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before the

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on

“Formal Rulemaking and Judicial Review: Protecting Jobs and the
Economy with Greater Regulatory Transparency and
Accountability”

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Chairman Coble, Ranking Member Cohen, and Members of the Subcommittee, thank you for inviting me to testify on the appropriate role of formal rulemaking procedures and judicial review in the federal regulatory system. These topics may seem obscure and technical, but as the Members of this Subcommittee are well aware, the choices that our government makes about the administrative process have enormous consequences for the welfare of the American people.

Attention to questions of administrative procedure has increased over the last few years. This attention is largely due to profound disagreements among our citizens, and among our elected representatives, about federal regulatory policy. President Obama's regulatory philosophy and strategy differ from those of President Bush, and these differences are manifest in the current administration's exercise of its rulemaking authority under statutes like the Clean Air Act and the Occupational Safety and Health Act. Moreover, recent legislation – most notably the Dodd-Frank Wall Street Reform and Consumer Protection Act and the Patient Protection and Affordable Care Act – authorize federal agencies to promulgate important new regulations. Many citizens support these regulatory initiatives. Others do not. These disagreements over regulatory policy are likely to be the focus of sustained political debate for some time to come, as they should be in a healthy democracy. These differences in perspective have also led to more intense scrutiny into the *process* by which federal agencies make regulations.

While this increased attention to process is welcome, we must be careful to distinguish our views of desirable regulatory *policy* from our assessment of desirable regulatory *process*. In the current climate, those who oppose the substance of the Obama Administration's initiatives in areas like health care, financial regulation, and environmental protection may be inclined to advocate more demanding procedural restrictions and judicial oversight of agency action, while those who favor the President's initiatives might tend to take the opposite position. But when thinking about the design of regulatory institutions, it is

important to take the long view. The same procedural safeguards that slow down the adoption of rules that impose new regulatory requirements also slow down the adoption of rules that relax regulatory requirements or that replace command-and-control regulations with market-based regimes. The same judicial review provisions that empower federal judges to strike down regulations that, in the judges' view, are not supported by sound science also empower judges to strike down rules that ease economic burdens on industry, or even to compel agencies to impose new regulations, if the judges conclude that the failure to regulate is irrational.

Indeed, it is helpful to recall that thirty years ago, President Reagan, like President Obama, initiated an array of notice-and-comment rulemaking proceedings in order to align federal agency policy with the President's regulatory philosophy. Many of these rulemakings were challenged in court by progressives who argued that they were procedurally invalid, substantively irrational, or both. Then, as now, Congress, the courts, and the American people confronted difficult choices about the about the appropriate procedural requirements for agency rulemaking and the appropriate role of judicial oversight. President Reagan and President Obama may have different regulatory approaches, but the basic questions about administrative procedure and the standard of judicial review are essentially the same. When we debate these questions, then, we should be sure that the positions we take do not depend on who is in the White House at the moment. We should be willing to advocate the same institutional rules today that we would have advocated in 1980, and vice versa.

I gather that the Subcommittee is interested in whether the prevailing law on rulemaking procedure and judicial review, particularly the default rules laid out in the Administrative Procedure Act (APA), are sufficiently stringent, or whether they are instead too lax. More specifically, my understanding is that the Subcommittee is interested in exploring (1) whether it would be wise to require that some or all federal agencies use *formal rulemaking*, as opposed to informal ("notice-and-comment") rulemaking; and (2) whether it would be wise to instruct the

federal courts to review agency regulations more rigorously. Would such reforms, as the title of this hearing suggests, better protect jobs (and other aspects of the welfare of the American people) and better promote transparency and accountability?

While these are hard questions, I believe that the answer to the first question is clearly no: the additional benefits of requiring formal rulemaking rather than notice-and-comment rulemaking are minimal, and the costs are likely high – even for someone who is skeptical of the value of many of the specific rules currently under consideration in the Obama Administration.

On the second question, my answer is more tentative. Judicial review of agency regulations, as currently practiced, is far from perfect. It is not as consistent or predictable as it ought to be, and there is disturbing evidence that judges’ personal policy preferences play a greater role than they should when judges review agency regulations. That said, while improvements are certainly possible, courts for the most part have struck a reasonable balance between conflicting goals, and any move toward requiring more demanding judicial review should at least take into account a number of possible drawbacks.

