And
534 some have estimated that mobile data use will multiply by 10
535 times in just the next few years; and experts agree that the

536 4G network is going to fall short.

537 The FCC has worked to make progress in meeting demand,
538 but we still have a long way to go to 5G. There have been
539 bipartisan efforts in Congress to direct the FCC to initiate
540 rulemaking on higher frequency bands and develop a national
541 plan for opening up more unlicensed spectrum.

542 We have even worked in a bipartisan way to cut
543 bureaucratic red tape so we can speed up deployment. But
544 innovation and the development of 5G would be thwarted under
545 this legislation. While Congress is pushing FCC in the
546 right direction, it generally is and should be left to the
547 agency to figure out the highly technical aspects of
548 implementing these proposals.

549 It is not an unintentional drafting error or bad
550 drafting when Congress directs the FCC to initiate
551 rulemaking. Rather, it is responsible policymaking to
552 ensure technical experts can implement our policy
553 objectives.

554 As spectrum increasingly becomes critical
555 infrastructure, it is important that we support agency
556 action that will help us maintain a competitive edge in the
557 global economy. And when an agency is directed by Congress
558 to reduce red tape and improve our technology
559 infrastructure, it should not be hampered by misguided
560 legislation like this.

561 However exceptional our judges across the country may
562 be, the courts are not equipped to second guess the FCC's
563 technical experts, nor should they. This is not their role,
564 and we should not undermine the Supreme Court's wisdom with
565 this legislation. And I urge my colleagues to support the
566 amendment, and I yield back.

567 Chairman Goodlatte. The chair would advise the members
568 that we do not have a working quorum at the moment, so votes
569 are pending. The committee will stand in recess until after
570 this vote series. We will come back immediately. We will
571 vote on this amendment and move on to other amendments, and
572 urge your colleagues to come back with you. Thank you very
573 much. The committee stands in recess.

574 [Recess.]

575 Mr. Johnson. Mr. Chairman?

576 Chairman Goodlatte. For what purpose does the
577 gentleman from Georgia seek recognition?

578 Mr. Johnson. Mr. Chairman, I would like to submit for
579 the record a letter to Chairman Goodlatte, and Ranking
580 Member Conyers from Earth Justice opposing H.R. 4768, a
581 letter from a group of administrative law experts at the
582 Center for Progressive Reform opposing 4768; a letter from
583 the Coalition for Sensible Safeguards which includes 150
584 labor, consumer health and safety, financial reform, faith,
585 environmental, and scientific integrity groups who oppose

586 H.R. 4768; and lastly, a blog posting by Public Knowledge,
587 which opposes H.R. 4768 -- for the record without objection.

588 Chairman Goodlatte. Without objection, they will be
589 made a part of the record, and [inaudible].

590 Mr. Johnson. Mr. Chairman, I would ask for a recorded
591 vote.

592 [inaudible]

593 Ms. Adcock. Mr. Goodlatte?

594 Chairman Goodlatte. No.

595 Ms. Adcock. Mr. Goodlatte votes no.

596 Mr. Sensenbrenner?

597 [No response.]

598 Mr. Smith?

599 [No response.]

600 Mr. Chabot?

601 [No response.]

602 Mr. Issa?

603 Mr. Issa. No.

604 Ms. Adcock. Mr. Issa votes no.

605 Mr. Forbes?

606 Mr. Forbes. No.

607 Ms. Adcock. Mr. Forbes votes no.

608 Mr. King?

609 [No response.]

610 Mr. Franks?

611 Mr. Franks. No.
612 Ms. Adcock. Mr. Franks votes no.
613 Mr. Gohmert?
614 [No response.]
615 Mr. Jordan?
616 [No response.]
617 Mr. Poe?
618 [No response.]
619 Mr. Chaffetz?
620 [No response.]
621 Mr. Marino?
622 [No response.]
623 Mr. Gowdy?
624 [No response.]
625 Mr. Labrador?
626 [No response.]
627 Mr. Farenthold?
628 [No response.]
629 Mr. Collins?
630 Mr. Collins. No.
631 Ms. Adcock. Mr. Collins votes no.
632 Mr. DeSantis?
633 [No response.]
634 Ms. Walters?
635 [No response.]

636 Mr. Buck?

637 Mr. Buck. No.

638 Ms. Adcock. Mr. Buck votes no.

639 Mr. Ratcliffe?

640 Mr. Ratcliffe. No.

641 Ms. Adcock. Mr. Ratcliffe votes no.

642 Mr. Trott?

643 Mr. Trott. No.

644 Ms. Adcock. Mr. Trott votes no.

645 Mr. Bishop?

646 Mr. Bishop. No.

647 Ms. Adcock. Mr. Bishop votes no.

648 Mr. Conyers?

649 [No response.]

650 Mr. Nadler?

651 [No response.]

652 Ms. Lofgren?

653 [No response.]

654 Ms. Jackson Lee?

655 Ms. Jackson Lee. Aye.

656 Ms. Adcock. Ms. Jackson Lee votes aye.

657 Mr. Cohen?

658 Mr. Cohen. Aye.

659 Ms. Adcock. Mr. Cohen votes aye.

660 Mr. Johnson?

661 Mr. Johnson. Aye.

662 Ms. Adcock. Mr. Johnson votes aye.

663 Mr. Pierluisi?

664 [No response.]

665 Ms. Chu?

666 [No response.]

667 Mr. Deutch?

668 [No response.]

669 Mr. Gutierrez?

670 [No response.]

671 Ms. Bass?

672 [No response.]

673 Mr. Richmond?

674 [No response.]

675 Ms. DelBene?

676 Ms. DelBene. Aye.

677 Ms. Adcock. Ms. DelBene votes aye.

678 Mr. Jeffries?

679 [No response.]

680 Mr. Cicilline?

681 Mr. Cicilline. Aye.

682 Ms. Adcock. Mr. Cicilline votes aye.

683 Mr. Peters?

684 Chairman Goodlatte. The gentleman from Pennsylvania?

685 Mr. Marino. No.

686 Ms. Adcock. Mr. Marino votes no.

687 Chairman Goodlatte. Has every member voted who wishes
688 to vote? The clerk will report.

689 Ms. Adcock. Mr. Chairman, 5 members voted aye, 10
690 members voted no.

691 Chairman Goodlatte. And the amendment is not agreed
692 to. For what purpose does the gentleman from Rhode Island
693 seek recognition?

694 Mr. Cicilline. Mr. Chairman, I have an amendment at
695 the desk.

696 Chairman Goodlatte. The clerk will report the
697 amendment.

698 Ms. Adcock. Amendment to the amendment in the nature
699 of a substitute to H.R. 4768 offered by Mr. Cicilline. Page
700 1, Line 9, insert after extent necessary the following: "and
701 accept as otherwise provided in this section" --

702 Chairman Goodlatte. Without objection, the amendment
703 is considered as read and --

704 Mr. Ratcliffe. Mr. Chairman?

705 Chairman Goodlatte. The gentleman from Texas is
706 recognized.

707 Mr. Ratcliffe. I would like to reserve a point of
708 order.

709 Chairman Goodlatte. Point of order reserved, and the
710 gentleman from Rhode Island is recognized for 5 minutes on

711 his amendment.

712 Mr. Cicilline. Thank you Mr. Chairman. My amendment
713 would exempt rules made by the Food and Drug Administration
714 pertaining to consumer safety from the heightened judicial
715 review requirements of this legislation. This bill would
716 effectively eliminate judicial deference, empowering
717 activist courts to substitute their policy preferences for
718 the specialized expertise of Federal agencies. Ultimately,
719 it would bring the agency rulemaking process to a halt,
720 incentivizing judges to rewrite current regulations and
721 introducing uncertainty into the effort to make new ones.

722 In the more specific context of the FDA, it would
723 hinder the agency's efforts to protect American consumers.
724 Every year one out of six people in the United States,
725 roughly 48 million people, suffer from food borne illness.
726 More than 100,000 Americans are hospitalized, and 3,000 die.

727 In economic terms, these illnesses impose a cost of \$77
728 billion upon the U.S. economy. My amendment would preserve
729 the ability of the FDA to react quickly to sudden crises in
730 food or drug safety, saving lives and money in the process.
731 It would preserve the ability of the agency to define
732 dangerous levels of toxins, and protect our drinking water.
733 And it recognizes the importance of the role that the FDA
734 serves and the expertise that they provide on a daily basis
735 to protect the health and wellbeing of our constituents. I

736 urge my colleagues to support this amendment. And with
737 that, I yield back, Mr. Chairman.

738 Chairman Goodlatte. The chair recognizes himself in
739 opposition to the amendment. The amendment carves out of
740 the bill consumer safety regulations from the Food and Drug
741 Administration. This is yet another important area of
742 regulation, and it is yet another area subject to
743 bureaucratic overreach and unelected, unaccountable
744 bureaucrats' erroneous whims. We must strengthen the
745 court's ability to check overreaching and erroneous
746 statutory and regulatory interpretations, not weaken it as
747 the amendment would do. I urge my colleagues to oppose the
748 amendment.

