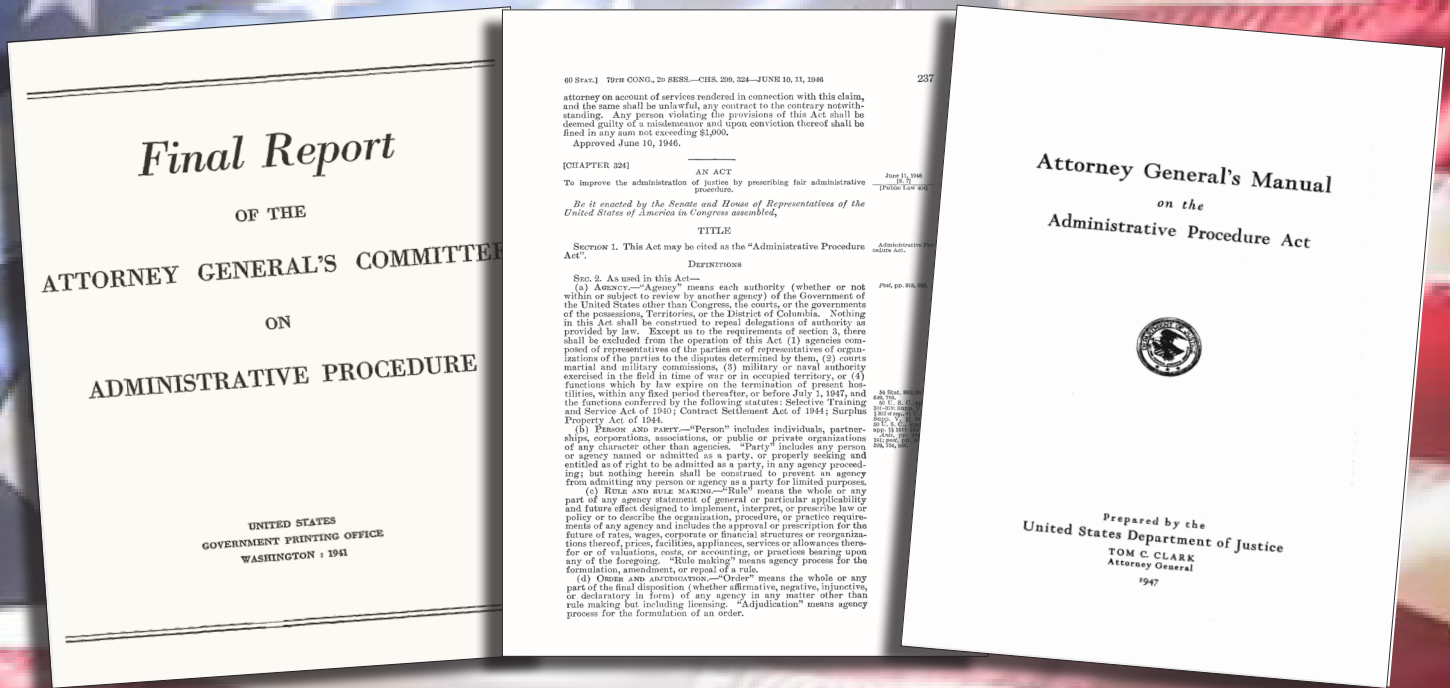




MODERNIZING THE ADMINISTRATIVE PROCEDURE ACT



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* The transcript of the summit was prepared by Heritage Reporting. The transcript has been edited for clarity.

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FOREWORD

BY DEPUTY ATTORNEY GENERAL JEFFREY A. ROSEN

On December 6, 2019, the Department of Justice hosted a summit entitled *Modernizing the Administrative Procedure Act*. The summit brought together leading practitioners, scholars, and policymakers to discuss how the Administrative Procedure Act (APA), originally enacted in 1946 and largely unchanged since then, should be reformed to better serve the modern regulatory state. The Department of Justice is publishing this record of the summit in the hope that the ideas and insights discussed there will encourage and inform much needed action by Congress to update and improve the APA.

This Report draws inspiration from the significant role the Department of Justice played in shaping the original APA. The APA emerged after more than a decade of debate over administrative reform, driven largely by the massive growth of the administrative state during the New Deal. That debate involved fundamental questions of governance: Could an administrative state that gave agencies executive, legislative, and judicial power, and entrusted their personnel with enormous discretion, be reconciled with the separation of powers, due process, and the rule of law? And, if so, how? A then-controversial report from the Special Committee on Administrative Law of American Bar Association, authored by Harvard Law School Dean Roscoe Pound, gives a sense of how participants in the debate viewed its stakes. It warned that underlying the growth of the administrative state is the idea of “administrative absolutism,” in which “a highly centralized administration set up under complete control of the executive” is “relieved of judicial review and make[s] its own rules,” without regard for norms of due process or the rule of law.¹

To influence this debate, then-Attorney General Frank Murphy created the Attorney General’s Committee on Administrative Procedure. The committee surveyed the Roosevelt Administration’s administrative agencies to understand their needs and the realities of administration, and in 1941 Attorney General Robert Jackson published a lengthy report detailing the committee’s findings and recommendations.² Those recommendations, together with additional reform proposals from the committee’s conservative minority, drew from existing practices and helped spawn the legislative bills that eventually became the APA in 1946.³

¹ American Bar Association, Report of the Special Committee on Administrative Law, 63 A.B.A. Ann. Rep. 331, 343, 346–51 (1938).

² Robert H. Jackson, Final Report of the Attorney General’s Committee on Administrative Procedure (1941).

³ See generally Joanna Grisinger, *Law in Action: The Attorney General’s Committee on Administrative Procedure*, 20 J. of Policy Hist. 379 (2008); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw. U. L. Rev. 1557 (1996); James E. Brazier, *An Anti-New Dealer Legacy: The Administrative Procedure Act*, 8 J. Policy History 206 (1996).

This Report aims to play a similar role today by offering an evaluation of how well the basic administrative framework created by the APA serves current needs and a summary of some desirable improvements. Like the recommendations in the 1941 report, the improvements addressed here are heavily informed by, and attempt to build on, existing practices. We hope that just as the 1941 report showed the way to the APA, this Report promotes modernization of the APA after 74 years.

Ever since the APA's enactment, policymakers have recognized that we still need a better regulatory process. The procedures introduced by the APA established rule-of-law principles as a check on administrative power, giving parties some measure of due process when confronted with agency action. Undoubtedly, this was an important achievement. But even shortly after the APA's enactment, the need for further reform was clear. As early as the recommendations of the Second Hoover Commission in 1955, there has been a steady flow of calls for additional regulatory improvements, such as the Ash Council Report of 1971 and the American Bar Association's 1979 report *Federal Regulation: Roads to Reform*. Such calls for reform have recognized that better procedures were needed not only to make regulation more fair, but to address other important values. As President Reagan observed in 1981, in his landmark Executive Order 12,291, the APA left unresolved the need to “reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions, provide for presidential oversight of the regulatory process, minimize duplication and conflict of regulations, and ensure well-reasoned regulations.” Each succeeding administration has likewise recognized that the APA's procedures alone are insufficient to promote efficiency, accountability, transparency, and public participation.⁴

The need to ensure that the regulatory process is consistent with these wider values has only increased as the regulatory state has grown ever larger. The cumulative cost of regulation today is monumental. Studies estimate the aggregate total cost of federal regulations to fall between \$1.75 and \$2 trillion per year—roughly equivalent to what the federal government in 2018 collected in individual and corporate tax receipts combined.⁵ When the Government wants to tax Americans, however, Congress must pass, and the President must sign, a bill enacting the tax into law. The Constitution even specifies that “[a]ll bills for raising revenue shall in originate in the House of Representatives”⁶—the federal body most directly accountable to the electorate. This process ensures accountability when the government directs private resources for public ends. Yet today, an entire regulatory apparatus lays claim to an extraordinary amount of private resources, imposing costs that are as consequential as the costs of taxes for the private parties who must bear them.

⁴ See, e.g., Executive Order 12,866 (Sept. 30, 1993); Executive Order 13,563 (Jan. 18, 2011).

