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APA AT 65: IS REFORM NEEDED TO CREATE JOBS, PROMOTE ECONOMIC GROWTH, AND REDUCE COSTS?

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

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APA AT 65: IS REFORM NEEDED TO CREATE JOBS, PROMOTE ECONOMIC GROWTH, AND REDUCE COSTS?

MONDAY, FEBRUARY 28, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS,
COMMERCIAL AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 3:10 p.m., in room 2141, Rayburn House Office Building, the Honorable Howard Coble (Chairman of the Subcommittee) presiding.

Present: Representatives Coble, Gowdy, Ross, and Conyers.

Staff Present: (Majority) Daniel Flores, Subcommittee Chief Counsel; Allison Rose, Professional Staff Member; Ashley Lewis, Clerk; (Minority) Carol Chodroff, Counsel; and James Park, Counsel.

Mr. COBLE. The Subcommittee will come to order.

One of our witnesses, Professor Strauss, encountered difficulty with a cancelled airline flight, and he requested that he be allowed to be interviewed telephonically, which we granted. That seems to be not an unreasonable request. I have been waylaid by cancelled airlines, as well.

We are going to go ahead and start. We are on a short leash here today. But let me make my opening statement.

The Administrative Procedure Act was passed 65 years ago in 1946. It was one of the most significant statutes Congress ever passed because it set the ground rules for legislative rulemaking by an administrative agency. At the time, many understood the importance of the act in governing how agencies exercised legislative power delegated to them by Congress.

There had been a long and hotly contested debate in the decades before the APA's passage over whether or not and to what extent Congress could delegate its legislative power at all. It was imperative to set forth in the APA clear rules that stood a chance to constrain agency activity appropriately. I doubt, however, that many foresaw in 1946 the immense amount of legislative power that Congress would come to delegate to Federal agencies over the succeeding decades.

For example, just during the last term of Congress, the Obama Care legislation and the Dodd-Frank financial reform bill granted unprecedented authority for agencies to issue regulations in sectors

equaling roughly one-third of our economy. The overall burden of regulation on the economy and uncertainty over what regulation is still to come over the next 2 years are often cited as reasons why our economy has not created enough jobs and growth since the events of 2008.

Since the APA's passage, concern has risen not only over the breadth of Congress' delegation of power to the agencies but also whether the APA is still up to the task of constraining how the agencies carry out those delegations.

There has long been concern that the APA's hallmark "notice-and-comment" procedures for informal rulemaking too often are hollow because agencies have reached preordained conclusions, in many instances, in discussions with interest groups before the public even receives a notice of the proposed rule.

After several decades of Presidential initiative, a growing number of experts and decision-makers believe it is time for Congress to incorporate into statute sound cost-benefit analysis principles that Administrations of both parties have embraced.

Many now question whether Federal agencies' clearly exclusive use of notice-and-comment rulemaking, rather than formal rulemaking hearings, adequately tests the facts and premises on which regulations are based. The Environmental Protection Agency's recent finding that carbon dioxide endangers public health and welfare—in the face of worldwide controversy over the science and data at issue—is a textbook example.

Similarly, there is concern over whether the combination of the APA's "arbitrary or capricious" standard and developments in judicial deference provide a system of judicial review that is strong enough to correct agency overreach and error adequately.

During the 108th and 109th Congresses, the Subcommittee on Commercial and Administrative Law explored in depth whether the APA and other administrative law statutes should be modernized for the 21st century. During the 110th and 111th Congresses, these efforts were put on hold, however. As the APA approaches its 65th anniversary and as the wave of new regulation under the Obama administration breaks with full strength over our economy, it is high time to renew our inquiry into whether the APA should be reformed.

I look forward to hearing about potential reforms from our witnesses and reserve the balance of my time.

I am now pleased to recognize the distinguished gentleman from Michigan, the former Chairman of this Judiciary Committee, Mr. Conyers.

And, Mr. Conyers, you may know this already. One of our witnesses, Mr. Strauss, became a victim of a cancelled airline, and he has requested permission that we interview him telephonically. And I think that is a reasonable permission, and we have requested that. So he will be—we will have him telephonically. I think everything has been honed in.

But I now recognize the distinguished gentleman from Michigan.

Mr. CONYERS. Thank you, Chairman Howard Coble. I am very happy to be with you again and with our witnesses, particularly Professor Dudley.

Mr. Chairman, this is the third time in a little over a month that our Subcommittee will consider the state of the Nation's regulatory system. I have been informed by staff that there isn't even legislation in on this subject yet. And the Judiciary Committee seems to be spending an extraordinary amount of time going over these matters, which I suppose for some it is appropriate because that is what some of you like to do.

Now, there were bills on the first two subjects of regulatory regulation, but there isn't a bill on the one that we are holding now. And you will recall last month, on the 24th day of that month, that we had a hearing on the REINS Act, which was the title, the acronym for "promoting jobs and expanding freedom by reducing needless regulations."

Now, the proponents of the REINS Act raised concerns about the financial cost imposed by regulations. And they cite eyebrow-raising figures that are troubling, especially in our current economic climate. What you will hear from at least one witness today, however, is that sources of these numbers are not impartial parties.

You will also hear what I think is of the utmost importance: A discussion solely of the cost of Federal regulation fails to paint the whole picture. In other words, merely holding repetitive hearings about the cost of Federal regulation misses the point. We must assess both the cost and the benefits of Federal regulation. Hasn't anyone on this Committee, Subcommittee, besides myself, realized that the benefits must be calculated as well?

The Office of Management and Budget, in both the current Administration and in the previous Bush administration, has found that the benefits greatly exceed the costs of major Federal regulations. For example, the regulations promulgated over the 10-year period between 1998 through 2008 are estimated to have cost between $51 billion and $60 billion. Notably, the benefits associated with these very same rules are estimated to be between $126 billion to $663 billion—more than 10 times their cost.

The former administrator of OIRA, Sally Katzen, under the Clinton administration, testified that OMB's report to Congress doesn't include data on benefits, and the numbers are striking, according to OMB.

In addition, only this month, on the 10th of February, we had a hearing on H.R. 527, the "Regulatory Flexibility Improvement Act—Unleashing Small Business to Create Jobs." That was its title. And our Federal agencies are charged with promulgating regulations that impact virtually every aspect of our lives, including the air we breathe, the water we drink, the food we eat, the cars we drive, and the play toys we give our children. And so I would like to know if the Chairman has any other future hearings on regulatory issues, because I have a few subjects I would like to submit to my distinguished Chairman.

And I thank you for the additional time, and I yield back to the Chair.

Mr. COBLE. I thank the gentleman. I will say to the gentleman from Michigan, I am not the high sheriff, so I don't initiate much of it.

Good to have all of you—good to have the gentleman from South Carolina, the distinguished gentleman, Mr. Trey Gowdy. Good to have you with us, Mr. Gowdy.

All statements will be made part of the record.

Statement of the Honorable John Conyers Jr.
for the Hearing on the "The APA at 65 - Is Reform Needed to Create Jobs, Promote Economic Growth and Reduce Costs?"
Before the Subcommittee on Courts, Commercial and Administrative Law

Monday, February 28, 2011, at 3:00 p.m.
2141 Rayburn House Office Building

For the third time in a little over a month, this Subcommittee will consider the state of the Nation's regulatory system.

This time, instead of focusing on a specific proposal, we will take a look at the Administrative Procedure Act (APA) - what many consider to be the "administrative Constitution" - on the 65th anniversary of its enactment.

The hearing title - "The APA at 65 - Is Reform Needed to Create Jobs, Promote Economic Growth and Reduce Costs?" - suggests a very broad, perhaps even unwieldy topic for one hearing.

Accordingly, I too will offer some broad comments on this broad topic.

First, in considering the first question asked in today's hearing title, namely "Is reform needed?," we should be very circumspect and prudential about how we tinker with the APA.

The APA has been in effect for 65 years and it has spawned 65 years' worth of precedent in terms of practice and case law.

This substantial body of precedent provides certainty for agencies and the public while maintaining the APA's flexibility with respect to rulemaking and adjudications.

Changes to the APA, particularly if they are significant, threaten to introduce uncertainty for all interested parties. Uncertainty, in turn, threatens to increase the cost of agency action.

As with the U.S. Constitution, prudence should guide whether and how we amend our Nation's "administrative Constitution."

Second, in being prudent about whether we should amend the APA, we should insure that we have an accurate picture of the administrative system.

This goes to the second part of today's hearing title, which asks whether amending the APA will "create jobs, promote economic growth and reduce costs?"

Given the import of the two earlier hearings on the purported need for regulatory reform the Subcommittee has held to date, I suspect we will hear claims today about the cost of regulations for the businesses that have to comply with them.

But, as I have noted during these two previous hearings, these flawed claims are based on the Crain study, which has been thoroughly discredited.

In lieu of that study, I recommend my colleagues on the other side of the aisle review the report issued earlier this month by the Center for Progressive Reform.

This report, entitled *Setting the Record Straight: The Crain and Crain Report on Regulatory Costs,* factually debunks the Crain study, which claims that the"annual cost of federal regulations in the United States increased to more than $1.75 trillion in 2008."

This figure completely ignores the benefits of regulation and the fact they greatly exceed the costs. These benefits include those attributable to our Nation's economy and for public health and safety of our citizens.

Here's just one example. A review of OSHA's Cotton Dust Standard reveals that the affected industry grew and prospered in the aftermath of the rule's promulgation.

In fact, much of that growth and prosperity was the result of innovations relating to compliance with the rule. Indeed, the costs of the rule ended up being much smaller than predicted because of these innovations.

Third, there is an entity that is willing and able to study these issues in a nonpartisan, academic and prudential environment.

I am referring to the Administrative Conference of the United States, which has been previously reauthorized on a bipartisan basis twice in the last seven years.

The Conference is an independent federal agency dedicated to improving the administrative process through consensus-driven applied research, providing nonpartisan expert advice and recommendations for improvement of federal agency procedures.
The Conference's membership is composed of federal officials and experts with diverse views and backgrounds from both the private sector and academia.
The Conference is staffed with some of the best minds in the field of administrative law. Indeed, I understand that two of our witnesses today are associated with the Conference.

As President Obama observed, the Conference is "a public-private partnership designed to make the government work better."

In short, the Conference is specifically designed to handle on a full-time basis exactly the kind of broad and free-ranging inquiry that we are attempting to do today.

The Conference has enjoyed broad bipartisan support precisely because it can fulfill the valuable mission of studying the administrative system in depth and proposing recommendations to Congress to make the administrative system better.
In fact, one of Chairman Coble's predecessors, Rep. Chris Cannon, led the charge in seeking to re-establish the Conference for those reasons.

A reauthorized and sufficiently funded ACUS would help to answer the question posed by the title of today's hearing.

Mr. COBLE. We are pleased today to have three outstanding witnesses, one in absentia: Ms. Susan Dudley, who is research professor of public policy and public administration, director of Regulatory Studies Center at the George Washington University; Mr. Jeffrey A. Rosen, Esquire, who is with Kirkland & Ellis LLP; and Professor Peter L. Strauss—Professor, can you hear me?

Mr. STRAUSS. Yes, I can.

Mr. COBLE. Professor, it is real good to have you with us, albeit in absentia. You became the victim of an airline delay, I am told. And we are pleased to be able to examine you telephonically. It is good to have you with us, sir.

Mr. STRAUSS. Thanks so much.

Mr. COBLE. And Professor Strauss, by the way, is the Betts Professor of Law at the Columbia School of Law.

Ms. Dudley and Mr. Rosen, we try to impose the 5-minute rule around here. And we impose it against ourselves, as well. So if you can keep your questions terse, we would appreciate that.

And when the amber light appears before you on the panel, that is your warning that the ice on which you are skating is getting thin. You will have 1 minute to go. When the red light appears, that is your signal to wrap up, if you could.

So, Ms. Dudley, why don't you start us off?

TESTIMONY OF SUSAN E. DUDLEY, RESEARCH PROFESSOR OF PUBLIC POLICY AND PUBLIC ADMINISTRATION, DIRECTOR, REGULATORY STUDIES CENTER, THE GEORGE WASHINGTON UNIVERSITY

Ms. DUDLEY. Thank you, Mr. Chairman and Members of the Subcommittee. As you said, I am Susan Dudley, director of the George Washington University——

Mr. COBLE. Ms. Dudley, pull that mike a little closer to you.

Ms. DUDLEY. There. I will just repeat that I am director of the George Washington University Regulatory Studies Center and research professor of public policy at GW.

From April 2007 to January 2009, I oversaw the executive branch regulations of the Federal Government as administrator of the Office of Information and Regulatory Affairs, but the views I express here are my own.

In my 5 minutes, I would like briefly to review some regulatory history and offer some general thoughts on reform that I divide into two categories: procedural and decisional.

The Administrative Procedure Act emerged in 1946 as a result of concerns about the growing fourth branch of government. It reflected a compromise between a respect for the separation of powers implicit in the Constitution and the perceived need for bureaucratic expertise in developing administrative laws.

The APA is arguably one of the most important pieces of legislation ever enacted. It has remained largely unchanged for 65 years despite significant transformation in the organization and scope of government regulatory agencies.

The 1970's, in particular, witnessed a dramatic shift in regulation. On the one hand, we saw a decline in the traditional economic regulation that was at issue when the APA was enacted, which controlled private-sector prices, entry, and exit. Scholars at the time persuasively showed that economic regulation tended to keep prices higher than necessary, to the benefit of regulated industries and at the expense of consumers. This led to the bipartisan movement to deregulate such industries as airlines and trucking and abolish regulatory agencies such as the Civil Aeronautics Board and the Interstate Commerce Commission.

On the other hand, a new form of social regulation aimed at addressing environmental, health, and safety concerns was emerging, administered by newly formed agencies such as EPA, OSHA, NHTSA, and the CPSC. Concerns over the burden of these new regulations led President Carter to expand on procedures begun by Presidents Nixon and Ford for analyzing the impact of new regulations and minimizing their burdens.

Though Congress has passed legislation aimed at ensuring cost-effective regulatory outcomes, these efforts have been driven largely by the executive branch. Every modern President has continued and expanded the procedural and analytical requirements that began in the 1970's.

Despite these requirements for regulatory impact analysis, the growth in new regulations continues, and with it, concerns that we have reached a point of diminishing returns. The executive and legislative requirements for analysis of new regulations appear to have been inadequate to counter the powerful motivations in favor of regulation.

Politicians and policy officials face strong incentives to do something, and passing legislation and issuing regulation demonstrates action. Requirements to evaluate the outcomes of those actions—the benefits, costs, and unintended consequences—tend to take a back seat.

I appreciate this Committee's interest in regulatory reform and welcome opportunities to discuss changes to both administrative procedures and decision rules that might alter these incentives. There is abundant scholarship available to the Committee, including the repository of recommendations made over the years by the Administrative Conference of the United States, which recently reconvened.

Unlike the scholarship regarding the traditional forms of regulation in the 1970's, the policy literature today does not uniformly support deregulation, but, rather, examines the incentives provided by the different forms of regulation and the resulting benefits and costs to society.

In the category of procedural reforms, the Committee might consider amending the APA to expand the use of formal rulemaking procedures, apply the "substantial evidence" test for judicial review, or provide for judicial review of data and analysis relied on in rulemakings. Applied to the most significant regulations, these process changes could improve the empirical accuracy of factual determinations and the rigor and transparency of agencies' supporting analysis.

The Committee may be able to improve upon the decisional criteria by which regulatory alternatives are evaluated by codifying the decision requirements currently embodied in Executive orders issued by Presidents Clinton and Obama. The main advantages of creating a statutory obligation for meeting these regulatory impact analysis standards would be to: one, apply them to independent agencies; and, two, make compliance with them judicially reviewable.

Congress will also need to decide whether these crosscutting decisional criteria would supercede or be subordinate to the decision criteria expressed in individual statutes.

In closing, I am delighted that this Subcommittee is interested in evaluating and improving the procedures by which the U.S. Government developments and evaluates regulatory policy. And I look forward to further discussion.

[The prepared statement of Ms. Dudley follows:]

THE GEORGE WASHINGTON UNIVERSITY
WASHINGTON DC
REGULATORY STUDIES CENTER

Prepared Statement of Susan E. Dudley
Director, GW Regulatory Studies Center
Research Professor, Trachtenberg School of Public Policy and Public Administration

Hearing on

The APA at 65 – Is Reform Needed to Create Jobs, Promote Economic Growth and Reduce Costs?

Before the Subcommittee on Courts, Commercial and Administrative Law
Committee on the Judiciary

U.S. House of Representatives

February 28, 2011

Prepared Statement of Susau E. Dudley
February 28, 2011

Chairman Coble, Ranking Member Cohen, and members of the subcommittee, thank you for inviting me to testify today on "The APA at 65 – Is Reform Needed to Create Jobs, Promote Economic Growth and Reduce Costs?" I am Director of the George Washington University Regulatory Studies Center, Research Professor in the Trachtenberg School of Public Policy and Public Administration, and a public member of the recently reconstituted Administrative Conference of the United States (ACUS), where I serve on the committee on regulation.[1] From April 2007 to January 2009, I oversaw the executive branch regulations of the federal government as Administrator of the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB). I have studied regulations and their effects for over three decades, from perspectives in government (as both a career civil servant and political appointee), academia, the non-profit world, and consulting.

As a long-time student of regulation, I am delighted that this subcommittee is interested in evaluating and improving the procedures by which the U.S. government develops regulatory policy. Though regulations affect every aspect of our lives, as a policy tool they rarely reach the attention of voters (and consequently of elected officials) because, unlike their spending cousins, their effects are often not visible. Like the direct government spending that is supported by taxes, regulations are designed to achieve social goals, but the costs of regulations are hidden in higher prices paid for goods and services and in opportunities foregone.

Over the course of our history, concerns about the effect of regulations have occasionally reached a level of public discourse that led to meaningful efforts at regulatory reform (and even outright deregulation), and the first part of my testimony briefly reviews three such periods. It then evaluates the regulatory landscape today, and goes on to examine possible regulatory reform initiatives in the legislative branch and executive branch.

I. Previous Efforts at Regulatory Reform

This first part of my testimony briefly reviews three historic periods of regulatory reform, and the conditions that led to them: (A) the Administrative Procedure Act (APA) of 1946, (B) the economic deregulation and increased role for regulatory analysis that began in the mid-1970s,

[1] The George Washington University Regulatory Studies Center raises awareness of regulations' effects with the goal of improving regulatory policy through research, education, and outreach. This statement reflects my views, and does not represent an official position of the GW Regulatory Studies Center or the George Washington University or ACUS.

and (C) the statutory regulatory reform efforts of the mid-1990s. It concludes with a review of the pressures that have led to more regulation, despite these reforms (D).

A. The Administrative Procedure Act of 1946

Until the early part of the 20th century, courts interpreted the separation of powers implicit in Articles 1 through 3 of the U.S. Constitution as prohibiting the delegation of legislative powers to the executive. The Supreme Court expressed in 1892, "that Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."[2] Yet, early cases did uphold delegations of legislative authority as long as the executive branch was merely "filling up the details."[3] And, in 1928, the Supreme Court moved away from a strict interpretation of the non-delegation doctrine when it found that a congressional delegation of power was constitutional because the statute included an "intelligible principle" to guide executive action.[4] Seven years later, the Supreme Court returned to the question of delegation of legislative power when it ruled that the National Industrial Recovery Act (NIRA) was unconstitutional because it provided the President (and private industry associations) "virtually unfettered" decision making power.[5]

This decision led to extensive debate, culminating in the passage of the APA in 1946. According to one researcher, the APA reflected a "fierce compromise":

> The battle over the APA helped to resolve the conflict between bureaucratic efficiency and the rule of law, and permitted the continued growth of government regulation. The APA expressed the nation's decision to permit extensive government, but to avoid dictatorship and central planning.[6]

The APA has guided executive branch rulemaking for 65 years, and is one of the most important pieces of legislation ever enacted. It established procedures an agency must follow to promulgate binding rules and regulations within the area delegated to it by statute. As long an agency acts within the rulemaking authority delegated to it by Congress, and follows the procedures in the APA, recent courts have found few constitutional limits on executive branch agencies' writing and enforcing regulations.

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[2] Field v. Clark, 143 U.S. 649 (1892)

[3] Wayman v. Southard, 23 U.S. (10 Wheat) 1 (1825)

[4] J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928)

[5] Schechter Poultry Corp. v. United States, 39 295 U.S. 495 (1935)

[6] George Shepard. *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*. 90 Nw. U. L. Rev. 1557 (1996)

B. Regulatory reform and deregulation in the 1970s and 1980s

Inflation fears in the 1970s raised awareness of the costs and unintended consequences of regulation, leading to bipartisan support for deregulation in traditionally-regulated industries, such as airlines and trucking. Scholars at the time were in general agreement that regulation of private sector prices, entry, and exit tended to keep prices higher than necessary, to the benefit of regulated industries, and at the expense of consumers. Policy entrepreneurs in the Ford, Carter, and Reagan Administrations, in Congress, and at think tanks, were able to link this knowledge to the problem of inflation by showing that eliminating economic regulations and fostering competition would lead to reduced prices. This led to successful bipartisan efforts to remove unnecessary regulation in several previously-regulated industries, with resulting improvements in innovation and consumer welfare.

While the legislative and executive branches were eliminating economic regulations in the late 1970s, a new form of "social" regulation aimed at addressing environmental, health, and safety concerns, was emerging. (Figures 1 and 2 below, which track the budgetary costs of running the federal regulatory agencies and the pages in the *Federal Register,* where newly proposed and issued regulations are published, illustrate the dramatic increase in social regulatory activity during this period.) Concerns over the burden of these new regulations and other reporting requirements led President Carter (and Presidents Nixon and Ford before him) to create procedures for analyzing the impact of new regulations and minimizing their burdens.[7] They also led to the passage of two significant pieces of legislation in 1980. The Regulatory Flexibility Act (RFA) required agencies to analyze the impact of their regulatory actions on small entities and consider effective alternatives that minimize small entity impacts. The Paperwork Reduction Act (PRA) established the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) to review and approve all new reporting requirements with an eye toward minimizing burdens associated with the government's collection of information.

When President Reagan took office in 1981, he continued to pare back economic regulations, and also gave the newly created OIRA a role in reviewing draft regulations to ensure their benefits exceeded their costs. The growth in federal regulatory activity leveled off for a brief period in the 1980s, but as inflation fears subsided and the economy improved, concerns over excessive regulation faded and regulatory activity began to increase again. Each subsequent president has continued and expanded OIRA's central regulatory oversight role.