The balance of my written statement will flesh out these points. I will first address the question whether Congress should require greater use of formal rulemaking. I will then turn to the question whether Congress should mandate a more stringent, less deferential standard of judicial review.

I. SHOULD CONGRESS REQUIRE GREATER USE OF FORMAL RULEMAKING?

The great challenge of administrative law is to design institutions that will allow the American people to reap the advantages of delegation to administrative agencies – advantages that include greater expertise, more flexibility, and a healthy insulation from day-to-day political horse-trading – while avoiding or limiting the risks of arbitrary, ill-considered, unaccountable

bureaucratic policymaking.¹ Our system relies heavily on carefully-designed administrative procedures to try to achieve these goals.² But correctly calibrating the degree of procedural formality is quite difficult. If the procedural safeguards governing agency decisions are too weak, agencies may fail to give due consideration to the interests of all the parties who might be affected by agency action, and may be tempted to disregard or downplay inconvenient evidence or arguments that cut against the agencies' preferred policies. On the other hand, if procedural requirements are too demanding, agencies may find themselves unable to take effective action to fulfill their responsibilities, or may be tempted to circumvent the required procedures altogether.

For agency rulemaking, the APA lays out two basic sets of procedural requirements. So-called "informal rulemaking," also known as "notice-and-comment rulemaking," is governed by § 553 of the APA, which requires that agencies publish advance notice of any proposed rule, give all interested parties an opportunity to submit written comments, and include with every final rule a statement explaining the rule's basis and purpose.³ So-called "formal rulemaking," governed by §§ 556 and 557 of the APA, requires extensive hearings, usually including oral testimony and cross-examination, as well as a formal record that forms the exclusive basis for final agency decisions.⁴ An agency rulemaking must be formal if, but only if, the statute authorizing the rulemaking specifically requires that the rule be made "on the record after opportunity for an agency hearing."⁵ The Supreme Court has interpreted that requirement stringently: a mere statutory requirement that an agency rule be made "after a

¹ See JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 379-84 (Foundation Press 2010). Because my book with Professor Manning covers many of the topics relevant to this statement, including citations to relevant case law and scholarly literature, for convenience I will refer to the relevant sections of the book throughout these footnotes. The cited pages of the book contain additional references, which for brevity's sake I will not cite separately in the footnotes in this statement.

² *Id.* at 580.

³ 5 U.S.C. § 553.

⁴ 5 U.S.C. §§ 556-557.

⁵ 5 U.S.C. § 553(c).

hearing” is not enough to trigger formal rulemaking under the APA. Because very few statutes use the precise “on the record after opportunity for an agency hearing” language, most agency rulemakings are informal rather than formal.⁶

Congress could require that agencies use formal rather than informal rulemaking either by amending individual statutes to include the necessary triggering language, or by amending the APA itself. But doing either would probably be unwise, for three reasons. First, the nominally “informal” notice-and-comment rulemaking process already imposes substantial procedural safeguards on agency rulemaking. Second, the formal rulemaking process, with its emphasis on adversarial proceedings, oral presentations, and cross-examination, is not especially well-suited to broad policy decisions of the sort contemplated in most major rulemakings. Third, the costs and delays associated with formal rulemaking would have an array of undesirable consequences.

A. Agency Rulemaking Is Already Subject to Extensive Procedural Requirements

On learning that most federal agencies enact major regulations through an “informal” process that requires only “notice and opportunity for comment,” many lay people might naturally doubt the adequacy of the procedural safeguards. Shouldn’t regulations that will affect the welfare of millions of citizens go through a more rigorous vetting process? It turns out, however, that the term “informal rulemaking” is misleading. Nominally “informal” notice-and-comment rulemaking is in fact heavily proceduralized, to the point where many commentators describe this process as a kind of “paper hearing.”⁷ Agencies must provide a fairly detailed and specific proposal, or set of alternatives, in their initial published notice of proposed rulemaking.⁸ This notice must also disclose the scientific or evidentiary basis of the proposal, so that

⁶ See MANNING & STEPHENSON, *supra* note 1, at 597-98.

