

*Testimony of*  
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*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 65<sup>th</sup> 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*,<sup>1</sup> 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.<sup>2</sup> 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,

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<sup>1</sup> 435 U.S. 519 (1978)

<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup> 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 109<sup>th</sup> 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

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<sup>3</sup> American Radio Relay League v. FCC, 524 F.3d 227, 248 (2008).

<sup>4</sup> 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.<sup>5</sup> 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.”<sup>6</sup> 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*

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<sup>5</sup> *Portland Cement Ass'n v. Ruckleshaus*, 486 F.2d 375, 392-93 (D.C. Cir. 1973).

<sup>6</sup> 524 F.3d at 246.

*Club v. Costle*,<sup>7</sup> that this includes the docketing of “oral communications of central relevance to the rulemaking.” Following an important recommendation of the Administrative Conference,<sup>8</sup> 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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<sup>7</sup> 657 F.2d 298 (1981)

<sup>8</sup> 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”<sup>9</sup> – established his right to extend the Executive Order to the independent regulatory commissions.<sup>10</sup> Those commissions can be nothing else than departments of the executive branch, as the Supreme Court has now clearly held.<sup>11</sup> Presidents have not brought the commissions fully into the tent of the executive orders,<sup>12</sup> 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,<sup>13</sup> 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

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<sup>9</sup> U.S. Const. Art. II, Sec. 2, Para 1.

<sup>10</sup> Peter L. Strauss and Cass Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 *Ad. L. Rev.* 181, 202 (1986).

<sup>11</sup> *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138 (2010).

<sup>12</sup> 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.

<sup>13</sup> 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.”<sup>14</sup> 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.

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<sup>14</sup> E. Donald Elliott, Reinventing Rulemaking, 41 Duke L. J. 1490, 1492-93.