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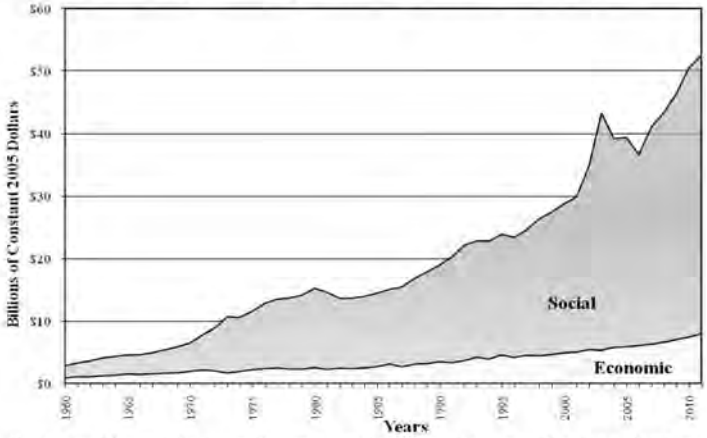
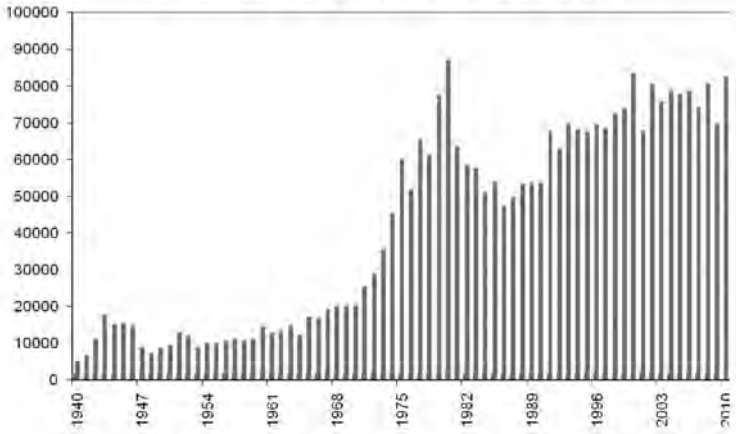
[7] President Carter's E.O. 12044 required agency heads to determine the need for a regulation, evaluate the direct and indirect effects of alternatives, and choose the least burdensome. Exec. Order No. 12044, 43 Fed. Reg. 12,661 (Mar. 24, 1978).

Figure 1: Budgetary Costs of Federal Regulation, adjusted for inflation



Source: Weidenbaum Center, Washington University and the George Washington University Regulatory Studies Center. Derived from the *Budget of the United States Government* and related documents, various fiscal years.

Figure 2: Federal Register Pages: 1940-2010



C. Regulatory reform in the 104th Congress

In 1995, a Republican majority took control of both houses of Congress, having run on a platform that included regulatory reform. By this time, the social regulations that had begun in the 1970s were the focus of concern. In contrast to the consensus on economic regulations, academics and policy makers did not generally support outright deregulation, but rather reforms to make regulations less burdensome and more cost-beneficial. The 104th Congress's ambitious agenda included efforts to codify regulatory impact analysis procedures similar to those required through executive order by Presidents Carter, Reagan, Bush and Clinton, to require compensation for regulatory actions that reduced the value of property rights, to cap the costs of new regulations through a regulatory budget, and to give Congress more control and accountability over the content of new regulations.

These efforts at comprehensive regulatory reform legislation in the 104th Congress were unsuccessful. Opponents of comprehensive reform at the time noted:

> By overreaching on this issue, the Republicans were tagged as anti-environment (anti-clean air and water) and anti-safety (dirty meat) by the mainstream media and the electorate. Both the Administration and the Congressional Democrats benefited politically from their stand against extreme Republican reg reform initiatives.[8]

While comprehensive reform efforts failed to win a majority of votes, some targeted efforts became law, including:

- The Unfunded Mandates Reform Act (UMRA) of 1995, which required executive branch agencies to estimate and try to minimize burdens on state, local, and tribal governments, and private entities,

- The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, which reinforced RFA requirements for small business impact analyses and provided for judicial review of agencies' determinations as to whether regulations would have "a significant economic impact on a substantial number of small entities,"

- The Congressional Review Act (CRA) of 1996, contained in SBREFA, which required rule-issuing agencies to submit final regulations with supporting documentation to both houses of Congress, and established expedited procedures by which Congress could overturn regulations within a specified time using a Joint Resolution of Disapproval,

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[8] White House Memorandum to Erskine Bowles from John Hilley and Sally Katzen, "Regulatory Reform" (Feb. 12, 1997), *available at* http://www.clintonlibrary.gov/_previous/KAGAN%20DPC/DPC%2051-57/3324_DOMESTIC%20POLICY%20COUNCIL%20BOXES%2051-57.pdf.

- 1995 Amendments to the Paperwork Reduction Act, which reauthorized OIRA and required further reductions in paperwork burdens, and

- Title II, Section 645, of the 1996 Omnibus Consolidated Appropriations Act, which directed OMB to submit a report to Congress estimating the costs and benefits of major regulations. The 1999 Regulatory Right to Know Act made permanent this requirement for OMB to report to Congress annually.[9]

These efforts have had mixed results. Agencies generally meet UMRA requirements with reference to regulatory impact analyses prepared pursuant to Executive Order 12866[10] (issued by President Clinton in 1993 and still in effect today), but rarely do more.[11] While, pursuant to SBREFA, courts have overturned regulations that fail to consider impacts on small business,[12] agencies have successfully defended regulations that ignore the RFA requirements if the regulation's effects on small entities are considered to be "indirect."[13,14]

Congress has used the CRA to enact a resolution of disapproval only once, overturning an OSHA regulation addressing ergonomics in the workplace. Though resolutions of disapproval require only a simple majority in Congress (and several have passed one house), they face the threat of presidential veto, which would require a two-thirds majority to override. The conditions surrounding the ergonomics regulation were likely key to its disapproval. It was a "midnight regulation," issued amid much controversy at the end of the Clinton Administration. The resolution disapproving the rule came at the beginning of the Bush Administration (which did not support the rule), eliminating the veto threat.

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[9] The 104th Congress also passed amendments to the Safe Drinking Water Act, directing the Environmental Protection Agency to set standards based on a balancing of costs and benefits. Safe Drinking Water Act Amendments of 1996, Pub. L. No. 104-182, 110 Stat. 1613 (1996).

[10] Exec. Order No. 12866, 58 Fed. Reg. 51,735 (Oct. 4, 1993), *available at* http://www.archives.gov/federal-register/executive-orders/pdf/12866.pdf.

[11] See testimony of Susan Dudley and other witnesses before the House Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform, Committee on Oversight and Government Reform, February 15, 2011, *available at* http://oversight.house.gov/index.php?option=com_content&view=article&id=1129:qunfunded-mandates-and-regulatory-overreachq&catid=14:subcommittee-on-technology

[12] Northwest Mining Association v. Babbitt, 5 F.Supp. 2nd 9 (D.D.C. 1998), and Southern Fishing Association vs. Daley, 995 F.Supp. 1411 (M.D. Fla. 1998).

[13] American Trucking Assns v. EPA 175 F.3d 1027, 1043 (D.C. Cir 1999)

[14] Jeffrey J. Polich, *Judicial Review and the Small Business Regulatory Enforcement Fairness Act: An Early Examination of When and Where Judges Are Using Their Newly Granted Power over Federal Regulatory Agencies*, 41 Wm. & Mary L. Rev. 1425 (2000).

OMB does report annually to Congress on the costs and benefits of major regulations, but a 2001 CRS report observed that OMB's reports, "have been incomplete, and its benefits estimates have been questioned."[15] A 1999 GAO report evaluating OMB's reports noted,

> It is politically difficult for OMB to provide an independent assessment and analysis of the administration's own estimates in a public report to Congress. If Congress wants an independent assessment of executive agencies' regulatory costs and benefits, it may have to look outside of the executive branch or outside of the federal government.[16]

D. Despite these efforts, regulations are increasing

As Figures 1 and 2 illustrate, despite these efforts at reform, the growth in new regulations continues. The executive and legislative requirements for analysis of new regulations appear to have been inadequate to counter the powerful motivations in favor or regulation. Politicians and policy officials face strong incentives to "do something," and passing legislation and issuing regulations demonstrate action. Whether the regulatory action ultimately produces the desired outcomes may be less important, partly because those effects are not immediately apparent, but also because action simply appears more constructive than inaction. There is no public relations advantage to doing nothing or to averting policy mistakes before they occur.

Often businesses are portrayed as the main opponents of regulation, but the evidence suggests otherwise. For decades, economists who study regulation have observed that regulation can provide competitive advantage, so it is often in the self-interest of regulated parties to support it. During my tenure at OIRA, I saw tobacco companies supporting legislation requiring that cigarettes receive Food and Drug Administration pre-marketing approval, food and toy companies wanting more regulation to ensure their products' safety, and energy companies supporting cap-and-trade for greenhouse gas emissions. Particularly when regulatory demands appeal to popular interests, politicians and policy officials find pursuing them hard to resist.[17]

Thus, legislators and regulators face strong incentives to issue new legislation and regulations, all with noble goals, while requirements to evaluate the outcomes of those policies (the benefits, costs, and unintended consequences) tend to take a back seat.

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[15] ROGELIO GARCIA, CONG. RESEARCH SERV., IB95035, FEDERAL REGULATORY REFORM: AN OVERVIEW (2001), *available at* http://www.thecre.com/pdf/2002-crs.pdf.

[16] U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-99-59, ANALYSIS OF OMB'S REPORTS ON THE COSTS AND BENEFITS OF FEDERAL REGULATION (1999), *available at* http://www.gao.gov/archive/1999/gg99059.pdf.

[17] Bruce Yandle, *Bootleggers and Baptists*, REGULATION, May/June 1983.

II. The Regulatory Landscape in 2011

Like the periods that preceded past regulatory reform efforts, concerns over the burdens of regulations are once again on the minds of American citizens.[18] The pace of new regulatory activity spiked after the terrorist attacks of September 2001, and has been increasing again recently.

Over the first two years of President Obama's term, executive branch agencies published 112 economically significant regulations (defined as having impacts of $100 million or more per year). That averages out to 56 major regulations per year, which is significantly higher than Presidents Clinton and Bush who each published an average of 45 regulations per year over their terms.[19] When one includes the independent agencies (over which presidents exercise less direct oversight) the comparisons are similar, with an average of 84 major regulations issued over the last 2 years, a 35 percent increase over the average of 62 per year in the Bush Administration and a 50 percent increase over the 56 per year average in the Clinton Administration.[20]

President Obama's December 2010 *Unified Agenda of Regulatory and Deregulatory Activities* does not presage a slow-down in activity. The *Agenda* lists 4,225 regulatory actions under development by federal regulatory agencies. That is 182 more entries than last year at this time, representing a 5 percent increase in activity. The regulatory road ahead looks even more ambitious when one focuses on the largest regulations. The *Agenda* reveals a 20 percent increase in economically significant regulations, or 40 more regulations with impacts of over $100 million under development now than at this time last year. Of the 224 economically significant rules listed in the 2010 *Agenda*, 48 appear there for the first time. There are 100 more economically significant regulations listed in this fall's *Agenda* than there were in 1995 (the first year for which electronic data are available).[21]

Some of this activity is required by new legislative mandates, most notably the Wall Street Reform and Consumer Protection Act (Dodd-Frank), and the Patient Protection and Affordable Care Act (PPACA). Others, including EPA's regulation of greenhouse gases under the Clean Air Act, are based on new judicial interpretations of statutes enacted 20 or more years ago, and do not necessarily reflect the priorities of any recent (or past) Congress.

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[18] Frank Newport, *Americans Leery of Too Much Gov't Regulation of Business*, GALLUP, Feb. 2, 2010, *available at* http://www.gallup.com/poll/125468/Americans-Leery-Govt-Regulation-Business.aspx.

[19] Analysis of the published economically significant final regulations tracked by the General Services Administration's Regulatory Information Services Center at www.reginfo.gov.

[20] Analysis of major regulations by month in the GAO database, available at www.gao.gov/fedrules.

[21] Office of Info. & Regulatory Affairs, Office of Mgmt. & Budget, Current Regulatory Plan and the Unified Agenda of Regulatory and Deregulatory Actions, http://www.reginfo.gov/public/do/eAgendaMain (last visited Feb. 23, 2011).

III. Legislative Efforts

This part of my testimony examines possible reforms and weighs their likely effects. I consider reforms in three categories: (A) changes to regulatory procedures, (B) changes to the decision criteria for selecting regulatory approaches, and (C) use of oversight, budget, and legislative authority to affect individual regulations.

A. Procedural reforms[22]

The APA describes two types of rulemaking – formal and informal. Most executive branch regulation is conducted through informal, or notice-and-comment rulemaking. As long as an agency acts within the rulemaking authority delegated to it by Congress, and follows the procedures in the APA, courts have ruled that it can write and enforce regulations subject to an "arbitrary and capricious" standard of review.

Formal rulemaking is generally used only by agencies responsible for economic regulation of industries, and only when a statute other than the APA specifically states that rulemaking is to be done "on the record."[23] Formal rulemaking involves trial-like hearings, where rules of evidence apply, and parties may both subpoena and cross-examine witnesses. Decisions must address each of the findings presented and be supported by "substantial evidence." Sections of the Occupational Safety and Health Act (OSHA) and Toxic Substances Control Act (TSCA) require a hybrid approach, in which the agencies propose rules and standards through notice and comment, but at the request of interested parties must hold a hearing.

To improve the empirical accuracy of factual determinations and the rigor of agencies' justifications for the most significant regulations they issue, legislators might consider amending the APA to (1) expand the use of formal rulemaking procedures, (2) apply the substantial evidence, or (3) provide for judicial review of data and analysis relied on in rulemakings.

Legal scholars argue that formal rulemaking procedures would be especially useful to ensure scientific integrity, and to address concerns that agencies sometimes do not take public comment seriously, but instead provide inadequate, perfunctory explanations for selecting one alternative over another, or for dismissing public concerns.[24] Critics are concerned that formal rulemaking

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[22] The Administrative Conference of the United States has conducted studies and provided recommendations on procedural issues that the Committee may find useful, including: 77-1 Congressional Control of Regulation: Legislative Vetoes; 74-4 Judicial Review of Informal Rulemaking; 85-1 Legislative Preclusion of Cost-Benefit Analysis; and 90-7 Responses to Congressional Demands for Information [60 Fed. Reg. 56312 (Nov 8, 1995].

[23] United States v. Fla. E. Coast Ry., 410 U.S. 224 (1973).

[24] JEFF ROSEN, AM. BAR ASS'N, FORMAL AND HYBRID RULEMAKING: TIME FOR A REVIVAL (2010), *available at* http://new.abanet.org/calendar/6th-annual-administrative-law-and-regulatory-practice-institute/Documents/Jeff%20Rosen%20PowerPoint.pdf.

procedures will slow down the issuance of new regulation, and impose unnecessary costs on regulating agencies,[25] but supporters offer examples of such rulemakings being completed expeditiously, and of notice-and-comment rulemakings that have taken more than a decade.[26]

The substantial evidence standard directs a reviewing court to set aside an agency action unless the record provides "such relevant evidence as a reasonable person would accept as adequate to support a conclusion."[27] It is arguably a more exacting standard than "arbitrary and capricious," which grants considerable deference to agency expertise. Substituting a substantial evidence test could motivate agencies to develop and provide better scientific and technical data and analysis in support of regulations.[28] Some argue that the substantial evidence test used as part of an informal (or even hybrid) regulatory proceeding would differ very little from an arbitrary and capricious test, however.[29,30]

The Information Quality Act (IQA) attempts to ensure the "quality, objectivity, utility, and integrity" of information disseminated to the public, and provides procedures by which affected parties can petition agencies to correct information that does not meet those standards. The IQA does not explicitly provide for judicial review of agency denials of requests for correction, and to date, courts have chosen not to try cases that have been brought. Congress may consider amending the IQA to make agency decisions reviewable.[31]

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[25] *Hearing on Executive Order 13422, 72 Fed. Reg. 2763 (January 23, 2007), President Bush's recent amendments to Executive Order 12866, Before the Subcomm. on Investigations and Oversight of the H. Comm. on Science and Technology*, 110th Cong. (2007) (testimony of Peter L. Strauss, Betts Professor of Law, Columbia Law School), *available at* http://democrats.science.house.gov/Media/File/Commdocs/hearings/2007/oversight/26apr/strauss_testimony.pdf.

[26] ROSEN, *supra* note 23.

[27] Mareno v. Apfel, 1999 U.S. Dist. LEXIS 8575 (S.D. Ala. Apr. 8, 1999) ("more than a scintilla but less than preponderance").

[28] EE Bachrach, Case for a Substantial Evidence Amendment to the Informal Rulemaking Provision of the Federal Food, Drug, and Cosmetic Act, 55 Food & Drug L.J. 293 (2000).

[29] Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of the Fed. Reserve Sys., 745 F.2d 677 (D.C. Cir. 1984) (Scalia, J., writing for the majority) ("In review of rules of general applicability made after 'notice and comment' rule-making, [substantial evidence and arbitrary or capricious] criteria converge into a test of reasonableness."), *available at* http://openjurist.org/745/f2d/677/association-v-board.

[30] Matthew J. McGrath, *Convergence of the Substantial Evidence and Arbitrary and Capricious Standards of Review During Informal Rulemaking*, 54 GEO. WASH. L. REV. 541 (1986).

[31] For different perspectives on this issue, see James W. Conrad, Jr., *The Information Quality Act – Antiregulatory Costs of Mythic Proportions?*, 12 KAN. J. L. & PUB. POL'Y 521 (2003), *available at* http://www.law.ku.edu/publications/journal/pdf/v12n3/conrad.pdf; Sidney A. Shapiro, RENA STEINZOR & MARGARET CLUNE, CTR. FOR PROGRESSIVE REFORM, OSSIFYING OSSIFICATION: WHY THE INFORMATION QUALITY ACT SHOULD NOT PROVIDE FOR JUDICIAL REVIEW (2006), *available at* http://www.progressivereform.org/articles/CPR_IQA_601.pdf.

Several procedural reforms under consideration in the 112th Congress bear brief mention. H.R. 10, the REINS (Regulations from the Executive In Need of Scrutiny) Act,[32] is patterned after the 1996 CRA, providing expedited procedures for evaluating and voting on major regulations, but rather than requiring Congress to enact a "joint resolution of disapproval" to prevent a rule from going into effect, no major rule could go into effect until Congress enacted an affirmative "joint resolution of approval." If passed, it would allow both legislators[33] and the president[34] to take more responsibility for the content of major new regulations, but may alter agency incentives in unintended ways.[35]

Senator Mark Warner has said he intends to propose legislation focused on altering regulatory agencies' incentives to issue new regulations and examine the effectiveness of existing regulations.[36] His legislation "would require federal agencies to identify and eliminate one existing regulation for each new regulation they want to add."[37] This "regulatory pay-go" shares similarities with a regulatory budget, a concept that attracted bipartisan interest in the 1970s and 1980s, but has not been championed in recent years. In 1980, President Carter's *Economic Report of the President* discussed proposals "to develop a 'regulatory budget,' similar to the expenditure budget, as a framework for looking at the total financial burden imposed by regulations, for setting some limits to this burden, and for making tradeoffs within those limits." The Report noted analytical problems with developing a regulatory budget, but concluded that "tools like the regulatory budget may have to be developed" if governments are to "recognize

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[32] Regulations from the Executive in Need of Scrutiny Act, H.R. 10, 112th Cong. § 2 (2011).

[33] Jonathan Adler, The Federalist Soc'y for Regulatory & Pub. Policy Studies, The Regulations from the Executive in Need of Scrutiny (REINS) Act, http://www.fed-soc.org/publications/pubID.2074/pub_detail.asp (2011).

[34] In testimony before the House Judiciary Committee, David McIntosh observed, "If the President disapproves of a rule, he can veto its authorizing resolution; if he endorses it, he can allow it to take effect. Either way, the President is forced to take ownership of the independent agency's action and will be held accountable by the people for his choice." *The REINS Act: Promoting Jobs and Expanding Freedom by Reducing Needless Regulations: Hearing on H.R. 10 Before the Subcomm. on Courts, Commercial and Administrative Law of the H. Comm. on the Judiciary* ,112th Cong. (2011) (statement of David McIntosh, Member of Congress, Retired), *available at* http://judiciary.house.gov/hearings/pdf/McIntosh01242011.pdf.

[35] *The REINS Act: Promoting Jobs and Expanding Freedom by Reducing Needless Regulations: Hearing on H.R. 10 Before the Subcomm. on Courts, Commercial and Administrative Law of the H. Comm. on the Judiciary* ,112th Cong. (2011) (statement of Sally Katzen), *available at* http://judiciary.house.gov/hearings/pdf/Katzen01242011.pdf.

[36] *See* SUSAN DUDLEY, THE GEORGE WASHINGTON UNIV. REGULATORY STUDIES CTR., REGULATORY PAY-GO (2011), *available at* http://www.regulatorystudies.gwu.edu/images/commentary/20110207_dudley_regulatory_pay-go.pdf

[37] Mark Warner, *To Revive the Economy, Pull Back the Red Tape*, WASH. POST, Dec. 13, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/12/12/AR2010121202639_pf.html.

that regulation to meet social goals competes for scarce resources with other national objectives," and set priorities to achieve the "greatest social benefits."[38]

B. Decision criteria[39]

Congress may want to improve upon the decisional criteria by which regulatory alternatives are evaluated, either by codifying the decision requirements currently embodied in executive order and extending them to independent agencies, or by expanding the coverage of existing statutes, such as UMRA, and the RFA. Congress will need to decide whether these cross-cutting decisional criteria would supersede or be subordinate to the decision criteria expressed in individual statutes, such as Section 109 of the Clean Air Act, which has been interpreted as precluding the consideration of any factors other than human health in the setting of national ambient air quality standards.

The executive branch has taken the lead on decisional criteria for analyzing and developing new regulations. All recent presidents, both Democratic and Republican, have adopted sound decisional criteria through executive order to guide regulatory decisions, and at least since 1980, there have been attempts to codify these executive requirements in statute.[40] The main advantages of creating a statutory obligation for meeting these regulatory impact analysis standards are to (1) apply them to independent agencies (which Administrations have been loath to do through executive order for fear of stirring up debate over the relationship between independent agencies and the President) and (2) make compliance with them judicially reviewable.

The 112th Congress could consider legislation that simply adopts Executive Order 12866 (first issued by President Clinton in 1993) or even President Obama's recent Executive Order 13563, which incorporates E.O. 12866 by reference (see below). Legislation might emphasize certain features that members have found lacking in regulatory analyses (such as impacts on employment, risk assessment, analysis of non-regulatory alternatives, etc.). It might also combine decisional criteria with procedural ones; for example, requiring that if certain decisional criteria are met (such as effects above a threshold), a rulemaking would follow a different procedural path (such as an advance notice of proposed rulemaking, or a formal hearing).

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[38] Chairman of the Council of Econ. Advisers, 1980 Economic Report of the President [hereinafter 1980 Economic Report], at 125 (1980), *available at* http://fraser.stlouisfed.org/publications/ERP/page/4569/download/46077/4569_ERP.pdf.

[39] The Administrative Conference of the United States has conducted studies and provided recommendations on applications of decision criteria that the Committee may find useful, including: 79-4 Cost-Benefit Analysis in Regulatory Decision-Making; 85-2 Regulatory Analysis of Agency Rules; 88-9 Presidential Review of Agency Rulemaking [60 Fed. Reg. 56312 (Nov 8, 1995)]; and Paul Verkuil, *A Critical Guide to the Regulatory Flexibility Act,* Duke L.J. 213 (1982).

[40] *See* 1980 Economic Report, *supra* note 37, at 123.

