

Congress Should Stop Abrogating Its Spending Power and Rein in the USDA Slush Fund

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KEY TAKEAWAYS

The USDA has set a terrible precedent by greatly expanding its use of discretionary spending authority under the Commodity Credit Corporation Charter Act.

This expansive use may lead to potential end-runs around congressional authorization to create new programs, such as those focused on climate change.

Congress needs to restore normalcy with the Commodity Credit Corporation so that Congress, not the USDA, exercises its spending power under the U.S. Constitution.

Over the past few years, the U.S. Department of Agriculture (USDA) has set a terrible precedent by greatly expanding its use of the Agriculture Secretary's discretionary spending authority under the Commodity Credit Corporation Charter Act.¹ Congress has only exacerbated the problem by passing appropriations language that arguably suggests an after-the-fact blessing of these actions.²

The Agriculture Secretary has far too much discretion under the Charter Act, but up until recently, this discretionary power has generally not been abused. Over the past few years, this has changed. The spending under the Charter Act has vastly expanded in terms of amount, as well as in scope, providing assistance beyond simply helping farmers, while undermining congressional primacy in crafting federal agricultural policy. This *Issue Brief* is not focused on whether Congress

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should spend money on certain programs. Instead, it focuses on returning to, and ensuring, the limited use of the Agriculture Secretary's discretionary spending under the Charter Act. This is critical to ensuring that Congress, not the USDA, exercises its spending power under the U.S. Constitution.

The Commodity Credit Corporation and Recent Developments

Since 1933, the Commodity Credit Corporation (CCC) has served as a funding mechanism for federal agricultural programs. The CCC is a wholly owned corporation of the United States government that is authorized to borrow up to \$30 billion from the U.S. Treasury to make payments for agricultural programs.³ This borrowing authority, which Congress replenishes every year as part of the appropriations process, allows the CCC to make payments without waiting on annual appropriations for each specific program. Except for federal crop insurance, the CCC is generally the means by which agriculture-related farm bill programs are funded, such as price-support and conservation programs.⁴

In general, Congress specifically authorizes how CCC money should be spent, usually through omnibus farm bill legislation. In addition, the Agriculture Secretary, under section 5 of the Charter Act,⁵ has broad discretionary power to use the CCC in support of U.S. agriculture.⁶ However, for the most part, this discretionary authority has not been used to any significant extent.⁷ From 2012 to 2017, Congress even expressly limited the Agriculture Secretary's ability to use this discretionary spending authority under the Charter Act.⁸ But then came the \$28 billion of so-called trade aid to farmers in 2018 and 2019, consisting primarily of the Market Facilitation Program (MFP),⁹ which was funded with the Agriculture Secretary's discretionary spending authority. This was followed by \$20.5 billion in COVID-19 food assistance in 2020 using this same authority.¹⁰

Special interests have taken notice of this new willingness to use the CCC in a very expansive manner. Legislators in the previous Congress made extreme legislative proposals to amend the CCC to expand the Agriculture Secretary's discretionary authority and to increase the CCC's borrowing limit from \$30 billion to \$68 billion. Quite simply, these proposals becoming law would mean that the \$30 billion available for the CCC to spend each year would more than double.¹¹ Fortunately, these proposals were not enacted. However, they will inevitably turn up again in the current Congress.

The Problems with the Expanded Use of CCC Discretionary Spending Authority

Following are just some of the problems that should be of major concern to policymakers and the public. The new and expansive use of the CCC:

Creates a USDA Slush Fund for Almost Anything. The trade aid arguably may not even have been authorized under the broad language in section 5.¹² The Trump Administration, though, moved forward with the programs. The Biden Administration (and future Administrations of *either party*) may push other programs that are even less likely to be authorized under section 5. Future Administrations could also very well push mandates on farmers and use the CCC to fund their regulatory schemes.

There is an indication that the Biden Administration may use the CCC to quickly implement its preferred climate change policies, such as a carbon bank (a tradeable carbon credit system involving farmers)¹³ and possibly other policy goals. When it comes to programs like a carbon bank or other climate change policies, the language in section 5 almost certainly does not authorize unilateral creation of such programs. Section 5 has specific and express language that deals with environmental programs, explaining that CCC money can be used to “[c]arry out conservation or environmental programs *authorized by law*.”¹⁴ (Emphasis added.)

