COALITION FOR SENSIBLE SAFEGUARDS

June 8, 2016

The Honorable Robert Goodlatte
Chairman
House of Representatives
Judiciary Committee
Washington, DC 20515

The Honorable John Conyers
Ranking Member
House of Representatives
Judiciary Committee
Washington, DC 20515

RE: Mark-up on Separation of Powers Restoration Act (H.R. 4768)

Dear Representative:

The Coalition for Sensible Safeguards (CSS), which includes more than 150 diverse labor, consumer, public health, food safety, financial reform, faith, environmental and scientific integrity groups representing millions of Americans, urges members of this committee to oppose the Separation of Powers Restoration Act (H.R. 4768).

Congress should be looking for ways to strengthen our country's regulatory system by identifying gaps and instituting new safeguards for the public. Unfortunately, this legislation does the opposite by ensuring even more delays in new public health, safety, and financial security protections for the public.

The legislation will make our system of regulatory safeguards weaker by allowing for judicial activism at the expense of agency expertise and congressional authority, thereby resulting in unpredictable outcomes and regulatory uncertainty for all stakeholders. If passed, this legislation would rob the American people of many critical upgrades to public protections, especially those that ensure clean air and water, safe food and consumer products, safe workplaces, and a stable, prosperous economy.

This radical legislation would reverse a fundamental and well-settled legal principle that has long successfully guided our regulatory system. It would abolish judicial deference to agencies' statutory interpretations in rulemaking by requiring a court to decide all relevant questions of law *de novo*, including all questions concerning the interpretation of constitutional, statutory, and regulatory provisions of final agency actions. Such deference was established as bedrock administrative law by the Supreme Court in the 1984 case *Chevron v. Natural Resources Defense Council* and came to be referred to as *Chevron* deference. *Chevron* deference has been upheld by hundreds of federal courts since and has been endorsed by both conservative and liberal Supreme Court justices and federal court judges.

In practice, abolishing *Chevron* deference will make the current problems in our country's broken regulatory process much worse in several ways. H.R. 4768 will lead to even more regulatory delays, particularly for those "economically significant" or "major" new rules that provide the greatest benefits to the public's health, safety, and financial security. The examples of regulatory paralysis are ubiquitous and impossible to ignore.

- In the energy sector, offshore drilling safety measures to address the cause of the BP oil spill in the Gulf, new safety standards to prevent oil train derailments and explosions, and new energy efficiency standards to benefit consumers all took far too long to finalize and benefit the public.
- In the food safety sector, implementation of the Food Safety Modernization Act was finally completed last week, despite agencies missing every statutory deadline and numerous tainted food scandals in the interim.
- In the banking sector, a significant portion of the Dodd-Frank Wall Street Reform Act has yet to be finalized, or in some cases, even proposed, despite the law's enactment almost six years ago.

The delays in new protections for the public are systemic, touching virtually every agency and regulatory sector. A recent study by a conservative think tank found that federal agencies have only been able to meet half of the rulemaking deadlines Congress has set out for them over the last twenty years.

There is substantial academic literature and expert consensus that intrusive judicial scrutiny of agency rulemaking is one of the main drivers of regulatory paralysis. Thus, increasing litigation risk for agency rules, which is exactly what this bill would accomplish by spawning hundreds of new lawsuits per year, will mean many more missed congressional deadlines and a regulatory process this is unable to act efficiently and effectively in protecting the public as Congress requires. This further "chilling" of rulemaking will certainly benefit Big Business lobbyists and lawyers who will further pressure regulators to carve out loopholes, weaken safety standards, or otherwise obstruct new rulemakings with the greatly enhanced threat of a lawsuit waiting in the wings.

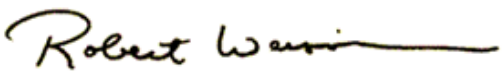
Additionally, eliminating judicial deference to agency rulemaking would be tantamount to ringing the dinner bell for judicial activism by empowering reviewing courts to substitute their policy preferences for those of the agency. One of the primary policy rationales for *Chevron* deference is that agencies have considerable and superior expertise in the regulatory sectors they oversee as compared to generalist judges. Thus, H.R. 4768 would make it easier for the courts to overturn an agency's highly technical, resource-intensive, and science-based rulemakings without the expertise needed to make such determinations.

Further, judicial activism would impact Congressional authority, curtailing it rather than enhancing it, an irony given the name of the bill. The *de novo* review of the scope and nature of Congressional grants of authority to agencies will invite courts to create law, ignore congressional intent, or both. Again, the bill will allow judges to simply replace congressional intent with the judges' own construction of the statute or policy preferences with respect to congressional objectives.

Perhaps the most telling critique of attempts to replace *Chevron* deference with *de novo* review comes from former Justice Antonin Scalia, an aggressively vocal supporter of *Chevron* deference during his career and an indication of just how broad and mainstream the support is for maintaining such deference. Writing for the majority in City of Arlington v. F.C.C., Justice Scalia argued that requiring that "every agency rule must be subjected to a *de novo* judicial determination" without any standards to guide this review would result in an "open-ended hunt for congressional intent," rendering "the binding effect of agency rules unpredictable and destroy the whole stabilizing purpose of Chevron. The excessive agency power that the dissent fears would be replaced by chaos."[1]

H.R. 4768 marks an unprecedented and dangerous move away from traditional judicial deference towards a system of enhanced powers for Big Business lobbyists and weakened protections for consumers and working families. CSS urges members of the committee to reject the Separation of Powers Restoration Act, (H.R. 4768).

Sincerely,



Robert Weissman, President
Public Citizen
Chair, Coalition for Sensible Safeguards

The Coalition for Sensible Safeguards is an alliance of consumer, labor, scientific, research, good government, faith, community, health, environmental, and public interest groups, as well as concerned individuals, joined in the belief that our country's system of regulatory safeguards provides a stable framework that secures our quality of life and paves the way for a sound economy that benefits us all.

[1] *City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863, 1874 (2013).