Both UMRA (Title II) and the RFA contain analytical requirements, similar to those in Executive Order 12866, that call for understanding the likely effects (positive and negative) of new regulations before they are implemented. However, researchers have found they are less effective than originally expected. UMRA covers a limited number of major regulations (the CRS found that seventy-two percent of the economically significant rules covered by the Executive Order are not covered by UMRA)[41] and, because its requirements are merely informational, appear to have limited effect on agency decisions.[42] The small business community has been frustrated that courts have interpreted the RFA's requirements to assess economic impact as applying only to direct compliance costs and may encourage Congress to amend the RFA to explicitly include indirect impacts. They argue that agencies should consider reasonably foreseeable indirect economic impacts on small entities, such as increases in input prices (e.g., electricity or transportation) or state-level regulations issued pursuant to federal rules.[43]

C. Oversight, budget, and legislation

Only Congress can address aspects of legislation that hinder APA procedures (such as requirements that agencies issue interim final regulations that limit public comment) or preclude reliance on sound decisional criteria (such as statutory language that can be interpreted to prevent agencies from considering important factors). Congress can also influence agency action through oversight of individual regulatory actions and through funding provisions in appropriations bills. This Subcommittee may find it valuable to use its oversight authority to evaluate how well agencies are following the requirements of the APA.

As Congress considers options available to guide the decision criteria agencies use to develop regulations, to reform the procedures by which regulations are issued, and to take responsibility for the content of individual regulations promulgated pursuant to statutes, it may want to consider giving a non-executive branch agency responsibility for reviewing regulations. A congressional office focused on regulations would have several benefits,[44] including providing an independent check on the analysis and decisions of regulatory agencies and OMB. As GAO

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[41] US CONG RESEARCH SERVICE, UNFUNDED MANDATES REFORM ACT: HISTORY, IMPACT, AND ISSUES, Robert Jay Dilger and Richard S. Beth, 7-5700, R40957. (August 2010), *available at:* http://assets.openers.com/rpts/R40957_20100813.pdf

[42] *See* SUSAN DUDLEY, THE GEORGE WASHINGTON UNIV. REGULATORY STUDIES CTR., UNFUNDED MANDATES (2011), *available at* http://www.regulatorystudies.gwu.edu/images/commentary/20110216_dudley_umra.pdf

[43] *Hearing on Legislation to Improve the Regulatory Flexibility Act Before the H. Comm. on Small Business*, 110th Cong. (2007) (testimony of Thomas Sullivan, Chief Counsel for Advocacy, Small Business Administration), *available at* http://archive.sba.gov/advo/laws/test07_1206.html.

[44] See Testimony of Robert W. Hahn and Robert E. Litan before the House Government Reform Committee, Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, March 2003, *available at:* http://www.brookings.edu/testimony/1999/04_righttoknow_litan.aspx

noted, "it is politically difficult for OMB to provide an independent assessment and analysis of the administration's own estimates in a public report to Congress."[45]

A Congressional office would be able to devote resources to areas OMB cannot, such as examining the effects of regulations issued by independent regulatory agencies. Just as the CBO provides independent estimates of the on-budget costs of legislation and federal programs, a Congressional regulatory office could provide Congress and the public independent analysis regarding the likely off-budget effects of legislation and regulation. This would be particularly important if Congress enacts some of the other procedural and decisional changes under discussion.

IV. Executive Efforts

On January 18, 2011, President Obama penned an op ed in the Wall Street Journal[46] outlining his approach to regulation, and issued a new executive order on regulation. Executive Order 13563[47] on "Improving Regulation and Regulatory Review" reaffirms sound principles and practices that have been in effect since 1981.[48] It reinforces President Clinton's Executive Order 12866, and stresses the importance of conducting sound analysis of likely regulatory impacts, of providing public opportunities to engage in the process of developing new regulations, and of designing less-burdensome, more flexible approaches to achieve regulatory goals. It also requires agencies to develop plans for periodically reviewing regulations already on the books, with an eye toward streamlining, repealing, or expanding them to make them more effective and less burdensome.

Some aspects of the new Order bear brief mention.

- Section 4 of the new Order reflects OIRA Administrator Cass Sunstein's preference for flexible approaches that "nudge," rather than command, desirable behavior, directing agencies to "identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public." This could lead to positive applications of behavioral science insights, and avoid some of the unintended consequences of command-and-control regulation. By retaining E.O. 12866 and its requirement that agencies justify the decision to regulate by a compelling public need

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[45] U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-99-59, ANALYSIS OF OMB'S REPORTS ON THE COSTS AND BENEFITS OF FEDERAL REGULATION (1999), *available at* http://www.gao.gov/archive/1999/gg99059.pdf.

[46] Barack Obama, Op-Ed., *Toward a 21st-Century Regulatory System*, WALL ST. J., Jan. 18, 2011, *available at* http://online.wsj.com/article/SB10001424052748703396604576088272112103698.html?mod=WSJ_hp_LEFTTopStories#articleTabs%3Darticle.

[47] Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

[48] Press Release, The White House, Fact Sheet: The President's Regulatory Strategy (Jan. 18, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/01/18/fact-sheet-presidents-regulatory-strategy.

including "material failures of private markets,"[49] the new Order has not endorsed a potentially dangerous application of behavioral science, namely to use consumer "irrationality" as sufficient reason to intervene in markets, a policy that could have encouraged regulators to substitute their judgments about private decisions for consumers'.[50]

- Section (1)(b) of the new Order, which repeats key principles from the 1993 Order, appears to go further by substituting "must" for "should" and "shall." For example, "each agency *must*, ...propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify)." (emphasis added)

- In directing agencies "to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible," section 1(c) says they "may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts." "Human dignity" is a phrase not found in E.O. 12866, and likely means different things to different people. For example, many might find human dignity in the freedom to make one's own choices, rather than having those choices predetermined by government regulation.

- Section 5 refers to the President's March 2009 Memorandum on "Scientific Integrity" and calls on agencies to "ensure the objectivity of any scientific and technological information and processes used to support the agency's regulatory actions."

The Order will likely strengthen OIRA, the office in OMB that oversees and coordinates all significant executive branch regulations. The staff of about 50 career civil servants operates within the Executive Office of the President, reviewing regulations to ensure they are consistent with the President's priorities, and coordinating interagency review to avoid redundancy and conflict. With its mission to ensure the benefits of regulations justify the costs, it is institutionally more interested in impacts on society broadly and less susceptible to special interest pressures than line agencies, and provides what President Obama has called "a dispassionate and analytical 'second opinion' on agency actions."[51]

There are indications that OIRA is already playing a greater role than it appeared to earlier in the Administration. During the first year of the Obama Administration, the average length of OIRA

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[49] Exec. Order No. 12866, 58 Fed. Reg. 51,735, § 1(a) (Oct. 4, 1993).

[50] *See* BRIAN MANNIX, THE GEORGE WASHINGTON UNIV. REGULATORY STUDIES CTR., THE TROUBLING PROSPECT OF "BEHAVIORAL" REGULATION (2010), *available at* http://www.regulatorystudies.gwu.edu/images/commentary/20100419-mannix-behavioralists.pdf.

[51] Memorandum of January 30, 2009—Regulatory Review, 74 Fed. Reg. 5977 (Jan. 30, 2009), *available at* http://www.reginfo.gov/public/jsp/EO/fedRegReview/POTUS_Memo_on_Regulatory_Review.pdf.

review, which may be a reasonable proxy for the rigor of that review, was significantly less than the averages in previous administrations. Economically significant regulations were reviewed in an average of 33 days, compared to 43 to 45 days, respectively, in the Bush and Clinton Administrations. Since November 2010, however, OIRA appears to be taking longer for interagency reviews – an average of 53 days for economically significant regulations, perhaps indicating that its "dispassionate and analytical 'second opinion'" is more appreciated by the White House.[52]

One disappointment in the new Executive Order is that it does not bring the so-called independent agencies under the OIRA review rubric, nor does it subject them to the Order's analytical and transparency requirements. Thus, most financial regulation (including those issued by the new Consumer Financial Protection Agency) will continue to be exempt from OIRA's scrutiny, and not constrained by the sound principles and procedures outlined by the President.

V. Conclusion

For over a century, legislators have delegated authority to executive branch agencies, and the volume and reach of regulation has grown. Like government spending programs, funded by taxes and deficits, regulations are designed to achieve social goals. However, there is no regulatory equivalent to the fiscal budget—no transparent accounting of spending priorities proposed by the President and appropriated by Congress. Americans are often unaware of regulations' impacts because their costs are hidden in higher prices paid for goods and services and in opportunities foregone.

From time to time, concerns about the cumulative impact of regulations have reached a level that led to meaningful regulatory reform. Bipartisan efforts in Congress and the executive branch brought about the economic deregulation of the 1970s and 1980s. That same period witnessed a growth in social regulations, however, and presidents of both parties have tried to maintain control by establishing procedures for analyzing and reviewing regulations. Legislators have also attempted to impose discipline on the regulatory process through procedural reforms and oversight, but at the same time have continued to delegate new legislative authority to regulatory agencies. The net effect is the expanding modern regulatory state illustrated in Figures 1 and 2.

I appreciate this committee's interest in regulatory reform, and welcome opportunities to discuss the likely effects of changes to both administrative procedures and decision rules used to develop new regulations and evaluate existing ones.

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[52] Statistics can be calculated using the search tools on the GSA website, www.reginfo.gov.

Mr. COBLE. Thank you, Professor Dudley. And you ought to be commended; you beat the illuminated red light, putting pressure on Mr. Rosen.

Mr. Rosen, good to have you with us.

TESTIMONY OF JEFFREY A. ROSEN, ESQ., KIRKLAND & ELLIS LLP

Mr. ROSEN. Thank you, sir. Chairman Coble and Members of the Subcommittee, thank you for inviting me——

Mr. COBLE. Mr. Rosen, pull that mike a little closer, if you will.

Mr. ROSEN. That would help, wouldn't it?

I was saying, thank you for inviting me to address today's important topic. My name is Jeff Rosen, and I am currently a partner at Kirkland & Ellis LLP. I also serve as a member of the governing council of the American Bar Association's Administrative Law Section and as co-chair of its rulemaking committee.

I have previously served as the general counsel of the U.S. Department of Transportation and as general counsel and senior policy advisor at the Office of Management and Budget. But the views and observations that I am offering today are entirely my own.

Now, it is generally recognized that Federal Government regulations touch upon virtually every sector of our economy. But the enormous impact of such regulations and the regulatory process on our national economy is not always well understood. Sometimes the costs associated with regulations issued by Federal agencies actually exceed the annual budgets of the agencies that produce them. So the rulemaking authority can be as significant as Federal spending.

In the last 2 years alone, Federal agencies issued more than 125 final regulations that involve more than $100 million each, and sometimes billions of dollars. And the people and organizations who bear the cost of regulation are, themselves, wide-ranging, such as universities, hospitals, local governments, and businesses both large and small, among others. So it is highly appropriate that you focus on what can be done to improve both the regulatory process and the rules that are promulgated.

As you know, this year marks the 65th anniversary of the passage of the Administrative Procedure Act, a statute which has never been significantly amended or modernized. Indeed, it has now been more than a decade since enactment of any significant legislative improvement to administrative law, dating back to the year 2000 when the Information Quality Act was passed.

But experience over both a long period of time and over the last decade points to opportunities for improvement. Many of these are items that represent best practices employed by Presidents of both parties. Indeed, a number of them were reiterated by President Obama as recently as last month when he issued Executive Order 13563, titled "Improving Regulation and Regulatory Review."

The Executive orders about regulation that were issued by President Reagan, President Clinton, President Bush, and President Obama all contain elements that are worthy of legislative codification.

In my prepared statement, which you have, I tried to address a wide range of potential improvements, but in our limited time today I would like to focus on two issues.

The first is judicial review, which has always been a crucial aspect of the APA because it is a check and balance on the use of the authority delegated by Congress, itself, to agencies that provide strong incentives for agencies to get things right.

There is a need to clarify when judicial review is available and, perhaps, when it is not. In particular, I would like to suggest it would be beneficial to clarify that judicial review is available to ensure compliance with the Information Quality Act and to expand judicial review applicable to compliance with the Unfunded Mandates Reform Act.

In addition, at least with regard to major, economically significant regulations, it would have a positive effect to enable judicial review for the aspects of regulation that I suggest ought to be codified from existing Executive orders and executive-branch requirements, such as the rulemaking criteria.

And that takes me to the second improvement upon which I would like to focus, and that is expanding the occasions on which rules that involve complex empirical and scientific issues and that have a large impact on the economy are required to be conducted on the record.

When the APA was enacted 65 years ago, it was expected that some rulemakings would employ formal and hybrid rulemaking procedures. And sometimes they did. But over time, those have become less common, even though they are superior for resolving contested factual and empirical issues. Again, at least for certain kinds of major rules, Congress ought to consider requiring that rulemaking be conducted on the record and based only on the record.

In conclusion, I can't imagine there is anyone who thinks there are no improvements possible to our administrative law and regulatory processes. I hope this Subcommittee will pursue a range of improvements that will make government agencies work better, while enabling job growth and economic growth for our country.

Thank you very much, and I would be happy to answer questions at the appropriate time.

[The prepared statement of Mr. Rosen follows:]

Prepared Statement of Jeffrey A. Rosen
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Hearing on "The APA at 65 – Is Reform Needed to Create Jobs, Promote Economic Growth and Reduce Costs?"

Subcommittee on Courts, Commercial and Administrative Law
Committee on the Judiciary
U.S. House of Representatives

February 28, 2011

Mr. Chairman, Ranking Member Cohen, and members of this Subcommittee, thank you for the invitation to talk to you today about the topic of improving administrative law and the regulatory process, for the benefit of our national economy. My name is Jeffrey A. Rosen, and I am a senior litigation partner and regulatory lawyer in the Washington, D.C. office of the law firm of Kirkland & Ellis LLP. I previously served as General Counsel and Senior Policy Advisor for the White House Office of Management and Budget ("OMB") from 2006 to 2009. In that capacity, I was responsible for advising the OMB Director and the President with regard to administrative and constitutional law, and I worked closely with the Office of Information and Regulatory Affairs ("OIRA") on numerous regulatory matters, among other duties. Before my time at OMB, I served as General Counsel of the United States Department of Transportation ("DOT") from 2003 to 2006 where I was responsible for DOT's regulatory program, served as DOT's Regulatory Policy Officer, and had the privilege to act as counsel to Secretary Norman Y. Mineta.[1]

Having experienced the regulatory process from the perspectives of an agency lawyer, an OMB reviewer, and a lawyer for private litigants, I appreciate the opportunity to appear before this subcommittee to discuss the history and future of the Administrative Procedure Act ("APA") and other administrative law statutes. The APA in particular is one of the most important pieces of legislation ever enacted by Congress. Indeed, because it governs key aspects of how federal agencies go about their daily business, the APA affects everyone in the United States, and often in profound ways. We now have sixty-five years of experience under the APA on which to draw lessons about what works, and it is time to make some needed improvements. That is why today's hearing is so important. By focusing on this key piece of legislation, Congress can ensure that administrative law, which has seen no new legislation in the last decade, can continue to meet the needs of the American people. In particular, it is time to institutionalize and codify a

[1] I want to note that I am appearing today in my personal capacity, and not on behalf of my law firm or its clients. The views I express are my own, based on my own experience and observations. However, I would like to acknowledge my colleague, Aaron Nielson, who assisted me in preparing this written testimony.

number of "best practices," many of which have originated in Executive Branch actions, to ensure that statutory law keeps pace with changes in administrative practice and the needs of our modern economy.

I. A Brief Historical Overview of the APA and Other Administrative Law Statutes.

The APA was enacted in 1946, but its origins are much older. As Justice Robert Jackson explained in *Wong Yang Sung v. McGrath*, the first Supreme Court case to explore the APA in significant detail, before the APA was enacted a "conviction" had formed that agency "power was not sufficiently safeguarded and sometimes was put to arbitrary and biased use".[2] Both Congress and the Executive Branch responded to that "[c]oncern over administrative impartiality" by conducting extensive reviews of agency conduct.[3] Despite a strong consensus that something needed to be done, reform was "put aside" because of the "gathering storm of national emergency" that was World War II.[4]

Following World War II, the reform process recommenced. After a "painstaking" canvassing of divergent views of all "interested parties" and "administrative agencies," the APA "passed both Houses without opposition and was signed by President Truman June 11, 1946."[5] But as Justice Jackson presciently observed in 1950, the APA is not a perfect statute: it "contains many compromises and generalities and, no doubt, some ambiguities."[6] Indeed, Justice Jackson frankly warned that additional "[e]xperience may reveal defects" in the APA,[7] and some of those have indeed become more apparent as the size and scope of the federal regulatory state has expanded further during the last six decades.

Remarkably, the APA has not been significantly amended since its enactment nearly sixty-five years ago. But Congress has legislated some supplements to administrative law since 1946. For example, Congress has enacted the Freedom of Information Act, the Government in the Sunshine Act, the Paperwork Reduction Act, the Regulatory Flexibility Act, the Negotiated Rulemaking Act, the Unfunded Mandates Reform Act, the Congressional Review Act, the Regulatory Right to Know Act, the Truth in Regulating Act, and the Information Quality Act. Each of these statutes was driven to some extent by the all-too-real concern that even regulation perceived as necessary can be counterproductive if the regulatory process is not undertaken with care. Each was also needed to deal with issues that the APA did not address or resolve.

Some of these legislatively-enacted reforms are briefly summarized as follows:

The Freedom of Information Act: Congress enacted FOIA, a well-known good governance transparency provision, in 1966.[8] This statute allows the public to see what federal agencies are doing, subject to a number of (well-litigated) exceptions. It does not, however,

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[2] *Wong Yang Sung v. McGrath*, 339 U.S. 33, 37 (1950) (citing Elihu Root, *Public Service by the Bar*, 41 A.B.A. Rep. 355, 368 (1916); Charles Evan Hughes, *Some Aspects of the Development of American Law*, 39 N.Y.B.A. Rep. 266, 269 (1916); George Sutherland, *Private Rights and Government Control*, 42 A.B.A. Rep. 197, 205 (1917); *Address of President Guthrie*, 46 N.Y.B.A. Rep. 169, 186 (1923)).
[3] *Id.* at 38.
[4] *Id.* at 40.
[5] *Id.*
[6] *Id.* at 41.
[7] *Id.*
[8] 5 U.S.C. § 552 *et seq.*

control what agencies can do or what procedures they must follow when creating and enforcing regulations.

The Government in the Sunshine Act: Congress passed this transparency-oriented statute in 1976. Simply put, the Act requires that "every portion of every meeting of an agency shall be open to public observation," subject to a number of exceptions.[9]

The Paperwork Reduction Act: The Paperwork Reduction Act, enacted by Congress in 1980, was intended to ease the paperwork burden that agencies impose on the public.[10] Speaking broadly, agencies must obtain OMB approval before collecting information, to reduce redundant requests. As such, it has little effect on the decision-making process used by agencies for determining the substantive content of regulations or for agency adjudications.

The Regulatory Flexibility Act: Congress also enacted this statute in 1980, though it was significantly amended in 1996 by the Small Business Regulatory Enforcement Fairness Act.[11] The Regulatory Flexibility Act requires that agencies determine, to the extent feasible, a rule's economic impact on small businesses, consider options for reducing any significant economic impact, and explain the regulatory approach they opt to follow. Of particular note, it requires that agencies must review rules again within ten years of their promulgation.

The Negotiated Rulemaking Act: Congress passed the Negotiated Rulemaking Act in 1990 to encourage negotiated rulemaking.[12] Negotiated rulemaking is a procedure that is intended to bring together affected interests and an agency to negotiate a rule before it is proposed. Through this process, consensus can be reached among the affected interest groups and the agency through cooperation. The hope is that this collaborative process will result in less burdensome but equally effective rules and regulations, in a transparent manner.

The Unfunded Mandates Reform Act: The Unfunded Mandates Reform Act was enacted in 1995 to address the serious problem of costly mandates for which no funding is provided.[13] As a general matter, this Act requires that rules that impose a substantial federal mandate (i.e., $100 million or more in any year) must meet a number of requirements to identify the least burdensome regulatory approach, including that the agency consider alternatives, undertake a cost-benefit analysis, and explain its decision on the record.

The Congressional Review Act: Congress enacted the Congressional Review Act in 1996.[14] It requires agencies to submit their rules to Congress, and among other things gives Congress an opportunity to override "major" rules (especially those with an annual effect on the economy of $100 million or more) through a joint resolution within sixty days, with some expedited procedures in the Senate. In the nearly fifteen years it has been on the books, however, Congress has only overridden one rule, an OSHA ergonomic rule. The Senate has

[9] 5 U.S.C. § 552b(b).
[10] 44 U.S.C. § 3501 *et seq.*
[11] 5 U.S.C. § 601 *et seq.*
[12] 5 U.S.C. § 561 *et seq.*
[13] 2 U.S.C § 1501 *et seq.*
[14] 5 U.S.C. § 801 *et seq.*

voted to disapprove only two others, although three more came close, having received procedural votes in 2010.[15]

The Regulatory Right to Know Act: This statute, enacted in 2000, requires OMB to annually provide Congress with a report estimating the total costs and benefits of federal regulations.[16] OMB has prepared those reports annually, and the Bush Administration made them available at OMB's website, where they continue to be available to the public.[17]

The Truth in Regulating Act: Also enacted in 2000, this statute provides that when a federal agency publishes an economically significant rule, a chairman or ranking member of a relevant committee in either House of Congress may request an independent report on the rule from the Comptroller General.[18] Congress, however, has not appropriated funds for this, so it became a dead-letter.

The Information Quality Act: This Act, also known as the Data Quality Act, became law in 2000.[19] It requires OMB and agencies to promulgate information quality guidelines to help ensure accurate information is used during the administrative process, and to create a process for interested parties to seek corrections of erroneous information.

As the foregoing demonstrates, aside from the APA itself, major Congressional revision of administrative law has largely occurred in only two time periods. *First*, an initial round of reforms came from the late 1970s to the early 1980s, when Congress enacted important legislation like the Paperwork Reduction Act and the Regulatory Flexibility Act. And *second*, an additional round of important updates came during the mid-1990s to 2000, when Congress amended the Regulatory Flexibility Act and passed the Unfunded Mandates Reform Act, the Congressional Review Act, and the Information Quality Act, as well as other bills.

Experience with these newer statutes, as with the APA itself, has indicated the potential for further improvements. Congress, however, has not enacted any meaningful provision relating to administrative law in over a decade, and has never materially amended the APA. Indeed, the most famous attempt to amend the APA—the so-called Bumpers Amendment, (named for former Senator Dale Bumpers of Arkansas)—was offered three decades ago.[20]

II. In Recent Years, The Executive Branch Has Taken the Lead in Administrative Law and Regulatory Practice.

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[15] In 2003, the Senate disapproved an FCC rule relating to broadcast media ownership, but it was not acted upon in the House. In 2005, the Senate disapproved a USDA rule regarding Mad Cow Disease, which also was not acted upon in the House. In 2010, three resolutions of disapproval failed in the Senate on motions to proceed, but each received at least 40 votes; those involved rules from EPA, HHS, and the National Mediation Board.

[16] 31 U.S.C. § 1105 note "Accounting Statement and Associated Report by Director of the Office of Management and Budget".

[17] *See* http://www.whitehouse.gov/omb/inforeg_regpol_reports_congress.

[18] 5 U.S.C. § 801 note "Truth in Regulating Act of 2000".

[19] 44 U.S.C. § 3516 note "Paperwork Reduction Act Guidelines".

[20] *See generally* Ronald M. Levin, *Review of 'Jurisdictional Issues' Under the Bumpers Amendment*, 1983 DUKE L.J. 355 (reviewing and critiquing the Bumpers Amendment).