Based on this language, the climate change policies would first have to be authorized by Congress. Proponents might argue that climate change programs could fall under the other provisions in section 5. Besides being a weak argument, given that these other provisions deal with unrelated supply issues and marketing-related issues connected to agricultural commodities, such a claim would ignore the fact that Congress already spoke directly on environmental programs and would render this environmental provision superfluous.¹⁵

Expands the Use of the CCC to Special Interests Beyond Farmers. The recent abuse of the Charter Act authority has led to legislation that would expand subsidy recipients well beyond farmers. For example, the Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act and the Responding to Epidemic Losses and Investing in the Economic Future for Producers Act proposed to permanently expand the Charter Act to “aid agricultural processing plants to ensure supply chain continuity during an emergency period.”¹⁶

This language could arguably cover giving money to any party throughout the supply chain that processes agricultural commodities into some other product.¹⁷ This might mean giving money to food manufacturers,

ethanol plants, bakeries, or even clothing companies, as they each process raw agricultural commodities into new products.¹⁸ The attempt to turn the CCC away from farmers to supply chain participants begs the question of where to stop. Grain merchants, feedlot operators, hedge funds trading in options, grocery stores, restaurants, candy manufacturers, and even individual consumers are all links in the agricultural supply chain for whom stimulus could affect consumption.

Invites Even Greater CCC Abuse. This recent expansive use of the CCC could merely be the start of bigger problems to come. In addition to trying to turn the CCC into a golden goose for special interests beyond farmers, there have been, and there will continue to be, attempts to amend section 5 to create even more discretionary reasons for the Secretary to provide money to special interests¹⁹ and to expand the CCC's borrowing limit from \$30 billion to \$68 billion.²⁰ Based on Congressional Research Service data, from fiscal year (FY) 2005 to FY 2020, the only year in which the CCC exceeded the \$30 billion in spending was in FY 2020 due to the Secretary's distribution of trade aid and COVID-19 payments.²¹ Congress simply provided additional temporary borrowing authority to prevent a breach of the borrowing limit.

There is no basis for going beyond the \$30 billion limit since the specifically authorized programs are not exceeding this spending level. In fact, there is usually room for billions of dollars in discretionary spending (thereby already giving the Secretary a generous "slush fund").²² Increasing the \$30 billion borrowing limit is just a way of increasing the amount of discretionary spending. Were the borrowing limit increased to \$68 billion, this would likely give the Secretary a whopping \$40 billion or more to spend each year as he or she deems fit.²³

To put \$40 billion in context, this amount would usually be about double the cost of the federal crop insurance program, Title I subsidies, and conservation programs combined.²⁴ It would be like creating an even bigger farm bill for farmers, but without Congress having to debate the programs or even passing legislation. This would turn the CCC from a funding mechanism for congressionally authorized programs into a massive slush fund controlled by the Agriculture Secretary.

Ignores Representative Government and Separation of Powers. Congress, not the USDA, has spending power under the U.S. Constitution. While the existing overly broad language in section 5 of the Charter Act is arguably an improper delegation of this spending power by delegating too much discretion to the Agriculture Secretary, at least the USDA had used this authority in a fairly limited manner. The recent spending spree, though,

has changed all of this and made the application of section 5 a significant problem. When the USDA decides to spend tens of billions of dollars with little or no congressional direction, as is happening now under section 5, the USDA is in effect exercising spending power.

Unlike Members of Congress who represent and are accountable to their constituents, the USDA has no such obligations. The voice of the American people on spending matters is represented through Congress. When Congress gives away this power, it is in effect silencing the voice of the people and avoiding accountability for the spending of taxpayer dollars.