⁷ See *id.* at 624-25.

⁸ See *id.* at 635-36.

the agency's evidence can be subjected to critical scrutiny.⁹ Any interested party (indeed, any member of the public) may submit written comments on the agency's proposal. These submissions may criticize the agency's analysis and evidence, and may also suggest alternatives. Under Executive Order 12866, executive branch agencies must also submit proposed rules, along with a detailed cost-benefit analysis, to the Office of Management and Budget for review.¹⁰ If the agency decides to promulgate a final rule, it must provide a detailed written explanation that includes responses to all material comments submitted by interested parties.¹¹ If an agency fails to respond adequately to criticisms or proposed alternatives submitted by commenters, the agency risks judicial reversal. This creates powerful incentives for agencies to take comments seriously and to provide detailed responses.¹² Furthermore, if the agency decides to change its policy substantially in response to comments, it may have to initiate a new round of notice-and-comment so that all parties have a fair opportunity to critique the new proposal.¹³

While the notice-and-comment process is hardly perfect, few would argue that it fails to provide sufficient transparency or sufficient opportunities for affected parties to compel agencies to address their concerns. Indeed, the more common criticism of notice-and-comment rulemaking is that it is *too demanding* of agencies (although there is some controversy over this point).¹⁴ Given that the notice-and-comment rulemaking process already provides for extensive public participation and agency engagement with all serious concerns or objections, the only thing the formal rulemaking process is likely to add is red tape.

⁹ *See id.* at 614-17.

¹⁰ *See id.* at 550-71.

¹¹ *See id.* at 621-24.

¹² *See id.*

¹³ *See id.* at 626-35.

¹⁴ *See id.* at 624-26.

B. Formal Rulemaking Procedures Are Not Well-Suited to Effective Regulatory Decisionmaking

The hearing requirements laid out in § 556 and 557 of the APA seem designed for individualized determinations, which turn on case-specific facts and benefit from adversarial contestation. They are not terribly well-suited to general policy decisions that require balancing the interests of a large number of potentially interested parties. Therefore, while some individualized determinations may count as “rules” under the APA’s technical definition,¹⁵ most agency rulemakings are would benefit more from the quasi-legislative procedures of notice-and-comment rulemaking than from the quasi-judicial procedures of formal rulemaking.

In his testimony at a related hearing before this Subcommittee in February 2011, Mr. Jeffrey Rosen asserted that “[t]here is no better tool than cross-examination [of the sort generally available in formal rulemaking] to expose unsupportable factual assertions and [to] assur[e] the public that only the best science underlies agency action.”¹⁶ With all due respect to Mr. Rosen’s depth of experience as a litigator and the insightful points he made throughout his testimony, his statement about the purported benefits of face-to-face cross-examination is *itself* an unsupported factual assertion. To my knowledge, there is no systematic evidence demonstrating that adversarial oral cross-examination is the most effective tool for making sound scientific or policy judgments on general issues of the sort addressed in most rulemakings. Indeed, the usual justifications for oral cross-examination, such as the need to assess the demeanor of witnesses, are generally inapposite in the rulemaking context. As Judge Richard Posner explained (albeit in a different context), “[T]rials are to determine adjudicative facts rather than legislative facts. The distinction is between facts germane to the specific

¹⁵ 5 U.S.C. §551(4).

¹⁶ Prepared Statement of Jeffrey A. Rosen, 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, Feb. 21, 2011, p. 12.

dispute, which often are best developed through testimony and cross-examination, and facts relevant to shaping a general rule, which ... more often are facts reported in books and other documents not prepared specially for litigation or refined in its fires.”¹⁷

In one of the few close examinations of the use of oral cross-examination in agency rulemaking, Judge (then Professor) Stephen Williams found that cross-examination had little positive effect. In those cases where such cross-examination had been required, Judge Williams concluded that it was “doubtful that the use of cross-examination was necessary to clarify ... the critical issues” and, moreover, that even when cross-examination did effectively undermine certain arguments in favor of a rule, that did not matter much because the “enormous quantities of additional data” in the record meant that cross-examination “proved to be of little importance.”¹⁸ Judge Williams further pointed out that requiring cross-examination in rulemaking proceedings “may actually tend to frustrate its own supposed goal: elucidation of the issues. Cross-examination virtually assures that high-level agency decision makers will not participate, for they do not have enough time for that sort of enterprise.”¹⁹ By contrast, as Judge Williams noted, in major informal rulemaking proceedings, typically the agency head or his highest ranking assistants participate directly.²⁰