749 For what purpose does the gentleman from Tennessee seek
750 recognition?

751 Mr. Cohen. To strike the last word.

752 Chairman Goodlatte. The gentleman is recognized for 5
753 minutes.

754 Mr. Cohen. And I just want to ask the chair a
755 question. You were saying this would avoid whims and
756 caprices of the agency. Is not there a process now that --
757 it makes no sense? The regulation or the order that the
758 courts can overrule it?

759 Chairman Goodlatte. Well, if the gentleman would
760 yield.

761 Mr. Cohen. I will.

762 Chairman Goodlatte. What this deals with is a
763 presumption that the Supreme Court adopted, saying that,
764 because Congress was silent on this issue, they would
765 presume that the Congress wanted the courts to defer to the
766 agency bureaucrats' interpretation of the legislation
767 passed. And this legislation makes it clear that the courts
768 should not do that, and the courts should base their
769 decision looking at the clear language of the statute, and
770 not based upon a bureaucrat's interpretation of that
771 statute.

772 Mr. Cohen. But, if there is a presumption that this
773 interpretation is right, if it is whimsical or capricious,
774 would there not be an ability to overlook that presumption?
775 The presumption falls at a certain level, does it --

776 Chairman Goodlatte. Oh, absolutely. Yeah.

777 Mr. Cohen. Yeah.

778 Chairman Goodlatte. No question about that. What this
779 says is -- to the court, "Do not take a look at one of the
780 other branch's point of view on this issue. Take a look at
781 it from the standpoint of the court itself."

782 Mr. Cohen. I yield. Thank you sir.

783 Chairman Goodlatte. For what purpose does the
784 gentleman from Texas --

785 Mr. Radcliffe. Mr. Chairman, I would just like to

786 withdraw my point of order with respect to the gentleman's
787 amendment, and yield back.

788 Chairman Goodlatte. The order is withdrawn. The
789 question occurs on the amendment.

790 Mr. Johnson. Mr. Chairman?

791 Chairman Goodlatte. For what purpose does the
792 gentleman from Georgia seek recognition?

793 Mr. Johnson. I ask to strike the last word.

794 Chairman Goodlatte. The gentleman is recognized for 5
795 minutes.

796 Mr. Johnson. Thank you Mr. Chairman. When it comes to
797 the question of whether or not an unelected bureaucrat
798 trained and steeped in the intricacies of the particular
799 subject matter that the code, or regulation, or rule
800 addresses, is in a much better position to make the call
801 than an unelected judge with lifetime tenure.

802 This amendment I speak in support of, it would exempt
803 from the bill any rule issued by the Food and Drug
804 Administration that pertains to consumer safety. This
805 amendment is necessary to safeguard the public health and
806 safety of American consumers from the bill's burdensome,
807 regulatory framework, which would significantly delay or
808 prevent critical agencies, including the FDA, from
809 protecting public health and safety.

810 Just last week the FDA finally implemented the

811 bipartisan FDA Food Safety Modernization Act, which was
812 passed by Congress and signed into law by President Obama in
813 2011, representing the most substantial reform to food
814 safety in over 70 years. With the legislation having been
815 passed in 2011, and the rules finally implemented, if this
816 legislation were to pass, then the rule would be subjected
817 to a time consuming, and also costly litigation process in
818 the courts, already overburdened with work and already
819 understaffed because the Senate, under Republican
820 leadership, refuses to confirm the judges that have been
821 nominated by the President. So, we have judicial gridlock.

822 We have judicial emergencies. And here we are with this
823 legislation seeking to put more work onto an already-
824 overburdened judiciary, and then strap them with the kind of
825 sophisticated rulemaking authority that should be vested in
826 what is referred to on this panel as unelected bureaucrats.
827 But actually, these are hardworking Federal employees who
828 are concerned about their job, doing the best job that they
829 can under the limited funding that Congress appropriates
830 because Congress cannot pass any appropriations bills.

831 And so, we continue with continuing resolutions,
832 funding at last year's number, when in fact costs are going
833 up. And we are trying to strangle the Federal Government,
834 our Congress -- we just heard from Prime Minister Modi this
835 morning, talking about the aspirations, and ideals, and

836 investment that he is proposing to make in his country over
837 the next 10 years.

838 Would it not be something if America decided to invest
839 in its country, in its infrastructure, in its government, in
840 its ability to create and promote prosperity among all
841 people, not just the already wealthy, i.e. the top one
842 percent? Would it not be nice? But, instead, we go about
843 cutting government and then trying to gum up the works of
844 the agencies that protect the health, safety, and wellbeing
845 of Americans.

846 According to the Center for Disease Control, one in six
847 Americans get sick every year from food borne diseases, or
848 48 million people a year. Of these, 3,000 die every year
849 from diseases that are largely preventable. Under the
850 authority and clear regulatory framework achieved by the
851 Food safety Modernization Act, the FDA's finalized rules
852 would prevent food-borne illnesses from outbreaking and
853 contaminating produce and other important situations that
854 need protection.

855 In its letter opposing H.R. 4768, the Coalition for
856 Sensible Safeguards, which represents more than 150 labor,
857 food, and health, safety, and environmental public interest
858 groups, notes that H.R. 4768 will lead to regulatory
859 paralysis, particularly for rules relating to food safety
860 and in that sector.

861 So, without this amendment, at best, rules protecting
862 the public's food supply would be delayed for months or even
863 years, causing substantial confusion and delay in all agency
864 rulemaking. And at worst, the bill provides generalist
865 courts with unbridled discretion to make substantive
866 determinations concerning agency statutory authority. So, I
867 support the amendment and encourage my colleagues to do the
868 same. And with that, I yield back.

869 Chairman Goodlatte. The time of the gentleman has
870 expired.

871 Mr. Issa. Mr. Chairman, could I move to strike the
872 last word?

873 Chairman Goodlatte. The gentleman is recognized for 5
874 minutes.

875 Mr. Issa. I will be brief. I would like to enter into
876 a short colloquy with the chairman, both you and Mr.
877 Ratcliffe, as authors of the bill. I just want to
878 understand. The last two members on the other side of the
879 aisle seem to doubt the qualifications of the Federal
880 judiciary to adjudicate these cases.

881 A couple of questions. Currently, does the Federal
882 judiciary not already adjudicate these cases?

883 Chairman Goodlatte. The Federal judiciary does
884 adjudicate these cases. And in doing so, they have, under
885 the Chevron doctrine, deferred, when there is ambiguity, to

886 the interpretation given not by the Congress through
887 legislative history, but to the regulatory agency. We are
888 not asking them to do that. We are asking them to look at
889 the plain language of the law and make decisions based
890 thereon rather than having a tilt toward the bureaucracy.

891 The bureaucracy, as one of the speakers on the other
892 side said, has some expertise in this area. But they are
893 also often -- having come from interest group organizations
894 that lobby that very regulatory agency for the
895 interpretation that they want. And now, they have jobs
896 there and they are definitely interpreting it the way the
897 organizations they used to work for want.

898 So, we think the better rule here is to tell the
899 judiciary that their assumption that the Congress wants them
900 to look at the bureaucracy's interpretation no longer
901 applies, and that they should look at the plain language of
902 the law and decide it based on that.

903 Mr. Issa. Thank you. And one quick follow up, Mr.
904 Ratcliffe. As the primary author of the bill, under the
905 current law, if I understand correctly, the judges are
906 trying to understand basically the interpretation of these
907 agencies. Under your bill, will it not be true that they
908 will be looking at the law, which they are more qualified to
909 look at, and not some of the complexities of the
910 interpretation for purposes of size? Will it not simplify

911 their expertise relative to what they are ruling on?

912 Mr. Ratcliffe. I absolutely agree. It absolutely
913 will. And that is one of the reasons behind this bill. And
914 I think it is worth pointing out that, in response to one of
915 the comments, these, you know, Article III judges are vetted
916 and confirmed based on their education, training, and
917 experience. No, they are not elected, but they are not
918 simply just hired, like many bureaucrats are.

919 And so, you know, our Founders set this up
920 intentionally for those in the judicial branch to interpret
921 any ambiguity that we have, and I think that this bill sets
922 us back on the right path.

923 Mr. Issa. Excellent. I want to thank the chairman and
924 Mr. Ratcliffe for bringing us something that has judges
925 decide what they are qualified to do on, and I object to --
926 or I will vote no on the amendment, and I yield back.

927 Chairman Goodlatte. The question occurs on the
928 amendment offered by the gentleman from Rhode Island.

929 All those in favor, respond by saying aye.

930 Those opposed no.

931 Being the chair, the noes have it and the amendment is
932 not agreed to.

933 Mr. Cicilline. Mr. Chairman, I ask for a recorded
934 vote.

935 Chairman Goodlatte. A recorded vote is requested, and

936 the clerk will call the roll.