The CCC should not be used as a way of creating major policy out of whole cloth or serve as an end run around congressional authorization. Recent Agriculture Secretaries have done just that by using Charter Act authority to create new subsidy programs.²⁵ Former Agriculture Secretary Tom Vilsack, who has been nominated to serve in the same position again, appears to want to continue this trend.²⁶

Recommendations for Policymakers

The recent expansive use of the CCC must be reined in. Legislators should certainly reject the extreme efforts to make the problem even worse, such as by increasing section 5 discretion or increasing the CCC borrowing authority. The real question, though, is how this expansive use can be reined in when the genie is out of the bottle. In addition to the USDA reining in the discretionary spending, Congress should:

- **Limit section 5's application to authorized programs at specified funding levels.** This is the ideal solution. The CCC should simply be used as a means to fund those programs that Congress has authorized at the levels provided by Congress. This would include removing all discretionary spending powers that currently exist in section 5. Some would claim that this solution would prevent the USDA from using the CCC to quickly address problems for farmers. However, Congress has been more than willing to pass legislation, such as through appropriations, to quickly address any alleged unforeseen harm being suffered by farmers,²⁷ or
- **Make commonsense changes to section 5 to address the worst abuses.** If the ideal solution is not adopted, Congress should, at a minimum, take steps to ensure that the discretionary spending authority under section 5 of the Charter Act is not abused and is limited in its use. These steps include:

- **Limiting discretionary spending under section 5 to directly helping farmers and ranchers** to address damage caused by unforeseen natural events, such as disasters and disease, not already covered by existing agricultural programs and which constitute emergencies that must be addressed immediately;
- **Prohibiting the CCC from being used for special interests beyond farmers and ranchers**, including special interests that have an indirect connection to farmers;
- **Allowing discretionary power to be used only on programs** to address temporary and targeted problems;
- **Requiring express congressional authorization** to continue any discretionary use of section 5 beyond one year;
- **Properly accounting for existing authorized programs** that help farmers and ensuring there is no duplication of assistance; and
- **Requiring the USDA to be transparent about how a program works** (including how recipients of any benefits were selected) and to explain why the spending is clearly authorized under section 5. The past Congress included language in the House-passed HEROES Act that would help to accomplish this transparency objective.²⁸

Conclusion

By allowing the CCC to be used as a slush fund by the Agriculture Secretary, Congress is abrogating its spending power. The current abuses need to be reined in. If the CCC abuse continues, Administrations from both parties will attempt to use questionable statutory authority to create programs, possibly with little or no real connection to agriculture, to fulfill their political and ideological objectives.

Congress needs to get things back under control before this abuse becomes the new norm. In doing so, Congress would be taking action to protect the integrity of the lawmaking process and the interests of the American people.

