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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**

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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,

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.

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. 12866²⁴—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

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 as 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

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

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.

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 Institutionalize 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

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. Congress should consider making cost-benefit analysis a permanent part of administrative law: 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. 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: 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,

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 its 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 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 executive 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.

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.