Cross-examination, and other trappings associated with the formal hearing process, may appeal to lawyers and other skilled oral advocates. Indeed, some scholars have suggested that the provisions for formal procedures in the original APA may have more to do with lawyers’ preferences than with anything else. As Yale Law School Professor Alan Schwartz puts it, “lawyers

¹⁷ *Indiana Belt Harbor Railroad Co. v. American Cyanamid Co.*, 916 F.2d 1174 (7th Cir. 1990).

¹⁸ Stephen F. Williams, “*Hybrid Rulemaking*” under the *Administrative Procedure Act: A Legal and Empirical Analysis*, 42 UNIVERSITY OF CHICAGO LAW REVIEW 401, 440 (1975).

¹⁹ *Id.* at 444.

²⁰ *See id.*

[pressing for the APA] preferred generic procedural reform because that introduced a much greater amount of lawyering into the entire federal administrative process than there had been before.... [T]he more procedure there is and the more due process there is, the more money for lawyers there is.”²¹ Yet despite their appeal to lawyers, adversarial oral proceedings are not generally the way that most scientists, or indeed most policymakers, typically try to make sound judgments on the sorts of issues that come up in major rulemakings.²²

C. Requiring Formal Rulemaking Would Have Perverse Effects

While there is little reason to believe that requiring formal procedures would substantially improve the quality of agency decisions, the costs and delays associated with formal rulemaking are well documented. Even a relatively minor amendment to a simple Food and Drug Administration labeling rule (one of the few contexts where, until 1990, formal rulemaking had been required) could take up to a decade, and produce thousands and thousands of pages of official documents, without any apparent positive effect on the quality of the final decision.²³ While not all formal rulemakings take quite this long, the costs and delays involved are typically substantial.²⁴ Such costs and delays would have a number of undesirable consequences:

²¹ Alan Schwartz, *Comment on “The Political Origins of the Administrative Procedure Act,”* by McNollGast, 15 JOURNAL OF LAW, ECONOMICS & ORGANIZATION 218, 220-21 (1999).

²² See Williams, *supra* note 18, at 444-45; Carl F. Cranor, *Science Courts, Evidentiary Procedures and Mixed Science-Policy Decisions*, 4 RISK 113 (1993).

²³ See MANNING & STEPHENSON, *supra* note 1, at 597-98.

²⁴ See Robert W. Hamilton, *Rulemaking on the Record by the Food and Drug Administration*, 50 TEXAS LAW REVIEW 1132 (1975); Richard A. Merrill & Earl M. Collier, Jr., *“Like Mother Used To Make”*: An Analysis of FDA Food Standards of Identity, 74 COLUMBIA LAW REVIEW 561, 608-09 (1974).

1. Requiring Formal Rulemaking Would Impede Desirable Rule Changes

Delaying agency action by years or decades, or perhaps even deterring agencies from acting at all, might seem like a good idea to someone whose regulatory philosophy differs from that of the incumbent administration, or who is skeptical of the value of federal regulation generally. But such a view would be shortsighted, because slowing down the rulemaking process does not necessarily privilege *non-regulation*, but rather privileges the *status quo*. The same procedural requirements that make it difficult or impossible to promulgate rules that impose new mandates on the private sector also make it difficult or impossible to promulgate rules that lift such mandates, or that replace command-and-control regulatory systems with market-based systems, or that streamline existing regulatory programs so that they are more efficient and predictable for affected parties.