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Endnotes

1. Commodity Credit Corporation Charter Act of 1948, Public Law No. 80–806.
2. “Congressional actions by the 116th Congress, such as a required expansion in the FY2019 supplemental appropriations of payments under the trade aid program, could be viewed as congressional support for the trade aid package. Similarly, the mid-year reimbursement under the CARES Act could also signal congressional support of the 116th Congress for USDA’s discretionary use of CCC’s authority, especially in times of emergency.” (Footnotes omitted.) Megan Stubbs, “The Commodity Credit Corporation: In Brief,” Congressional Research Service, R44606, updated January 14, 2021, p. 11, <https://crsreports.congress.gov/product/pdf/R/R44606> (accessed February 10, 2021).
3. This *Issue Brief* is not intended to be a detailed analysis of the CCC. To learn more about the CCC and how it operates, see Stubbs, “The Commodity Credit Corporation: In Brief.”
4. *Ibid.*
5. Section 5 of the Commodity Credit Corporation Charter Act of 1948, Public Law No. 80–806, and 15 U.S. Code § 714c.
6. Stubbs, “The Commodity Credit Corporation: In Brief.”
7. Stubbs, “The Commodity Credit Corporation: In Brief.” Congressional Research Service R44606, updated September 4, 2019, <https://crsreports.congress.gov/product/pdf/R/R44606/4> (accessed February 10, 2021). See also Jonathan Coppess et al., “The Market Facilitation Program: A New Direction in Public Agricultural Policy?” University of Illinois Urbana-Champaign, Department of Agricultural and Consumer Economics, *farmdoc daily*, Vol. 9, No. 220 (November 21, 2019), <https://farmdocdaily.illinois.edu/2019/11/the-market-facilitation-program-a-new-direction-in-public-agricultural-policy.html> (accessed February 10, 2021); Randy Schnepf et al., “Farm Policy: USDA’s 2018 Trade Aid Package,” Congressional Research Service, R45310, December 5, 2019, <https://crsreports.congress.gov/product/pdf/R/R45310> (accessed January 12, 2021); and Jeff Stein, “As Billions Flow to Farmers, Trump Administration Faces Internal Concerns Over Unprecedented Bailout,” *The Washington Post*, September 9, 2019, https://www.washingtonpost.com/business/economy/as-billions-flow-to-farmers-trump-administration-faces-internal-concerns-over-unprecedented-bailout/2019/09/09/66ec9278-cfe6-11e9-b29b-a528dc82154a_story.html (accessed January 12, 2021).
8. Stubbs, “The Commodity Credit Corporation: In Brief.” Also see, for example, Consolidated Appropriations Act of 2017, Public Law No. 115–31, Division A, Sec. 715.
9. News release, “USDA Issues Third Tranche of 2019 MFP Payments,” U.S. Department of Agriculture, February 3, 2020, <https://www.usda.gov/media/press-releases/2020/02/03/usda-issues-third-tranche-2019-mfp-payments> (accessed February 10, 2021).
10. Stubbs, “The Commodity Credit Corporation: In Brief.” The Congressional Research Service (CRS) lists the \$28 billion as funding only for the MFP, but judging by USDA documents, this total amount appears to cover some funding for the Food Purchase and Distribution Program and the Agricultural Trade Promotion Program as well. See, for example, news release, “USDA Issues Third Tranche of 2019 MFP Payments,” and U.S. Department of Agriculture, “Market Facilitation Program—Interim Report,” September 30, 2020, <https://www.usda.gov/oig/audit-reports/market-facilitation-program-interim-report> (accessed February 10, 2021).
11. Daren Bakst, David A. Ditch, and Joshua Sewell, “Congress Should Reject Efforts to Give Away Its Spending Power to Create a Massive USDA Slush Fund,” Heritage Foundation *Issue Brief* No. 5091, July 16, 2020, <https://www.heritage.org/agriculture/report/congress-should-reject-efforts-give-away-its-spending-power-create-massive-usda>.
12. “The imposition of tariffs by other countries on U.S. agricultural products, among other actions, are disrupting marketing of agricultural commodities and are outside of the control of the agricultural producers who are being negatively impacted. In response to the actions of foreign governments, the President has pledged that up to \$12 billion in financial assistance will be made available for certain agricultural commodities under section 5 of the CCC Charter Act (15 U.S.C. § 714c). This section authorizes CCC to assist in the disposition of surplus commodities and to increase the domestic consumption of agricultural commodities by expanding or aiding in the expansion of domestic markets or by developing or aiding in the development of new and additional markets, marketing facilities, and uses for such commodities.” This is the stated statutory authority for the trade aid as listed in the 2018 MFP final rule, and it is arguably a very expansive view. Commodity Credit Corporation and Farm Service Agency, “Market Facilitation Program,” *Federal Register*, Vol. 83, No. 169 (August, 30, 2018), pp. 44173–44178, <https://www.federalregister.gov/documents/2018/08/30/2018-18842/market-facilitation-program> (accessed February 10, 2021). The “USDA explained that the MFP payments were permissible under Section 5 because they ‘will provide producers with financial assistance that gives them the ability to absorb some of the additional costs from having to delay or reorient marketing of the new crop due to the trade actions of foreign governments resulting in the loss of exports.’ From a legal perspective, this is arguably a very creative interpretation of the CCC Section 5 authorities.” (Footnotes omitted.) Coppess et al., “The Market Facilitation Program: A New Direction in Public Agricultural Policy?”
13. Ed Maixner and Philip Brasher, “Carbon Markets Lure Farmers, But Will Benefits Be Enough to Hook Them?” *Agri-Pulse*, November 23, 2020, <https://www.agri-pulse.com/articles/14880-carbon-markets-lure-farmers-but-are-benefits-enough-to-hook-them> (accessed February 10, 2021).
14. Section 5 of Commodity Credit Corporation Charter Act of 1948, Public Law No. 80–806, and 15 U.S. Code § 714c.