Though Congress has been relatively inactive, administrative law and regulatory practice have not stood still. But it has been the Executive Branch that has taken lead, rather than Congress or the Judicial Branch. Whereas Congress has *never* amended the APA in a material way, the Executive Branch has frequently created its own requirements for how federal agencies ought to function, and established a variety of principles, requirements, coordination mechanisms, and the like, particularly with regard to what now-Justice Elena Kagan referenced as "Presidential Administration" in her 2001 Harvard Law Review article that described agencies during the Clinton years.[21] The Executive Branch has tended to fill the void with administrative and regulatory process requirements of its own, some of which have earned bipartisan plaudits, as well as with other meritorious ideas that might deserve Congressional consideration because of their important contributions concerning transparency and other significant values.

Historically, Presidents Nixon and Carter were somewhat involved in creating the process governing federal agencies' rulemaking, but "the modern development of centralized Presidential review of agency regulation came about through President Reagan's issuance of Executive Order 12,291 in 1980 and Executive Order 12,498 in 1985."[22] Those orders "mandated a whole host of procedures to be implemented when agencies proposed issuing 'major' rules."[23] The goal was to improve agency efficiency and to ensure that agencies considered the costs they imposed on the public, for instance by using regulatory tools like cost-benefit analysis. President George H.W. Bush retained those two orders.

President Clinton revoked both of President Reagan's orders and replaced them with Executive Order No. 12866[24]—though in substance (especially as applied) President Clinton's order did not differ greatly from President Reagan's. President George W. Bush, in turn, mostly left in place Executive Order No. 12866 during his presidency, and President Obama has retained it, also. Just last month President Obama signed another new executive order, Executive Order No. 13563, "to improve regulation and regulatory review."[25] Executive Order No. 13563 actually does very little beyond what Executive Order No. 12866 and other executive orders have already required for many years. That is itself significant because OMB solicited and obtained more than 180 sets of comments from the public about potential changes to the regulatory review process, but President Obama maintained the existing elements with regard to several consensus principles of regulation. Hence, the basic framework and requirements for such things as regulatory plans and agendas, cost-benefit analysis, Regulatory Policy Officers, and centralized OMB review has now existed for decades with support from Presidents of both major parties.

A less happy situation exists with regard to another executive order that President Bush issued in 2007 to improve the regulatory process, Executive Order 13422. That executive order made several improvements to the regulatory process, including centralized review of some agency "guidance documents" that have effects similar to regulation, additional requirements for transparency of aggregate costs and benefits in annual regulatory plans, increased transparency regarding the role of agency Regulatory Policy Officers, documentation of the initial need for

[21] Elena Kagan. *Presidential Administration,* 114 HARV. L. REV. 2245 (2001).
[22] Michael Hissam, *The Impact of Executive Order 13,422 on Presidential Oversight of Agency Administration*, 76 GEO. WASH. L. REV. 1292, 1294 (2008) (citing Exec. Order No. 12291 (Feb. 17, 1981) and Exec. Order No. 12498 (Jan. 4, 1985)).
[23] *Id.*
[24] *See* Exec. Order No. 12,866, (Sept. 30, 1993).
[25] *See* Exec. Order No. 13563 (Jan. 18, 2011).

new regulation, and an OIRA consultation about certain rulemakings that might warrant use of the APA's formal rulemaking provisions. Nonetheless, after taking office, one of the first things President Obama did was summarily revoke Executive Order 13422 by issuing Executive Order 13497.[26] Given that OMB Director Orzag one month later quietly reinstated OMB review of "guidance documents" by a memorandum to agencies,[27] and transparency was lost by the revocation of the other provisions, President Obama's Executive Order 13497 was a setback for sound administrative law and practice.

These are not the only Executive Branch actions that have affected administrative law and regulatory practice. For example, there are several other executive orders still in effect that agencies are required to follow, such as Executive Orders 12630,[28] 12988,[29] 13211,[30] and 13272.[31] Moreover, there are several important OMB Bulletins and Memoranda, including those involving Good Guidance Practices,[32] Data Quality,[33] Peer Review,[34] and Principles of Risk Analysis,[35] as well as OMB Circular A-4 dealing with Regulatory Analysis.[36]

Because the APA has not been modernized since 1946, Executive Branch requirements such as the ones noted above—regardless of the administration that promulgates them—have proven critically important to the proper functioning of the modern administrative state. Indeed, even a cursory review of President Obama's recent Executive Order 13563 shows how vital executive orders governing the regulatory process are in today's world. Executive Order 13563, for instance, continues to require agencies to use "the best available science," "identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends," and "take into account benefits and costs, both quantitative and qualitative."[37] It also requires agencies to be mindful of "redundant, inconsistent, or overlapping" burdens.[38] None of these commonsensical requirements are part of the APA—they all spring from the Executive Branch.

Moreover, Executive Order 13563 does more than require agencies to take account of the costs imposed on the regulated public before adopting new rules. It also mandates that "[t]o the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period

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[26] *See* Exec. Order No. 13497 (Jan. 30, 2009) (revoking Executive Orders 13258 and 13422 issued by President George W. Bush).
[27] OMB Memo. M-09-13, *at* http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-13.pdf.
[28] Exec. Order No. 12630 (Mar. 15, 1988) (relating to agency practice and property rights).
[29] Exec. Order No. 12988 (Feb. 5, 1996) (relating to agency practice and civil justice reform).
[30] Exec. Order No. 13211 (May 18, 2001) (relating to agency practice and energy supply).
[31] Exec. Order No. 13272 (Aug. 13, 2002) (relating to agency practice and small business).
[32] Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3440 (Jan. 25, 2007).
[33] Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 8452 (Feb. 22, 2002).
[34] OMB Memo. M-05-03, *at* http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2005/m05-03.pdf.
[35] OMB Memo. M-07-24, *at* http://www.whitehouse.gov/sites/default/files/omb/assets/omb/memoranda/fy2007/m07-24.pdf
[36] OMB Circular A-4, *at* http://www.whitehouse.gov/omb/circulars_a004_a-4.
[37] Exec. Order No. 13563 (Jan. 18, 2011).
[38] *Id.*

that should generally be at least 60 days."[39] Obviously, nothing in the APA requires agencies to use the internet, which was not even invented until decades *after* the APA was enacted.

The supplemental principles and requirements of executive branch orders and directives, as well agencies' own practices like the retrospective review of rules that has been done at DOT,[40] are thus essential to today's administrative law. The APA in its 1946 form with no modernization at all simply does not square with all the needs of the modern economy and today's hugely expanded regulatory state. Without executive branch actions to patch over those areas where the APA shows its age, agency practice and procedure would be out of date. Many of the supplements found in executive orders—and in Congress' own supplemental statutes from the 1990's—now represent "best practices" and/or vital needs for fulfilling the goals for which the APA was originally enacted. But for all the good that these have done over time, executive orders and OMB oversight are not a fully adequate substitute for Congressional action at this juncture. Indeed, there are at least three overarching reasons why enacting reform into statutory law is preferable to continuing to rely on the Executive Branch to organize and police its own processes.

First, executive orders are not permanent, but can be changed unilaterally—and without the public participation that characterizes the legislative process. This lack of certainty has several drawbacks. For one, regulatory uncertainty is a hidden tax on the economy that is unhelpful to job creation; if businesses and other regulated parties do not know what the law will be, they quite rationally act with an added measure of caution.[41] For another, if the rules can change with Presidential administrations (as they can with executive orders), partisans can sometimes politicize what preferably ought to be a depoliticized subject—the basic principles governing agency action.

That executive orders are subject to abrupt revocation is not an idle fear. For instance, as mentioned earlier, one of the first things President Obama did upon taking office was to revoke President Bush's Executive Order 13422.[42] That rush to revoke was not helpful to good governance, as it had the effect of reducing transparency and rigor in the regulatory process.[43] Obviously, the Executive Branch could not so cavalierly brush aside requirements if they instead were added to the United States Code.

Second, executive orders are not usually subject to judicial review. This foundational point must be understood. No matter what an executive order says that agencies *ought* to do, the

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[39] *Id.*

[40] *See* Order Soliciting Community Proposals, 70 Fed. Reg. 3761 (Jan. 26, 2005); *see also Secretary Mineta Announces Opportunity for Public to Discuss DOT Regulations*, *at* http://www.dot.gov/affairs/2005/dot1605.htm.

[41] *See, e.g.*, Geoff Colvin, *Uncertain of future regulation, businesses are paralyzed*, FORTUNE (Oct. 20, 2010), *at* http://money.cnn.com/2010/10/19/news/economy/business_paralysis.fortune/index.htm ("As I travel around the country, businesspeople tell me they've rarely felt so unsure of what the laws and rules governing their business will be. ... So instead of investing and hiring as usual in a recovery, U.S. companies are sitting on more cash than ever. We shouldn't be surprised. It has always been true that the more activist the administration in Washington, the more uncertainty it spawns.").

[42] Exec. Order No. 13497 (Jan. 30, 2009) (revoking Exec. Order No. 13422 (Jan. 18, 2007)).

[43] *See generally* Hissam, *supra* note 22, at 1301-1306 (explaining why "the criticisms that have been levied against the changes put in place by Executive Order 13,422 are misplaced," and why it "neither upsets the proper (or prior) balance between agency heads and the President nor displaces the will of Congress for the will of the executive branch" (*id.* at 1306)).

affected public generally has no right to go to court to make sure that agencies actually do it. In other words, if an agency violates an executive order—for instance, if an agency were to disregard President Obama's command that agencies use "the best, most innovative, and least burdensome tools for achieving regulatory ends"[44]—an affected party cannot ask a federal court to compel the agency to make good on the President's promise. Indeed, Executive Order No. 13563, like previous executive orders from other Presidents, could not be clearer on this point: "This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States ...."[45] This disclaimer of judicial review stands in marked contrast to the APA, which expressly authorizes a day in court for *any* "person suffering legal wrong because of agency action."[46] The APA is meant to ensure due process. By contrast, executive orders must be understood as acts of executive grace—not legal obligation.

And this also is not just a hypothetical concern. President Clinton's Executive Order No. 12866 was retained and has been the policy of the Obama Administration since January 30, 2009. In no uncertain terms, Executive Order No. 12866 requires that federal agencies "shall assess both the costs and the benefits of [an] intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs."[47] Notwithstanding this explicit commitment to cost-benefit analysis, in 2009 the National Highway Traffic Safety Administration's issued its final Roof Strength Rule even though its published data showed it to have negative "net benefits," i.e., costs in excess of benefits, and probably by hundreds of millions of dollars.[48] That the Administration's new Roof Strength Rule contravened an executive order is not dispositive before a reviewing court under the APA. Even more brazenly, EPA's December 2009 Endangerment Rule, which would enable regulation of most sectors of the economy, provided no cost-benefit analysis at all, nor does EPA capture and contain such costs elsewhere.[49] The President's commitment to Executive Order 12866 failed to prevent EPA from proceeding as it did, and it instead has fallen to the courts to review the concerns about EPA's arbitrary action on other legal grounds rather than the executive order.

Finally, absent amendment to the APA, there remains a risk that some courts may frown on OMB (or the President's) participation in the rulemaking process. Because policies included in executive orders but not statutory law are, by definition, not part of the APA, some courts may view OMB participation in administrative decision-making negatively, rather than recognize the vital advantages of that role.[50] For example, one court has gone so far as to say that "[r]eview by the Office of Budget Management (OMB) serves no purpose and is wholly discretionary," and ordered that an agency had to act before OMB could participate.[51] Agencies should not be *punished* for consulting with the President or the OMB in the regulatory process. While most

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[44] *Id.*
[45] *Id.*
[46] 5 U.S.C. § 702.
[47] Exec. Order No. 12866 (Sept. 30, 1993); *see also* Exec. Order No. 13497 (Jan. 30, 2009) (adopting Exec. Order No. 12866).
[48] *See* 74 Fed. Reg. 22348, 22377-78 (May 12, 2009).
[49] *See* 74 Fed. Reg. 66496 (Dec. 15, 2009).
[50] *See, e.g.*, *Public Citizen Health Research Group v. Tyson*, 796 F.2d 1479, 1507 (D.C.Cir. 1986) ("All parties to this action dispute vigorously the legality of OMB's participation in the rulemaking.").
[51] *American Lung Ass'n v. Browner*, 884 F. Supp. 345, 349 (D. Ariz. 1994).

courts have not reacted and would not be expected to react in that manner, codifying OMB's role would avoid such a risk. Moreover, if principles of effective regulation are codified into statutory law, agencies will be able to follow OMB guidance without fear that the resulting agency action might be struck down by a federal court.[52]

Simply put, executive orders are important as a *supplement* to duly enacted law, but they should not *replace* Congressional legislation. Congress has the ultimate responsibility for the processes to be used by the agencies to which Congress delegates its own authority.

III. Courts Are Quite Deferential to the Executive Branch, and Should Not Be Expected to Fill Gaps in the APA On Their Own.

Compounding the Executive Branch's power over administrative law is the fact that the federal courts in general are exceedingly deferential to what the President and agencies do. Indeed, while there are exceptions, deference is often a defining characteristic of judicial review of agency actions—sometimes with good reason, but sometimes to a fault.

For example, with regard to statutory construction and with regard to judicial review of agency actions, the Supreme Court in recent decades has taken an approach that is often deferential to the Executive Branch.[53]

In addition, the APA originally envisioned that rulemaking would sometimes be conducted through notice and comments procedures, and sometimes through the formal process set out in 5 U.S.C. §§ 556 and 557.[54] Such procedures (with evidence presentation and cross-examination) can be especially beneficial for issues involving complex empirical or scientific issues. In *United States v. Florida East Coast Railway Co.*, however, the Supreme Court scaled back the occasions when a formal record would be required under the APA, more often leaving the question of whether to conduct formal rulemaking to the agency's discretion.[55] In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, the Supreme Court further held that courts generally cannot impose additional process on agencies, but must defer to an agency's choice of procedure even when there are real doubts about what the agency has done.[56]

The upshot is that we should not expect the courts to enforce "best practices" or needed additions to the APA on their own, as it is the judicial role to apply the APA and the agencies' organic statutes as they are written, and not to themselves engraft the innovations and learning of the last two decades. Accordingly, to achieve the goals of the APA as it was originally intended, Congress will need to modernize the APA itself.

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[52] *See, e.g.*, *Public Citizen, Inc. v. Mineta*, 340 F.3d 39 (2d Cir. 2003) (striking down agency action as arbitrary and capricious even though the agency *declined* to follow OMB guidance and instead issued more stringent regulations than those suggested by OMB).

[53] *See, e.g.*, *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (holding that ambiguous statutory language should be deemed a delegation to an agency to reasonably resolve the ambiguity); *FCC v. Fox Television Stations*, 129 S. Ct. 1800 (2009) (holding that agencies can change prior policies without being subject to heightened review).

[54] *SEC v. Chenery Corp*, 332 U.S. 194 (1947), also established that agencies have broad discretion to choose between rulemakings and adjudications.

[55] 410 U.S. 224 (1973).

[56] 435 U.S. 519 (1978).

And reform is necessary. Putting aside concerns sometimes expressed about the potential for agency capture by advocacy groups, labor unions, trial lawyers, or others, there are systemic reasons why agencies may make mistakes. Cass Sunstein, currently the Administrator of OIRA, has in the past identified certain "characteristic pathologies of modern regulation—myopia, interest group pressure, draconian responses to sensationalist anecdotes, poor priority setting, and simple confusion."[57] Or as then-Judge Stephen Breyer put it in his Oliver Wendell Holmes Lecture at Harvard Law School, there is a real danger that agencies may regulate "risk ... so small as to be virtually meaningless" because of persistent problems that "plague" agency action like "tunnel vision."[58]

To ensure a beneficial level of judicial review occurs in light of observations over the last three decades, Congressional action will be essential to continue to make our system of checks and balances work well, and ensure that our economy is not unnecessarily harmed. Congress alone has the power to make permanent certain desirable features of administrative law and regulatory practice that the Executive Branch either has unilaterally elected to implement or other features that should be enacted but that the Executive Branch *cannot* do, such as clarifying or authorizing more comprehensive judicial review in certain situations.

IV. It is Time to Update the APA to Institntionalize Best Practices and to Make Improvements.

As explained above, Congress has not enacted any meaningful administrative law reform in more than a decade. And even more fundamentally, Congress has *never* materially modernized the APA in the nearly sixty-five years that it has been on the books. Instead, much control of administrative law has been left to the Executive Branch—the very branch governed by administrative law principles in the first place. I respectfully suggest that it is now time to enact certain "best practice" principles to govern agency action. These principles are nonpartisan and reflect good government. Most have their origins in executive orders issued by presidents of both parties, including in President Obama's Executive Order No. 13563. By adopting key requirements into statutory law, Congress can ensure that agencies retain their power to promulgate necessary regulations, while at the same time avoiding unnecessary and inefficient regulations that do more harm than good, particularly with regard to the "major" rules that have understandably been the greatest focus of attention.

Taken as a whole, regulatory improvements should be helpful to our economy, and to job creation. In Executive Order 13563, President Obama reiterated that our regulatory system should promote "economic growth, innovation, competitiveness, and job creation." Those criteria deserve greater emphasis, and themselves deserve codification in law. In at least one statute, Congress directed an agency to conduct "evaluations of potential loss or shifts in employment which may result from" the agency regulatory actions.[59] There are major rules where that provision appears to have been ignored, so experience suggests that improvements in the regulatory process are necessary to ensure that all agencies pay close attention to the impact their regulatory actions have on jobs and the economy in the future. Moreover, an improved

[57] Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 4 (1995).
[58] STEPHEN BREYER, BREAKING THE VICIOUS CYCLE: TOWARD EFFECTIVE RISK REGULATION 10, 13 (1993).
[59] 42 U.S.C. §7621.

regulatory process should reduce the harmful impact of excessive regulatory uncertainty and transactions costs on jobs and the economy, also.

This Subcommittee held a series of important hearings during the 109th Congress, which ought not to be overlooked.[60] Useful ideas have been in circulation in the Executive Branch, in the Academy, among the Bar and professional associations, and elsewhere. These should be reviewed, assessed, and considered by the Congress. To assist in that activity, I'd like to suggest some aspects of administrative law and regulatory practice that ought to be potential candidates for Congressional reform:

1. Congress should consider requiring greater opportunity for public participation in the rulemaking process: President Obama has emphasized that "[r]egulations [should] be adopted through a process that involves public participation," and that there must be an "open exchange of information and perspectives among State, local, and tribal officials, experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole."[61] The question is how to best accomplish that objective, and there are a range of options Congress should consider. One is to codify in some manner Executive Order 13563's requirement that agencies should "seek the views of those who are likely to be affected" by a rule "*[b]efore* issuing a notice of proposed rulemaking."[62] Greater use of the Advanced Notice of Proposed Rule-making and similar advance processes would be a good thing. Another possibility is increased use of negotiated rulemaking, or at least greater transparency for the APA's alternative of notice-and-comment rulemaking. Moreover, the President's requirement that "each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days"[63] is generally a good one. And "each agency [should] also provide, for both proposed and final rules, timely online access to the rulemaking docket on regulations.gov, including relevant scientific and technical findings, in an open format that can be easily searched and downloaded," and "an opportunity for public comment on all pertinent parts of the rulemaking docket, including relevant scientific and technical findings."[64] Conversely, while emergencies and other situations may require some flexibility, it may be prudent to assess whether more careful limitations or criteria are needed for practices that restrict public participation, such as interim final rules or direct final rules.

2. Congress should consider clearly articulating thresholds for when regulation is appropriate: It is commonsensical that agencies should not make new rules without first identifying and clearly stating why the regulation is necessary. For instance, Executive Order 12866 requires agencies to "identify the problem [they] intend[] to address, including where applicable the failure of private markets or public institutions that warrant new agency action,"[65] and OMB Circular A-4 further requires a careful analysis of various types of market failures.[66]

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[60] *See* Interim Report on the Administrative Law, Process and Procedure Project for the 21st Century, Committee Print No. 10 (Dec. 2006).
[61] Exec. Order No. 13563 (Jan. 18, 2011).
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] Exec. Order No. 12866 (Sept. 30, 1993).
[66] OMB Circular A-4, *at* http://www.whitehouse.gov/omb/circulars_a004_a-4. The now-revoked Executive Order No. 13422 had clarified that agencies were required to "identify in writing the specific market failure (such as externalities, market power, lack of information) or other specific problem that it intends to address (including,

This basic principle reminds agencies of the fact—too often forgotten—that new regulations are not costless, and that unless there is some sort of market failure or other significant problem that cannot be resolved through private ordering, government involvement requires justification. This principle is not unique to any one Administration, nor should it be controversial, as it is widely accepted among economists and social scientists. As both the Clinton and Obama administrations have said, "the private sector and private markets are the best engine for economic growth," and "[f]ederal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets ...."[67] Congress should consider enacting this principle as law.

3. <u>Congress should consider making cost-benefit analysis a permanent part of administrative law</u>: For nearly thirty years, cost-benefit analysis has been mandated by executive order. President Reagan required it first in 1981, ordering that "regulatory action shall not be undertaken unless the potential benefits to society from the regulation outweigh the potential costs to society."[68] Presidents Clinton, Bush, and Obama have retained such a requirement: "In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating."[69] Accordingly, the straightforward principle that agencies should consider the costs and other harms caused by new regulations and not just potential benefits is well-settled within the Executive Branch. It should be codified into statutory law too. Moreover, in any law that it enacts, Congress should clearly state that cost-benefit analysis applies to *all* agencies, notwithstanding any other text to the contrary. While cost-benefit analysis is not a panacea, it would be prudent for Congress to expressly define "costs" as including both direct *and* indirect costs imposed by proposed regulations.

4. <u>Congress should consider requiring greater use of formal hearings, with live testimony and cross-examination of witnesses, for some types of scientific and factually-intensive rulemakings</u>: The APA contemplates formal rulemaking,[70] but after *Vermont Yankee*[71] agencies hardly ever use this option. That should change. There is no better tool than cross-examination to expose unsupportable factual assertions and assuring the public that only the best science underlies agency action. Unfortunately, after the Supreme Court's decision in *Florida East Coast Railway Co.*, a statute must expressly state that "hearings" are to be "on the record" before formal rulemaking is required.[72] In other words, if Congress does not use the magic words "on the record," then even a statutory command that an agency hold a "hearing" is not enough to require formal rulemaking.[73] Congress should consider a better approach. For instance, all "major rules" above a certain threshold could be subject to formal rulemaking,

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where applicable, the failures of public institutions) that warrant new agency action, as well as assess the significance of that problem, to enable assessment of whether any new regulation is warranted." Exec. Order No. 13422 (Jan. 18, 2007).

[67] Exec. Order No. 12866 (Sept. 30, 1993); *see also* Exec. Order No. 13497 (Jan. 30, 2009) (adopting Exec. Order No. 12866).

[68] Exec. Order No. 12291 (Feb. 17, 1981).

[69] Exec. Order No. 12866 (Sept. 30, 1993).

[70] *See* 5 U.S.C. §§ 553(c), 556-57.

[71] 435 U.S. 519 (1978)

[72] 410 U.S. 224, 237-38 (1973).

[73] *Id.*

and/or other rulemakings where scientific integrity is an essential component might be designated for such procedures by category, agency, or by OIRA designating them for such treatment. In some situations it is worth spending the necessary time and effort to make sure that the agency gets it factual premises right, so Congress should give this serious consideration.