⁵ See Congressional Budget Office, *The Federal Budget in 2018: An Infographic* (June 18, 2019), <https://www.cbo.gov/publication/55342>; CEI: *Federal Regulations Cost \$1.9 Trillion Annually*, <https://mises.org/power-market/cei-federal-regulations-cost-19-trillion-annually>.

⁶ U.S. Const. Art. I, § 7.

In addition to its increasing costs, regulation has also grown in size and importance compared to legislation. At the summit, Professor Chris Walker noted that while the 114th Congress passed 329 public laws, totaling 3,000 pages in the *Statutes at Large*, during that same two-year period agencies issued more than 7,000 final rules, spanning 80,000 pages in the *Federal Register*. This imbalance repeats year after year. As a result, most lawmaking today is agency rulemaking, and what a law says can, as a practical matter, be far less important than what an agency says a law requires. So long as regulation plays so large a role, it is crucial that the regulatory process incorporate public input, reflect democratic control, and ultimately promote efficiency and growth.

APA reform is long overdue also because the APA no longer reflects how the regulatory process actually works. As Professor Walker explained, the “[r]eality of how administrative law functions today has departed dramatically from the text of the [APA] and the assumptions that motivated [that statute].” Those departures fall into two broad categories. First, the Judiciary has significantly changed the regulatory process through so-called “administrative common law.” Professor Aaron Nielson highlighted how judicial decisions have added a range of requirements to make informal rulemaking more rigorous, while contributing to the steep decline in use of formal rulemaking and formal adjudication. Second, the Executive Branch has also instituted several important reforms to make regulations and regulators more efficient and accountable. Foremost among these are centralized review of regulations by the White House’s Office of Information and Regulatory Affairs (OIRA) and the use of cost-benefit analysis for major rules—two reforms that every President for the past 40 years has embraced, and that have become key features of rulemaking. The upshot is that the practice of rulemaking and adjudication bears little resemblance to the original procedures authorized by the APA.

So, what can be done? Fortunately, as the summit demonstrated, numerous policy and legislative proposals exist that could improve the regulatory process. For example, Helgi Walker proposed making the procedural requirements of the Congressional Review Act judicially enforceable and extending judicial review to cover putatively non-binding agency guidance that, for all intents and purposes, is actually binding on regulated parties. Chris Walker offered another interesting suggestion of making the amount of process and scrutiny a rule must undergo correspond to the rule’s importance. This principle, already reflected in executive orders on cost-benefit analysis for major rules, will help ensure better outcomes. It will also raise the profile of major rules, promoting transparency and accountability by making it likelier that Congress and the public pay attention to major rulemakings and the important policy choices they embody.

Summit panelists—including knowledgeable House and Senate staff—also highlighted several potentially promising legislative proposals that Congress has considered in recent years. In particular, some participants focused on the Regulatory Accountability Act introduced last Congress by Senators Rob Portman (R-OH), Orrin Hatch (R-UT), Joe Manchin (D-WV), and Heidi Heitkamp (D-ND).⁷ That bill, which has received considerable attention from scholars and practitioners of diverse vantage points,⁸ would institute a range of reforms. First, it would adopt a set of nine reforms unanimously recommended by the ABA House of Delegates to modernize the APA.⁹ These include codifying the *Portland Cement* doctrine that agencies must fully disclose data and other information used in rulemakings, establishing a minimum comment period for major rules, and requiring agencies to adopt procedures to review rules retrospectively. Second, the Regulatory Accountability Act would codify several procedures established in recent decades by executive order, including cost-benefit analysis, consideration of a reasonable number of alternatives to an agency’s preferred course of action, and centralized review of proposed rules by OIRA.¹⁰ Codification would promote stability by enshrining these reforms in statute. It would also extend these best practices to independent agencies, which are currently not covered by the relevant executive orders—a measure multiple panelists recommended.

Third, the Regulatory Accountability Act would create a distinct set of more rigorous procedures for “high impact” and “major” rules. “High impact” rules are defined in the bill as rules likely to have an economic impact of \$1 billion or more, and “major” rules as those rules likely to have an economic impact of \$100 million or more or to significantly impact the economy in other ways.¹¹ These are the rules it is most important to get right because they can shape the fate of entire industries. The Regulatory Accountability Act would therefore require agencies to undertake a rigorous cost-benefit analysis of all such rules *and* of reasonable alternatives.¹² This cost-benefit analysis, moreover, would be judicially reviewable.¹³

⁷ Regulatory Accountability Act of 2017, S. 951, 115th Cong. (2017).

⁸ See, e.g., Cass R. Sunstein, “A Regulatory Reform Bill That Everyone Should Like,” *Bloomberg View* (June 22, 2017), <https://www.bloomberg.com/opinion/articles/2017-06-22/a-regulatory-reform-bill-that-everyone-should-like>.

⁹ See S. 951 § 3, 115th Cong. (2017); ABA Resolution 106B (Feb. 8, 2016), reported in ABA Administrative and Regulatory Law News p.13 (Spring 2016); see also Jamie Conrad, *ABA House of Delegates Approval of Recommended APA Amendments*, Yale J. on Reg.: Notice & Comment (Feb. 24, 2016), <https://www.yalejreg.com/nc/hod-approval-of-recommended-apa-amendments-by-jamie-conrad/>.

¹⁰ See S. 951 § 3, 115th Cong. (2017).

¹¹ See *id.* § 2. The definition of “major rules” parallels the term’s meaning in the Congressional Review Act, 5 U.S.C. § 804(2).

¹² See *id.* § 3.

¹³ See *id.*

In addition, the Regulatory Accountability Act would revive the use of public agency hearings for the development of high-impact and major rules.¹⁴ Such hearings would be limited to certain disputed factual issues and would enable both proponents and opponents of proposed rules to probe the factual bases of competing proposals through cross-examination, “the greatest legal engine ever invented for the discovery of truth.”¹⁵ Though these proposals have critics as well as supporters, several panelists argued that they deserve serious consideration.

The summit also highlighted several reforms implemented by the Trump Administration that might guide future legislative efforts to modernize the APA. The Administration has made regulatory reform a top priority not only to advance principles of good governance, but also because a better regulatory process is essential to the competitiveness of the American economy. In an age of global economic competition, regulatory costs can affect whether businesses choose to locate or form in the United States in the first place, and whether the goods and services produced here are competitive both domestically and abroad.

The Trump Administration has been particularly focused on reducing regulatory barriers to entrepreneurship. As Andrew Olmem, Deputy Director of the White House National Economic Council, explained at the summit, ill-conceived and over burdensome regulations can “make it impossible for [entrepreneurs] to get their new ventures off the ground, and that in the long term really hurts ... economic growth.” It is critical that regulators rigorously consider these and other costs when deciding what regulations are appropriate.

A centerpiece of this Administration’s efforts to make regulation more effective and efficient has been Executive Order 13,771, issued by President Trump just after taking office. Executive Order 13,771 requires agencies to eliminate two regulations for every new regulation they issue and to impose no new net regulatory costs. As I explained at the summit, this landmark reform requires agencies, for the first time, to adhere to a regulatory budget and to consider the cumulative burden of their regulations on taxpayers. This encourages agencies to adopt the most cost-effective approach to regulating and to prioritize rescission of the most burdensome regulations, insofar as consistent with their statutory obligations.¹⁶ Executive Order 13,771 recognizes what taxpayers have long known: Private resources are not a limitless, “free good” for regulators, and the resource constraints that require prioritization in every other facet of life should apply in the regulatory context as well.

¹⁴ See *id.*

¹⁵ 5 J. Wigmore, *Evidence* § 1367, p. 32 (1974).

¹⁶ Before the current Administration began I had written about this concept in two articles in 2014 and 2016. See Jeff Rosen, *Putting Regulators on a Budget*, *National Affairs* (Spring 2016); Jeffrey A. Rosen & Brian Callanan, *The Regulatory Budget Revisited*, 66 *Admin. L. Rev.* 835 (2014).