The over-proceduralization associated with formal rulemaking also makes it more difficult for agencies to update their rules in response to new information or changed circumstances. Often agencies are required by statute to promulgate a rule to deal with some problem. If formal rulemaking were required, presumably the agency would have no choice but to use it when enacting its initial rule. This first attempt at regulation may often turn out to have been misguided, but cumbersome formal rulemaking requirements might nonetheless deter an agency from updating or abandoning a rule that turned out not to be working as intended – even in circumstances where Democrats and Republicans could agree that change was needed. Here is it worth keeping in mind that despite controversies over the Obama Administration’s regulatory initiatives in certain high-profile areas, the administration has also undertaken a range of rulemaking efforts to scale back unnecessary or overly burdensome regulations.²⁵ Indeed, one aspect of President Obama’s recent executive order on regulatory review that ought to command broad bipartisan

²⁵ See Cass R. Sunstein, *21st Century Regulation: An Update on the President’s Reforms*, WALL STREET JOURNAL, May 26, 2011.

support is his directive that agencies conduct retrospective analyses of their existing regulations, to see if experience with these regulations reveals that their benefits indeed justify their costs.²⁶ If formal rulemaking were required for any regulatory change, then agencies would be much less likely to alter their regulations in response to such retrospective analyses, essentially freezing the regulatory status quo in place.

Of course, if one opposes a particular regulation, or set of regulations, it might be tempting to require formal rulemaking only for *those* regulations, but not for others. Doing so would have the practical effect of delaying or blocking the targeted regulations, but would do so indirectly, and in such a way that those responsible could avoid accountability. We can and should have a vigorous debate over regulatory policy, but – as the title of this hearing implies – it is important to have this debate in a manner that promotes transparency and accountability. Those interests are ill-served when we disguise substantive decisions as procedural decisions.

2. Requiring Rulemakings To Be Formal May Lead to Other, Less Desirable Forms of Agency Regulation

While statutes sometimes require agencies to make rules, oftentimes statutes will give agencies the option either of making rules or of making policy in a piecemeal fashion through individualized, ad hoc adjudications.²⁷ Indeed, some agencies, such as the National Labor Relations Board, proceed almost exclusively through administrative adjudication rather than rulemaking.²⁸ Other agencies, like the Federal Communications Commission and the Securities and Exchange Commission, use a mix of rulemaking and adjudication.²⁹

²⁶ See Executive Order 13563, “Improving Regulation and Regulatory Review,” Sec. 6 (Jan. 18, 2011).

²⁷ See MANNING & STEPHENSON, *supra* note 1, at 643, 656-61.

²⁸ See *id.* at 661.

²⁹ See *id.*

If Congress were to require that agencies use formal rulemaking procedures rather than notice-and-comment procedures, a likely consequence is that agencies would rely more on case-by-case adjudication. This would not, however, mean that agencies were not making general policy. Under governing Supreme Court doctrine, agencies are generally permitted to make broad policy pronouncements in the context of individualized orders, much as common law courts announce general rules of decision when deciding particular cases.³⁰ While this mode of regulatory policymaking may sometimes be appropriate, it is generally less predictable, and involves less broad-based public participation, than rulemaking.³¹

Furthermore, some agencies do not conduct their own administrative adjudications, but rather bring enforcement actions in federal court against parties that the agency believes to be in violation of the relevant statute or its implementing regulations. Many of these statutes use vague and general language. If the responsible agency does not give this statutory language more precise content through rulemaking, then that task will fall to the court. Thus over-proceduralization of agency rulemaking could result in more *judicial* lawmaking, which might also be a perverse and undesirable result.

3. Inhibiting Agency Rulemaking May Lead to Worse Legislation

Many critics of contemporary American government argue that Congress has delegated too much of its lawmaking authority to federal agencies.³² This concern might lead one to argue for the imposition of much more demanding procedural requirements on agency rulemaking, on the logic that if rulemaking becomes more cumbersome and less efficient, delegation to agencies will become less attractive to Congress. Congress, the argument continues, will therefore be more inclined to make the hard regulatory

³⁰ See *id.* at 643-656, 661, 668-70.

³¹ See *id.* at 659-60.

³² See *id.* at 380-82.

choices itself by enacting more specific and detailed statutes, rather than enacting vague language and delegating the responsibility to working out the details to the agencies.