937 Ms. Adcock. Mr. Goodlatte?

938 Chairman Goodlatte. No.

939 Ms. Adcock. Mr. Goodlatte votes no.

940 Mr. Sensenbrenner?

941 [No response.]

942 Mr. Smith?

943 [No response.]

944 Mr. Chabot?

945 [No response.]

946 Mr. Issa?

947 Mr. Issa. No.

948 Ms. Adcock. Mr. Issa votes no.

949 Mr. Forbes?

950 [No response.]

951 Mr. King?

952 [No response.]

953 Mr. Franks?

954 Mr. Franks. No.

955 Ms. Adcock. Mr. Franks votes no.

956 Mr. Gohmert?

957 [No response.]

958 Mr. Jordan?

959 [No response.]

960 Mr. Poe?

961 [No response.]
962 Mr. Chaffetz?
963 [No response.]
964 Mr. Marino?
965 Mr. Marino. No.
966 Ms. Adcock. Mr. Marino votes no.
967 Mr. Gowdy?
968 [No response.]
969 Mr. Labrador?
970 [No response.]
971 Mr. Farenthold?
972 [No response.]
973 Mr. Collins?
974 Mr. Collins. No.
975 Ms. Adcock. Mr. Collins votes no.
976 Mr. DeSantis?
977 [No response.]
978 Ms. Walters?
979 [No response.]
980 Mr. Buck?
981 Mr. Buck. No.
982 Ms. Adcock. Mr. Buck votes no.
983 Mr. Ratcliffe?
984 Mr. Ratcliffe. No.
985 Ms. Adcock. Mr. Ratcliffe votes no.

986 Mr. Trott?
987 Mr. Trott. No.
988 Ms. Adcock. Mr. Trott votes no.
989 Mr. Bishop?
990 Mr. Bishop. No.
991 Ms. Adcock. Mr. Bishop votes no.
992 Mr. Conyers?
993 Mr. Conyers. Aye.
994 Ms. Adcock. Mr. Conyers votes aye.
995 Mr. Nadler?
996 [No response.]
997 Ms. Lofgren?
998 [No response.]
999 Ms. Jackson Lee?
1000 Ms. Jackson Lee. Aye.
1001 Ms. Adcock. Ms. Jackson Lee votes aye.
1002 Mr. Cohen?
1003 Mr. Cohen. Aye.
1004 Ms. Adcock. Mr. Cohen votes aye.
1005 Mr. Johnson?
1006 Mr. Johnson. Aye.
1007 Ms. Adcock. Mr. Johnson votes aye.
1008 Mr. Pierluisi?
1009 [No response.]
1010 Ms. Chu?

1011 [No response.]

1012 Mr. Deutch?

1013 [No response.]

1014 Mr. Gutierrez?

1015 [No response.]

1016 Ms. Bass?

1017 [No response.]

1018 Mr. Richmond?

1019 [No response.]

1020 Ms. DelBene?

1021 Ms. DelBene. Yes.

1022 Ms. Adcock. Ms. DelBene votes yes.

1023 Mr. Jeffries?

1024 [No response.]

1025 Mr. Cicilline?

1026 Mr. Cicilline. Aye.

1027 Ms. Adcock. Mr. Cicilline votes aye.

1028 Mr. Peters?

1029 [No response.]

1030 Chairman Goodlatte. The gentleman from Virginia?

1031 Mr. Forbes. No.

1032 Ms. Adcock. Mr. Forbes votes no.

1033 Chairman Goodlatte. Has every member voted who wishes

1034 to vote? The clerk will report.

1035 Ms. Adcock. Mr. Chairman, 6 members voted aye, 10

1036 members voted no.

1037 Chairman Goodlatte. And the amendment is not agreed
1038 to.

1039 For what purpose does the gentlewoman from Texas seek
1040 recognition?

1041 Ms. Jackson Lee. Mr. Chairman, I have an amendment at
1042 the desk.

1043 Chairman Goodlatte. The clerk will report the
1044 amendment.

1045 Ms. Adcock. Amendment to the amendment in the nature
1046 of a substitute to H.R. 4768 offered by Ms. Jackson Lee.

1047 [The amendment of Ms. Jackson Lee follows:]

1048 ***** INSERT 4 *****

1049 Ms. Jackson Lee. Mr. Chairman, I ask that the
1050 amendment be considered as unanimous consent.

1051 Chairman Goodlatte. Without objection, the amendment
1052 is considered as read and the gentlewoman is recognized for
1053 5 minutes on her amendment.

1054 Ms. Jackson Lee. Thank you very much, Mr. Chairman.
1055 And it is interesting that I, as we speak, have a markup in
1056 Homeland Security. And I wanted to make sure that this
1057 amendment was considerate of the responsibilities that the
1058 Homeland Security Department has in ensuring the security
1059 and safety -- but security -- of the people of the United
1060 States.

1061 So, this legislation falls short of that. It would
1062 abolish judicial deference to agencies' statutory
1063 interpretations in Federal rulemaking and create harmful and
1064 costly burdens to the administrative process. Having sat on
1065 this committee, and I am saddened to say that -- I have said
1066 this before and others -- I have listened to this before, I
1067 am sure -- I have seen this legislation before.

1068 H.R. 4768 will shift the scope and authority of
1069 judicial review of agency actions away from Federal agencies
1070 by amending Section 706 of the Administrative Procedures
1071 Act, APA, to require that courts decide all relevant
1072 questions of law, including all questions of interpretation
1073 of constitutional, statutory, and regulatory provisions on a
1074 de novo basis without deference to the agency that
1075 promulgated the final rule. And that is, of course, the
1076 agency that has held any number of hearings and fact-finding
1077 to ensure that this is a provision that is necessary for
1078 their administrative and statutory responsibilities.

1079 In particular, I am concerned about the ability for
1080 agencies to act in times of imminent danger and the need to
1081 protect citizens. Specifically, this is a sweeping and
1082 dangerous measure that would jeopardize the ability of the
1083 Department of Homeland Security to protect our Nation in
1084 times of urgent, an imminent need.

1085 The Jackson Lee Amendment 014, would remedy this flaw
1086 in case of a rule made by the Secretary of Homeland Security
1087 pertaining to any matter of National security, by requiring
1088 the reviewing court to decide all relevant questions of law,
1089 interpret constitutional statutory provisions, and determine
1090 the meaning or applicability of the terms of an agency
1091 action.

1092 As a senior member of the Homeland Security Committee,
1093 I understand the many challenges the Department of Homeland
1094 Security has, and the many facets of its work. I bring to
1095 the attention not only the work that engages visa and border
1096 protection, both in the northern and southern border, which
1097 is what we happen to be discussing in Homeland Security, but
1098 the Transportation Security Administration, the Secret
1099 Service, as well as FEMA and natural disasters -- manmade
1100 disasters.

1101 The Department is the first line of defense in
1102 protecting the Nation and leading recovery efforts from all
1103 hazards and threats, which include everything from weapons

1104 of mass destruction to natural disasters. We do not need to
1105 be reminded of the heightened state of security we are in
1106 now, and the ever-increasing demands imposed upon our
1107 government agencies tasked with keeping our borders and
1108 citizens safe. The overall mission of DHS is too critical
1109 and its function indispensably essential, such that it would
1110 be impugned to do anything that will slow down the process
1111 that allows DHS to do its job.

1112 We have heard that refrain: "Do your job." And DHS,
1113 because of its very unique, particular, and crucial
1114 responsibility, needs to be unfettered in doing its job,
1115 depending on or based on emergency crisis-oriented work.
1116 Now is not the time to undermine or slow the ability of DHS
1117 in its ability to address growing threats and active acts of
1118 terrorism. Rather than engage in a wasteful and redundant
1119 analysis of all of its rules, DHS will be focused on the
1120 crucial mission of securing the homeland.

1121 The Jackson Lee Amendment, 014, will keep in place the
1122 appropriate and needed expertise and specialized abilities
1123 of the Department of Homeland Security to makes rules,
1124 regulations necessary for our Nation's security. I would
1125 ask my colleagues to consider and support the Jackson Lee
1126 Amendment. With that, I yield back.

1127 Chairman Goodlatte. The chair thanks the gentlewoman.
1128 For what purpose does the gentleman from Texas seek

1129 recognition?

1130 Mr. Ratcliffe. I move to strike the last word.

1131 Chairman Goodlatte. The gentleman is recognized for 5
1132 minutes.

1133 Mr. Ratcliffe. Mr. Chairman, I oppose the amendment.
1134 The amendment from my friend and colleague from Texas, Ms.
1135 Jackson Lee, carves out of this bill National security
1136 regulations from the Department of Homeland Security. But
1137 as we all know, the Department of Homeland Security has a
1138 record of significant regulatory overreach. In fact, from
1139 my perspective, some of the most egregious and offensive
1140 interpretations of congressional intent have occurred by
1141 bureaucrats operating at the Department of Homeland
1142 Security.

1143 So, we should be strengthening the court's ability to
1144 check that, not weakening it, as this amendment would do.
1145 Unelected bureaucrats at the Department of Homeland Security
1146 are no less influenced by political agendas than bureaucrats
1147 at any other Federal agency.