5. **Congress should consider strengthening the standard of review for informal rulemakings and reconsider some applications of *Vermont Yankee***: The APA distinguishes between formal and informal rulemakings. Participants in formal rulemakings receive more agency process, and are also are entitled to arguably heightened judicial review under the "substantial evidence" standard.[74] On the other hand, when agencies engage in informal rulemaking, they have the best of both worlds: they are *not* subject to those meaningful procedural requirements, *nor* are decisions reviewed under the "substantial evidence" standard. Instead, informal rulemakings are merely reviewed under the arguably lesser "arbitrary and capricious" standard.[75] There is no need for divergent standards of review, and Congress should carefully consider enhancing the scrutiny that is required for at least some notice-and-comment rulemakings. Likewise, Congress should consider improving upon *Vermont Yankee* by establishing some categories of cases in which courts would have greater authority to assess the validity of agency actions, perhaps when scientific integrity is at issue. At least where a "major rule" is at issue, Congress may want to require a deeper, more searching judicial inquiry to ensure that the agency had adequate public participation and process, adequately considered all the relevant factors and decision criteria, and correctly applied the law.

6. **Congress should consider clarifying what aspects of administrative law are subject to judicial review**: Some of the valuable reforms enacted in the past have left ambiguities as to whether they are subject to judicial review. It is time for Congress to consider correcting that situation. It should clarify that the Information Quality Act is subject to judicial review, and should add express and/or more encompassing judicial review provisions to the Unfunded Mandates Act, the Paperwork Reduction Act, and perhaps others. Moreover, should Congress codify outside of the APA any aspects of the various executives orders mentioned, Congress should make clear whether judicial review is intended to apply. While there plainly are situations when judicial review ought not to be authorized, in most instances it should be a goal to ensure that affected Americans have a legal remedy, enforceable in court, to protect against unlawful agency action that affects them in tangible ways.

7. **Congress should consider setting limits on the volume of new regulations that can be imposed on the economy in any one time period**: One Senator recently proposed a simple rule to prevent the continuing growth of regulatory burdens: "federal agencies [must] identify and eliminate one existing regulation for each new regulation they want to add."[76] This "regulatory 'pay as you go' system" would "address the regulatory uncertainty felt by many of our small and large businesses" and so encourage "fresh investment" in the economy.[77] A related option—and the two are not mutually exclusive—would be to create a "regulatory budget" which would cap the economic cost of the regulations that an agency could impose on

[74] 5 U.S.C. § 706(2)(E).
[75] *Id.* at § 706(2)(A).
[76] Mark Warner, *To revive the economy, pull back the red tape*, WASH. POST (Dec. 13, 2010), *at* http://www.washingtonpost.com/wp-dyn/content/article/2010/12/12/AR2010121202639.html.
[77] *Id.*

the public during any one time period, or that the Executive Branch as a whole could impose on the economy during any one time period. After all, just as agencies must operate within a monetary budget and balance competing interests, they also should prioritize among regulations so that our economy is not hindered unnecessarily. Indeed, from an economic perspective, a tax and a regulation that each costs $1 million annually can impose comparable burdens and negative impacts on our economy, so Congress should consider mechanisms that will at a minimum look at ways of spreading such costs over longer periods of time.

8. Congress should consider expanding requirements for agencies to re-examine existing or outdated regulations that are no longer necessary or desirable: When Executive Order 12866 was issued in 1993, it recognized that agencies should "examine whether existing regulations (or other law) have created, or contributed to, the problem that a new regulation is intended to correct and whether those regulations (or other law) should be modified to achieve the intended goal of regulation more effectively."[78] That executive order remains in effect, and this principle needs to be underscored again. Likewise, Section 610 of the Regulatory Flexibility Act requires agencies to periodically revisit existing rules,[79] and there is no reason the Code of Federal Regulations should perpetually expand. Nonetheless, few rules seem to be rescinded or retired each year, so Congress should consider whether additional reviews, automatic sunset provisions, a Review Commission, an OMB nominations process, or some other mechanism should be enacted to ensure that unnecessary rules are identified and removed in a timely and effective manner.

Principles of accountability and transparency ought to have great importance as Congress considers these questions, along with the essential values of empirical accuracy and scientific integrity, cost effectiveness, procedural fairness, and respect for the rule of law and the Constitution's enumerated powers and limits of government.

Regulation and its reform is once again a subject of vital public interest. There are and ought to be substantive debates about the content and merit of individual proposed regulations. But the time is right for people of varied points of view to consider meaningful improvements to our federal administrative law and regulatory process that would be beneficial across a range of agencies and potential regulations. Doing so would be good government. It would also reduce excessive regulatory unpredictability and uncertainty, and would be beneficial to the economy and job creation. The "best practices" and learning from recent decades are certainly a sensible place to start.

Thank you for the opportunity to appear here today. I hope my comments will prove helpful to the Subcommittee, and I will be pleased to answer any questions.

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[78] Exec. Order No. 12866 (Sept. 30, 1993); *see also* Exec. Order No. 13563 (Jan. 18, 2011) (recognizing a need to "review [] existing significant regulations" to see if they are "outmoded, ineffective, insufficient, or excessively burdensome").
[79] *See* 5 U.S.C. § 601.

Mr. COBLE. Thank you, Mr. Rosen.
Professor Strauss, can you hear me?
Mr. STRAUSS. Yes, I can.
Mr. COBLE. Professor, you are recognized for 5 minutes.

TESTIMONY OF PETER L. STRAUSS,
BETTS PROFESSOR OF LAW, COLUMBIA LAW SCHOOL

[Mr. Strauss' testimony and answers were delivered via telephone.]

Mr. STRAUSS. Thanks so much. I don't have a red light, but I hope to stay within your constraints.

Chairman Coble, Ranking Member Cohen, and Members of the Subcommittee, thanks so much for inviting me to testify today. I am really sorry that the weather has kept me from physical presence, and appreciate your willingness to hear me this way.

I am speaking just on my own and want to express some thoughts I hope your Committee will find helpful to its important work. June 11 will be the 65th birthday of the APA, an appropriate time for reassessment. And I agree with so much of the thrust of what has already been said to you, if not to all the details.

I am going to speak only to rulemaking, as the other witnesses have, hoping you will agree that some, though not all, rulemaking is beneficial, either because it fulfills basic human needs or because it creates jobs, promotes growth, and reduces costs. The issue is finding procedures that permit effective sifting of the wheat from the chaff.

Over 30 years ago, reacting to the Supreme Court's holding in the Vermont Yankee Nuclear Power case that only Congress or agencies could elaborate Section 553 simple procedures, then-Professor Antonin Scalia called for a revision of its one-size-fits-all nature. I might add that I was general counsel of the NRC at the time and had the opportunity to see the ways in which the rights to cross-examine could be used to obstruct important proceedings. And I trust that is one consideration the Committee will have in view.

Since that time, both the courts and our Presidents, Republican and Democrat, have added complexities that are described in the literature as "ossification." But the varying pattern they have created lacks the stability and sense of a thoughtful legislative solution, makes government inefficient in doing what it should be doing, and invites evasion.

Quite recently, D.C. Circuit Judge Brett Kavanaugh wrote that, "These decisions have gradually transformed rulemaking, whether regulatory or deregulatory, from the simple and speedy practice contemplated by the APA into a laborious, seemingly never-ending process. The judicially created obstacle course can hinder executive-branch agencies from rapidly and effectively responding to changing or emerging issues within their authority, such as consumer access to broadband, or effectuating policy or philosophical changes in the executive's approach to the subject matter at hand.

"This trend," Judge Kavanaugh continued, "has not been good as a jurisprudential matter and continues to have significant practical consequences for the operation of the Federal Government and those affected by Federal regulation and deregulation."

In 2006, this Committee produced its thoughtful and thorough bipartisan interim report considering the prospects for rulemaking improvement. My written testimony explores a few settings where congressional rationalization could be helpful that I would be

happy to expand on in Q and A. Let me for the moment just tell you what they are.

First, the notice requirements of Section 553 should make explicit that giving effective rulemaking notice requires agencies to expose the technical data on which they might rely.

The influential 1973 opinion in *Portland Cement Association v. Ruckelshaus* said it isn't consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data or on data that in critical degree is known only to the agency. And I think virtually the whole of the academic community agrees with this. But as Judge Kavanaugh observed in his recent opinion, put bluntly, "the Portland Cement doctrine cannot be squared with the text of Section 553 of the APA."

Second, Congress should generalize the Clean Air Act's welcome requirement to put in the rulemaking record all documents of relevance to the rulemaking proceeding, including, as the Administrative Conference long ago recommended, docketing oral communications of central relevance.

Third, you might consider codifying in one statute the many requirements for impact analysis now in place, including those that are now elements of Executive Order 12866, to permit needed regulation to proceed efficiently.

And shouldn't Congress also bring the independent regulatory commissions under these mandates? Presidents haven't done that, as I understand it, only because they fear the political costs to their relationship with you, with the Congress. Given the extraordinary range of rulemaking Dodd-Frank requires of independent commissions, Congress ought to welcome this change.

And, finally, I think it is time to bring the pre-notice period within the APA. Often what occurs before a notice of proposed rulemaking, as, Mr. Chairman, you noted in your opening remarks, has been published, produces commitments that, in the words of President George H.W. Bush's general counsel at the EPA, "convert notice-and-comment rulemaking into a form of Kabuki theater, a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues."

Here I think Congress might be able to build on the biannual regulatory agenda and the annual regulatory plan, as well as the potentials offered by the Internet and regulations.gov. The information age, in fact, is fundamentally transforming the relationship between citizen and government. Sitting at home, I can now access in seconds government materials that I could have obtained two decades ago, if at all, only by hiring a specialist.

As you consider the APA at 65, adapting it to these changes has an importance of the first order.

Thank you again for the privilege of appearing before you today, and I will be happy to answer questions.

[The prepared statement of Mr. Strauss follows:]

Testimony of
Peter L. Strauss
Before the
Subcommittee on Courts, Commercial and Administrative Law
Committee on the Judiciary
United States House of Representatives

on

The APA at 65 – Is Reform Needed to Create Jobs, Promote Economic Growth, and Reduce Costs?

February 28, 2011

Chairman Coble, Ranking Member Cohen, and Members of the Subcommittee. Thank you for inviting me to testify here today; I recall with pleasure the privilege of an earlier appearance before you, and am delighted for the opportunity to return. I am here today strictly in my personal capacity; this is volunteered testimony that I hope your committee will find helpful to its important work.

As you may know, I have for the last forty years been a scholar of Administrative Law at Columbia Law School, now holding the Betts professorship; I am former General Counsel of the Nuclear Regulatory Commission; was once a public member of the Administrative Conference of the United States and am now a Senior Fellow of the Conference; and I am a former Chair of the American Bar Association's Administrative Law and Regulatory Practice Section. I am the senior author of one of the leading law school casebooks on administrative law, and have published, along with other books and dozens of law review articles on the subject, a monograph on Administrative Justice in the United States. Much of my work has concerned rulemaking, and that is the aspect of

the APA that I want to address here today. June 11 will be its 65th birthday. It is certainly an appropriate time for reassessment.

I start with the premise that some, although not all, rulemaking is beneficial, either because it fulfills basic human needs, such as having toilet facilities at work, or because it creates jobs, promotes growth and reduces costs. The issue is finding procedures that permit effective sifting of the wheat from the chaff. And that, in my judgment, warrants some reconsideration of our rulemaking procedures.

Years ago, then-Professor Antonin Scalia reacted to the Supreme Court's decision in *Vermont Yankee Nuclear Power v. Natural Resources Defense Council,*[1], which I had had the privilege of briefing for the United States as General Counsel of the NRC. He had already been Chair of the Administrative Conference of the United States and Assistant Attorney General in the Office of Legal Counsel; he would go on to distinguished careers on the DC Circuit and now on the Supreme Court. The *Vermont Yankee*'s opinion very forcefully held that only Congress, or the agencies themselves, were in a position to elaborate the simple procedures of Section 553. Professor Scalia then foresaw the necessity of revising the one-size-fits-all character of Section 553 informal rulemaking.[2] Since then, both the courts and our Presidents – Republican and Democrat – have added complexities to rulemaking, described in the literature as "ossification." In effect they have created that varying pattern, but it lacks the stability and sense of a thoughtful legislative solution, and has itself imposed costs that both make government inefficient in doing what it should be doing, and invite evasion. As Judge Brett Kavanaugh of the D.C. Circuit recently wrote,

[1] 435 U.S. 519 (1978)
[2] Antonin Scalia, Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court, 1978 Sup. Ct. Rev. 345 (404-408).

> Courts have incrementally expanded those APA procedural requirements well beyond what the text provides. And courts simultaneously have grown … arbitrary-and-capricious review into a far more demanding test. Application of the beefed-up arbitrary-and-capricious test is inevitably if not inherently unpredictable -- so much so that, on occasion, the courts' arbitrary-and-capricious review itself appears arbitrary and capricious.
>
> Over time, those … decisions have gradually transformed rulemaking -- whether regulatory or deregulatory rulemaking -- from the simple and speedy practice contemplated by the APA into a laborious, seemingly never-ending process. The judicially created obstacle course can hinder Executive Branch agencies from rapidly and effectively responding to changing or emerging issues within their authority, such as consumer access to broadband, or effectuating policy or philosophical changes in the Executive's approach to the subject matter at hand. The trend has not been good as a jurisprudential matter, and it continues to have significant practical consequences for the operation of the Federal Government and those affected by federal regulation and deregulation.[3]

Eleven years ago, Mark Seidenfeld, a Florida State University scholar, published a striking grid cross-referencing eighteen different statutes or executive orders against twenty-five different stages in the rule-making process, as a stark illustration of the complexities that have emerged.[4] Once again, we find ossification – a "trend [that] has not been good as a jurisprudential matter, and … continues to have significant practical consequences for the operation of the Federal Government and those affected by federal regulation and deregulation." In attending as carefully as we must to the costs as well as the benefits of regulation, we need to avoid making the process of adopting regulations that will accomplish sound public policy so complex as to block them, as well as regulations that are unjustified.

In 2006, at the conclusion of the 109th Congress, this Committee produced a bipartisan "Interim Report on the Administrative Law, Process and Procedure Project for the 21st Century" that very thoughtfully and thoroughly considers the prospects for

[3] American Radio Relay League v. FCC, 524 F.3d 227, 248 (2008).
[4] Mark Seidenfeld, A Table of Requirements for Federal Administrative Rulemaking,, 27 F.S.U.L.Rev. 533 (2000).

rulemaking improvement. Let me use my time to mention just a few examples where in my own judgment congressional rationalization of rulemaking could be genuinely helpful.

First, the notice requirements of Section 553 ought now to make explicit that a part of the requirement of notice is that agencies must give the public access to the technical data on which they might rely. Courts have been enforcing such an obligation since 1973.[5] It is attractive as a policy matter. And in the age of e-rulemaking, the distribution of data over the Internet via Regulations.gov and the Federal Data Management System should be straightforward and nearly cost-free. Those who may be affected or protected by a rule will then have the opportunity to bring their own data forward. As Judge Harold Leventhal remarked in *Portland Cement Ass'n v. Ruckleshaus*, the 1973 opinion creating this rule, "It is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data, or on data that [in] critical degree, is known only to the agency." But as Judge Kavanaugh observed in the opinion from which I have just quoted, "Put bluntly, the *Portland Cement* doctrine cannot be squared with the text of §553 of the APA."[6] Congress can make this straightforward proposition part of a revised Section 553; if it does not, adherence to the *Vermont Yankee* precedent may lead the Supreme Court to reject it, as Judge Kavanaugh understandably fears.

Second, Congress should generalize the welcome requirement of Section 307 of the Clean Air Act to place in the rulemaking record all documents "of relevance to the rulemaking proceeding." Again, it would be helpful to put into statutory form what has been the judicial understanding of this requirement since Judge Wald's decision in *Sierra*

[5] Portland Cement Ass'n v. Ruckleshaus, 486 F.2d 375, 392-93 (D.C. Cir. 1973).
[6] 524 F.3d at 246.

Club v. Costle,[7] that this includes the docketing of "oral communications of central relevance to the rulemaking." Following an important recommendation of the Administrative Conference,[8] many but not all agencies have followed this practice – including, also, communications they receive during the pre-notice period. Public knowledge of contacts with an agency during rulemaking, whether by private parties or the White House, seems integral to the legitimacy of rulemaking. The dockets of the EPA and DOT helpfully include this material; should not all rulemakings be as transparent?

Third, consideration might be given to rationalizing and streamlining the many requirements for impact analysis now in place. Since President Carter's administration, if not before, presidential Executive Orders have required increasing levels of coordination with the White House, and increasing attention to the costs and benefits of regulation. Congress has quite properly wanted to see that this is done, yet has failed directly to provide for it, has to some extent burdened rulemaking with multiple and possibly duplicative requirements, and has tolerated the Presidents' decisions to leave the independent regulatory commissions out of the cost-benefit analysis process. Codifying in one statute the analytic demands placed on rulemaking, including those that are now elements of Executive Order 12,866, and so framing them as to permit needed regulation to proceed efficiently, would in my judgment be a highly desirable step.

And should Congress not also bring the independent regulatory commissions under these mandates? A few years after President Reagan promulgated his Executive

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[7] 657 F.2d 298 (1981)

[8] Recommendation 77-3, until 1993 published as 1 C.F.R. **Error! Main Document Only.**§305.77-3. Now that ACUS has thankfully been revived, its recommendations (many of which, like this one, have continuing relevance) should be restored to the CFR.

Order 12281, then-Professor Cass Sunstein and I collaborated on an article supporting the view that, as a matter of constitutional analysis, the President's constitutional position – in particular, his authority to demand "the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the duties of their respective Offices"[9] – established his right to extend the Executive Order to the independent regulatory commissions.[10] Those commissions can be nothing else than departments of the executive branch, as the Supreme Court has now clearly held.[11] Presidents have not brought the commissions fully into the tent of the executive orders,[12] on my understanding, only because they fear that the political costs to their relationship with Congress would exceed the benefits of their doing so. In the Paperwork Reduction Act, Congress can be thought to have drawn that line. You can, and perhaps should, erase it.

Finally, I gather that previous hearings have aired concerns about the consultations that occur inside and outside government before a notice of proposed rulemaking is formally published. Other than in its provision permitting any person to petition for the initiation of rulemaking,[13] Section 553 says nothing about this period, but fully half of the intersections on Professor Seidenfeld's grid may be found there. Often what occurs before a notice of proposed rulemaking has been published produces commitments that, in the words of President George H.W. Bush's General Counsel at the EPA, convert notice and comment rulemaking into a form of Kabuki theater – "a highly

[9] U.S. Const. Art. II, Sec. 2, Para 1.
[10] Peter L. Strauss and Cass Sunstein, The Role of the President and OMB in Informal Rulemaking, 38 Ad. L. Rev. 181, 202 (1986).
[11] Free Enterprise Fund v. Public Company Accounting Oversight Board , 130 S. Ct. 3138 (2010).
[12] Section 4 of EO 12866 *does* require independent regulatory commissions to participate in the Regulatory Plan by – a welcome step in my judgment, although even this requirement is perhaps not rigorously enforced.
[13] 5 U.S.C. **Error! Main Document Only.**§553(e)

stylized process for displaying in a formal way the essence of something which in real life takes place in other venues."[14] Here, in addition to providing for the docketing of information about communications, Congress might build upon the bi-annual Regulatory Agenda and annual Regulatory Plan and the potentials opened by the Internet and Regulations.gov. The publication of those documents provides early access to rulemaking development; their use is perhaps the least developed aspect of the current Executive Order regime. Congress might require tighter linkage between the Plan and/or Agenda and the notice-and-comment materials than now exists on Regulations.gov. The Obama administration has pushed for early implementation of what amounts to a docket number for initiatives appearing there, a welcome measure that could be made a statutory requirement. Through listservs and other means, agencies could be led to create automated notice of possible rulemaking on subjects of interest to any person who cares to enroll for it.

The Information Age generally promises a fundamental transformation in the nature of the relationship between citizen and government. Sitting at my computer at home, I can now access in seconds government interpretations and other materials that I could have obtained two decades ago, if at all, only by hiring a specialist lawyer at considerable expense. As you consider the APA at 65, adapting it to these remarkable changes strikes me as having an importance of the first order.

Thank you again for the privilege of appearing before you today. I will be happy to answer any questions you may have.

[14] E. Donald Elliott, Reinventing Rulemaking, 41 Duke L. J. 1490, 1492-93.

Mr. COBLE. Thank you, Professor Strauss.

And we have been joined by the distinguished gentleman from Florida, Mr. Ross. Good to have you with us.

We will now—Members of the Subcommittee will now examine the witnesses. And keep in mind, we apply the 5-minute rule to ourselves, as well.

Professor Dudley, what are the most important potential ABA reforms on which you and your fellow witnesses agree?

Ms. DUDLEY. Well, I would say we agree on a lot. I have been very interested in listening to the other witnesses' testimony.

Peter talked about greater transparency for technical information supporting regulations. I think that is very important, getting public comment on the technical information and making sure that is exposed to public comment.

He talked about—I think all three of us have talked about codifying the regulatory impact analysis requirements in Executive orders, which I think is very important.

And bringing independent agencies under that rubric, I agree wholeheartedly with Peter on that. And I think I will let Jeff tell——

Mr. COBLE. Thank you.

Let me go to Professor Strauss.

Professor Strauss, let me put the same question to you. What are the most important potential APA reforms on which you and your fellow witnesses agree?

Mr. STRAUSS. I think Professor Dudley put it pretty well.

As I said in my remarks, I can't agree to the suggestion of expanding formal rulemaking. The history of that has been quite dismal. There is a piece in the literature remarking that an FDA formal rulemaking to determine the percentage of peanuts a substance has to contain to be labeled "peanut butter" took 9 years and 20 weeks of hearings, producing an 8,000-page hearing record to produce a 6-page opinion to justify a decision to require at least 90 percent peanuts.

What I saw at the NRC in that respect was the use of cross-examination by opponents of nuclear power simply to obstruct the licensing of nuclear power plants.

Mr. COBLE. Thank you, Professor.

Mr. Rosen, what differences of opinion between you and your fellow witnesses are most important? And what are the key issues we should consider to hopefully resolve those differences?

Mr. ROSEN. Well, I think I would echo that there is more agreement than disagreement, that I think there were a number of items that Professor Strauss alluded to, and Professor Dudley, that I would agree with, as well. So there is a number of agreements.

The only one that I have heard of, at least in the oral discussion, probably is that Professor Strauss and I have a different view about the on-the-record kind of formal rulemaking. Although, it may not be as large as it could be, in that I favor that for a very limited subset of truly major rules where there are empirical or scientific controversies that underlie the rules.

With regard to the length of time, that is always a concern in rulemaking, but I would point out a couple of things. One, there are notice-and-comment rulemakings around the Federal Govern-

ment that have taken 15 years or more. And so, time is partly a function of management and how the activity is managed. Two, there are formal or hybrid rulemakings that have been conducted in a quite expeditious manner at OSHA and some other agencies where there are still statutory requirements to do that. And, third, I would just observe, for a small subset of cases it can be more important to get things right than to get them done quickly.

And so, that is why there is probably a small difference, or I would characterize as small—Professor Strauss may have his own view—but at least there is a difference with regard to that issue.

Mr. COBLE. I thank you, Mr. Rosen.

And, finally, in an effort to beat the red light, let me conclude with Professor Dudley.