However, even if we accept the premise that greater proceduralization makes delegation to agencies less attractive, it does not necessarily follow that Congress will respond by writing more detailed statutes. There are at least two other possibilities. First, Congress might respond not by writing more detailed rules into the statute, but rather by writing cruder, blunter rules into the statute.³³ Imagine, for example, that instead of delegating to the new Consumer Financial Protection Bureau (CFPB) the authority to promulgate regulations regarding consumer credit transactions, the Democratic majorities that passed the Dodd-Frank Act had instead enacted specific substantive restrictions on consumer credit transactions. It is not at all clear that current critics of the CFPB would have been happier if Congress had opted for this alternative to delegation, yet that is what might well have happened if progressive advocates of substantive legislation could have argued, persuasively, that the rulemaking process was too cumbersome for delegation to be effective.

Second, if greater proceduralization makes agency rulemaking an unattractive option for Congress, Congress might respond by enacting vague language and leaving its implementation to the federal judiciary.³⁴ In other words, over-proceduralization of agency rulemaking might lead Congress to delegate to courts rather than to agencies. There are already a handful of federal regulatory programs that involve congressional delegation of de facto rulemaking authority to the judiciary rather than to an agency, including important aspects of the antitrust, bankruptcy, and patent laws. While there may be some advantages to judicial

³³ See *id.* at 683; see also Matthew C. Stephenson, *Statutory Interpretation by Agencies*, in DANIEL FARBER & ANNE JOSEPH O'CONNELL EDS., RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 285, 292 (Edward Elgar Publishing 2010).

³⁴ See MANNING & STEPHENSON, *supra* note 1, at 683; Stephenson, *supra* note 33, at 292.

delegation, it is far from clear that critics of delegation to agencies would be happy with more widespread delegation to federal judges.³⁵ Yet that is a likely consequence of procedural reforms that make agency delegation impractical.

4. Cumbersome Formal Rulemaking May Impede Effective Political Oversight

Although Congress often delegates regulatory policy decisions to administrative agencies in order to secure a healthy degree of insulation from the short-term pressures of partisan politics, it is also vitally important that agencies, staffed as they are by unelected bureaucrats, are subject to effective oversight by both Congress and the President. The formal rulemaking process tends to inhibit such oversight, for three reasons. First, the demands of the formal rulemaking process make it difficult for Congress or the President to get an agency to change course in response to the views (or a change in party control) of these elected branches of government. Indeed, in those few regulatory areas where an agency is (or believes itself to be) required to follow formal rulemaking requirements, there are often clashes between frustrated oversight committees, who want the agency to do something quickly about a pressing problem, and equally frustrated agency officials who find themselves hamstrung by the formal rulemaking requirements.³⁶ Second, formal rulemaking gives agencies a convenient way to “run out the clock” when they do not in fact want to do what Congress or the President want them to do. An agency can appear to comply with a congressional request by initiating a formal rulemaking proceeding, but string out the process for years. In the interim, the elected representatives pressing the agency for action might leave office, or change committee assignments, or turn their attention to other matters. Third, greater proceduralization of agency rulemaking tends to shift power within the agencies from the political appointees and senior policy staff to the agency lawyers who know how to navigate the labyrinthine procedures required to get

³⁵ See Stephenson, *supra* note 33, at 292-94.

³⁶ See MANNING & STEPHENSON, *supra* note 1, at 589-90.

anything done, but who might be less responsive to political oversight.³⁷

II. SHOULD CONGRESS REQUIRE MORE STRINGENT JUDICIAL REVIEW OF AGENCY RULES?

In addition their role in enforcing procedural requirements, the federal courts provide an important independent check on agency rulemaking. Under the APA, the federal judiciary must hold unlawful and set aside agency rules that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”³⁸ Thus federal courts are supposed to review agency action for consistency with the statutory mandate that gives the agency the power to regulate, and the courts are also supposed to inquire into the substantive rationality of the agency’s decision.³⁹ But how stringent a standard should the courts apply when performing these tasks?

As was true with procedural choices, setting the right standard of judicial review is something of a balancing act. Too little judicial scrutiny eliminates a potentially important check on administrative arbitrariness or disregard for legal requirements.⁴⁰ Overly demanding judicial review may lead federal judges to overstep the appropriate bounds on their authority, substituting their own policy judgments for the considered views of the agency.⁴¹ The latter possibility is particularly troubling given that federal judges are neither experts in the relevant fields nor politically accountable for their decisions.