1148 And, again, no area of regulation is so important that
1149 we should allow those unelected bureaucrats to avoid the
1150 vigorous system of checks and balances that our Framers
1151 intended, and that this bill would restore.

1152 So, while I appreciate the spirit in which the
1153 gentlelady offers this amendment, I urge my colleagues to

1154 oppose it, and I yield back.

1155 Mr. Conyers. Mr. Chairman?

1156 Chairman Goodlatte. For what purpose does the
1157 gentleman from Michigan seek recognition?

1158 Mr. Conyers. I rise in support of the amendment.

1159 Chairman Goodlatte. The gentleman is recognized for 5
1160 minutes.

1161 Mr. Conyers. Thank you, sir. This bill exempts from
1162 the bill rules issued by the Department of Homeland Security
1163 pertaining to matters of National security. And it is
1164 necessary because H.R. 4768's heightened judicial review
1165 requirements will stall or sometimes prevent rulemaking by
1166 the Department of Homeland Security, which is essential to
1167 the Nation's safety.

1168 Effective rulemaking is a critical tool for the
1169 Department of Homeland Security to prevent acts of
1170 terrorism, among other things. Section 550 of the
1171 Department of Homeland Security Appropriations Act
1172 authorizes the Department of Homeland Security to promulgate
1173 regulations pertaining to the security of high-risk chemical
1174 facilities.

1175 Pursuant to this authority, Homeland Security issued
1176 the chemical facility anti-terrorism standards regulation
1177 back in 2007, which mandated security requirements for over
1178 4,000 high-risk chemical facilities Nationwide. If

1179 released, stole, or sabotaged, chemicals produced at these
1180 facilities pose a significant risk to human life and public
1181 health.

1182 Homeland Security is currently reviewing public
1183 comments on a proposal to expand this rule to make these
1184 standards more effective. Once proposed, this rule will
1185 concern areas within Homeland Security's technical
1186 expertise, such as protecting National security and public
1187 health. H.R. 4768 would cause unnecessary paralysis of such
1188 rulemaking by permitting a generalist court to nullify
1189 Homeland Security's reasonable interpretations of its own
1190 statutory authority.

1191 Mr. John Walke, Senior Counsel at National Resource
1192 Defense Council, testified at the subcommittee hearing on
1193 the bill that this is because 4768 permits the judiciary,
1194 and I quote, "to ignore administrative records and
1195 expertise, and to substitute its own inexpert views and
1196 limited information," end quotation. This form of judicial
1197 fiat would empower generalist courts to make these
1198 determinations on a de novo basis while reviewing agency
1199 action.

1200 This amendment underscores the importance of preserving
1201 our system of checks and balances where courts defer to
1202 agencies' reasonable statutory interpretations and
1203 substantive expertise.

1204 So, I urge that the members carefully consider
1205 supporting this amendment, as I am going to do. I thank the
1206 --

1207 Ms. Jackson Lee. Will the gentleman yield?

1208 Mr. Conyers. Yes. Of course.

1209 Ms. Jackson Lee. Now, first of all, let me thank the
1210 gentleman for his very detailed explanation on the basis of
1211 this amendment. And I also want to add, and I think the
1212 gentleman said it, so let me say that I would like to
1213 reinforce that Section 702 of the APA in its current form
1214 subjects agency rulemaking to judicial review for any person
1215 suffering legal wrong because of agency action or adversely
1216 affected or aggrieved for agency action within the meaning
1217 of the relevant statute.

1218 And so, there is relief for those who, for whatever
1219 reason, feel offended by the regulatory process of an
1220 agency. My amendment suggests that Homeland Security needs
1221 a carve-out because of the responsibilities that it has. It
1222 is securing the Nation. I would argue that its intent to
1223 make sure that we are safe -- secure is the appropriate
1224 terminology; we deal with security of the Nation -- and to
1225 protect us from terrorism and terrorist acts, along with
1226 being prepared for a natural and manmade disasters, warrants
1227 the idea that there is a safety net if someone is offended
1228 by a particular rulemaking that occurs by the agency.

1229 And the processes that this legislation has immediately
1230 subjects Homeland Security to constant review of their
1231 efforts to secure the Nation. I ask support of the Jackson
1232 Lee amendment, and I yield back. Thank you.

1233 Chairman Goodlatte. The time of the gentleman has
1234 expired.

1235 Mr. Conyers. I yield back.

1236 Chairman Goodlatte. The chair thanks the gentleman.
1237 The question occurs on the amendment offered by the
1238 gentlewoman.

1239 Mr. Johnson. Mr. Chairman?

1240 Chairman Goodlatte. For what purpose does the
1241 gentleman from Georgia seek recognition?

1242 Mr. Johnson. I move to strike the last word.

1243 Chairman Goodlatte. The gentleman is recognized for 5
1244 minutes.

1245 Mr. Johnson. Mr. Chairman, we have been talking a
1246 whole lot about bureaucrats. And it is as if these
1247 bureaucrats have no substantive expertise in the field
1248 within which they are employed, oftentimes having worked for
1249 decades.

1250 And so, these bureaucrats are actually Federal workers.
1251 They are human beings. They are our neighbors. They are
1252 our friends and relatives. They work in the Federal
1253 Government. Yes, they are Federal employees. And yes, they

1254 are bureaucrats, but that does not make them bad. So, a
1255 bureaucrat is simply someone who has developed the
1256 substantive expertise in a particular field who has risen to
1257 a top position and who makes calls after going through the
1258 administrative process, which has been carefully
1259 constructed, both statutorily and by case law, throughout
1260 American jurisprudence.

1261 It is a carefully-constructed and delicately balanced
1262 process by which administrative rules are promulgated. And
1263 the public has the ability to weigh in on these rules
1264 through the notice and comment period, oftentimes.

1265 And then, on occasion, there are administrative --
1266 there is administrative litigation that takes place. And
1267 then a decision is made. Now what this legislation would do
1268 is to just scuttle all of that, and replace it with a de
1269 novo review in a Federal court, putting a judge in a
1270 position to substitute his or her judgment for that of the
1271 expertise of an agency bureaucrat, as they are called here,
1272 derisively.

1273 And what it is, is harmful for the American people.
1274 And it is an unelected judge with lifetime tenure that makes
1275 the call, who is not amenable to the people, not politically
1276 connected, disassociated from politics and from the people -
1277 - the decision-making process of politics; and that inures
1278 to only the benefit of those who the judge, in his or her

1279 esteemed wisdom, decides should be the winners or losers.
1280 That is not the way that our administrative process should
1281 operate.

1282 I rise in support of the Jackson Lee Amendment, and I
1283 would ask my colleagues to think carefully about what they
1284 are doing by supporting this legislation and opposing this
1285 amendment, which is only going to protect the health,
1286 safety, and well-being of the people. With that, I will --

1287 Ms. Jackson Lee. Will the gentleman yield for just a
1288 moment?

1289 Mr. Johnson. I will yield to the gentlelady from
1290 Texas.

1291 Ms. Jackson Lee. I will take just a moment. It is not
1292 too long ago that we know this Nation faced a horrific
1293 tragedy in 9/11. I have indicated that anyone offended by
1294 the regulatory scheme or regulatory efforts of the Homeland
1295 Security department has a process under Section 702 of the
1296 Administrative Procedures Act.

1297 In this instance, when urgency may be the call of the
1298 day to protect the American people, why would we then
1299 subject the reason and the expertise of the department while
1300 it is trying to secure the American people, to a de novo
1301 review by a judge -- who I have great respect for? I
1302 certainly have great respect and I have heard some of our
1303 presidential candidates acknowledge.

1304 But what I would say that that is a de novo review,
1305 which would take away the factual basis upon why we are
1306 making decisions to secure airports, to protect the border.
1307 And so, I would ask my colleagues to support the Jackson Lee
1308 Amendment. With that, I yield back to the gentleman. Thank
1309 you.

1310 Mr. Johnson. And I yield back the balance of my time.

1311 Chairman Goodlatte. The question occurs on the
1312 amendment offered by the gentlewoman from Texas.

1313 All those in favor, respond by saying aye.

1314 Those opposed no.

1315 The noes have it.

1316 Ms. Jackson Lee. Roll call.

1317 Chairman Goodlatte. A roll call is requested, and the
1318 clerk will call the roll.

1319 Ms. Jackson Lee. Thank you.

1320 Ms. Adcock. Mr. Goodlatte?

1321 Chairman Goodlatte. No.

1322 Ms. Adcock. Mr. Goodlatte votes no.

1323 Mr. Sensenbrenner?

1324 [No response.]

1325 Mr. Smith?

1326 [No response.]

1327 Mr. Chabot?

1328 [No response.]