15. Proponents have recently made additional arguments why a carbon bank could be funded through the discretionary spending authority under section 5; in other words, without congressional authorization. One argument claims that carbon is a commodity and therefore this is sufficient to trigger the commodity authorities listed in the statute. Jerry Hagstrom, “USDA Official: Carbon Is a Commodity, Justifies CCC Use,” Progressive Farmer Ag Policy Blog, February 6, 2021, <https://www.dtnpf.com/agriculture/web/ag/blogs/ag-policy-blog/blog-post/2021/02/06/usda-official-carbon-commodity-ccc> (accessed February 10, 2021). However, section 5 of the Charter Act covers “agricultural commodities.” The Charter Act defines agricultural commodities as “agricultural commodities, products thereof, foods, feeds, and fibers (hereinafter collectively referred to as ‘agricultural commodities’)” Section 2 of the Charter Act, 15 U.S. Code § 714. It would be a stretch to claim that carbon would fall under such a definition. Even looking at different statutory language defining “agricultural commodities” or “agricultural commodity,” carbon would almost certainly not fall under the definition. See 7 U.S. Code § 5602, and 7 U.S. Code § 1518. Not only would it almost certainly not meet these statutory definitions, carbon is not an “agricultural commodity” in common usage, given that even if carbon were a “commodity,” carbon is not somehow uniquely connected to agriculture, nor limited to the agricultural sector. If carbon were an “agricultural commodity,” it is difficult to imagine what would *not* be an agricultural commodity. It is also important to note that even if the Charter Act could allow carbon to be considered an agricultural commodity, this would not properly address the argument made in the text of this paper that Congress specifically addressed environmental and conservation programs within section 5. Discussions on the USDA’s role in a carbon bank or carbon market have also referenced congressional direction in the 2008 farm bill for the USDA to establish technical guidelines for environmental services markets. (Food, Conservation, and Energy Act of 2008, Public Law No. 110–246; 16 U.S. Code § 3845.) AGree, “Nexus of Climate, Food, and Agriculture Security,” 22:46, February 4, 2021, <https://vimeo.com/508567310> (accessed February 11, 2021). The environmental services market provision is very limited in scope and authorizes the development of guidelines connected to environmental services markets, not the creation of any program, including a carbon bank program. As the CRS explained, “The enacted 2008 farm bill (P.L. 110-246, the Food, Conservation, and Energy Act of 2008) contains a new conservation provision that seeks to facilitate the participation of farmers and landowners in environmental services markets by directing USDA to develop technical guidelines for measuring farm- and forestry-based environmental services.” The provision itself does not create a specific environmental service market, like a carbon bank. It merely creates guidelines that could help if farmers did enter into environmental services markets. To learn more about this provision, see Congressional Research Service, “Provisions Supporting Ecosystem Services Markets in U.S. Farm Bill Legislation,” RL34042, December 15, 2009, <https://www.everycrsreport.com/reports/RL34042.html> (accessed February 10, 2021).
16. Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act of 2020, H.R. 6800, 116th Congress, <https://www.congress.gov/bill/116thcongress/house-bill/6800> (accessed February 10, 2021).
17. A key question is: What does it mean to be an agricultural processing plant? While not a legal discussion, the Economic Research Service discusses food and beverage manufacturing, illustrating how such a plant could be broad in scope: Economic Research Service, “Manufacturing,” U.S. Department of Agriculture, May 14, 2020, <https://www.ers.usda.gov/topics/food-markets-prices/processing-marketing/manufacturing> (accessed February 11, 2021).
18. Another possible, albeit questionable, interpretation is that money could be given to anyone in the supply chain, even to individuals and businesses who do not own, or that are not, agricultural processing plants, so long as providing them with assistance would “aid agricultural processing plants.”
19. Bakst, Ditch, and Sewell, “Congress Should Reject Efforts to Give Away Its Spending Power to Create a Massive USDA Slush Fund”; Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act of 2020, H.R. 6800; and Responding to Epidemic Losses and Investing in the Economic Future (RELIEF) for Producers Act of 2020, S. 4156, 116th Congress, <https://www.congress.gov/bill/116th-congress/senate-bill/4156/text?q=%7B%22search%22%3A%5B%22grassley%22%5D%7D&r=4&s=8> (accessed February 10, 2021). Also see news release, “Grassley, Colleagues Introduce Bill to Support Livestock and Poultry Producers Affected by COVID-19;” Senator Chuck Grassley, July 2, 2020, <https://www.grassley.senate.gov/news/news-releases/grassley-colleagues-introduce-bill-support-livestock-and-poultry-producers> (accessed February 10, 2021).
20. To Amend the Commodity Credit Corporation Charter Act to Raise the Borrowing Limit of the Commodity Credit Corporation, H.R. 6728, 116th Congress, <https://www.congress.gov/bill/116th-congress/house-bill/6728?q=%7B%22search%22%3A%5B%22hr+6728%22%5D%7D&s=1&r=1> (accessed February 10, 2021), and news release, “Rep. Austin Scott Introduces Legislation to Raise CCC’s Borrowing Authority;” Congressman Austin Scott, May 5, 2020, <https://austinscott.house.gov/media-center/press-releases/rep-austin-scott-introduces-legislation-raise-ccc-s-borrowing-authority> (accessed February 10, 2021).
21. Stubbs, “The Commodity Credit Corporation: In Brief,” p. 9.
22. Stubbs, “The Commodity Credit Corporation: In Brief.”
23. The \$40 billion lower limit is a conservative estimate. The typical amount would likely be \$50 billion or more. Stubbs, “The Commodity Credit Corporation: In Brief,” p. 9.
24. Renee Johnson and Jim Monke, “What Is the Farm Bill?” Congressional Research Service, RS22131, September 26, 2019, <https://fas.org/sgp/crs/misc/RS22131.pdf> (accessed February 10, 2021).
25. Charter Act authority was cited in establishing the \$100 million Biofuels Infrastructure Partnership in May 2015, to fund high-blend ethanol pumps despite a legislative prohibition on spending farm bill funds on energy delivery systems. In 2018, CCC authority was used to establish the \$218 million Cotton Ginning Cost Share program for cotton producers. See, for example, Stubbs, “The Commodity Credit Corporation: In Brief;” and Taxpayers for Common Sense, “Blinders for Blender Pumps,” July 21, 2015, <https://www.taxpayer.net/agriculture/golden-fleece-blinders-for-blender-pumps/> (accessed February 11, 2021).