The current doctrine on judicial review of agency rulemakings is as follows. First, the reviewing court must decide whether the agency has a valid legal basis for its rule, and this assessment

³⁷ *See id.* at 581.

³⁸ 5 U.S.C. § 706(2)(a).

³⁹ *See* MANNING & STEPHENSON, *supra* note 1, at 717.

⁴⁰ *See id.* at 719.

⁴¹ *See id.*

often involves an evaluation of the agency's interpretation of its authorizing statute. Under the doctrine announced by the Supreme Court in *Chevron, U.S.A. v. Natural Resources Defense Council*,⁴² a reviewing court must strike down agency regulations that are inconsistent with a clear statutory provision, but must uphold agency regulations that are based on a plausible reading of an ambiguous statutory provision (at least if the agency's interpretation is announced in a notice-and-comment rule, or something similarly formal).⁴³ The logic here is that if the statute is ambiguous, then the agency's interpretation is more of a policy decision than a legal decision, and courts should generally be reluctant to substitute their policy judgments for those of the responsible agency officials.⁴⁴ An agency's interpretation of its own regulation receives similarly deferential judicial review.⁴⁵

Second, the reviewing court must decide whether the agency's decision is "arbitrary and capricious." Because courts are reluctant to second-guess agency policy judgments on complex technical issues, courts focus less on the *substance* of the agency's decision than on the agency's *reasoning process*. A reviewing court will ask whether the agency considered all the relevant factors, addressed all important alternatives, and offered an explanation for its decision reasonably connects the final choice made to the available evidence.⁴⁶ This form of review is known as "hard look" review. (For formal agency proceedings, the APA also requires that factual findings be supported by "substantial evidence,"⁴⁷ a standard of review that seems somewhat more stringent, but that in practice is quite similar to hard look review.)

Are these standards of review appropriate? Are they adequate? Should Congress amend the APA to make the default standard of judicial review more stringent? These are difficult questions,

⁴² 467 U.S. 837 (1984).

⁴³ See MANNING & STEPHENSON, *supra* note 1, at 814-24, 935-36.

⁴⁴ See *id.* at 824-25, 828.

⁴⁵ See *id.* at 715-16.

⁴⁶ See *id.* at 756-75.

⁴⁷ See *id.* at 718.

which are impossible to answer conclusively, or even to treat adequately in these brief comments. In contrast to my discussion of the proposal for requiring formal rulemaking procedures, where my views are strongly held and would (I believe) command wide consensus among administrative law scholars across the political spectrum, I am much less certain whether the stringency of judicial review should be ratcheted up or down (or left unchanged). It is fair to say that administrative law scholars advocate a wide range of opinions on this question (though, interestingly and importantly, these differences do not seem to correlate with political ideology). Because my understanding is that the Subcommittee is considering the possibility of imposing a more stringent (that is, less deferential) standard of judicial review, I will limit my remarks here to some questions and concerns about such a move.

First, one effect of imposing more stringent hard look review would be to make it more difficult and costly for agencies to adopt new rules (or to modify or repeal existing rules). There are two reasons for this. The first is that hard look review focuses on the agency's reasoning process, and this leads agencies to try to insulate themselves from judicial reversal by developing more detailed factual records and explanatory statements. While this can be good up to a point,⁴⁸ when judicial review of agency rulemaking becomes too demanding, the effect may be largely the same as imposing on the agency more elaborate and burdensome procedural requirements.⁴⁹ This, in turn, implicates all the concerns about over-proceduralization discussed earlier in my statement. Second, when agencies are uncertain whether or not courts will uphold their proposals, they may be deterred from regulating at all.⁵⁰ Again, this may seem superficially desirable if one dislikes the regulatory agenda of the incumbent administration, but the long-term consequences may be bad for everyone (except lawyers).

⁴⁸ *See id.* at 775-76, 780-81.

⁴⁹ *See id.* at 778.

⁵⁰ *See id.*

A second potentially adverse effect of a more stringent standard of judicial review, especially in complicated technical policy areas, is the possibility of good faith error by judges who lack the expertise, training, and resources to fully understand and evaluate regulatory policy decisions.⁵¹ Again, review of an expert agency decision by an independent generalist judge may have many advantages.⁵² But past a certain point, such review may introduce more errors than it corrects. Even under the current hard look review standard, the case law is replete with examples of judges getting basic statistical, scientific, or economic concepts badly wrong, or misunderstanding important parts of the record, or treating trivial mistakes or omissions as a reason to invalidate a major rule.⁵³ A less deferential standard of review would likely lead to more such errors, and these costs might well outweigh the benefits of preventing agency errors in a handful of close cases.