1329 Mr. Issa?
1330 Mr. Issa. No.
1331 Ms. Adcock. Mr. Issa votes no.
1332 Mr. Forbes?
1333 [No response.]
1334 Mr. King?
1335 [No response.]
1336 Mr. Franks?
1337 Mr. Franks. No.
1338 Ms. Adcock. Mr. Franks votes no.
1339 Mr. Gohmert?
1340 [No response.]
1341 Mr. Jordan?
1342 [No response.]
1343 Mr. Poe?
1344 [No response.]
1345 Mr. Chaffetz?
1346 [No response.]
1347 Mr. Marino?
1348 [No response.]
1349 Mr. Gowdy?
1350 [No response.]
1351 Mr. Labrador?
1352 [No response.]
1353 Mr. Farenthold?

1354 [No response.]
1355 Mr. Collins?
1356 [No response.]
1357 Mr. DeSantis?
1358 [No response.]
1359 Ms. Walters?
1360 [No response.]
1361 Mr. Buck?
1362 Mr. Buck. No.
1363 Ms. Adcock. Mr. Buck votes no.
1364 Mr. Ratcliffe?
1365 Mr. Ratcliffe. No.
1366 Ms. Adcock. Mr. Ratcliffe votes no.
1367 Mr. Trott?
1368 Mr. Trott. No.
1369 Ms. Adcock. Mr. Trott votes no.
1370 Mr. Bishop?
1371 Mr. Bishop. No.
1372 Ms. Adcock. Mr. Bishop votes no.
1373 Mr. Conyers?
1374 Mr. Conyers. Aye.
1375 Ms. Adcock. Mr. Conyers votes aye.
1376 Mr. Nadler?
1377 [No response.]
1378 Ms. Lofgren?

1379 [No response.]

1380 Ms. Jackson Lee?

1381 Ms. Jackson Lee. Aye.

1382 Ms. Adcock. Ms. Jackson Lee votes aye.

1383 Mr. Cohen?

1384 Mr. Cohen. Aye.

1385 Ms. Adcock. Mr. Cohen votes aye.

1386 Mr. Johnson?

1387 Mr. Johnson. Aye.

1388 Ms. Adcock. Mr. Johnson votes aye.

1389 Mr. Pierluisi?

1390 [No response.]

1391 Ms. Chu?

1392 [No response.]

1393 Mr. Deutch?

1394 [No response.]

1395 Mr. Gutierrez?

1396 [No response.]

1397 Ms. Bass?

1398 [No response.]

1399 Mr. Richmond?

1400 [No response.]

1401 Ms. DelBene?

1402 [No response.]

1403 Mr. Jeffries?

1404 [No response.]

1405 Mr. Cicilline?

1406 Mr. Cicilline. Aye.

1407 Ms. Adcock. Mr. Cicilline votes aye.

1408 Mr. Peters?

1409 [No response.]

1410 Chairman Goodlatte. The gentleman from Virginia?

1411 Mr. Forbes. No.

1412 Ms. Adcock. Mr. Forbes votes no.

1413 Chairman Goodlatte. Has every member voted who wishes

1414 to vote? The clerk will report.

1415 Ms. Jackson Lee. Mr. Chairman, how am I recorded?

1416 Ms. Adcock. Aye.

1417 Ms. Jackson Lee. Thank you.

1418 Ms. Adcock. Mr. Chairman, five members voted aye,

1419 eight members voted no.

1420 Chairman Goodlatte. And the amendment is not agreed

1421 to.

1422 Mr. Conyers. Mr. Chairman?

1423 Chairman Goodlatte. For what purpose does the

1424 gentleman from Michigan seek recognition?

1425 Mr. Conyers. I have an amendment at the desk. I ask

1426 it be reported.

1427 Chairman Goodlatte. The clerk will report the

1428 amendment.

1429 Ms. Adcock. Amendment to the amendment in the nature
1430 of a substitute to H.R. 4768 offered by Mr. Conyers. Page
1431 1, Line 9, insert after "extent necessary" the following:

1432 "And accept as --

1433 [The amendment of Mr. Conyers follows:]

1434 ***** INSERT 5 *****

1435 Chairman Goodlatte. Without objection, the amendment
1436 is considered as read and the gentleman is recognized for 5
1437 minutes on his amendment.

1438 Mr. Conyers. Thank you. This is an absolutely
1439 necessary amendment, and it would exempt from the bill
1440 rulemakings by the Environmental Protection Agency
1441 pertaining to the regulation of lead and copper in drinking
1442 water.

1443 The recent Flint water crisis, in my state of Michigan,
1444 illustrates the critical importance of safe drinking water
1445 and the need for this amendment. The facts show that the
1446 Flint crisis was a preventable public health disaster.

1447 The lead contamination occurred because an unelected

1448 and unaccountable emergency manager decided to switch the
1449 city's water source to the Flint River without the benefit
1450 of proper corrosion control. This corrosive water leached
1451 highly toxic lead from residents' water pipes, exposing
1452 thousands of children to lead, which in turn can cause
1453 permanent developmental damage.

1454 Although much of the blame for the Flint Water crisis
1455 rests with unelected officials who prioritized saving money
1456 over saving lives, the presence of lead in drinking water is
1457 not unique to Flint. Potentially, millions of Americans
1458 across the Nation have the same risk.

1459 Urgent rulemakings, such as the Environmental
1460 Protection Agency's proposed revisions to its lead and
1461 copper rule, must not be impeded or delayed. Even before
1462 the Flint water crisis, the agency had begun the process of
1463 updating this rule, which it was originally promulgated in
1464 1991 after years of analysis.

1465 Rather than hastening this rulemaking, however, H.R.
1466 4768 would have the opposite result. Under the bill, a
1467 court lacking the requisite scientific or technical
1468 knowledge would be empowered to ignore administrative
1469 records and expertise, and to make its own determination
1470 based on its perhaps inexpert views and limited information.

1471 So, my amendment simply preserves current legal
1472 doctrine in cases involving review of regulations designed

1473 to prevent the contamination of drinking water by dangerous
1474 substances such as lead and copper.

1475 Clearly, it is critical that American have access to
1476 safe drinking water and that we do not hinder the ability of
1477 Federal agencies, such as the Environmental Protection
1478 Agency, to prevent future lead contamination events like the
1479 Flint water crisis. Federal judges who are constitutionally
1480 insulated from political accountability should not have the
1481 power to second-guess the agency experts concerning the
1482 appropriateness of highly technical regulations crucial to
1483 protecting the health and safety of millions of Americans.

1484 And so, I urge my fellow colleagues to carefully
1485 examine this amendment, support it. And Mr. Chairman, I
1486 thank you and yield back the balance of my time.

1487 Chairman Goodlatte. The chair thanks the gentleman and
1488 recognizes himself in opposition to the amendment.

1489 The amendment carves out of the bill regulations on
1490 lead and copper in drinking water. It would preserve
1491 unelected bureaucrats' broad discretion to impose on the
1492 public overreaching statutory and regulatory interpretations
1493 in this area of policy. It would guarantee that those
1494 unaccountable bureaucrats do not have to worry any more than
1495 they do now about courts checking their self-serving
1496 interpretations.

1497 It would let agencies get away just as much as now with

1498 resting overreaching regulations on tortured interpretations
1499 of existing statutes, instead of coming to Congress for new
1500 legislation, because the plain terms of existing law really
1501 do not support what they want to do.

1502 In short, the amendment seeks to perpetuate the Chevron
1503 and Auer doctrines, a weakening of the separation of powers,
1504 a weakening that threatens liberty and undermines
1505 accountable government of the people, by the people, and for
1506 the people.

1507 Drinking water regulation is important, but no area of
1508 regulation is so important that it should allow unelected
1509 bureaucrats to avoid the vigorous system of checks and
1510 balances the Framers intended, and this bill would restore.
1511 Indeed, bureaucrats should know that they will face vigorous
1512 judicial checks and balances when they act so that they have
1513 the strongest incentives to offer the best possible
1514 statutory and regulatory grounds for their actions and carry
1515 out the most responsible and fair enforcement possible. And
1516 I urge my colleagues to oppose this amendment.

1517 Mr. Cicilline. Mr. Chairman?

1518 Chairman Goodlatte. For what purpose does the
1519 gentleman from Rhode Island seek recognition?

1520 Mr. Cicilline. Move to strike the last word.

1521 Chairman Goodlatte. The gentleman is recognized for 5
1522 minutes.

1523 Mr. Cicilline. Thank you, Mr. Chairman. I rise in
1524 strong support of this amendment, which would exempt the EPA
1525 rulemaking related to the regulation of lead and copper in
1526 drinking water. In its place, the amendment preserves
1527 current law, which gives appropriate deference to EPA
1528 regulations issued with the input of scientific and industry
1529 experts to prevent contamination through the corrosion of
1530 lead pipes.

1531 One of the most important functions Congress has
1532 delegated to executive branch agencies is the formulation
1533 and enforcement of regulations to protect public health and
1534 safety. Perhaps foremost among these rules are those that
1535 ensure that Americans have access to safe drinking water.
1536 The Flint water crisis is an unfortunate reminder that we
1537 cannot take access to clean drinking water for granted. It
1538 is essential that the EPA continues to retain the ability to
1539 protect our Nation's public water systems from lead
1540 contamination.