26. See, for example, Art Cullen, "Vilsack Sees Big Shift in Ag Induced by Climate," *The Storm Lake Times*, January 22, 2021, <https://www.stormlake.com/articles/vilsack-sees-big-shift-in-ag-induced-by-climate/> (accessed February 10, 2021); Kelsey Tamborrino, "Pingree Talks New Appropriations Role," *Politico*, February 1, 2021, <https://www.politico.com/newsletters/morning-energy/2021/02/01/pingree-talks-new-appropriations-role-793075> (accessed February 10, 2021); and U.S. Senate, "To Consider the Following Nomination: The Honorable Thomas J. Vilsack, of Iowa, to be Secretary of Agriculture," 117th Cong., 1st sess., February 2, 2021, <https://www.agriculture.senate.gov/hearings/to-consider-the-following-nomination-thomas-j-vilsack-of-iowa-to-be-secretary-of-agriculture> (accessed February 10, 2021).
27. See, for example, Division B Title 1 of Public Law No. 115-123, which provided \$2.36 billion for losses related to hurricanes and wildfires in 2017 (Bipartisan Budget Act of 2018); Public Law No. 116-20, which provided \$3.01 billion for losses related to a range of natural disasters in 2018 and 2019, including hurricanes, tornadoes, typhoons, floods, volcanic activity, snowstorms, and wildfires (Additional Supplemental Appropriations for Disaster Relief Act of 2019); Public Law No. 116-94, which extended eligibility for previously authorized disaster aid to losses caused by drought, peaches and blueberries that were due to freeze in 2017, and for sugar beet processors for losses in quality and quantity in 2018 and 2019, amongst others (Further Consolidated Appropriations Act of 2020).
28. Section 60402 of the Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act of 2020.