Professor, what are some of the foremost recent examples of agency overreach or agency error that could have been prevented or corrected if these reforms had been in place?

Ms. DUDLEY. I don't have them on the tip of my tongue. I would expect that there are independent agency regulations that, had they been subject to the benefit-cost analysis, the regulatory impact analysis, that we would have had better outcomes.

Mr. COBLE. Well, the record will be open for 5 days, so you all feel free to contribute forthwith.

I yield back. The distinguished gentleman from Michigan is recognized for 5 minutes.

Mr. CONYERS. Thank you, Mr. Chairman.

Could I ask Mr. Rosen of his familiarity or knowledge of the 13 amendments that were passed on February 19, since the two hearings that we have had, in which major regulatory laws or procedures were struck down in the House of Representatives?

Mr. ROSEN. I am sorry, Mr. Conyers, I don't know if I understood the question. Could I ask you to repeat it for me? And I will try to answer it as best I can.

Mr. CONYERS. I will be happy to do that.

In H.R. 1, which was voted on at about 4 a.m. in the morning and passed by a vote of 235 to 189, there were included 13 different amendments that hampered the implementation of existing regulations or of future regulations, particularly concerning environmental protection, the implementation of the health-care reform legislation, and other measures.

Mr. ROSEN. H.R. 1, if I recall correctly, is the continuing resolution appropriations funding bill. And I am aware that there were a large number of amendments offered during the debate on that bill, some of which involved regulatory issues. My understanding is those grew out of concern about some of the very costly regulations issued in the last 2 years and beliefs and concerns that perhaps those were not well-conceived, carefully thought out.

And I think that maybe is an illustration of why we are all of the view that some improvements to the regulatory process might ensure better regulation and avoid the need for congressional action to correct errors like that.

Mr. CONYERS. Well, the question that I asked you, are you familiar with the regulatory amendments that you hope will improve the way that we go about doing business here today in the Congress and in the Federal Government?

Mr. ROSEN. Well, I think the answer to that is yes.

Mr. CONYERS. Then you are familiar with the amendment—or are you familiar with Amendment No. 13, introduced by our colleague Thomas Cooley, that prohibits the use of funds from being used to implement, administer, or enforce the EPA's rule entitled "Water Quality Standards for the State of Florida's Lakes and Flowing Waters"?

Mr. ROSEN. I am aware that such an amendment was offered. I am not well-versed in the details of that particular one.

Mr. CONYERS. Well, are you—there were 13 in H.R. 1. Are you aware of any of them in particular?

Mr. ROSEN. Am I aware of any other one in particular?

Mr. CONYERS. Of any of them in particular.

Mr. ROSEN. I was aware of a rider that dealt with the issue of EPA's authority with regards to greenhouse gas regulation, which would be one of the most costly, if not the most costly, regulation in American history. I was aware of some other riders or amendments that were offered——

Mr. CONYERS. What about the health-care amendments offered by our distinguished Member of the Judiciary Committee, Steve King, in which we prohibited the use of funds to carry out the provisions of the Patient Protection and Affordable Care Act?

Mr. ROSEN. I would say that I am not familiar with the details of it. I am aware, again, through really media accounts on that particular one.

But, again, I think it highlights the point I was making, is that many Members of Congress feel that there have been some errors made in the regulatory process. And I think and hope that part of what this hearing is about is to improve that process and avoid those kind of errors.

Mr. CONYERS. Well, if you are not familiar with them—and I am not going to ask Professor Dudley the same thing—maybe improvements are being made—that you might want to submit additional testimony for the record to demonstrate that improvements are being made in the direction that you would like to go.

Mr. ROSEN. Well, I would certainly be happy to do that, but I think the bigger point is, when Members of Congress offer amendments, that is at another level of the regulatory process that fundamentally goes to the democratic process and the accountability of Congress as the people's representatives, where, in addition to technical analysis, cost-benefit and other forms of technical analysis, it is, of course, important that Congress reflect the wishes of the voters.

Mr. CONYERS. Would you be willing to give us your impression and whether you approve these or not in an additional statement that you would submit to the Committee?

Mr. ROSEN. Whether I agree or disagree with some of the amendments to the bill?

Mr. CONYERS. Well, yes, because these are only the amendments that deal with regulations. And that is why we are here. And if you don't know about them, there may be improvements being made that you are unaware of that could affect the nature of your testimony before the Committee today.

Mr. ROSEN. Well, I don't think it would——

Mr. COBLE. The gentleman's time has expired.

You may answer that question, Mr. Rosen.

Mr. ROSEN. I don't actually think it would affect my testimony, because my testimony goes to having sound procedures that are independent of one's political views on any particular policy issue and go to a sound process and the use of good evidence and science and the like.

I, like everybody, have views about particular amendments and particular proposals, and I am happy to share those when it is appropriate. But I don't think it would change my view about the need to have a regulatory process and an approach to regulation that is sound and good for our economy.

Mr. COBLE. The gentleman's time has expired.

The Chair recognizes the distinguished gentleman from South Carolina, Mr. Gowdy, for 5 minutes.

Mr. GOWDY. Thank you, Mr. Chairman. I want to thank you for presiding over this hearing.

Last week, while we were on recess, I had the pleasure of visiting a chemical plant in Greenville, South Carolina. And I have to confess to you, with a background in law enforcement and not in administrative procedures, I was dumbstruck at the labyrinthine regulatory complex that that company had to negotiate. And I guess the example that stayed with me the most was a six-by-six concrete building that was visited, regulated, inspected by four different agencies. It is impossible to explain that to average folks.

Mr. Rosen, Mr. Strauss mentioned some abuses in the formal rulemaking process. If you were emperor for the day, what would you do to assuage his fears of those abuses?

Mr. ROSEN. I think two things. One is, I would limit it to those situations where there is benefit to be had by on-the-record procedures because there are empirical and scientific kinds of issues to be resolved. So I think his concern, in part, if I understand it, is that, were this done on too widespread a basis, it could have negative effects. And I would target it to where it could be most useful.

And the second is, for those of you who have a past as trial lawyers or have some familiarity, judges all the time have to manage trials. And a trial can, as Professor Strauss, I think, fears, get out of control and go on too long and not be managed well. And it can be—alternatively, it can be managed very well, with a schedule and deadlines and cutoff periods and process.

And I think part of what I would advocate, and perhaps would partly address what I understand Professor Strauss' concern to be, is ensure that when hybrid or formal rulemaking procedures are used there are good management practices in place so that we don't have a 9- or 10-year process.

And I can tell you, during the Bush administration, OSHA did some hybrid rulemaking proceedings, and they didn't take 9 years. They were much, much faster than that.

Mr. GOWDY. Professor Dudley, Congress is going to be considering a piece of legislation that deals with lasers and aircraft. And I want you to imagine that you were empress for the day. I believe you said that there is a strong incentive sometimes to issue new regulations and perhaps not so much of an incentive to later evalu-

ate those or, frankly, to do much of a cost-benefit analysis while you are considering them.

If you were advising us or an executive-branch agency on something like shooting a laser at an airplane, what apparatus would you suggest for us?

Ms. DUDLEY. I would suggest the procedures that have been in Executive order since the early 1980s, and reinforced in 1993 and reinforced last month by President Obama. And that is to first identify what the compelling need for the problem is, what is the best way to address that, look at the data available, what alternatives there are, and then look at the cost and the benefits—so it is not just cost, but benefits as well—and who would be affected, the distributional impact.

So there is a series of steps that I think all of your witnesses agree one would go through to see what is the best way to approach that regulation.

Mr. GOWDY. The REINS Act has a threshold of a $100 million impact. Is that threshold appropriate, too high?

Ms. DUDLEY. That is the threshold that is used in Executive order for—OMB requires regulations that hit that level to have a more full regulatory impact analysis. I think that or a higher threshold might be appropriate for a REINS Act. That captures between 40 and 100 regulations a year, depending on how you count them.

Mr. GOWDY. Thank you.

Ms. DUDLEY. The $100 million threshold would.

Mr. GOWDY. Mr. Strauss, I have maybe about 30 seconds left. Can you give me some examples of unwarranted or superfluous regulations or regulations that had, perhaps, a well-intended intent but wound up having unintended pernicious consequences?

Mr. STRAUSS. No, but I want to put that in the context of not being able to do very much in the other direction either. Professor Dudley has been in a position to monitor those issues and did a remarkable job at it, as I believe Professor Sunstein, former Professor Sunstein is doing now.

I am thoroughly in favor of the OIRA process. It has been around for a while. It is perhaps time for Congress to domesticate it. I am not in a position to make the kind of expert assessments that you are asking for on my own.

Mr. GOWDY. Okay.

Thank you, Mr. Chairman.

Mr. COBLE. Thank you, Mr. Gowdy.

The Chair recognizes the distinguished gentleman from Florida, Mr. Ross, for 5 minutes.

Mr. ROSS. Thank you, Mr. Chairman.

Getting back to what the distinguished gentleman, the Ranking Member, Mr. Conyers from Michigan, had inquired of you, Mr. Rosen, being from Florida, I am somewhat familiar with the numeric nutrient water standard criteria that is being pushed on Florida and Florida alone. And my concern for that, of course, is the economic impact that it has, the cost-benefit that it has in Florida. For example, it will cost 14,000 jobs if implemented, $1.1 billion financial impact. It will cost $281 million to $500 million—$511 million just to monitor.

And I guess my question is, as I read the history of the last 65 years of the APA, standing—it seems to me that, at one time, parties had to have actual standing. And now it has been liberalized that anybody with a tangential interest can have standing to address either a rule—and I would like you to speak on that, Mr. Rosen, if you will, about standing and if you think we ought to maybe tighten up the standing requirements in order to participate in this process.

Mr. ROSEN. Well, that is an interesting point because there is a balance to be struck between ensuring that judicial review can occur for those who have been aggrieved and allowing just anybody who wants to to come in and complain and what I would regard as misuse the courts. So there is a balance.

In terms of the current state of the law, you know, the Supreme Court has set out those requirements. And I could see some benefit to having more statutory guidance——

Mr. ROSS. The Supreme Court set the parameters for standing, but did so without any direction from this body here. And I guess what I am getting at is that——

Mr. ROSEN. Pretty minimal, yeah. And I could see benefit to doing that.

Mr. ROSS. For example, when I was in Florida, we had a mini APA that addressed regulations in the State of—State regulations. But we addressed to the standing issue, because at one point it was so liberalized that any citizen of the State of Florida could object and thereby shut down a project, shut down employment, you know, shut down the growth of our economy. So we went back and we codified that.

And it seems to me that if we are talking about, you know, regulations strangling businesses, if we are talking about the regulatory process being open to everybody, even those that it does not affect, I think, wouldn't you agree that we should address the issue of standing, as a legislative body?

Mr. ROSEN. In general, yes, I would see benefit to Congress addressing that. The reason I pause is there are sometimes different tests for different kinds of parties. And just to use as an example, the Supreme Court in the *Massachusetts v. EPA* case broadened the availability of standing for States. And so, State attorney generals have, arguably, broader standing than some other participants. And you would have to think carefully about how to fix these things, because you might do something that still leaves huge loopholes and doesn't address what your concern is.

So, in a general way, I think I would agree with you. But in terms of getting down to exactly how you would draft the particulars, I think there would be a lot of work to be done.

Mr. ROSS. Professor Dudley, do you have any comment on whether we need to address the standing aspect?

Ms. DUDLEY. I won't because I am not a lawyer, so I will punt to our lawyers.

Mr. ROSS. Okay.

And, Mr. Strauss, how about you?

Mr. STRAUSS. Well, I think that one issue to think about is that rulemaking really is open to any interested person. And I would hope that the Congress would not change that.

I will also say that when I was at the Nuclear Regulatory Commission, I had a chance to observe the impact of having people come in from both sides of issues on the way the commissioners approached their business. James Landiswrote about the machine-gun impact of hearing only from the regulated. From that perspective, it seems to me highly useful to have agencies looking over their shoulders in both directions.

Mr. ROSS. Then, by way of example, when we look at what regulations were being promulgated by OSHA the 1st of this year that were fortunately withdrawn, dealing with the hearing protection and dealing with the MSDs, the musculoskeletal disorders, these were incredibly burdensome regulations that were being promulgated and ready for publication by OSHA but fortunately withdrawn. And it seems to me, then, that we are either eliminating a critical aspect of the regulatory rulemaking process, and that is that we are leaving out those that are being affected by it.

And my concern is that—and I am out of time here, so I guess I will stop there.

Mr. COBLE. You may finish your question.

Mr. ROSS. Thank you.

My concern is—and I will ask you, Mr. Rosen, because you have experience in this regard—is there anything we can do to make sure that those that are adversely impacted or impacted at all by these regulations have a say early on, so that we don't get to where we did in these last two regulations where they were being promulgated and then suddenly withdrawn because they realized the absurdity of their impact?

Mr. ROSEN. Yes. Two thoughts on that.

One is, there could be expanded requirements for certain kinds of rules for pre-notice-and-comment process, for the use of ANPRMs or other kinds of pre-process, to ensure that there is greater opportunity for public participation and input, particularly if it could be done through the Internet or other current technologies.

The second thing is, I do think that some of the concerns that you are expressing go to the ultimate rules that come out that seem to have problems. And, in some sense, if the principles of regulation can be improved—I mean, just to pick a couple out of President Obama's Executive order, he says that agencies should tailor their regulations to impose the least burden on society and that they should identify and consider regulatory approaches that reduce burdens and maintain flexibility.

If those principles are adhered to, I think some of the other process points you are concerned about, such as the standing and rights of aggrieved persons, will be mitigated.

Mr. ROSS. Thank you.

Mr. COBLE. The gentleman's time has expired.

Mr. Conyers has a question for Ms. Dudley. And, Mr. Gowdy, if you and Mr. Ross have another question, you will be recognized.

Mr. Conyers is recognized for 5 minutes.

Mr. CONYERS. Professor Dudley, you were formerly with Mercatus, and before that you were with a number of, well, people that were opposed to a lot of regulation and rules.

And I wanted to ask you, did you come out against airbags at one time in your career?

Ms. DUDLEY. Let me just clarify. I was at the Mercatus Center at George Mason University. And before that I was a consultant, and before that I was in the government. So I don't think it is a fair characterization to say that I was with people who were opposed to rules.

So let me——

Mr. CONYERS. You didn't work for any of them. All right. I am——

Ms. DUDLEY. I did work for the Mercatus Center, yes. I was there for a while, and I directed their regulatory studies program.

Mr. CONYERS. All right. Well, the question—I stand corrected. Did you come out against airbags?

Ms. DUDLEY. I filed a comment—I filed over 100 comments on Federal regulations, on proposed regulations. And in each of those, I applied the steps of analysis that——

Mr. CONYERS. Just answer yes or no, please.

Ms. DUDLEY. It isn't a yes-or-no answer.

Mr. CONYERS. You mean you didn't say—you didn't oppose or you didn't support?

Ms. DUDLEY. I was critical of aspects of one airbag regulation that was issued many years ago, yes, because it was killing small adults and children riding in the front seat of a car.

Mr. CONYERS. Do you still take the position that ground-level ozone is actually beneficial because it protects us from skin cancer?

Ms. DUDLEY. That is a scientific fact.

Mr. CONYERS. The answer is yes?

Ms. DUDLEY. Yes.

Mr. CONYERS. Okay. Thank you.

Did you comment that the EPA should leave decisions regarding the sulfur content of gasoline to individual States?

Ms. DUDLEY. I don't recall. But I do believe——

Mr. CONYERS. I do.

Ms. DUDLEY. I do believe in Federal——

Mr. CONYERS. I recall. Because I have——

Ms. DUDLEY [continuing]. Should be left to States.

Mr. CONYERS. You can answer yes; it is okay.

Ms. DUDLEY. I want to be factual.

Mr. CONYERS. Oh, I see.

Ms. DUDLEY. Although we didn't—we aren't under oath, are we? But I am honest by nature.

Mr. CONYERS. Do you oppose regulations requiring—last question, Mr. Chairman.

Do you oppose regulations requiring industry to provide information on toxic releases and chemical hazards?

Ms. DUDLEY. I actually have written extensively on that topic, and it isn't a simple answer.

I think that the way that the information is provided is essential. It has to be good information that shares information on risks. People should be informed about risk.

Mr. CONYERS. It sounds like a polite way of saying yes.

Ms. DUDLEY. It is not. I am trying to be accurate.

Mr. CONYERS. Thank you, Mr. Chairman, for your generosity.

Mr. COBLE. I thank you.

And I have a minute remaining. Did you want to be heard further on your line of questioning, Ms. Dudley? Were you in the middle of an answer?

Ms. DUDLEY. No, I think I am fine. Thank you, sir.

Mr. COBLE. Very well.

I want to thank all of our witnesses for their testimony.

Mr. Ross, did you have another question?

Mr. ROSS. No, sir, I do not.

Mr. COBLE. I want to thank all of our witnesses for their testimony today.

Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will forward and ask the witnesses to respond as promptly as they can, so that their answers may be made a part of the record.

Mr. CONYERS. Mr. Chairman, may I ask unanimous consent to put into the record the February 26 New York Times article on "Regulation Lax as Gas Wells' Tainted Water Hits Rivers"?

Mr. COBLE. Without objection.

Mr. CONYERS. Thank you.

[The information referred to follows:]

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February 26, 2011

Regulation Lax as Gas Wells' Tainted Water Hits Rivers

By IAN URBINA

The American landscape is dotted with hundreds of thousands of new wells and drilling rigs, as the country scrambles to tap into this century's gold rush — for natural gas.

The gas has always been there, of course, trapped deep underground in countless tiny bubbles, like frozen spills of seltzer water between thin layers of shale rock. But drilling companies have only in recent years developed techniques to unlock the enormous reserves, thought to be enough to supply the country with gas for heating buildings, generating electricity and powering vehicles for up to a hundred years.

So energy companies are clamoring to drill. And they are getting rare support from their usual sparring partners. Environmentalists say using natural gas will help slow climate change because it burns more cleanly than coal and oil. Lawmakers hail the gas as a source of jobs. They also see it as a way to wean the United States from its dependency on other countries for oil.

But the relatively new drilling method — known as high-volume horizontal hydraulic fracturing, or hydrofracking — carries significant environmental risks. It involves injecting huge amounts of water, mixed with sand and chemicals, at high pressures to break up rock formations and release the gas.

With hydrofracking, a well can produce over a million gallons of wastewater that is often laced with highly corrosive salts, carcinogens like benzene and radioactive elements like radium, all of which can occur naturally thousands of feet underground. Other carcinogenic materials can be added to the wastewater by the chemicals used in the hydrofracking itself.

While the existence of the toxic wastes has been reported, thousands of internal documents obtained by The New York Times from the Environmental Protection Agency, state regulators and drillers show that the dangers to the environment and health are greater than previously understood.

The documents reveal that the wastewater, which is sometimes hauled to sewage plants not designed to treat it and then discharged into rivers that supply drinking water, contains radioactivity at levels higher than previously known, and far higher than the level that federal regulators say is safe for these treatment plants to handle.

Other documents and interviews show that many E.P.A. scientists are alarmed, warning that the drilling waste is a threat to drinking water in Pennsylvania. Their concern is based partly on a 2009 study, never made public, written by an E.P.A. consultant who concluded that some sewage treatment plants were incapable of removing certain drilling waste contaminants and were probably violating the law.

The Times also found never-reported studies by the E.P.A. and a confidential study by the drilling industry that all concluded that radioactivity in drilling waste cannot be fully diluted in rivers and other waterways.

But the E.P.A. has not intervened. In fact, federal and state regulators are allowing most sewage treatment plants that accept drilling waste not to test for radioactivity. And most drinking-water intake plants downstream from those sewage treatment plants in Pennsylvania, with the blessing of regulators, have not tested for radioactivity since before 2006, even though the drilling boom began in 2008.

In other words, there is no way of guaranteeing that the drinking water taken in by all these plants is safe.

That has experts worried.

"We're burning the furniture to heat the house," said John H. Quigley, who left last month as secretary of Pennsylvania's Department of Conservation and Natural Resources. "In shifting away from coal and toward natural gas, we're trying for cleaner air, but we're producing massive amounts of toxic wastewater with salts and naturally occurring radioactive materials, and it's not clear we have a plan for properly handling this waste."

The risks are particularly severe in Pennsylvania, which has seen a sharp increase in drilling, with roughly 71,000 active gas wells, up from about 36,000 in 2000. The level of radioactivity in the wastewater has sometimes been hundreds or even thousands of times the maximum allowed by the federal standard for drinking water. While people clearly do not drink drilling wastewater, the reason to use the drinking-water standard for comparison is that there is no comprehensive federal standard for what constitutes safe levels of radioactivity in drilling wastewater.

Drillers trucked at least half of this waste to public sewage treatment plants in Pennsylvania in 2008 and 2009, according to state officials. Some of it has been sent to other states, including New York and West Virginia.

Yet sewage treatment plant operators say they are far less capable of removing radioactive contaminants than most other toxic substances. Indeed, most of these facilities cannot remove enough of the radioactive material to meet federal drinking-water standards before discharging the wastewater into rivers, sometimes just miles upstream from drinking-water intake plants.

In Pennsylvania, these treatment plants discharged waste into some of the state's major river basins. Greater amounts of the wastewater went to the Monongahela River, which provides drinking water to more than 800,000 people in the western part of the state, including Pittsburgh, and to the Susquehanna River, which feeds into Chesapeake Bay and provides drinking water to more than six million people, including some in Harrisburg and Baltimore.

Lower amounts have been discharged into the Delaware River, which provides drinking water for more than 15 million people in Philadelphia and eastern Pennsylvania.

In New York, the wastewater was sent to at least one plant that discharges into Southern Cayuga Lake, near Ithaca, and another that discharges into Owasco Outlet, near Auburn. In West Virginia, a plant in Wheeling discharged gas-drilling wastewater into the Ohio River.

"Hydrofracking impacts associated with health problems as well as widespread air and water contamination have been reported in at least a dozen states," said Walter Hang, president of Toxics Targeting, a business in Ithaca, N.Y., that compiles data on gas drilling.

Problems in Other Regions

While Pennsylvania is an extreme case, the risks posed by hydrofracking extend across the country.

There were more than 493,000 active natural-gas wells in the United States in 2009, almost double the number in 1990. Around 90 percent have used hydrofracking to get more gas flowing, according to the drilling industry.

Gas has seeped into underground drinking-water supplies in at least five states, including Colorado, Ohio, Pennsylvania, Texas and West Virginia, and residents blamed natural-gas drilling.

Air pollution caused by natural-gas drilling is a growing threat, too. Wyoming, for example, failed in 2009 to meet federal standards for air quality for the first time in its history partly because of the fumes containing benzene and toluene from roughly 27,000 wells, the vast majority drilled in the past five years.

In a sparsely populated Sublette County in Wyoming, which has some of the highest concentrations of wells, vapors reacting to sunlight have contributed to levels of ozone higher than those recorded in Houston and Los Angeles.

Industry officials say any dangerous waste from the wells is handled in compliance with state and federal laws, adding that drilling companies are recycling more wastewater now. They also say that hydrofracking is well regulated by the states and that it has been used safely for decades.

But hydrofracking technology has become more powerful and more widely used in recent years, producing far more wastewater. Some of the problems with this drilling, including its environmental impact and the challenge of disposing of waste, have been documented by ProPublica, The Associated Press and other news organizations, especially out West.