1541 Congress originally tasked the EPA with this important
1542 job in 1986, because the agency possesses the requisite
1543 technical and scientific expertise necessary to craft the
1544 complicated but vital rules necessary to ensure millions of
1545 Americans, our constituents, have access to lead-free water.

1546 Unfortunately, H.R. 4768 would undermine Congress's
1547 legislative mandate to the EPA by permitting a generalist

1548 court to substitute its own policy judgments for those of
1549 scientific and environmental experts regarding the
1550 substantive regulations that are necessary to ensure
1551 Americans can safely drink the water from their kitchen
1552 faucets. That is because H.R. 4768, like many of the anti-
1553 regulatory bills supported by the majority, treats all
1554 regulations the same, regardless of the subject matter, and
1555 creates no distinction for those which protect public health
1556 and safety.

1557 Given the well-known and harmful effects lead can have
1558 on human health, particularly the health of developing
1559 children, it is critical that we pass this amendment to
1560 ensure the EPA can continue to effectively carry out its
1561 congressional mandate to protect our drinking water from
1562 hazardous contaminants.

1563 And I want to personally thank the gentleman from
1564 Michigan for offering this amendment, and urge my colleagues
1565 to support it so that we could ensure that all of our
1566 constituents are protected from contaminated water. And
1567 with that, I yield back.

1568 Chairman Goodlatte. The chair thanks the gentleman.
1569 The question occurs on the amendment offered by the
1570 gentleman from Michigan.

1571 All those in favor, respond by saying aye.

1572 Those opposed no.

1573 In the opinion of the chair, the noes have it.

1574 Mr. Conyers. May I have a record vote, Mr. Chairman?

1575 Chairman Goodlatte. A recorded vote is requested, and

1576 the clerk will call the roll.

1577 Ms. Adcock. Mr. Goodlatte?

1578 Chairman Goodlatte. No.

1579 Ms. Adcock. Mr. Goodlatte votes no.

1580 Mr. Sensenbrenner?

1581 [No response.]

1582 Mr. Smith?

1583 [No response.]

1584 Mr. Chabot?

1585 Mr. Chabot. No.

1586 Ms. Adcock. Mr. Chabot votes no.

1587 Mr. Issa?

1588 Mr. Issa. No.

1589 Ms. Adcock. Mr. Issa votes no.

1590 Mr. Forbes?

1591 [No response.]

1592 Mr. King?

1593 [No response.]

1594 Mr. Franks?

1595 Mr. Franks. No.

1596 Ms. Adcock. Mr. Franks votes no.

1597 Mr. Gohmert?

1598 [No response.]
1599 Mr. Jordan?
1600 [No response.]
1601 Mr. Poe?
1602 [No response.]
1603 Mr. Chaffetz?
1604 [No response.]
1605 Mr. Marino?
1606 [No response.]
1607 Mr. Gowdy?
1608 [No response.]
1609 Mr. Labrador?
1610 [No response.]
1611 Mr. Farenthold?
1612 [No response.]
1613 Mr. Collins?
1614 [No response.]
1615 Mr. DeSantis?
1616 Mr. DeSantis. No.
1617 Ms. Adcock. Mr. DeSantis votes no.
1618 Ms. Walters?
1619 [No response.]
1620 Mr. Buck?
1621 Mr. Buck. No.
1622 Ms. Adcock. Mr. Buck votes no.

1623 Mr. Ratcliffe?
1624 Mr. Ratcliffe. No.
1625 Ms. Adcock. Mr. Ratcliffe votes no.
1626 Mr. Trott?
1627 Mr. Trott. No.
1628 Ms. Adcock. Mr. Trott votes no.
1629 Mr. Bishop?
1630 Mr. Bishop. No.
1631 Ms. Adcock. Mr. Bishop votes no.
1632 Mr. Conyers?
1633 Mr. Conyers. Aye.
1634 Ms. Adcock. Mr. Conyers votes aye.
1635 Mr. Nadler?
1636 [No response.]
1637 Ms. Lofgren?
1638 [No response.]
1639 Ms. Jackson Lee?
1640 Ms. Jackson Lee. Aye.
1641 Ms. Adcock. Ms. Jackson Lee votes aye.
1642 Mr. Cohen?
1643 Mr. Cohen. Aye.
1644 Ms. Adcock. Mr. Cohen votes aye.
1645 Mr. Johnson?
1646 [No response.]
1647 Mr. Pierluisi?

1648 [No response.]

1649 Ms. Chu?

1650 [No response.]

1651 Mr. Deutch?

1652 [No response.]

1653 Mr. Gutierrez?

1654 [No response.]

1655 Ms. Bass?

1656 [No response.]

1657 Mr. Richmond?

1658 [No response.]

1659 Ms. DelBene?

1660 [No response.]

1661 Mr. Jeffries?

1662 [No response.]

1663 Mr. Cicilline?

1664 Mr. Cicilline. Aye.

1665 Ms. Adcock. Mr. Cicilline votes aye.

1666 Mr. Peters?

1667 [No response.]

1668 Chairman Goodlatte. Has every member voted who wishes

1669 to vote? The gentleman from Virginia?

1670 Mr. Forbes. No.

1671 Ms. Adcock. Mr. Forbes votes no.

1672 Chairman Goodlatte. The clerk will report.

1673 Ms. Adcock. Mr. Chairman, 10 members voted no, 4
1674 members voted aye.

1675 Chairman Goodlatte. And the amendment is not agreed
1676 to. Are there further amendments to H.R. 4768?

1677 Mr. Cicilline. Mr. Chairman?

1678 Chairman Goodlatte. For what purpose does the
1679 gentleman from Michigan seek recognition?

1680 Mr. Cicilline. I have an amendment at the desk, Mr.
1681 Chairman.

1682 Chairman Goodlatte. The clerk will report the
1683 amendment. For what purpose does the gentleman from Texas
1684 seek recognition?

1685 Mr. Ratcliffe. Mr. Chairman, I would like to reserve a
1686 point of order on this amendment.

1687 Chairman Goodlatte. The point of order is reserved.
1688 The clerk will report.

1689 Ms. Adcock. Amendment to the amendment in the nature
1690 of a substitute to H.R. 4768 offered by Mr. Cicilline. Page
1691 2, Line 7 --

1692 [The amendment of Mr. Cicilline follows:]

1693 ***** INSERT 6 *****

1694 Chairman Goodlatte. Without objection, the amendment
1695 is considered as read, and the gentleman is recognized for 5
1696 minutes on his amendment.

1697 Mr. Cicilline. Thank you, Mr. Chairman. This
1698 amendment would ensure that race, national origin, or
1699 religion of a judge not be a proper grounds for recusal from
1700 any action or proceeding, and I will just use a few moments

1701 to address the issue of a point of order with respect to
1702 germaneness, and suggest to the chairman my amendment is
1703 germane for several reasons.

1704 First, H.R. 4768 concerns the appropriate scope of
1705 review of an agency action by a reviewing court. My
1706 amendment goes to the heart of the issue by codifying
1707 existing judicial standards applicable to the review of
1708 agency action. A strong independent Federal judiciary is
1709 critical to the functioning of our democracy.

1710 No Federal judge who has been nominated by the
1711 President and confirmed by the Senate should ever be subject
1712 to calls for disqualification simply because of their ethnic
1713 origin or background. It is shameful and outrageous that
1714 anyone would suggest a judge's race, national origin, or
1715 religion would prevent them from rendering fair and
1716 impartial decisions.

1717 It does not matter if a judge is Mexican American,
1718 African American, Irish American, Jewish, Muslim, or
1719 Christian. The only thing that matters is whether the judge
1720 adheres to the Constitution and properly applies the law.
1721 And that is why my amendment reaffirms and codifies the
1722 principle that the race, National origin, or religion of a
1723 judge are not proper grounds for recusal from legal
1724 proceedings.

1725 My Republican colleagues have argued H.R. 4768 is a

1726 necessary reform, assuring that would curb so-called
1727 executive overreach. But in doing so, H.R. 4768 would
1728 elevate the role of judicial review. It would extend the
1729 reach of the Federal bench and allow judges to supplant the
1730 role that agencies serve in the policy-making process -- a
1731 very misguided idea, in my view. However, if we are going
1732 to reorganize the process of judicial review, let's take
1733 this opportunity to reassert that no Federal judge is
1734 subject to discrimination based on their race, color, or
1735 creed.

1736 Second, if the purpose of this bill is to give more
1737 power to the judicial branch, then an amendment ensuring
1738 that these judges are protected from spurious efforts to
1739 have them recused based on race, National origin, or
1740 religion, is unequivocally germane. Federal courts have
1741 already recognized this principle.