The Administration’s overall reform efforts have contributed to a sustained decline in excessive regulatory restrictions during President Trump’s tenure. The Council of Economic Advisers estimates that deregulatory actions in broadband, healthcare, manufacturing, and other economic sectors have netted billions of dollars in savings for the economy and will save individual households thousands of dollars each year.¹⁷ The Administration has also sharply reduced the rate at which new regulations are issued. In 2017 and 2018, federal agencies added an average of just 61 significant rules per year—less than a quarter of the 279 significant regulatory actions added annually from 2000 to 2016.¹⁸ The Administration has cut the number of new economically significant rules by a similar degree, averaging just 10 new actions in 2017 and 2018—not counting deregulatory actions—compared to an average of 53 from 2000 to 2016.

President Trump has also acted to make the regulatory process fairer and more transparent by curtailing abuse of guidance documents. As multiple summit panelists observed, guidance documents are a double edged sword. While guidance documents can give regulated entities helpful information about how to comply with existing laws or regulations, agencies can misuse guidance to circumvent notice-and-comment rulemaking. Furthermore, as Ms. Walker explained, the “blizzard of regulatory documents, FAQs, letter rulings, suggestions from regulators, winks and nods” that confront regulated parties can make it “extremely challenging” to know what the law actually is. To address these problems, Executive Order 13,891 requires agencies to review all existing guidance, rescind any that should no longer be in effect, post all effective guidance on a single, searchable webpage, and make clear that guidance documents are not legally binding. Several such webpages are now available, including the Justice Department’s (available at <https://www.justice.gov/guidance>). Relatedly, Executive Order 13,892 prohibits agencies from applying guidance documents in a manner that causes unfair surprise. The reforms introduced by these executive orders represent basic, good government principles, and are the latest examples of Executive Branch improvements to the regulatory process that Congress could codify.

Individual agencies have also adopted worthwhile reforms in recent years. For example, the Department of Justice has undertaken its own efforts to combat inappropriate uses of guidance, including by instituting a policy that Department attorneys would not use their civil or criminal enforcement authority to convert other agencies’ guidance into rules that have the force or effect of law. The Department also successfully persuaded the Supreme Court to narrow the circumstances under which judges should defer to agency interpretations of their own regulations.¹⁹ As described at the summit, another set of important reforms can be found

¹⁷ The Annual Report of the Council of Economic Advisers 118-30 (February 2020), <https://www.whitehouse.gov/wp-content/uploads/2020/02/2020-Economic-Report-of-the-President-WHCEA.pdf>.

¹⁸ See *id.* at 108.

¹⁹ See *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

in the Department of Transportation’s “rule on rules,” issued in December 2019.²⁰ Among other things, the “rule on rules” provides for more robust public participation in rulemaking through enhanced procedures for economically significant rules and for guidance documents. It also reforms the adjudication process by codifying various procedural protections for parties subject to administrative enforcement actions. As another example, the Department of Health and Human Services has undertaken significant regulatory reform efforts, including overhauling a suite of regulations to improve coordination of patient care and implementing a pioneering use of artificial intelligence to rationalize the agency’s regulations. HHS reforms have already produced billions of dollars in regulatory savings.

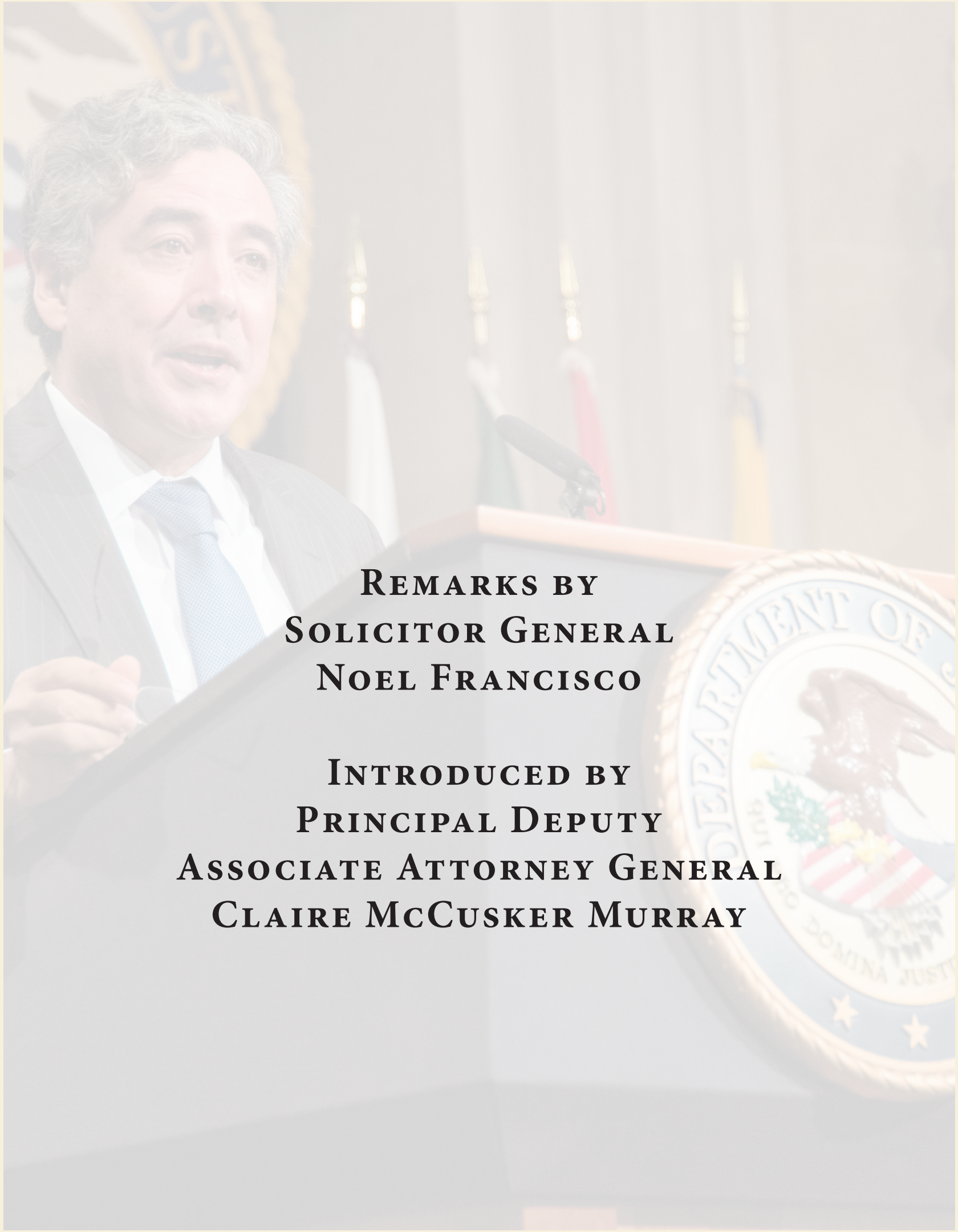
The merits of particular reforms aside, the diversity of APA reform ideas discussed at the summit and embodied in bills, regulations, and executive orders demonstrates that Congress has a rich menu of options to guide future legislative efforts. And while summit participants were not asked to reach a consensus about the precise shape that APA reform should take, there was a consistent theme: Congress should act. The regulatory process has changed considerably in the seven-plus decades since the APA’s enactment, largely due to Executive Branch reforms and judicial decisions. And while many of those changes have been positive, they are not substitutes for legislation. Legislation would serve both practical interests and more abstract values. It would promote stability by codifying procedures that, in their current form, can be undone at the stroke of a presidential pen. It would honor the separation of powers by having the elected representatives in Congress make the important policy choices involved in deciding what values we want the administrative state to embody. And it would allow for more systematic, holistic reform than judicial action can achieve.