And recent incidents underscore the dangers. In late 2008, drilling and coal-mine waste released during a drought so overwhelmed the Monongahela that local officials advised people in the Pittsburgh area to drink bottled water. E.P.A. officials described the incident in an internal memorandum as "one of the largest failures in U.S. history to supply clean drinking water to the public."

In Texas, which now has about 93,000 natural-gas wells, up from around 58,000 a dozen years ago, a hospital system in six counties with some of the heaviest drilling said in 2010 that it found a 25 percent asthma rate for young children, more than three times the state rate of about 7 percent.

"It's ruining us," said Kelly Gant, whose 14-year-old daughter and 11-year-old son have experienced severe asthma attacks, dizzy spells and headaches since a compressor station and a gas well were set up about two years ago near her house in Bartonville, Tex. The industry and state regulators have said it is not clear what role the gas industry has played in causing such problems, since the area has had high air pollution for a while.

"I'm not an activist, an alarmist, a Democrat, environmentalist or anything like that," Ms. Gant said. "I'm just a person who isn't able to manage the health of my family because of all this drilling."

And yet, for all its problems, natural gas offers some clear environmental advantages over coal, which is used more than any other fuel to generate electricity in the United States. Coal -fired power plants without updated equipment to capture pollutants are a major source of radioactive pollution. Coal mines annually produce millions of tons of toxic waste.

But the hazards associated with natural-gas production and drilling are far less understood than those associated with other fossil fuels, and the regulations have not kept pace with the natural-gas industry's expansion.

Pennsylvania, Ground Zero

Pennsylvania, which sits atop an enormous reserve called the Marcellus Shale, has been called the Saudi Arabia of natural gas.

This rock formation, roughly the size of Greece, lies more than a mile beneath the Appalachian landscape, from Virginia to the southern half of New York. It is believed to hold enough gas to supply the country's energy needs for heat and electricity, at current consumption rates, for more than 15 years.

Drilling companies were issued roughly 3,300 Marcellus gas-well permits in Pennsylvania last year, up from just 117 in 2007.

This has brought thousands of jobs, five-figure windfalls for residents who lease their land to the drillers and revenue for a state that has struggled with budget deficits. It has also transformed the landscape of southwestern Pennsylvania and brought heavy burdens.

Drilling derricks tower over barns, lining rural roads like feed silos. Drilling sites bustle around the clock with workers, some in yellow hazardous material suits, and 18-wheelers haul equipment, water and waste along back roads.

The rigs announce their presence with the occasional boom and quiver of underground explosions. Smelling like raw sewage mixed with gasoline, drilling-waste pits, some as large as a football field, sit close to homes.

Anywhere from 10 percent to 40 percent of the water sent down the well during hydrofracking returns to the surface, carrying drilling chemicals, very high levels of salts and, at times, naturally occurring radioactive material.

While most states require drillers to dispose of this water in underground storage wells below impermeable rock layers, Pennsylvania has few such wells. It is the only state that has

allowed drillers to discharge much of their waste through sewage treatment plants into rivers.

Regulators have theorized that passing drilling waste through the plants is safe because most toxic material will settle during the treatment process into a sludge that can be trucked to a landfill, and whatever toxic material remains in the wastewater will be diluted when mixed into rivers. But some plants were taking such large amounts of waste with high salt levels in 2008 that downstream utilities started complaining that the river water was eating away at their machines.

Regulators and drilling companies have said that these cases, and others, were isolated.

"The wastewater treatment plants are effective at what they're designed to do — remove material from wastewater," said Jamie Legenos, a spokeswoman for the Pennsylvania Department of Environmental Protection, adding that the radioactive material and the salts were being properly handled.

Overwhelmed, Underprepared

For proof that radioactive elements in drilling waste are not a concern, industry spokesmen and regulators often point to the results of wastewater tests from a 2009 draft report conducted by New York State and a 1995 report by Pennsylvania that found that radioactivity in drilling waste was not a threat. These two reports were based on samples from roughly 13 gas wells in New York and 29 in Pennsylvania.

But a review by The Times of more than 30,000 pages of federal, state and company records relating to more than 200 gas wells in Pennsylvania, 40 in West Virginia and 20 public and private wastewater treatment plants offers a fuller picture of the wastewater such wells produce and the threat it poses.

Most of the information was drawn from drilling reports from the last three years, obtained by visiting regional offices throughout Pennsylvania, and from documents or databases provided by state and federal regulators in response to records requests.

Among The Times's findings:

¶More than 1.3 billion gallons of wastewater was produced by Pennsylvania wells over the past three years, far more than has been previously disclosed. Most of this water — enough to cover Manhattan in three inches — was sent to treatment plants not equipped to remove many of the toxic materials in drilling waste.

¶At least 12 sewage treatment plants in three states accepted gas industry wastewater and discharged waste that was only partly treated into rivers, lakes and streams.

¶Of more than 179 wells producing wastewater with high levels of radiation, at least 116 reported levels of radium or other radioactive materials 100 times as high as the levels set by federal drinking-water standards. At least 15 wells produced wastewater carrying more than 1,000 times the amount of radioactive elements considered acceptable.

Results came from field surveys conducted by state and federal regulators, year-end reports filed by drilling companies and state-ordered tests of some public treatment plants. Most of the tests measured drilling wastewater for radium or for "gross alpha" radiation, which typically comes from radium, uranium and other elements.

Industry officials say they are not concerned.

"These low levels of radioactivity pose no threat to the public or worker safety and are more a public perception issue than a real health threat," said James E. Grey, chief operating officer of Triana Energy.

In interviews, industry trade groups like the Marcellus Shale Coalition and Energy in Depth, as well as representatives from energy companies like Shell and Chesapeake Energy, said they were producing far less wastewater because they were recycling much of it rather than disposing of it after each job.

But even with recycling, the amount of wastewater produced in Pennsylvania is expected to increase because, according to industry projections, more than 50,000 new wells are likely to be drilled over the next two decades.

The radioactivity in the wastewater is not necessarily dangerous to people who are near it. It can be blocked by thin barriers, including skin, so exposure is generally harmless.

Rather, E.P.A. and industry researchers say, the bigger danger of radioactive wastewater is its potential to contaminate drinking water or enter the food chain through fish or farming. Once radium enters a person's body, by eating, drinking or breathing, it can cause cancer and other health problems, many federal studies show.

Little Testing for Radioactivity

Under federal law, testing for radioactivity in drinking water is required only at drinking-water plants. But federal and state regulators have given nearly all drinking-water intake facilities in Pennsylvania permission to test only once every six or nine years.

The Times reviewed data from more than 65 intake plants downstream from some of the busiest drilling regions in the state. Not one has tested for radioactivity since 2008, and most have not tested since at least 2005, before most of the drilling waste was being produced.

And in 2009 and 2010, public sewage treatment plants directly upstream from some of these drinking-water intake facilities accepted wastewater that contained radioactivity levels as high as 2,122 times the drinking-water standard. But most sewage plants are not required to monitor for radioactive elements in the water they discharge. So there is virtually no data on such contaminants as water leaves these plants. Regulators and gas producers have repeatedly said that the waste is not a threat because it is so diluted in rivers or by treatment plants. But industry and federal research cast doubt on those statements.

A confidential industry study from 1990, conducted for the American Petroleum Institute, concluded that "using conservative assumptions," radium in drilling wastewater dumped off the Louisiana coast posed "potentially significant risks" of cancer for people who eat fish from those waters regularly.

The industry study focused on drilling industry wastewater being dumped into the Gulf of Mexico, where it would be far more diluted than in rivers. It also used estimates of radium levels far below those found in Pennsylvania's drilling waste, according to the study's lead author, Anne F. Meinhold, an environmental risk expert now at NASA.

Other federal, state and academic studies have also found dilution problems with radioactive drilling waste.

In December 2009, these very risks led E.P.A. scientists to advise in a letter to New York that sewage treatment plants not accept drilling waste with radium levels 12 or more times as high as the drinking-water standard. The Times found wastewater containing radium levels that were hundreds of times this standard. The scientists also said that the plants should never discharge radioactive contaminants at levels higher than the drinking-water standard.

In 2009, E.P.A. scientists studied the matter and also determined that certain Pennsylvania rivers were ineffective at sufficiently diluting the radium-laced drilling wastewater being discharged into them.

Asked about the studies, Pennsylvania regulators said they were not aware of them.

"Concerned? I'm always concerned," said Dave Allard, director of the Bureau of Radiation Protection. But he added that the threat of this waste is reduced because "the dilutions are so huge going through those treatment plants."

Three months after The Times began asking questions about radioactive and other toxic material being discharged into specific rivers, state regulators placed monitors for radioactivity near where drilling waste is discharged. Data will not be available until next month, state officials said.

But the monitor in the Monongahela is placed upstream from the two public sewage treatment plants that the state says are still discharging large amounts of drilling waste into the river, leaving the discharges from these plants unchecked and Pittsburgh exposed.

Plant Operators in the Dark

In interviews, five treatment plant operators said they did not believe that the drilling wastewater posed risks to the public. Several also said they were not sure of the waste's contents because the limited information drillers provide usually goes to state officials.

"We count on state regulators to make sure that that's properly done," said Paul McCurdy, environmental specialist at Ridgway Borough's public sewage treatment plant, in Elk County, Pa., in the northwest part of the state.

Mr. McCurdy, whose plant discharges into the Clarion River, which flows into the Ohio and Mississippi Rivers, said his plant was taking about 20,000 gallons of drilling waste per day.

Like most of the sewage treatment plant operators interviewed, Mr. McCurdy said his plant was not equipped to remove radioactive material and was not required to test for it.

Documents filed by drillers with the state, though, show that in 2009 his facility was sent water from wells whose wastewater was laced with radium at 275 times the drinking-water standard and with other types of radiation at more than 780 times the standard.

Part of the problem is that industry has outpaced regulators. "We simply can't keep up," said one inspector with the Pennsylvania Department of Environmental Protection who was not authorized to speak to reporters. "There's just too much of the waste."

"If we're too hard on them," the inspector added, "the companies might just stop reporting their mistakes."

Recently, Pennsylvania has tried to increase its oversight, doubling the number of regulators, improving well-design requirements and sharply decreasing how much drilling waste many treatment plants can accept or release. The state is considering whether to require treatment plants to begin monitoring for radioactivity in wastewater.

Even so, as of last November, 31 inspectors were keeping tabs on more than 125,000 oil and gas wells. The new regulations also allowed at least 18 plants to continue accepting the higher amounts set by their original permits.

Furthermore, environmental researchers from the University of Pittsburgh tested wastewater late last year that had been discharged by two treatment plants. They say these tests will show, when the results are publicly released in March, that salt levels were far above the legal limit.

Lax Oversight

Drilling contamination is entering the environment in Pennsylvania through spills, too. In the past three years, at least 16 wells whose records showed high levels of radioactivity in their wastewater also reported spills, leaks or failures of pits where hydrofracking fluid or waste is stored, according to state records.

Gas producers are generally left to police themselves when it comes to spills. In Pennsylvania, regulators do not perform unannounced inspections to check for signs of spills. Gas producers report their own spills, write their own spill response plans and lead their own cleanup efforts.

A review of response plans for drilling projects at four Pennsylvania sites where there have been accidents in the past year found that these state-approved plans often appear to be in violation of the law.

At one well site where several spills occurred within a week, including one that flowed into a creek, the well's operator filed a revised spill plan saying there was little chance that waste would ever enter a waterway.

"There are business pressures" on companies to "cut corners," John Hanger, who stepped down as secretary of the Pennsylvania Department of Environmental Protection in January, has said. "It's cheaper to dump wastewater than to treat it."

Records back up that assertion.

From October 2008 through October 2010, regulators were more than twice as likely to issue a written warning than to levy a fine for environmental and safety violations, according to state data. During this period, 15 companies were fined for drilling-related violations in 2008 and 2009, and the companies paid an average of about $44,000 each year, according to state data.

This average was less than half of what some of the companies earned in profits in a day and a tiny fraction of the more than $2 million that some of them paid annually to haul and treat the waste.

And prospects for drillers in Pennsylvania are looking brighter.

In December, the Republican governor-elect, Tom Corbett, who during his campaign took more gas industry contributions than all his competitors combined, said he would reopen state land to new drilling, reversing a decision made by his predecessor, Edward G. Rendell. The change clears the way for as many as 10,000 wells on public land, up from about 25 active wells today.

In arguing against a proposed gas-extraction tax on the industry, Mr. Corbett said regulation of the industry had been too aggressive.

"I will direct the Department of Environmental Protection to serve as a partner with Pennsylvania businesses, communities and local governments," Mr. Corbett says on his Web site. "It should return to its core mission protecting the environment based on sound science."

Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record.

Mr. COBLE. With that, again, I thank the witnesses.

And this hearing is adjourned.

[Whereupon, at 4:08 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Post-Hearing Questions and Responses from Susan E. Dudley, Research Professor of Public Policy and Public Administration, Director, Regulatory Studies Center, The George Washington University

Questions for Susan Dudley

1. How do you compare the value of what you describe as "social" regulations (which you say are aimed at addressing environmental, health, and safety concerns) with economic regulations?

"Economic regulation" is generally defined as regulation of prices, entry, exit, product quality, and quantity. In discussing this type of regulation, President Clinton's economic analysis guidelines issued in 1996 called for "a presumption against the need for regulatory actions that, on conceptual grounds, are not expected to generate net benefits, except in special circumstances," and demanded "a particularly demanding burden of proof … to demonstrate the need for" economic regulation of price, entry, and quality.[1] "Social regulations," on the other hand, are justified by failures of private markets and can bring about positive benefits (net of costs).

2. You claim that the number of regulations promulgated by current Administration is increasing. As you may recall, President Obama inherited from the prior Administration a United States on the precipice of total financial collapse, which was largely the result of a lack of regulation of the financial marketplace and associated industries.

The statistics presented in my testimony generally do not include financial regulation, which are mainly promulgated by independent regulatory agencies and thus not subject to OIRA review under Executive Order 12866. I have not researched financial regulation recently and cannot answer the specific questions, other than to note that there is disagreement among scholars as to whether the financial meltdown was "largely the result of a lack of regulation of the financial marketplace."

What role has the Great Recession played in the ongoing regulatory overhaul?

Didn't Alan Greenspan acknowledge that mistakes were made and that the market failed because the United States allowed it to regulate itself?

3. Would you be opposed to having the Administrative Conference of the United States review your suggested reforms to the APA and for it to make recommendations to Congress?

I would welcome suggestions for reform from all quarters, particularly ACUS.

4. You note that section 109 of the Clean Air Act has been "interpreted as precluding the consideration of any factors other than human health in the setting of national ambient air quality standards."

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[1] 1996 Economic Analysis Guidelines are available at http://www.whitehouse.gov/omb/inforeg_riaguide#i. The current guidelines include the same presumption.

In lieu of or in addition to "human health," what other factors should be considered?

Important factors would include whether the standard is achievable, and the opportunity costs of achieving the standard. Opportunity costs are not just measured in monetary terms, but include sacrifices of other activities, including those that contribute to human health and well-being, economic growth, environmental quality, job opportunities, etc.

5. You express strong support for H.R. 10, the so-called REINS Act. When you were with the Bush Administration, did you advocate for the enactment of any such version of this legislation?

No.

6. You were previously associated with the Mercatus Center, an "industry-funded, anti-regulatory advocacy organization," according to OMB Watch and Public Citizen. Donors to Mercatus appear to be companies with "long records of pushing for deregulations, such as BP Amoco, Exxon Mobil Corporation, General Motors, JP Morgan Chase, Merrill Lynch, Pfizer, and State Farm Insurance Company, as well as individuals from the corporate world such as David Koch," according to these watchdog groups.

Is this correct?

The Mercatus Center at George Mason University is a 501(c)(3) research center. I respectfully refer you to the Mercatus Center for information on its research, education and outreach activities and sources of funding.

As director of a research program at the Mercatus Center at George Mason University until 2006, I had no responsibility for, nor involvement in, the Center's funding, and cannot answer this question.

Is it correct that David Koch personally gave $100,000 to Mercatus in 2005?

As director of a research program at the Mercatus Center at George Mason University until 2006, I had no responsibility for, nor involvement in, the Center's funding, and cannot answer this question.

7. While at Mercatus, did you argue for the elimination of the National Highway Traffic Safety Administration auto air bag rule? Didn't you, on behalf of Mercatus, submit this comment in opposition to the rule: "If air bags protect lives, and consumers demand them, it is reasonable to assume that automobile manufacturers would have installed air bags in the absence of federal requirements to do so." Essentially, you argued that regulation was not necessary as the market would provide air bags to the public if there was sufficient demand.

As a researcher and a parent, I was concerned that NHTSA's once-size-fits-all air bag standard (designed for the average-weight unbelted male) had devastating unintended consequences. In response to NHTSA's request for comment on a proposed rule, I filed a public comment warning of further unintended consequences. NHTSA estimated that the vast majority of benefits from the revised rule (72 percent) would accrue to occupants who choose not to wear seat belts. Its analysis indicated that belted passengers gained very little protection, yet the revised standards did not allow consumers to make informed decisions based on an evaluation of their unique, individual circumstances. I pointed out that allowing the installation of manual on-off switches would allow consumers to determine when an air bag was not appropriate for them and their families.

Do you own a car?

Yes. I own a 2001 Prius.

Is your car equipped with any air bags?

Yes. I had no choice in the matter, because government standards require all cars to be equipped with airbags.

Would you prefer driving a car with or without an air bag?

I would prefer the option to purchase a car with or without an airbag.

Does it matter to you whether the air bag actually works?

If it does not work, then I would be doubly disappointed that the government forced me to buy it.

Did Ford Motor Company launch a multi-million dollar ad campaign to instill in the public skepticism about air bags?

I have no information on that.

Did the U.S. Supreme Court find in a 1983 decision that the "industry was not sufficiently responsive to safety concerns"?

I have no information on that.

8. Do you still take the position that ground-level ozone is actually beneficial because it protects us from skin cancer?

It is an undisputed scientific fact that ozone – regardless of where it is in the atmosphere – shields ultraviolet rays that contribute to skin cancer. (A common measure of ozone protection is the density of ozone in a vertical column of air measured between the ground and the stratosphere.) EPA acknowledged this when it chose not to appeal a District

Court's ruling requiring it to consider the offsetting health benefits of ozone when setting NAAQS.

9. Did you comment that the "EPA should leave decisions regarding the sulfur content of gasoline to individual states?"

I do not know if that is an accurate quote. However, I can confirm that I articulated concerns that EPA's presentation of the effects of its proposed "Tier 2" regulation did not make transparent that the rule would impose costs on consumers in some regions without corresponding benefits, because smog problems are regional. In my analysis, filed as a public interest comment with EPA as well as a published article, I disaggregated the nation-wide data EPA provided in order to understand the distributional effects of the nation-wide low-sulfur fuel requirement. EPA data revealed that consumers in certain regions of the country (particularly in the west) would pay as much as ten times more per ton of emissions removed than EPA's national average estimate. Furthermore, according to EPA data, these very consumers would receive no benefit (and could actually experience an increase in pollution levels) as a result of the proposed rule.

10. Do you oppose regulations requiring industry to provide information on toxic releases and chemical hazards?

No, as long as the information is accurate and meaningful, it can enable American citizens to make informed decisions about their own health and safety.

11. What is your view of Professor Strauss's suggestion that Congress should rationalize and streamline the many requirements for regulatory impact analysis now in place?

I concur with Professor Strauss that "Codifying in one statute the analytic demands placed on rulemaking, including those that are now elements of Executive Order 12,866, and so framing them as to permit needed regulation to proceed efficiently, would in my judgment be a highly desirable step." I also concur with his recommendation that independent regulatory agencies be subject to these requirements.

12. A number of amendments were made to H.R. 1, Full-Year Continuing Appropriations Act, 2011 that impact on the rulemaking and regulatory processes of various federal agencies. Please provide your perspective with respect to each of the following amendments:

I have not followed any of these amendments nor formed a perspective on them.

- Amendment No. 13, introduced by Representative Thomas Rooney (R-FL), which prohibits the use of funds from being used to implement, administer, or enforce the EPA's rule entitled "Water Quality Standards for the State of Florida's Lakes and Flowing Waters" published in the Federal Register by the EPA on December 6, 2010.

- Amendment No. 94, introduced by Representative John Sullivan (R-OK), which prohibits the use of funds to implement the EPA administrator's decision entitled "Partial Grant of Clean Air Act Waiver Application Submitted by Growth Energy to Increase the Allowable Ethanol Content of Gasoline to 15 percent".

- Amendment No. 109, introduced by Representative Morgan Griffith (R-VA), which prohibits the use of funds to the EPA, the Corps of Engineers, or the Office of Surface Mining Reclamation and Enforcement that may be used to carry out, implement, administer, or enforce any policy or procedure set forth in the memorandum issued by the EPA.

- Amendment No. 165, introduced by Representative John Carter (R-TX), which prohibits the use of funds to be used to implement, administer, or enforce the rule entitled "National Emission Standards for Hazardous Air Pollutants From the Portland Cement Manufacturing Industry and Standards of Performance for Portland Cement Plants" published by the Environmental Protection Agency on September 9, 2010.

- Amendment No. 177, introduced by Representative Wally Herger (R-CA), which prohibits the use of funds by the Secretary of Agriculture to implement or enforce Subpart B of the Travel Management Rule, relating to the designation of roads, trails, and areas for motor vehicle use in any administrative unit of the National Forest System.

- Amendment No. 216, introduced by Representative David McKinley (R-WV), which prohibits the use of funds by the EPA administrator from carrying out section 404(c) of the Federal Water Pollution Control Act, which authorizes the EPA to deny or restrict use of defined disposal sites for landfill or dredged material where, after notice and comment, it determines that there would be harm to municipal water supply, shellfish beds and fishery areas, or wildlife and recreation areas.

- Amendment No. 217, introduced by Representative David McKinley (R-WV), which prohibits the use of funds by the EPA to develop, propose, finalize, implement, administer, or enforce any regulation that identifies or lists fossil fuel combustion waste as hazardous waste that is subject to regulation.

- Amendment No. 404, introduced by Representative Greg Walden (R-OR), which prohibits the use of funds used to implement the Report and Order of the Federal Communications Commission relating to the matter of preserving the open Internet and broadband industry practices (FCC 10-201, adopted by the Commission on December 21, 2010).

- Amendment No. 466, introduced by Representative Ted Poe (R-TX), and agreed to by a recorded vote of 249-177, prohibits the use of funds by the EPA to

implement, administer, or enforce any statutory or regulatory requirement pertaining to emissions of greenhouse gases.

- Amendment No. 467, introduced by Representative Bob Goodlatte (R-VA), which prohibits the use of funds from being used to develop, promulgate, evaluate, implement, provide oversight to, or backstop the total maximum daily loads or watershed implementation plans for the Chesapeake Bay Watershed.

- Amendment No. 495, introduced by Representative Ralph Hall (R-TX), which prohibits the use of funds to implement, establish, or create a NOAA Climate Service as described in the "Draft NOAA Climate Service Strategic Vision and Framework" published at 75 Feb. Reg. 57739.

- Amendment No. 498, introduced by Representative Bill Johnson (R-OH), which prohibits the use of funds to develop, carry out, implement, or otherwise enforce rules published by the Office of Surface Mining Reclamation and Enforcement of the Department of the Interior concerning stream water quality protection.

- Amendment No. 563, introduced by Kristi Noem (R-SD), which prohibits the use of funds to modify the national primary ambient air quality standard or the national secondary ambient air quality standard applicable to coarse particulate matter under the Clean Air Act.