1742 For example, in *MacDRAW Inc. v. CIT Equipment*
1743 *Financing*, the plaintiff argued to the Second Circuit on
1744 appeal that then-U.S. District Court Judge Denny Chin was
1745 biased in part due to his Asian ancestry. In its decision,
1746 the Second Circuit found that race and ethnicity are
1747 improper bases for challenging a judge's impartiality, and
1748 that such claims violate the code of professional
1749 responsibility. My amendment simply codifies this principle
1750 into law.

1751 And finally, if there is any uncertainty concerning the
1752 principle that race, ethnicity, or National origin must not
1753 serve as a basis for judicial disqualification of review of
1754 agency action, we should err on the side of caution by
1755 adopting this amendment to make clear that discrimination
1756 has no place in determining the outcome of judicial review
1757 of agency action.

1758 My amendment will protect judges from the claim that
1759 the color of their skin or the place of the birth of their
1760 parents somehow prevents them from serving as an impartial
1761 arbiter. It would insulate them from the claim that they
1762 are somehow less able to preside over a Federal court based
1763 on nothing more than their race or faith that they practice.
1764 It would shield those who have served for years on the
1765 Federal bench with dignity from baseless and hurtful
1766 allegations of bias and prejudice.

1767 We are a diverse Nation. The makeup of our Federal
1768 courts increasingly reflects this fact. Let's put an end to
1769 the kind of prejudice that we have seen. Our constituents
1770 deserve a strong, independent Federal judiciary that is
1771 immune to racist attacks. And my amendment simply preserves
1772 their ability to serve without prejudice or bias and
1773 enshrines the principles of nondiscrimination that are the
1774 founding principles of our great Nation. I urge my
1775 colleagues to support my amendment, and with that, yield

1776 back the balance of my time.

1777 Chairman Goodlatte. Does the gentleman from Texas
1778 insist upon his point of order?

1779 Mr. Ratcliffe. Yes, Mr. Chairman. I insist on my
1780 point of order.

1781 Chairman Goodlatte. The gentleman is recognized for 5
1782 minutes on his point of order.

1783 Mr. Ratcliffe. Mr. Chairman, H.R. 4768, as you well
1784 know, amends the Administrative Procedure Act to overturn
1785 the so-called Chevron and Auer doctrines of judicial
1786 deference to agency interpretations of statutory and
1787 regulatory provisions.

1788 The Cicilline Amendment, by contrast, addresses an
1789 entirely different subject matter, the basis for which a
1790 Federal judge could be disqualified from hearing a case.
1791 And because the gentleman's amendment addresses an entirely
1792 different subject matter than the substitute amendment, the
1793 amendment is not germane. With that, I yield back.

1794 Chairman Goodlatte. The chair thanks the gentleman.
1795 Does the gentleman offering the amendment wish to speak on
1796 the point of order?

1797 Mr. Cicilline. Mr. Chairman, I would just say --

1798 Chairman Goodlatte. He is recognized.

1799 Mr. Cicilline. Thank you, Mr. Chairman. I would just
1800 say that, in fact, as I articulated in my earlier comments,

1801 H.R. 4768 is elevating the role of the Federal courts in
1802 review of agency action. And in that context, I think it is
1803 perfectly germane and appropriate to use this as an
1804 opportunity to state this principle, that notwithstanding
1805 any other provisions of law, race, National origin, or
1806 religion of a judge shall not be a proper grounds for
1807 recusal from an action or proceeding.

1808 And in fact, that is, in fact, the law. It simply sets
1809 forth in statute what is existing law. And in the context
1810 of H.R. 4768, which is really about empowering the Federal
1811 court to conduct agency reviews in a new way, and enhance
1812 the power of the court to do that, not offering the
1813 deference to agencies that have previously existed.

1814 It is in that context now that I think it is
1815 appropriate and certainly germane and relevant to this, that
1816 we ensure that in this elevated role, that the judicial
1817 officers are not subjected to recusal requests based on
1818 race, religion, or national origin. And so, I urge the
1819 chairman to find that this amendment is in order, and I urge
1820 my colleagues to support the amendment.

1821 Ms. Jackson Lee. I was going to ask to speak to the
1822 point of order.

1823 Mr. Cicilline. I yield to the gentlelady from Texas on
1824 her point of order.

1825 Chairman Goodlatte. The gentleman may yield.

1826 Ms. Jackson Lee. I thank the gentleman for yielding.
1827 I want to build on the gentleman's point that this is
1828 germane. In the alternative, I would ask that the point of
1829 order or the issue of germaneness be waived, and it has been
1830 done before. We do it frequently when a rule comes from the
1831 Rules Committee, and points of order are waived.

1832 So, I would make the point. And the reason I make this
1833 point is that the amendment of Mr. Cicilline goes to the
1834 activities of the bench. It goes to the fact that now the
1835 bill, the underlying bill, is providing another pathway for
1836 the court to be engaged actively in the review of the
1837 regulatory process under the Administrative Procedure Act,
1838 meaning that they now will step in de novo, and have added
1839 duties to be able to, in essence, review regulations
1840 promulgated by our agencies.

1841 This amendment ties directly to that court's potential
1842 review of those regulations. Why is that? All of us have
1843 heard reports in the press that seemingly have called into
1844 question a judge's ethnicity. Wrongly so, of course. But
1845 we have heard a particular judge called a Mexican.

1846 Those of us from Texas have great umbrage of that
1847 articulation of individuals who may be of certain descent,
1848 as we have different definitions for them. And so, it was a
1849 shocking terminology in the first place. But putting aside
1850 someone's misinformation and inappropriate talk, it does

1851 bring into question the gentleman's amendment. That is --

1852 Mr. Conyers. Would the gentlelady yield?

1853 Ms. Jackson Lee. I would be happy to yield, if I just
1854 finish -- if I might -- this one sentence. It brings into
1855 question the idea that a judge's duties, which is what this
1856 bill is about -- you would be calling into question the
1857 ethnicity. And so, I think the gentleman's amendment is
1858 germane, and I would be happy to yield -- and if not, the
1859 point of order can be waived. I would be happy to yield to
1860 the gentleman, the ranking member.

1861 Mr. Conyers. Thank you. Thank you very much, Ms.
1862 Jackson Lee. This amendment is important because it
1863 clarifies that a judge may not be disqualified from
1864 reviewing an agency action or proceeding on the basis of
1865 race, ethnicity, or National origin. One of the hallmarks
1866 of our justice system is the notion that justice is blind.
1867 And we are a Nation that believes we should be judged by the
1868 content of our character, not the color of our skin, as Dr.
1869 King so eloquently explained so many times.

1870 And this amendment ensures that Federal judges who have
1871 been appointed by the President, confirmed by the Senate,
1872 are not disqualified from reviewing agency action on the
1873 basis of race, ethnicity, or National origin. We can all
1874 agree that disqualification on these grounds is dangerous,
1875 morally repugnant, and belies the foundations of our system

1876 of justice. And those are the reasons that I join with
1877 those who support this amendment. And I thank the chairman.

1878 Chairman Goodlatte. The chair thanks the gentleman and
1879 is prepared to rule on the point of order. It is the
1880 opinion of the chair that the amendment is not germane. Are
1881 there --

1882 Mr. Cicilline. Mr. Chairman? I respectfully appeal
1883 the ruling of the chair.

1884 Chairman Goodlatte. For what purpose does the
1885 gentleman from Ohio seek recognition?

1886 Mr. Chabot. Mr. Chair, I move to table the motion.

1887 Chairman Goodlatte. The motion is made to table the
1888 appeal of the ruling of the chair.

1889 All those in favor of tabling the motion, respond by
1890 saying aye.

1891 Those opposed, no.

1892 In the opinion of the chair, the ayes have it, and the
1893 appeal of the ruling of the chair is tabled.

1894 Mr. Cicilline. Mr. Chairman, I request a recorded
1895 vote.

1896 Chairman Goodlatte. A recorded vote is requested, and
1897 the clerk will call the roll.

1898 Ms. Adcock. Mr. Goodlatte?

1899 Chairman Goodlatte. Aye.

1900 Ms. Adcock. Mr. Goodlatte votes aye.

1901 Mr. Sensenbrenner?
1902 [No response.]
1903 Mr. Smith?
1904 [No response.]
1905 Mr. Chabot?
1906 Mr. Chabot. Aye.
1907 Ms. Adcock. Mr. Chabot votes aye.
1908 Mr. Issa?
1909 Mr. Issa. Aye.
1910 Ms. Adcock. Mr. Issa votes aye.
1911 Mr. Forbes?
1912 [No response.]
1913 Mr. King?
1914 [No response.]
1915 Mr. Franks?
1916 Mr. Franks. Aye.
1917 Ms. Adcock. Mr. Franks votes aye.
1918 Mr. Gohmert?
1919 Mr. Gohmert. Aye.
1920 Ms. Adcock. Mr. Gohmert votes aye.
1921 Mr. Jordan?
1922 [No response.]
1923 Mr. Poe?
1924 [No response.]
1925 Mr. Chaffetz?