Third, there is disturbing evidence that judges sometimes let their personal political ideologies influence their review of agency regulations.⁵⁴ This is not to say that judges are acting in bad faith. But they are probably susceptible to the natural human tendency to scrutinize more carefully and skeptically results they disfavor, and to gloss over problems with the evidence or analysis when they like the final result. Of course, even if this is indeed a problem, we might still want a more stringent standard of review. After all, perhaps the problem is not that judges are being too hard on agency regulations that they dislike, but rather that

⁵¹ See *id.* at 776.

⁵² See *id.* at 775-76.

⁵³ See *id.* at 776. See also Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE LAW JOURNAL 1385, 1415-20 (1992); Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEXAS LAW REVIEW 525, 545-48 (1997); Howard Latin, *Good Science, Bad Regulation, and Toxic Risk Assessment*, 5 YALE JOURNAL ON REGULATION 89, 131 (1988); Frank Cross, *Pragmatic Pathologies of Judicial Review of Administrative Rulemaking*, 78 NORTH CAROLINA LAW REVIEW 1013, 1041-43, 1054-55 (2000); Richard Pierce, *Unruly Judicial Review of Rulemaking*, 5 NATURAL RESOURCES & ENVIRONMENT 23 (1990).

⁵⁴ See MANNING & STEPHENSON, *supra* note 1, at 777, 833-34; Stephenson, *supra* note 33, at 307-310.

judges are being too soft on agency regulations that they favor.⁵⁵ Nonetheless, an instruction to judges that they should reverse agency decisions only in extreme cases, where the agency is not just wrong but clearly wrong, is often thought to mitigate the influence of judicial ideology on judicial review of agency action, and some empirical evidence suggests that this is indeed the case.⁵⁶

Fourth, more rigorous judicial review tends to shift power within an agency from the scientific or policy experts to the agency lawyers. The former set of employees may have a better understanding of sound regulatory policy, but the latter are more skilled at drafting “bulletproof” regulations that will survive judicial review, as well as predicting what courts are likely to do. This shift in power might undermine the *actual* rationality of regulation, even as it enhances the *appearance* of rationality to reviewing courts.⁵⁷

Finally, overly aggressive judicial review can have the perverse effect of making agency regulations, and in particular the assumptions and political choices underlying those regulations, *less* transparent to courts, Congress, and the American people. In order to insulate their decisions from judicial second-guessing, agencies will try to make these decisions look as obscure and technical as possible.⁵⁸ Agencies may also simply revert to modes of policymaking, like ad hoc adjudication, that courts are less likely to reverse.⁵⁹

Again, none of this is to say that the form or degree of judicial scrutiny currently applied by the federal courts is the right one. My own view is that the current doctrine probably strikes a reasonable balance between the interest in ensuring meaningful judicial oversight and the interest in preventing judicial

⁵⁵ Cf. MANNING & STEPHENSON, *supra* note 1, at 834.

⁵⁶ See *id.* at 777, 834.

⁵⁷ See *id.* at 777-78.

⁵⁸ See *id.* at 777.

⁵⁹ See *id.* at 776.

overreaching. Of course, I might criticize the approach of some courts, and the results of some cases, as leaning too far in one direction or the other, but I am not aware of any systematic evidence that would justify congressionally-mandated increase in the rigor of the standard of review. More generally, any proposal to take such action should be mindful of the sorts of concerns I raised above.

It is also worth keeping in mind that *judicial* review is not the only option for increased oversight of administrative rulemaking. There is already extensive oversight by the executive branch, both internally within agencies and by the White House. Congressional oversight continues to play a vital role. While lawyers have a natural inclination to focus on courts and litigation, there are a variety of other tools and techniques that Congress or the President might employ if greater agency oversight seems warranted.

Thank you again for the opportunity to share my thoughts on these important issues, and I look forward to answering your questions.