Put simply, the time has come to modernize the APA. Legislative reform of the APA is needed to meet the realities of today’s economy and regulatory state. And, perhaps as importantly, it is needed to restore constitutional norms. Numerous members of the Supreme Court have noted that several features of the modern regulatory process raise serious constitutional concerns. See, e.g., *Gundy v. United States*, 139 S. Ct. 2116, 2139–42 (2019) (Gorsuch, J., dissenting) (arguing that broad delegations of rulemaking authority to agencies violate the separation of powers); *Paul v. United States*, 140 S. Ct. 342 (2019) (statement of Kavanaugh, J.) (“Justice Gorsuch’s scholarly analysis of the Constitution’s nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases.”); *Perez v. Mortgage Bankers Ass’n*, 575 U.S. 92, 119–26 (2015) (Thomas, J., concurring) (discussing the “constitutional concerns” associated with judicial deference to agencies’ legal interpretations); *City of Arlington v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting) (“And yet ... the citizen confronting thousands of pages of regulations—promulgated by an agency directed by

²⁰ See Dep’t of Transportation, Administrative Rulemaking, Guidance, and Enforcement Procedures, 84 Fed. Reg. 71,714 (Dec. 27, 2019).

Congress to regulate, say, ‘in the public interest’—can perhaps be excused for thinking that it is the agency really doing the legislating. And with hundreds of federal agencies poking into every nook and cranny of daily life, that citizen might also understandably question whether Presidential oversight—a critical part of the Constitutional plan—is always an effective safeguard against agency overreaching.”). The regulatory process can and should be reformed to address these serious problems.

This Report aims to disseminate the many good ideas for modernizing the APA that were discussed at the Department of Justice’s summit. In the 1940s, the Department of Justice harnessed its experience with administrative law to play a vital role in shaping what became the APA. Now, as then, the Department is eager to work with leaders in Congress to reform the law governing the regulatory process to advance the interests of the American public in economic opportunity, policy accountability, due process, transparency, and the rule of law.

A man with grey hair, wearing a dark pinstriped suit, white shirt, and blue tie, is speaking at a wooden podium. The background is slightly blurred, showing several flags and the large seal of the Department of Justice. The seal features an eagle with a shield, holding an olive branch and arrows, with the words 'DEPARTMENT OF JUSTICE' and 'QUI PRO DOMINA JUSTITIA SEQUITUR' visible.

**REMARKS BY
SOLICITOR GENERAL
NOEL FRANCISCO**

**INTRODUCED BY
PRINCIPAL DEPUTY
ASSOCIATE ATTORNEY GENERAL
CLAIRE MCCUSKER MURRAY**

INTRODUCTORY REMARKS

BY CLAIRE MCCUSKER MURRAY, PRINCIPAL DEPUTY ASSOCIATE ATTORNEY GENERAL
AS DELIVERED



Thank you all for joining us to discuss the potential modernization of the Administrative Procedure Act. In the last several years, we've seen a remarkable resurgence of interest in the foundations and future of our laws governing administrative agencies, and for good reason. A significant portion of our law is now created through administrative processes. At this point it is not an exaggeration to say that how a bill becomes a law can be less important than how a law is interpreted or enforced by an administrative agency. The question of how we are ruled, then, is in great part a question of administrative law, and there is no more important statute in administrative law than the APA, which for nearly a century has established the default rules governing the federal regulatory state. Surveying the landscape in 2019, there are at least a few reasons to think reform may be overdue. I will touch on just a couple.

One, to which I have already alluded, is the exponential growth in the administrative state over the last century. Could the drafters of the APA have anticipated such a dramatic expansion in the size, number, and activities of administrative agencies? The APA's emphasis on formal rulemaking and on formal adjudication's elaborate trial-like procedures, both of which are virtually never used today, suggests a rather different vision. At the same time, courts have established administrative law doctrines that seem to give judges nearly unlimited discretion to block changes in policy.

In Section 706 of the APA, for example, courts are instructed to invalidate agency actions that are arbitrary, capricious, or otherwise not in accordance with law. Today, despite the seemingly deferential language, virtually every significant action is challenged as arbitrary and capricious. Some scholars have suggested that the arbitrary and capricious standard was intended to codify rational basis review. More recently, courts have appeared to apply a more stringent standard of hard look review. Either way, it's hard to escape the impression that application of the arbitrary and capricious standard has itself become arbitrary and capricious. And when court decisions appear to be exercises of will rather than judgment, the rule of law suffers.

Meanwhile, elsewhere in Section 706, language directing courts to set aside agency action has become a prime vehicle for the proliferation of nationwide injunctions. Those expansive remedies have been criticized for encouraging aggressive forum shopping, circumventing the established procedures for class action litigation, and empowering individual district court judges to short-circuit the normal percolation of legal issues throughout the country. Whether or not the APA ever contemplated that state of affairs, these concerns warrant our careful consideration. In the end, reasonable minds may differ about how best to address these and other questions in administrative law. Today's summit will undoubtedly yield a variety of potential answers, but part of the virtue of today's summit is asking the questions in the first place.

Every day in courts across the country, the Department of Justice represents the United States in high-stakes, fast-moving litigation that demands the nearly constant attention of both litigators and leadership. But we do recognize that in the long run the issues we're taking the time to discuss today are no less important to the Department's mission. Although we remain immersed in the legal controversies of the moment, I am proud to see the Department taking a step back to reflect on these big questions.

As you will hear from our next speaker, that is well in keeping with a long tradition of the Justice Department dating back to its prominent role in the drafting of the original APA. At this time it is my honor to introduce the Solicitor General of the United States, Noel Francisco. Noel has had an exemplary career in public service and private practice, one that has put him at the center of some of the most vital debates in administrative law today.

Before joining the Department of Justice he was a partner at the Washington, D.C. office of Jones Day, where he chaired the firm's government regulation practice and argued a number of important cases before the Supreme Court, including the landmark separation of powers case, *NLRB v. Noel Canning*. From 2001 to 2003, he served in the White House Counsel's Office as Associate Counsel to President George W. Bush, and from 2003 to 2005, he served as the Deputy Assistant Attorney General in the Justice Department's Office of Legal Counsel. Earlier in his career, he clerked for Judge J. Michael Luttig on the U.S. Court of Appeals for the Fourth Circuit and for Justice Antonin Scalia on the U.S. Supreme Court. He was confirmed as the 48th Solicitor General of the United States in September of 2017 and has led that office with distinction for the past two years. Please join me in welcoming Solicitor General Noel Francisco.

REMARKS BY SOLICITOR GENERAL NOEL FRANCISCO

AS PREPARED FOR DELIVERY



Thank you very much. I am pleased to welcome you — or, for many of you, to welcome you back — to the Department of Justice, and to kick off this important summit on modernizing the Administrative Procedure Act. We are fortunate to have a wide variety of leaders in administrative law — spanning academia, private practice, and government — here to share ideas on how the APA can be improved. To set the stage for that discussion, I want to say a few words about how the APA came to be.

It is fitting that the Department of Justice is hosting this summit, because the Department played a significant role in shaping the original APA. The process that culminated in the APA began in the 1930s, when the federal government's effort to implement the New Deal led to dramatic growth in both the size and scope of the administrative state. This growth spurred calls from legislators, advocacy organizations, and regulated entities, among others, to impose some limits on the administrative state. By early 1939, several reform bills — some of them highly restrictive of federal agencies — had been introduced in Congress. Although it may seem hard to believe, the federal government was not wild about the idea of limiting its own power. But given the political realities, and perhaps the strength of the arguments on the merits, the Roosevelt Administration sensed that reform was inevitable. So rather than fight any effort to rein in federal agencies, the Administration instead sought to play an affirmative role in shaping the new law.

To that end, President Roosevelt asked his Attorney General, future Supreme Court Justice Frank Murphy, to create a committee to study the issue and propose legislation. In response, Attorney General Murphy created the Attorney General's Committee on Administrative Procedure, which included some brilliant legal minds, including then-Solicitor General Robert Jackson, Professor Henry Hart of Harvard Law School, and future Secretary of State Dean Acheson.

While the Attorney General's Committee worked to come up with its own proposed legislation, Congress was busy considering the bills that had already been introduced. In December 1940, Congress passed what was known as the Walter-Logan Bill — a bill that was highly restrictive of federal agencies. As was expected, President Roosevelt swiftly vetoed the legislation, and Congress was unable to override his veto.

The following month, January 1941, the Attorney General's Committee submitted its report, which spanned 474 pages and contained nearly 60 pages of conclusions. Although a few committee members issued dissenting statements on some issues, the Committee agreed on most of the report's recommendations. The Attorney General's report sparked several bills in Congress, including one encompassing the majority conclusions and another the dissenting conclusions. And so the congressional debate over administrative reform continued.