- Amendment No. 79, introduced by Representative Cory Gardner (R-CO), which prohibits the use of funds to pay the salary of any officer or employee of the Department of Health and Human Services who develops or promulgates regulations or guidance with regard to health insurance exchanges under subtitle D of title I of the Patient Protection and Affordable Care Act.

- Amendment No. 267, introduced by Representative Steve King (R-IA), which prohibits the use of funds to carry out the provisions of the Patient Protection and Affordable Care Act, the Health Care and Education Reconciliation Act of 2010, or any amendment made by either law.

- Amendment No. 268, introduced by Representative Steve King (R-IA), which prohibits the use of funds to pay the salary of any officer or employee of any Federal department or agency with respect to implementing the provisions of the Patient Protection and Affordable Care Act, the Health Care and Education Reconciliation Act of 2010, or any amendment made by either law.

- Amendment No. 430, introduced by Representative Joseph Pitts (R-PA), which prohibits the use of funds to pay the salary of any officer or employee of the Departments of Health and Human Services, Labor, or the Treasury who takes any action to specify or define, through regulations, guidelines, or otherwise, essential benefits under section 1302 of the Patient Protection and Affordable Care Act/

- Amendment No. 575, introduced by Representative Denny Rehberg (R-MT), which prohibits the use of funds to pay any employee, officer, contractor, or grantee of any department or agency to implement the provisions of the Patient Protection and Affordable Care Act or title I or subtitle B of title II of the Health Care and Education Reconciliation Act of 2010.

Post-Hearing Questions and Responses from Jeffrey A. Rosen, Esq., Kirkland & Ellis LLP

Questions for Jeffrey Rosen

1. What is your view of Professor Strauss's suggestion that Congress should rationalize and streamline the many requirements for regulatory impact analysis now in place?

   Response: I agree that it would be a good idea to codify many of the requirements for regulatory analysis into a single statute, perhaps as a new section of the APA.

2. What is your view of Professor Strauss's suggestions for greater transparency with respect to documents and communications between agencies and outside entities in the pre-notice-and comment period?

   Response: Others have commented that this form of transparency has been lacking with respect to some major rulemakings, including during the last two years. While there needs to be some protection of an agency's deliberative process, during the prior Administration I observed successful instances of "listening sessions", advance notice of proposed rulemakings, and other forms of public participation in the pre-rulemaking phase.

3. While Congress certainly should play a role in oversight of the administrative system, isn't it appropriate that the Executive Branch play the more active role in such oversight given that administrative agencies are primarily the Executive Branch's responsibility?

   Response: Both the Executive and Legislative Branches have constitutional roles to play with regard to the activities of federal administrative agencies. I agree that there should be strong centralized review of the administrative agencies by OMB, on behalf of the President. The U.S. Constitution in Article II, section 3 charges the President with authority to execute the laws. At the same time, Article I, section 1 provides that Congress has "[a]ll legislative Powers herein granted", so when it has delegated some of that authority to agencies, Congress has the responsibility to remain informed about how its delegated authority is being used, and to determine if it is consistent with the best interests of the American people. The REINS Act (H.R. 10), for example, represents one effort to strike the appropriate balance.

4. In your time as OMB's general counsel, did you ever advocate for a greater Congressional role in oversight of the administrative system?

   Response: I have consistently been respectful of Congress' role with regard to legitimate oversight of federal agencies for the purpose of considering legislation. For two examples, please see my testimony at:

   http://testimony.ost.dot.gov/test/pasttest/05test/Rosen4.htm
   http://testimony.ost.dot.gov/test/pasttest/04test/Rosen1.htm

5. Would you be opposed to having the Administrative Conference of the United States review your suggested reforms to the APA and for it to make recommendations to Congress?

Response: ACUS Chairman Paul Verkuil has told me that he reviewed my testimony that was provided to this Subcommittee's hearing. I would be pleased to have every member of ACUS review these potential reforms, as well as other groups with knowledge about regulation, such as the ABA's Administrative Law Section, the Federalist Society's Administrative Law and Regulation Practice Group, and the many organizations potentially interested in regulatory reform.

6. You note in your testimony that the Truth in Regulating Act was enacted in 2000, yet Congress has not appropriated funds for this legislation.

   During your time with OMB, did either you or OMB advocate funding the implementation of this Act?

   Why hasn't this Act been funded in the 11 years since its enactment?

Response: During my time at OMB, I participated actively in the development of the President's annual budget proposals. President Bush's annual budget proposals are public documents, which remain available at http://www.gpoaccess.gov/usbudget/browse.html, along with those of President Obama. I have not located any provision addressing this topic in those, although this topic primarily would involve the Legislative Branch. With regard to why Congress chose not to fund the Truth in Regulating Act, others would be in a better position to explain that than I would.

7. You observe that Executive Orders can be "changed unilaterally" and this can be done "without the public participation that accompanies the legislative process."

   Wasn't this exactly the nature of the criticism that was leveled at President Bush's Executive Order 13422, which was the subject of a hearing held by this very Subcommittee back in 2007?

Response: My recollection is that Executive Order 13422 received numerous public expressions of support. For example, on July 12, 2007 sixty-five separate organizations sent a letter to Congress in support of Executive Order 13422 (attached). By their very nature, any executive order can be changed by the President. However, as I indicated in my oral testimony in 2011, I think it would be a good idea for Congress to consider legislation to codify certain aspects of several executive orders relating to regulatory review, including 12866 and 13422, among others.

8. President Bush's Executive Order 13422 was aptly described by many in the administrative law community, such as Public Citizen, as a clandestine "power grab." Even the nonpartisan Congressional Research Service said it represented "a clear expansion of presidential authority over rulemaking authorities." I note you were General Counsel and Senior Policy Advisor at OMB during the time this Executive Order was issued.

   What role did you play in the drafting of this Order?

Response: Under Executive Order 11030, which has been in effect since 1962, OMB is responsible for the process of coordinating executive orders for the President. I was an active participant in that process with regard to Executive Order 13422, and with authorization spoke publicly about Executive Order 13422, as was noted in the CRS Report you reference at p. 13. Another example of my public comments can be found at: http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aCxGYwUgJKrg&refer=columnist_skrzycki. I did not then nor now agree with the comment from the lobbying group referenced in your question.

9. You note that President Obama "summarily revoked" Executive Order 13422 and that this "was not helpful to good governance"

> Yet, when President Bush issued Executive Oder (sic) 13422 without any prior announcement or public involvement, was this helpful to good governance?

Response: Revocation of Executive Order 13422 was not helpful to good governance because it eliminated beneficial provisions that had improved the regulatory process (such as review of guidance documents) and provided greater transparency (such as annual disclosure of aggregate costs and benefits, and public identification of agency regulatory policy officers). One indication that the 2009 revocation was harmful is that shortly after the executive order was revoked, then-OMB Director Orzag issued a memorandum to agencies again directing them to submit guidance documents to OMB for review. OIRA Administrator Sunstein recently confirmed publicly that such reviews continue to take place. Hence, it should be clear that Executive Order 13422 was a good government measure.

10. A number of amendments were made to H.R. 1, Full-Year Continuing Appropriations Act, 2011 that impact on the rulemaking and regulatory processes of various federal agencies. Please provide your perspective with respect to each of the following amendments:

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- Amendment No. 495, introduced by Representative Ralph Hall (R-TX), which prohibits the use of funds to implement, establish, or create a NOAA Climate Service as described in the "Draft NOAA Climate Service Strategic Vision and Framework" published at 75 Feb. Reg. 57739.

- Amendment No. 498, introduced by Representative Bill Johnson (R-OH), which prohibits the use of funds to develop, carry out, implement, or otherwise enforce rules

published by the Office of Surface Mining Reclamation and Enforcement of the Department of the Interior concerning stream water quality protection.

- Amendment No. 563, introduced by Kristi Noem (R-SD), which prohibits the use of funds to modify the national primary ambient air quality standard or the national secondary ambient air quality standard applicable to coarse particulate matter under the Clean Air Act.

- Amendment No. 79, introduced by Representative Cory Gardner (R-CO), which prohibits the use of funds to pay the salary of any officer or employee of the Department of Health and Human Services who develops or promulgates regulations or guidance with regard to health insurance exchanges under subtitle D of title I of the Patient Protection and Affordable Care Act.

- Amendment No. 267, introduced by Representative Steve King (R-IA), which prohibits the use of funds to carry out the provisions of the Patient Protection and Affordable Care Act, the Health Care and Education Reconciliation Act of 2010, or any amendment made by either law.

- Amendment No. 268, introduced by Representative Steve King (R-IA), which prohibits the use of funds to pay the salary of any officer or employee of any Federal department or agency with respect to implementing the provisions of the Patient Protection and Affordable Care Act, the Health Care and Education Reconciliation Act of 2010, or any amendment made by either law.

- Amendment No. 430, introduced by Representative Joseph Pitts (R-PA), which prohibits the use of funds to pay the salary of any officer or employee of the Departments of Health and Human Services, Labor, or the Treasury who takes any action to specify or define, through regulations, guidelines, or otherwise, essential benefits under section 1302 of the Patient Protection and Affordable Care Act/

- Amendment No. 575, introduced by Representative Denny Rehberg (R-MT), which prohibits the use of funds to pay any employee, officer, contractor, or grantee of any department or agency to implement the provisions of the Patient Protection and Affordable Care Act or title I or subtitle B of title II of the Health Care and Education Reconciliation Act of 2010.

Response: My perspective is the one I discussed at the Subcommittee's hearing, taking into account that the Obama Administration issued 3,573 final rules during 2010, compared to 217 laws actually enacted by Congress in 2010. First, regulations have the force and effect of law, so in a democracy, it is to be expected that the People's representatives will seek to change laws that they consider unwise, unfair, and/or harmful to the citizens whom Congress represents. That is true whether one agrees or disagrees with any particular regulation. Second, several of the amendments relate to last year's health care legislation that was passed using the budgetary reconciliation process. (P.L. 111-152 and P.L. 111-148) Because of the controversial nature of that legislation, it is unsurprising that a new Congress in 2011 would seek to address particular issues

associated with that law in this manner. From the standpoint of improving the Administrative Procedure Act, however, those amendments to H.R. 1 do not necessarily tell us much. Third, by contrast to the health care amendments to H.R.1, several of the other amendments relate to regulations issued by EPA, DOI, or other agencies. Such agency regulations are issued pursuant to authority delegated by Congress. That a majority of the members of the House of Representatives are significantly troubled by the items listed in your question is itself some evidence that regulatory reforms might be beneficial, as one would hope that a well-functioning system of administrative agencies would not generate so much dissatisfaction. Improvements to the regulatory system ought to be considered as one way to produce better outcomes and less negative public concern about federal agency actions.

July 12, 2007

The Honorable Robert C. Byrd
Chairman, Committee on Appropriations
United States Senate
Washington, DC 20510

The Honorable Thad Cochran
Ranking Member, Committee on Appropriations
United States Senate
Washington, DC 20510

Dear Chairman Byrd and Ranking Member Cochran:

The undersigned organizations strongly urge you to oppose including any language to the "Financial Services and General Government Appropriations Act, 2008," that would bar funding for President Bush's Executive Order 13422.

President Bush signed Executive Order 13422 on January 18, 2007, in an effort to increase the quality, accountability, and transparency of the federal government. Specifically, Executive Order 13422 expanded the scope of Executive Order 12866—the regulatory planning and review order issued by President Clinton—to subject not just agency rules to OMB review, but also, for the first time, significant guidance documents.

Executive Order 13422 essentially closed a legal loophole that had allowed federal agencies to circumvent regulatory review and planning requirements by issuing guidance documents with binding language in lieu of a proposed rule requiring public notice and comment. By statute and court opinion, guidance documents have no legally-binding effect; they are merely an agency's interpretation of how the public can comply with a particular rule or regulation. Yet federal agencies routinely issue guidance documents in a manner that is legally binding since it is far easier than undergoing the analytical rigors of a rulemaking. Executive Order 13422 corrects this abuse by federal agencies by ensuring that such significant guidance documents are subjected to public notice and comment.

In addition, Executive Order 13422 requires that an agency: (1) state why a rule is needed, (2) give an accurate accounting of costs and benefits of an individual rule and the aggregate costs and benefits of all rules issued by the agency that year, and (3) create a Regulatory Policy Officer within each agency to ensure that the executive order is implemented by the agency. Far from being "radical," these requirements are merely an attempt to instill principles of accountability and transparency into the regulatory process.

The House passed its version of the legislation, H.R. 2829, with an amendment by Rep. Brad Miller barring funding for Executive Order 13422 that would ensure that this order on good government is no longer implemented.

The undersigned organizations urge you to oppose any such language to the Senate bill, which would only serve to undermine serious efforts to improve our regulatory process.

AEROSPACE INDUSTRIES ASSOCIATION
AMERICAN ARCHITECTURAL MANUFACTURERS ASSOCIATION
AMERICAN BAKERS ASSOCIATION
AMERICAN CHEMISTRY COUNCIL
AMERICAN COMPOSITES MANUFACTURERS ASSOCIATION
AMERICAN COUNCIL ON EDUCATION
AMERICAN FARM BUREAU FEDERATION
AMERICAN FOREST AND PAPER ASSOCIATION
AMERICAN FOUNDRY SOCIETY
AMERICAN GAS ASSOCIATION
ASSOCIATION OF EQUIPMENT MANUFACTURERS
ASSOCIATED GENERAL CONTRACTORS OF AMERICA
A & D POLICY ANALYSIS
BUSINESS ROUNDTABLE
CHEMICAL PRODUCERS AND DISTRIBUTORS ASSOCIATION
COUNCIL FOR CITIZENS AGAINST GOVERNMENT WASTE
EDISON ELECTRIC INSTITUTE
FIRE AND EMERGENCY MANUFACTURERS AND SERVICES ASSOCIATION
FOOD MARKETING INSTITUTE
FOOD PROCESSING SUPPLIERS ASSOCIATION
GROCERY MANUFACTURERS/FOOD PRODUCTS ASSOCATION
INDEPENDENT LUBRICANT MANUFACTURERS
INDUSTRIAL MINERALS ASSOCIATION – NORTH AMERICA
INTERLOCKING CONCRETE PAVEMENT INSTITUTE
INTERNATIONAL DAIRY FOODS ASSOCIATION
INTERNATIONAL HOUSEWARES ASSOCIATION
INTERNATIONAL SIGN ASSOCIATION
INTERNATIONAL SLEEP PRODUCTS ASSOCIATION
IPC – THE ASSOCIATION CONNECTING ELECTRONICS INDUSTRIES
KITCHEN CABINET MANUFACTURERS ASSOCIATION
METALS SERVICE CENTER INSTITUTE
NATIONAL ASSOCIATION OF HOME BUILDERS
NATIONAL ASSOCIATION OF MANUFACTURERS
NATIONAL ASSOCIATION OF WHEAT GROWERS
NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS
NATIONAL CATTLEMEN'S BEEF ASSOCIATION
NATIONAL FEDERATION OF INDEPEPNDENT BUSINESSES
NATIONAL GLASS ASSOCIATION
NATIONAL MILK PRODUCERS FEDERATION
NATIONAL MINING ASSOCIATION
NATIONAL OILSEED PROCESSORS ASSOCIATION

NATIONAL PAINT AND COATINGS ASSOCIATION
NATIONAL PORK PRODUCERS COUNCIL
NATIONAL RESTAURANT ASSOCIATION
NATIONAL SHOOTING SPORTS FOUNDATION
NATIONAL WOODEN PALLET AND CONTAINER ASSOCIATION
NON FERROUS FOUNDERS' SOCIETY
NPES – THE ASSOCIATION FOR SUPPLIERS OF PRINTING, PUBLISHING AND CONVERTING TECHNOLOGIES
OUTDOOR POWER EQUIPMENT INSTITUTE
PORTLAND CEMENT ASSOCIATION
PRESSURE SENSITIVE TAPE COUNCIL
SALT INSTITUTE
SMALL BUSINESS & ENTREPRENEURSHIP COUNCIL
SOCIETY OF THE PLASTICS INDUSTRIES
SPECIALTY EQUIPMENT MARKET ASSOCIATION
SPORTING ARMS AND AMMUNITION MANUFACTURERS INSTITUTE, INC.
SYNTHETIC ORGANIC CHEMICAL MANUFACTURERS ASSOCIATION
TEXTILE RENTAL SERVICES ASSOCIATION
THE CARPET AND RUG INSTITUTE
THE REAL ESTATE ROUNDTABLE
THE REFRACTORIES INSTITUTE
U.S. CHAMBER OF COMMERCE
WASTE EQUIPMENT TECHNOLOGY ASSOCIATION
WOOD MILLING AND MILLWORK PRODUCERS ASSOCIATION

Cc: Members of the Senate Committee on Appropriations

Post-Hearing Questions and Responses from Peter L. Strauss,
Betts Professor of Law, Columbia Law School

Questions for Peter Strauss

1. **What would be result if agencies were required to engage in more – as opposed to less – formal rulemaking?**

   The past experiences I know about with formal rulemaking procedures has been that they extend rulemakings considerably. Conferring cross-examination rights on what may prove to be a considerable number of participants combines with the natural conservatism of a presiding officer not wishing to be reversed miles down the road on procedural grounds to facilitate the delay of rulemakings by those of a mind to do so.

2. **Ms. Dudley claims that formal rulemaking would be "especially useful to ensure scientific integrity, and to address concerns that agencies sometimes do not take public comment seriously."**

   What is your response?

   I certainly agree that scientific integrity is important, as also serious attention to public commentary. When scientists seek to assure integrity, however, they do not employ cross-examination – rather, complete exposure of their data and reasoning to permit others to assess it. And in any important rulemaking, taking public commentary seriously is assured by the threat of reversal if it appears this has not occurred. I know of nothing to suggest either that science had greater integrity, or public comments were taken more seriously, in formal rulemakings than in ordinary rulemakings under the current, proper expectations that both sharing of data and attention to important comments will be enforced on judicial review.

3. **What is your view of the suggestion that courts be required under the APA to apply the substantial evidence standard when reviewing all agency rulemaking, including informal rulemaking?**

   The "substantial evidence" test is commonly taken to express a congressional judgment favoring review somewhat more intense than would be expected under "arbitrary, capricious" review standards. In fact the intensity of the latter varies quite widely, and some judges have expressed great difficulty in telling the two nominally different standards apart. The bulk of rulemakings – 90% at least of those issued annually by federal agencies – do not warrant a "hard look" approach when they are reviewed (as I believe to be infrequent.) I would agree, however, with the suggestion that *for rules meeting the EO 12866 test of significance* a more intense approach to review would be warranted.

4. **What is your view of the suggestion that the APA provide for judicial review of data and analysis that agencies rely on in rulemakings?**

I am uncertain what is being asked here. Section 706 of the APA already does provide for judicial review of the data and analysis that agencies rely on in rulemaking. As in my answer to the previous question, I think it would be appropriate for Congress to signal that this review should be somewhat more intense for rules that are "significant." And, as I testified, in my judgment it would also be appropriate to amend the notice requirements of APA Section 553 to make clear that adequate notice requires providing the public access to data and analyses that an agency anticipates will underlie a proposed rulemaking. If the thought, however, is to transfer any fact-finding, decisional responsibility (as opposed to the current oversight responsibility) to the courts, I would strenuously oppose that.

5. **Ms. Dudley suggests that formal rulemakings can be completed expeditiously. Is that your understanding?**

No it is not. To repeat my answer to your first question, the past experiences I know about with formal rulemaking procedures has been that they extend rulemakings considerably. Conferring cross-examination rights on what may prove to be a considerable number of participants combines with the natural conservatism of a presiding officer not wishing to be reversed miles down the road on procedural grounds to facilitate the delay of rulemakings by those of a mind to do so.

After hearing this testimony, I asked a friend knowledgeable about OSHA rulemakings (the context in which this expeditious treat was said to have occurred) if he was aware of this. He said he was not, and shared my skepticism. Creating levers for participant control is inevitably creating an instrument for delay.

6. **Ms. Dudley and Mr. Rosen note approvingly that one Senator has proposed legislation to establish a "regulatory pay-go" scheme that would require federal agencies to identify and eliminate one existing regulation for each new regulation they want to add. What is your view of this idea?**

I know of no basis for concluding that each agency currently has the right number of regulations, with enough that are no longer need that this could be done. If the Nuclear Regulatory Commission were required to subtract one regulation for each new one it adopted, I doubt the public would be happy with the results. A more sensible approach, repeatedly required by Republican and Democrat Presidents alike, has been to encourage regulatory review, and the continuous weeding out of superannuated rules. Here, the issue has been assuring that agencies have the resources they require to accomplish this as well as deal with the new problems that require their attention.

7. **Ms. Dudley and Mr. Rosen also suggest the creation of a "regulatory budget" that would cap the economic cost that an agency or the Executive Branch as a whole could impose during any one time period. What is your view of this idea?**

Such evaluations are so imprecise, and so likely to be distorted by what has been, historically, industry's consistent over-estimation of cost figures – underestimating, for example, what innovations may accomplish – that I think them more likely to produce wasteful squabbling than real savings. OIRA already plays a policing role in this respect; I would have no objection to – could see some advantage to – the creation of a non-executive branch entity, perhaps based in Congress, to receive the analyses it does and be in a position, on occasion, to play the honest broker respecting them.

8. **Ms Dudley suggests that a non-executive branch entity, perhaps based in Congress, be created to review regulations. What is your view of this idea?**

It would important that such an organization be assuredly bi-partisan, like CRS, GAO, or CBO. With that assurance, in my judgment there could be much to gain from a body that might find indications of the need for legislation or produce reports that could be helpful in oversight processes. I should think GAO and CRS already capable of performing these functions to some degree.

9. **Mr. Rosen emphasizes the point that Congress has never materially amended the APA in the 65 years that it has been in effect. Does this necessarily mean that the APA needs to be significantly changed?**

The statement is true only on a narrow view of what amendment means. The Freedom of Information Act, Government in the Sunshine Act, Privacy Act, Negotiated Rulemaking Act and Alternate Means of Disputes Resolution in the Administrative Process legislation are all codified within the APA; Sections 557 (ex parte) and 702 (sovereign immunity) and the provisions concerning trial examiners, now administrative law judges, have also been amended. Section 553 has not been amended, and – as I testified – I do believe it would be helpful to amend that section in ways that would ratify incremental changes that have been occurring through executive and judicial action. Required exposure of scientific data in connection with a notice of proposed rulemaking, required publication of a proposed draft of the rule under consideration, and deletion of the words "concise, general" from Section 553(c) – words that considerably understate today's effective requirements for explanation – would, in my judgment, all be useful steps.

10. **What is your view of the suggestion that Congress expand regulatory analysis requirements, including re-examinations of existing rules?**

I prefer the verbs "rationalize and codify" to "expand." The scattered and fragmentary analysis requirements to be found in statutes and executive orders –

> not just economic analysis but also NEPA, UMRA, RegFlex, Federalism, Family impact ... – warrant unification and some pruning. One wishes to promote a rational process, one whose requirements are taken seriously and serve the end of more knowledgeable, effective and efficient regulation, but not at the cost of inducing pro forma compliance, stagnation or paralysis.

11. Would the Administrative Conference of the United States be the best forum for considering changes to the APA?

It would certainly be an excellent one – but, as in all things, we must be willing to invest the resources that would be necessary to do the research and other work required.

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