

March 17, 2016

Opening Statement of Senator James Lankford

Homeland Security and Governmental Affairs Subcommittee on Regulatory Affairs and Federal Management Hearing titled:

“Examining Agency Use of Deference, Part II”

Good morning and welcome to today’s Subcommittee hearing on “Examining Agency Use of Deference Part II.” Today’s hearing will focus on the practice of federal courts deferring to agencies when it comes to their interpretations of statutes –more commonly referred to as *Chevron* deference. The Constitution provides for three separate and distinct branches of government, each with a “check” on the others.

As Chief Justice John Marshall stated in 1825, “the legislature makes, the executive executes and the judiciary construes the law.” *Chevron* blurs the traditional understanding of the separation of powers by giving agencies the power to interpret the meaning of statutory ambiguities. *Chevron* deference has fundamentally altered how agencies regulate. Instead of simply carrying out the directives of Congress, agencies can seek out ambiguities in the law so that they can address problems as they see fit. They do so knowing that courts will likely defer to their interpretation as “permissible construction,” regardless of congressional intent.

Take, for example, the Waters of the United States rule. Emboldened by *Chevron* deference, the EPA expanded the Clean Water Act beyond anything contemplated by the enacting Congress- to the detriment of landowners and farmers. With studies showing that traditionally, Supreme Court justices defer to the agency’s interpretation more than 70% of the time, the EPA knows that it would be very unlikely that the Supreme Court would overturn the Waters of the United States Rule.

This abdication of judicial power runs counter to the standard of review laid out in the Administrative Procedure Act. The APA gives courts clear direction to “decide all relevant questions of law” and “interpret constitutional and statutory provisions.” *Chevron* deference ignores this directive. Instead of courts using their judgment to independently “decide all relevant questions of law,” *Chevron* directs courts to cede their judicial obligation to decide questions of law in favor of any reasonable agency interpretation.

In a 2006 empirical study, Cass Sunstein found that whether Supreme Court justices validated an agency’s interpretation of a statute based on *Chevron* deference hinged largely on ideological factors. He found that both the Supreme Court and the courts of appeals apply the

Chevron framework based on the judges' political convictions. For example, "the most liberal justices are 27 percentage points" more likely to uphold liberal agency interpretations of law than conservative agency interpretations. Similarly, conservative justices are 30 percent more likely to validate conservative agency interpretations of law than liberal agency interpretations.

Simply put, *Chevron* deference is a blank check for the executive branch to exercise its own brand of legislative authority with little to no accountability. This is not government of the people, by the people, and for the people – it is government by bureaucracy. Congress should correct this constitutional imbalance by making it clear that agencies should not interpret legislative text beyond its plain reading and courts should rigorously scrutinize agency interpretations of statutory language to ensure congressional intent is followed. Doing so vindicates separation of powers principles and leaves Congress's legislative role in tact.

It is in this light that I am pleased to join Senators Hatch, Grassley, and Lee in introducing the Separation of Powers Restoration Act of 2016. This bill, introduced just today, amends the APA to clarify that courts "may not defer to an agency interpretation of a statutory provision or rule." Ambiguities in statute are unavoidable, but when they do occur, courts, not agencies, must determine their meaning.

I look forward to hearing from our witnesses' ideas to address this issue in way that respects congressional intent and upholds judicial independence. With that, I will recognize Ranking Member Heitkamp for her opening remarks.