But later that year, any concern about administrative reform was eclipsed by a far graver crisis. On December 7, 1941 — 78 years ago tomorrow — our country was attacked at Pearl Harbor. In response, Congress and the President alike focused their energy on winning World War II. Only once the triumph of Allied Forces became certain did Congress fully turn its attention back to administrative reform.

By that time, the Attorney General's Committee Report had fully reshaped the legislative debate, thus vindicating the Justice Department's decision to play a leadership role in the reform debate. In fact, the bill that ultimately became the APA in 1946 contained many of the same reforms offered by the Attorney General's report. And after the bill's passage, the Department continued to shape the debate by issuing the *Attorney General's Manual on the Administrative Procedure Act*, which has been highly influential in the judicial interpretation of the APA.

Looking back from the distance of almost 75 years, I think it's clear that the APA has at least helped to hold administrative agencies to basic standards of rationality and procedural fairness. The administrative state is certainly more transparent and accountable than it would have been without the APA.

Of course, the APA wasn't and isn't perfect. Back when I was in private practice — a practice that included litigating lots cases on behalf of clients challenging federal agency actions under the APA — I testified before the House Judiciary Committee about the need for APA reform. In my testimony, I highlighted three areas where I thought the balance had tilted too far in favor of judicial deference to agencies and away from judicial oversight. Specifically, I discussed the trend of agencies using informal rulemaking more often than formal rulemaking to reduce judicial oversight; the courts' increasing deference to agency interpretations of the law; and judicial under-enforcement of statutes passed by Congress to promote agency transparency and accountability, like the Information Quality Act and the Regulatory Flexibility Act.

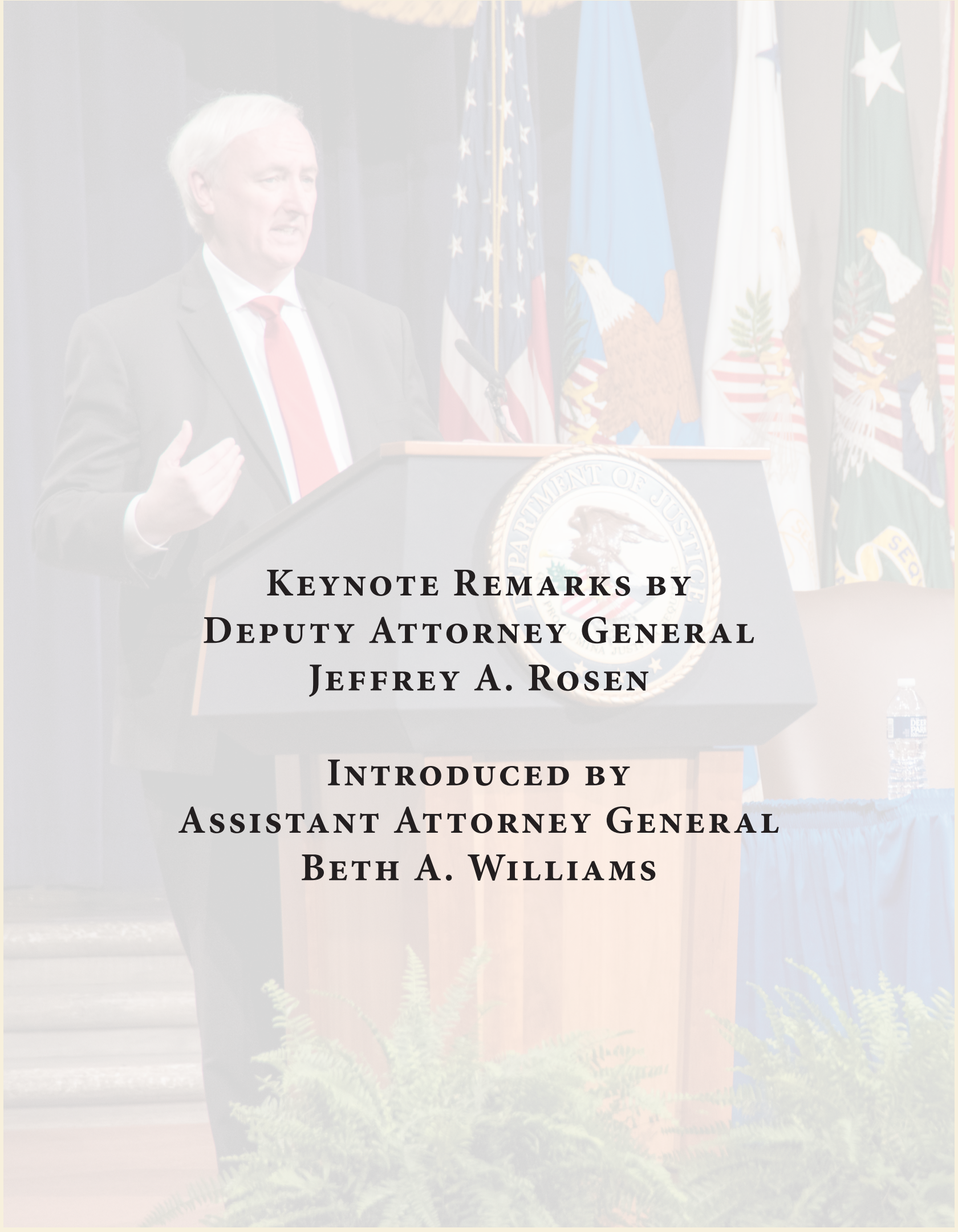
As Solicitor General representing the federal government, I have a different vantage point from which to consider the APA. In fact, several of the most important cases that I've argued in the Supreme Court over the past few years have involved issues related to the APA, including the challenges to the President's travel proclamation and the Department of Homeland Security's rescission of the DACA — Deferred Action for Childhood Arrivals — program. And I see an even larger number of APA decisions from the lower courts as part of my responsibility to authorize government appeals and emergency-relief requests. Some of those cases have highlighted the danger of courts using the APA to second-guess the Executive Branch's legitimate exercise of statutory authority. But I also continue to believe, as I testified back in 2011, that courts have an appropriate role to play in limiting agency excesses and enforcing the statutes Congress enacted.

That was the balance the Department tried to strike in the brief we filed last term in *Kisor v. Wilkie*, in which we argued that the Court should constrain, but not wholly eliminate, the deference that courts grant to agencies' interpretation of the law. The Supreme Court's opinion largely adopted our argument. In my view, that was a positive step toward restoring the right balance between the branches.

Any progress made through litigation, however, is modest compared to what can be accomplished through legislative reform of the APA. That is the primary topic of this summit. The first panel, entitled "Lessons from the Life of Administrative Law: What Experience Teaches About How the APA Can Be Improved," will focus on the ways that administrative law and the administrative state have changed over the seven decades since the APA's enactment, and what those developments mean for legislative reform efforts. The second panel, "APA Reform: What's on the Table," will focus on the numerous legislative proposals that have been made — and in some cases passed by the House — to reform the APA, including by expanding hybrid and formal rulemaking, increasing the use of cost-benefit analysis, and broadening the scope and rigor of judicial review. The third panel will focus on the significant regulatory reforms undertaken by the administration over the past three years, such as limiting the practice of rulemaking by guidance, and on the prospects of codifying those reforms in legislation. And finally, Deputy Attorney General Jeff Rosen, who brings to this job his decades of experience in administrative law both in and out of government, will deliver a keynote address discussing the Department's reform plans in greater depth.

By convening this summit, and by taking on the issue of APA reform more broadly, the Department of Justice is playing a critical leadership role in the legislative debate, just as it did in the passage of the APA. Enacting meaningful legislation will not be easy today, just as it was not easy then. But history shows that it is possible, and that it is worth the effort. Modernizing and improving the APA is an important mission for the Department — and for the Nation — and we will benefit greatly from the contributions of all of you.

Thank you all for playing a part, and I look forward to the discussion.