1926 [No response.]
1927 Mr. Marino?
1928 [No response.]
1929 Mr. Gowdy?
1930 [No response.]
1931 Mr. Labrador?
1932 [No response.]
1933 Mr. Farenthold?
1934 [No response.]
1935 Mr. Collins?
1936 [No response.]
1937 Mr. DeSantis?
1938 Mr. DeSantis. Yes.
1939 Ms. Adcock. Mr. DeSantis votes yes.
1940 Ms. Walters?
1941 [No response.]
1942 Mr. Buck?
1943 Mr. Buck. Yes.
1944 Ms. Adcock. Mr. Buck votes yes.
1945 Mr. Ratcliffe?
1946 Mr. Ratcliffe. Yes.
1947 Ms. Adcock. Mr. Ratcliffe votes yes.
1948 Mr. Trott?
1949 Mr. Trott. Yes.
1950 Ms. Adcock. Mr. Trott votes yes.

1951 Mr. Bishop?

1952 Mr. Bishop. Yes.

1953 Ms. Adcock. Mr. Bishop votes yes.

1954 Mr. Conyers?

1955 Mr. Conyers. No.

1956 Ms. Adcock. Mr. Conyers votes no.

1957 Mr. Nadler?

1958 [No response.]

1959 Ms. Lofgren?

1960 [No response.]

1961 Ms. Jackson Lee?

1962 Ms. Jackson Lee. No.

1963 Ms. Adcock. Ms. Jackson Lee votes no.

1964 Mr. Cohen?

1965 [No response.]

1966 Mr. Johnson?

1967 Mr. Johnson. No.

1968 Ms. Adcock. Mr. Johnson votes no.

1969 Mr. Pierluisi?

1970 [No response.]

1971 Ms. Chu?

1972 [No response.]

1973 Mr. Deutch?

1974 [No response.]

1975 Mr. Gutierrez?

1976 [No response.]

1977 Ms. Bass?

1978 [No response.]

1979 Mr. Richmond?

1980 [No response.]

1981 Ms. DelBene?

1982 Ms. DelBene. No.

1983 Ms. Adcock. Ms. DelBene votes no.

1984 Mr. Jeffries?

1985 [No response.]

1986 Mr. Cicilline?

1987 Mr. Cicilline. No.

1988 Ms. Adcock. Mr. Cicilline votes no.

1989 Mr. Peters?

1990 [No response.]

1991 Chairman Goodlatte. The gentleman from Texas, Mr.

1992 Smith. Have you already voted?

1993 Mr. Smith. Yes.

1994 Ms. Adcock. Mr. Smith votes yes.

1995 Chairman Goodlatte. The gentleman from Virginia, Mr.

1996 Forbes?

1997 Mr. Forbes. Yes.

1998 Ms. Adcock. Mr. Forbes votes yes.

1999 Chairman Goodlatte. The gentleman from Tennessee?

2000 Mr. Cohen. No.

2001 Ms. Adcock. Mr. Cohen votes no.

2002 Chairman Goodlatte. Has every member voted who wishes
2003 to vote? The clerk will report.

2004 Ms. Adcock. Mr. Chairman, 12 members voted aye, 6
2005 members voted no.

2006 Chairman Goodlatte. And the appeal of the ruling of
2007 the chair is tabled. Are there further amendments to the
2008 amendment in the nature of a substitute to H.R. 4768?

2009 The question is on the amendment to the amendment in
2010 the nature of a substitute.

2011 Those in favor will respond by saying aye.

2012 Those opposed, no.

2013 Being the chair, the ayes have it, and the amendment is
2014 agreed to.

2015 The chair would advise the members of the committee
2016 that we do not have a reporting quorum present to vote on
2017 final passage of the bill, so the committee will remain in
2018 session to give members an opportunity to get here until the
2019 next vote series. If we do not get numbers here by that
2020 time, we will have to reconvene tomorrow to vote on this
2021 measure.

2022 We will take a recorded vote and we will suspend the
2023 final action on the vote until members have a chance to get
2024 here the vote. So, the clerk will call the roll on final
2025 passage of H.R. 4768.

2026 Ms. Adcock. Mr. Goodlatte?
2027 Chairman Goodlatte. Aye.
2028 Ms. Adcock. Mr. Goodlatte votes aye.
2029 Mr. Sensenbrenner?
2030 [No response.]
2031 Mr. Smith?
2032 Mr. Smith. Aye.
2033 Ms. Adcock. Mr. Smith votes aye.
2034 Mr. Chabot?
2035 Mr. Chabot. Aye.
2036 Ms. Adcock. Mr. Chabot votes aye.
2037 Mr. Issa?
2038 Mr. Issa. Aye.
2039 Ms. Adcock. Mr. Issa votes aye.
2040 Mr. Forbes?
2041 [No response.]
2042 Mr. King?
2043 [No response.]
2044 Mr. Franks?
2045 Mr. Franks. Aye.
2046 Ms. Adcock. Mr. Franks votes aye.
2047 Mr. Gohmert?
2048 Mr. Gohmert. Aye.
2049 Ms. Adcock. Mr. Gohmert votes aye.
2050 Mr. Jordan?

2051 [No response.]

2052 Mr. Poe?

2053 [No response.]

2054 Mr. Chaffetz?

2055 [No response.]

2056 Mr. Marino?

2057 [No response.]

2058 Mr. Gowdy?

2059 [No response.]

2060 Mr. Labrador?

2061 [No response.]

2062 Mr. Farenthold?

2063 [No response.]

2064 Mr. Collins?

2065 [No response.]

2066 Mr. DeSantis?

2067 Mr. DeSantis. Aye.

2068 Ms. Adcock. Mr. DeSantis votes aye.

2069 Ms. Walters?

2070 [No response.]

2071 Mr. Buck?

2072 [No response.]

2073 Mr. Ratcliffe?

2074 Mr. Ratcliffe. Yes.

2075 Ms. Adcock. Mr. Ratcliffe votes yes.

2076 Mr. Trott?
2077 Mr. Trott. Yes.
2078 Ms. Adcock. Mr. Trott votes yes.
2079 Mr. Bishop?
2080 Mr. Bishop. Yes.
2081 Ms. Adcock. Mr. Bishop votes yes.
2082 Mr. Conyers?
2083 Mr. Conyers. No.
2084 Ms. Adcock. Mr. Conyers votes no.
2085 Mr. Nadler?
2086 [No response.]
2087 Ms. Lofgren?
2088 Ms. Lofgren. No.
2089 Ms. Adcock. Ms. Lofgren votes no.
2090 Ms. Jackson Lee?
2091 Ms. Jackson Lee. No.
2092 Ms. Adcock. Ms. Jackson Lee votes no.
2093 Mr. Cohen?
2094 Mr. Cohen. No.
2095 Ms. Adcock. Mr. Cohen votes no.
2096 Mr. Johnson?
2097 Mr. Johnson. No.
2098 Ms. Adcock. Mr. Johnson votes no.
2099 Mr. Pierluisi?
2100 [No response.]

2101 Ms. Chu?

2102 [No response.]

2103 Mr. Deutch?

2104 [No response.]

2105 Mr. Gutierrez?

2106 [No response.]

2107 Ms. Bass?

2108 [No response.]

2109 Mr. Richmond?

2110 [No response.]

2111 Ms. DelBene?

2112 Ms. DelBene. No.

2113 Ms. Adcock. Ms. DelBene votes no.

2114 Mr. Jeffries?

2115 [No response.]

2116 Mr. Cicilline?

2117 Mr. Cicilline. No.

2118 Ms. Adcock. Mr. Cicilline votes no.

2119 Mr. Peters?

2120 [No response.]

2121 Chairman Goodlatte. The gentleman from Virginia.

2122 Mr. Forbes. Yes.

2123 Ms. Adcock. Mr. Forbes votes yes.

2124 Chairman Goodlatte. The gentlewoman from California.

2125 Ms. Lofgren. I already voted.

2126 Chairman Goodlatte. Oh, sorry.

2127 Chairman Goodlatte. The gentleman from California, Mr.

2128 Peters?

2129 Mr. Peters. No.

2130 Ms. Adcock. Mr. Peters votes no.

2131 Mr. Farenthold. I am not recorded.

2132 Chairman Goodlatte. The gentleman from Texas, Mr.

2133 Farenthold?

2134 Mr. Farenthold. I am not recorded. I vote yes.

2135 Ms. Adcock. Mr. Farenthold votes yes.

2136 Chairman Goodlatte. The clerk will report.

2137 Ms. Adcock. Mr. Chairman, 12 members voted aye, 8

2138 members voted no.

2139 Chairman Goodlatte. The ayes have it, and the bill, as

2140 amended, is ordered reported favorably to the House.

2141 Members will have 2 days to submit views. And without

2142 objection, the bill will be reported as a single amendment

2143 in the nature of a substitute incorporating all adopted

2144 amendments, and staff is authorized to make technical and

2145 conforming changes.

2146 This completes the work of the committee today, and I

2147 thank all the members for attending. Markup is adjourned.

2148 [Whereupon, at 3:52 p.m., the committee adjourned

2149 subject to the call of the chair.]

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