**KEYNOTE REMARKS BY
DEPUTY ATTORNEY GENERAL
JEFFREY A. ROSEN**

**INTRODUCED BY
ASSISTANT ATTORNEY GENERAL
BETH A. WILLIAMS**

INTRODUCTORY REMARKS

BY BETH A. WILLIAMS, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL POLICY
AS DELIVERED



Good afternoon. My name is Beth Williams, and I am the Assistant Attorney General for the Office of Legal Policy, or OLP. OLP is often referred to as the think tank at the Department of Justice, and in that capacity OLP has had the privilege of giving serious thought to the regulatory state and to making sure that our processes at the Department of Justice abide by constitutional principles and the Administrative Procedure Act.

As the head of OLP, I serve as the Department's Chief Regulatory Officer and Regulatory Policy Officer. I also serve on the Department's Regulatory Reform Task Force. In each of these roles, I have been privileged to support the Department's efforts to make the regulatory process more transparent, more accountable, and less burdensome for the American people. Today, I have the honor of introducing someone who is a paragon of dedication to these worthwhile goals — our keynote speaker, Deputy Attorney General Jeffrey A. Rosen. I can think of no one better to close out this summit. Confirmed by the Senate on May 16th of this year, Deputy Attorney General Rosen acts as the Department's Chief Operating Officer and advises and assists the Attorney General in leading the Department's more than 110,000 employees.

The Deputy Attorney General brings to the Department a wealth of administrative law expertise. From 2003 to 2006, he served as General Counsel of the Department of Transportation, and from 2006 to 2009, he served as General Counsel and Senior Policy Advisor for the White House Office of Management and Budget, the office that coordinates and reviews all significant regulations by federal agencies across the Executive Branch. Immediately before his present appointment, the Deputy Attorney General served for two years as the Deputy Secretary of Transportation, where he was the Chief Operating Officer of that department. There, he oversaw significant regulatory reform initiatives that serve as a model to other agencies.

Between his positions in government, he was a partner at Kirkland & Ellis, where I first had the pleasure of working with him and getting to know him. Jeff was a legend at Kirkland not only for his fearsome litigation skills but also for his kindness and unmatched work ethic. Associates would take note that one of the last cars to leave the garage at night was the one that was emblazoned with "Hockey Dad" on the back. From 2015 to 2016, Jeff chaired the Administrative Law and Regulatory Practice Section of the ABA, and of particular interest to all of us here at this summit, he has twice testified before Congress on APA reform. Please join me in giving a warm welcome to the 38th Deputy Attorney General of the United States, Jeffrey A. Rosen.

KEYNOTE REMARKS BY DEPUTY ATTORNEY GENERAL JEFFREY A. ROSEN

AS PREPARED FOR DELIVERY



Thank you Beth Williams for that kind introduction and for helping lead the Justice Department's important regulatory reform work.

Before I begin, I would be remiss not to mention the events that transpired this morning. On behalf of the Department, our thoughts and prayers are with the victims of the shooting this morning at the Naval Air Station in Pensacola, Florida. Promoting public safety and the rule of law are two of the most critical missions that the Department undertakes. Success in those areas, in turn, allows for important events like this Summit.

So with that said, thank you also to Noel Francisco and to all of our speakers, moderators, and panelists for their insights today. We've heard many thoughtful ideas for improving the APA, and I hope this summit begins a process that leads to many of those ideas becoming law. It's also great to see many familiar faces in the audience, including from across the administration. As the last panel showcased, this administration has done stellar work reforming the regulatory process and reducing unnecessary regulation. Between our panelists and our audience, the presence of so many leading thinkers on administrative law speaks to the importance of the topic that brings us together: modernizing the Administrative Procedure Act.

The Administrative Procedure Act is one of the most important pieces of legislation ever enacted. By prescribing the procedures agencies must follow in regulating private parties, the APA governs much of the federal government's conduct and affects virtually every American. For these reasons, the APA has been described as a "superstatute," as the "fundamental charter" of the "Fourth Branch" of the government, and even as "the constitution of the administrative state."

That last description, I have to say, goes too far. The constitution of the administrative state is the Constitution of the United States. And the APA is celebrated largely because it advances the values of that fundamental charter by making administrative procedure more consistent with principles of due process and the rule of law. Today, it is easy to take these contributions of the APA for granted. But that is a mistake. The APA's enactment in 1946 followed years of debate over whether, and to what extent, to restrain an administrative state that had grown rapidly during the New Deal. That debate partly pitted the New Deal's supporters against its opponents and, more fundamentally, pitted a vision of government based on supposed bureaucratic expertise and trust in permanent civil servants against one based on due process, public input, the separation of powers, and the rule of law.

In the course of that debate, both sides experienced victories and setbacks. The 1941 Walter-Logan bill, for example, was a strong rebuke to the excesses of the administrative state, but was vetoed by President Roosevelt. Ultimately, the bill that became the APA firmly established rule-of-law principles as a check on administrative powers, but it did not decisively settle the broader contest. This history is an important reminder that beneath seemingly dry matters of administrative procedure are fundamental questions about what values we want the administrative state — and government generally — to embody.

The Amount of Regulation Has Ballooned Since 1946.

Those questions remain important today because, while the APA has not changed much in the 73 years since its passage, administrative procedure and the regulatory state very much have.

The clearest, most consequential example of this change is in informal rulemaking. In the debate over the APA, and in the APA itself, informal rulemaking was something of an afterthought. In 1946, the main form of regulation was adjudication and, as former Harvard Law School Dean James Landis wrote, the “uppermost problem” that “led eventually to the passage of the [APA]” was concern about separating agencies’ prosecutorial and adjudicatory functions. The 1941 Report of the Attorney General’s Committee on Administrative Procedure reflects this focus, devoting more than twice as many pages to adjudication as to rulemaking.

Today, of course, the opposite is true: informal rulemaking is where the action is. Informal rulemaking’s day came with the major health, welfare, and environmental statutes of the 1960s and 1970s, and regulation has never been the same. Informal rulemaking has been the fuel of the administrative state’s explosive growth.

This growth can be measured in several ways. One metric is the length each year of the Federal Register, where agencies publish proposed rules, final rules, and rule changes. In 1947, as wartime regulation receded, the Federal Register was a breezy 8,902 pages. In a speech on the APA to a state bar association around that time, Attorney General Tom Clark felt it necessary to pause his discussion to observe: “It occurs to me that some of you may not be acquainted with the Federal Register. Too few lawyers are aware of the existence of this publication.” It is inconceivable that such a public service announcement would be needed today. In 2016, the Federal Register’s length peaked at 97,110 pages. Last year, that shrunk by nearly one-third, but it was still 68,082 pages.

The number of new regulations is equally startling. From 1995 to 2017, agencies issued over 92,000 rules, compared to just 4,400 newly-enacted laws by Congress. Regulation is now our principal form of lawmaking by far.

Moreover, the number of regulations tells only part of the story. Just as important has been regulation's expanding scope. In recent years, regulation has increasingly replaced legislation as the tool for resolving fundamental policy questions. Some major regulations issued by past administrations have imposed billions of dollars in costs, affected thousands of jobs, and have sought to decide the course and survival of entire industries. These sorts of policy decisions are ones average citizens would rightly expect to be made by politically accountable representatives in Congress — not by administrators and agency staff, many of whom are intentionally insulated from accountability to voters. This is partly a problem created by Congress itself through excessive delegation. But it has also been a problem of regulatory overreach, as regulators in prior administrations have sought to bypass Congress by stretching their statutory authority to enact policies that the relevant statutes do not allow and that Congress did not contemplate.

Presidents and Policymakers Have Long Recognized that the APA Alone Does Not Ensure a Regulatory Process that Promotes Economic Growth, Public Voice, or Accountability.

Unsurprisingly, the explosive growth in rulemaking has brought into focus additional values that regulation should serve. In recent decades, both Republican and Democratic administrations have recognized the need for the regulatory process to promote economic growth and efficiency, public voice, transparency, and accountability. President Reagan introduced these themes in his landmark Executive Order 12,291, stressing the need “to reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions, provide for presidential oversight of the regulatory process, minimize duplication and conflict of regulations, and insure well-reasoned regulations.”

Each succeeding administration has carried these principles forward. For example, in Executive Order 12,866, President Clinton called for a regulatory system that protects the public “without imposing unacceptable or unreasonable costs on society.” E.O. 12,866 recognized that “the private sector and private markets are the best engine for economic growth,” and that agencies should produce “regulations that are effective, consistent, sensible, and understandable” through a process that is “accessible and open to the public.” President Obama echoed these themes in E.O. 13,563, declaring that our regulatory system “must allow for public participation and an open exchange of ideas,” “must promote predictability and reduce uncertainty,” and “must take into account benefits and costs.”

In short, for decades, every administration has recognized that we need a better regulatory process. Yet, for decades, the APA has been virtually unchanged. This is remarkable. For all its virtues, the APA is not perfect and never has been. As the Supreme Court observed in 1950, the APA “contains many compromises and generalities and, no doubt, some ambiguities,” and “experience may reveal defects” in the statute.

That prediction was prescient. Experience has revealed ways the APA fails to achieve the goals of good but limited government. As early as the mid-1950s, the Second Hoover Commission recommended amending the APA to make both rulemaking and adjudication fairer and less burdensome. And these defects have been repeatedly recognized since.

In his 1960 report to President-Elect Kennedy, James Landis wrote that “effective procedural solutions, so necessary to the proper functioning of the administrative agencies, have admittedly not been achieved despite the sweeping studies which culminated in the Administrative Procedure Act of 1946.”

Two decades later, Griffin Bell, who served as attorney general under President Carter, lamented that overregulation has been “allowed to impede national growth,” and blamed this problem on Congress’s “reluctan[ce] to re-examine the functions of any of the regulatory agencies it created” or to meaningfully supervise their rulemaking. These critiques have also been reflected in legislative proposals over the decades — from Senator Lloyd Bentsen’s 1979 proposal to create a regulatory budget for each agency, to Senator Bob Dole’s 1995 proposal to require agencies to revisit old rules and to undertake rigorous cost-benefit analysis for all new ones, to the Regulatory Accountability Act passed by the House in several successive Congresses right up to last year.

In recent years, interest in updating the APA has been widespread. One of the leading voices originally pushing for enactment of the APA in the 1930s and 1940s was the American Bar Association, and in 2016, seventy years after the APA’s enactment, as Professor Ronald Levin explained earlier today, the American Bar Association House of Delegates adopted Resolution 106B, which urged “Congress to amend the rulemaking provisions of the APA,” and identified nine ways the APA could be modernized.

Executive and Judicial Branch Reforms to the Regulatory Process Provide Some Insights for Modernizing the APA.

Happily, as all this suggests, the lack of reform does not result from a lack of ideas. As our panelists discussed today, there are many ideas for improving the regulatory process — including some I’ve offered myself in the past — and some have already been put into practice without legislation. In the absence of legislative reform, the executive branch and the judiciary have, on their own, made numerous changes to how regulation is formulated, enforced, and reviewed. Together, they provide a partial menu of options for modernizing the APA.

A. Executive Branch Reforms

Let me offer two examples of longstanding executive branch improvements to the regulatory process. The first is centralized review of agency regulation through the Office of Management and Budget. When President Reagan introduced centralized review in Executive Order 12,291, one month into his administration, he met with considerable skepticism. Boyden Gray, who helped draft that E.O., has recounted that when agency officials first gathered to review the order, “[h]eads were shaking vigorously” and “sidebar conversations were expressing disagreement and skepticism” — that is, until “cacophony turned to stunned silence as the officials in attendance, one by one, reached the end of a document they had assumed to be a draft, only to find the signature of Ronald Reagan on the last page.” But despite that initial opposition, over the ensuing years centralized presidential review so proved its value that every President since Reagan has embraced it as an essential regulatory tool.

Centralized presidential review has enjoyed such support because, fundamentally, it advances widely shared, good governance values that apply to regulation and deregulation alike. Centralized review has improved the regulatory process in numerous ways, including priority setting, consistency, analytical requirements, and accountability. For these reasons, past Office of Information and Regulatory Affairs administrators of both parties, the Administrative Conference of the United States, and the American Bar Association have all endorsed expansion of centralized OMB review to most independent agencies.

So that takes me to the second executive branch innovation that has become a crucial feature of centralized review: the use of cost-benefit analysis for major rules. For approximately 40 years, administrations of both parties have used this tool to improve regulation by preventing rules that do more harm than good.

I would also note that the basic distinction between major and minor rules is itself an executive branch innovation. Under the APA, all legislative rules — no matter how costly or consequential — are governed by a single, one-size-fits-all set of procedures. Isn’t that odd? Our jurisprudence has long recognized that before the government can deprive someone of his property, the amount of process due depends, in part, on the private interest at issue and the probable value of additional procedural safeguards. The same logic should apply to the regulatory process. Some rules impose minor burdens on parties; others impose existential costs. The idea that the latter deserve no more scrutiny than the former is absurd. And it is a position every Administration for the past 40 years has rejected. So it bears emphasizing that centralized review, cost-benefit analysis, and greater scrutiny for the most costly rules all spring from the executive branch and are not currently part of the APA.

More recently, the executive branch has developed additional innovations that I want to highlight as well, because regulatory reform has been one of this administration's highest priorities. Those reforms began with one of President Trump's first acts in office: issuing Executive Order 13,771. This E.O. required agencies to repeal two existing regulations for each new one they issued and to impose no new *net* regulatory costs — a goal the administration exceeded. E.O. 13,771 is a landmark process reform because it encourages agencies, for the first time, to adhere to a regulatory budget and to consider the cumulative burden of their regulations on taxpayers. This helps agencies to adopt the most cost-effective approach to regulating and to prioritize rescission of the most burdensome regulations, insofar as is consistent with their statutory obligations. In fact, countries such as the United Kingdom, Canada, and Australia already have a “one in, one out” system for regulations. And the administration's overall deregulatory approach has delivered real reform: The administration has eliminated hundreds of unnecessarily burdensome regulations, netting tens of billions of dollars in regulatory cost savings.

In another important reform, this administration has also combatted the misuse of guidance documents. In prior administrations, agencies sometimes used guidance documents as a shortcut around rulemaking. They issued guidance not merely to provide non-binding advice, but to expand the law and change the public's behavior. And, making matters worse, agencies scattered guidance across a range of documents, many of which were difficult for regulated parties to find, and agencies sometimes enforced interpretations of law without providing public notice of those interpretations. Small businesses, in particular, often found themselves confronted with an unknown and unknowable regulatory regime.

This administration is putting an end to those practices. In the Sessions and Brand memos, DOJ declared that it will not treat noncompliance with other agencies' sub-regulatory guidance as itself a violation of applicable statutes or regulations in civil or criminal enforcement. And, just two months ago, President Trump issued two Executive Orders to curtail guidance abuse. E.O. 13,891 requires agencies to review existing guidance, rescind any that should no longer be in effect, post all effective guidance on a single, searchable webpage, and make clear that guidance documents are not legally binding in any way. E.O. 13,892, meanwhile, bars agencies from applying guidance in a manner that causes unfair surprise. With all due respect to the decision in *Chenery II*, where the Supreme Court tolerated *ex post facto* regulating, this practice deprives parties of fair notice and presents a fundamental due process concern. Accordingly, E.O. 13,892 provides that in taking actions that affect parties' legal rights, an agency may apply only standards of conduct that have been publicly stated in a manner that would not cause unfair surprise. This reform will help ensure that administrative enforcement proceedings, in particular, provide greater protection for American's individual rights.

B. Judicial Branch Reforms

Now, in modernizing the APA, what about judicial precedents? So-called “administrative common law” has significantly changed the regulatory process in varied ways. Take the D.C. Circuit’s *Portland Cement* rule that agencies disclose data, studies, and other information upon which they intend to rely in rulemaking. By enabling interested parties to evaluate and, if necessary, challenge the basis of agency decision-making, *Portland Cement* has pushed rulemaking towards greater rigor and accountability. One can contrast the APA’s requirement of a “concise general statement” with the requirements for notice-and-comment rulemaking today. In 1947, the Attorney General’s Manual on the APA opined that, under the concise-general-statement requirement, “findings of fact and conclusions of law are not necessary,” “[n]or is there required an elaborate analysis of the rules or of the considerations upon which the rules were issued.” This guidance tracked the 1947 Manual’s overall effort to downplay the APA’s significance. Today, however, the Manual’s approach is sometimes out-of-step with later judicial decisions.

At the same time, some administrative common law is neither sound law nor sound policy. One recent example of harmful judicial innovation concerns the scope of the administrative record. Under the APA, judicial review must be based on the “record” compiled in the administrative proceeding at issue, full stop. Accordingly, courts have recognized that, at least ordinarily, judicial review is limited to that record, and nothing more. In the 1970s, however, the Supreme Court posited that there may be rare cases where extra-record discovery is appropriate. The Court cited no textual basis for this exception. All the same, until recently, the Supreme Court had never allowed extra-record discovery in a challenge to administrative action. That changed with the Census case last June, when the Court considered extra-record evidence even though all Justices to consider the question agreed the district court had abused its discretion in ordering such discovery. Now that the Supreme Court has allowed this exception once, litigants will try to open a whole new front in APA litigation, albeit one the APA itself did not contemplate.

This highlights that modernizing the APA may involve clarifying what is not allowed, as well as adopting improvements to how the regulatory process should function.

The Justice Department Supports Legislative Modernization of the APA.

Now, where does this leave us? The Administrative Procedure Act of 1946 plainly needs to be brought current to 2019. The time available today does not allow a full canvass of all the ways the APA might be modernized, but I have tried today to sketch some executive branch and judicial reforms that are suggestive. Even the basic act of codifying existing best practices would be valuable, as it would promote stability and eliminate uncertainty. But, ideally, Congress should do even more to modernize the regulatory process.

Indeed, it is clear the APA needs modernizing to meet the realities of today's economy and regulatory state. Let me reiterate that: The Department of Justice unequivocally supports the position that the Administrative Procedure Act of 1946 needs legislative modernization. Fortunately, there are thoughtful voices in Congress who have been working on this. And just as DOJ played a vital role with regard to the Walter-Logan bill and the legislation that became the APA during the 1940s, we are prepared to do so again. DOJ stands firmly in favor of legislating improvements to the APA that would build on the commendable regulatory improvements made since January 2017. Good administrative procedure is essential to a well-functioning government and to respecting Americans' individual liberties, and we look forward to working with Congress on this vital issue.

Many thanks to all of you for joining us here today.



PANEL 1

**LESSONS FROM THE LIFE OF
ADMINISTRATIVE LAW: WHAT
EXPERIENCE TEACHES ABOUT HOW
THE APA CAN BE IMPROVED**

PANEL PARTICIPANTS

Moderator: Jennifer Mascott, Deputy Assistant Attorney General,
Office of Legal Counsel

Panelists: Aaron Nielson, Professor of Law, J. Reuben Clark Law School,
Brigham Young University

Nicholas R. Parrillo, Professor of Law, Yale Law School

Helgi C. Walker, Partner, Gibson, Dunn & Crutcher LLP

Matthew L. Wiener, Vice Chair & Executive Director,
Administrative Conference of the United States

DANIEL J. FEITH [*emcee*]: I am now pleased to introduce Jenn Mascott, who will moderate our first panel on how administrative law today deviates from the APA and what this suggests about how the APA might be improved.

Jenn serves as a Deputy Assistant Attorney General in the Office of Legal Counsel and is on leave from her position as an assistant professor of law at George Mason's Antonin Scalia Law School. Jenn's scholarship, which focuses on administrative law and the separation of powers, has appeared in the *Stanford Law Review* and *George Mason Law Review*, among other places, and has been cited by the Supreme Court. Jenn has also served as a public member of the Administrative Conference of the United States and earlier was a law clerk to Supreme Court Justice Clarence Thomas and also to then-Judge Brett Kavanaugh. She is a graduate of the George Washington University Law School and the University of Maryland. Jenn, the panel is yours.

MS. MASCOTT: Thanks a lot, Dan, and thanks to all of you for being here today. We are delighted to start off our panel discussions this morning with an all-star lineup of administrative law scholars and practitioners. What I'm going to do is begin by introducing each of the panelists. They'll then give opening remarks. They'll take a brief opportunity to respond to what each other has said, and then we'll finish out the remainder, the majority of the panel discussion with moderator-led Q and A and hope for some interactive conversation among us.

We're going to start with Aaron Nielson today. He serves as professor of law at Brigham Young University Law School. He teaches and writes in the areas of administrative law, civil procedure, federal courts, and antitrust. His publications have appeared in journals such as the *Harvard Law Review*, *Chicago Law Review*, and *Georgetown Law Review*, among others. He chairs the Administrative and Management Committee of the Administrative Conference of the United States. He previously served as partner in the D.C. Office of Kirkland & Ellis, and served as law clerk to Justice Sam Alito, former Judge Brown of the D.C. Circuit, and Judge Jerry Smith at the Fifth Circuit.

Then we'll hear from Helgi Walker, who's a partner in Gibson Dunn's D.C. office. She co-chairs the firm's administrative law and regulatory practice group and is a member of the firm's appellate and constitutional law group. Her work focuses on appellate, regulatory, and complex litigation matters.

She serves in a leadership role in many outside professional service organizations. Just some of her many roles include being a fellow of the American Academy of Appellate Lawyers and chair of the D.C. Circuit's Advisory Committee on Procedures. She previously served for five years as a public member on the Administrative Conference of the United States. She's

a former law clerk to Justice Clarence Thomas and Judge Wilkinson of the Fourth Circuit, worked as Associate Counsel in the White House for two years from 2001 to 2003, and has worked in several capacities in the Federal Communications Commission.

Then we have Nick Parrillo, professor of law at Yale, where he teaches courses on administrative law and government bureaucracy. His publications have appeared in venues such as the *Harvard Law Review* and the *Yale Law Journal* and have received awards from the ABA's Administrative Law Section, Law and Society Association, and the American Society for Legal History.

In 2017, Nick conducted a comprehensive study of agency guidance documents for the Administrative Conference of the United States that he's going to touch on a bit today in his remarks. The study provided the basis for conference recommendations on agency policy statements and best practices and has led to a follow-on project on interpretive rules. He's testified before Congress and spoken before the Second Circuit Judicial Conference. He's the co-author of a case book in administrative law and has received Yale Law School's annual teaching award.


And then the final speaker will be Matt Wiener, who's the Vice Chairman and Executive Director of the Administrative Conference of the United States, an agency commonly known as ACUS. It studies the administrative process. It makes recommendations on how to improve it. So he's really our guru of all gurus of administrative law here today, overseeing a lot of the recommendations that ACUS has made over the past couple of years.

Before serving in ACUS, he's also got a lot of experience in Congress serving as general counsel to U.S. Senator Arlen Specter and counsel to the House Committee on the Judiciary. He was a law firm partner at Dechert. Currently he's an elected member of the American Law Institute and a fellow of the American Bar Foundation.

So we have a wealth of experience here this morning to talk to us about how current practice has changed and transformed over the years and the decades since enactment of the APA, and we'll begin with Aaron Nielson from BYU.

MR. NIELSON: All right. Thank you. So that's exactly where I want to start off: How things have changed since the APA was enacted and the way that the law works. When I teach administrative law, I tell my students there are four boxes of administrative law, and you always want to know which box you are in. The four boxes are formal rulemaking, informal rulemaking, formal adjudication, and informal adjudication, and it matters a lot which box you are in because the APA's procedures are tied to the box. So you follow the statute. It tells you if you know your box, you know your procedures.

Figure 1



The APA's Four (Simplified) Boxes in 1946

	Rulemaking	Adjudication
Formal	§§ 553(a), 556-557, 706(2)(A)-(E): <ul style="list-style-type: none"> • General Notice • Physical Hearing • Taking of Evidence with Cross-Examination • Burden of Proof on Government • Proposed Findings of Fact and Law • Closed Record • Arbitrary & Capricious Review • <i>Ultra Vires</i> Review • Substantial Evidence Review 	§§ 554, 556-557, 706(2)(A)-(E): <ul style="list-style-type: none"> • Notice • Physical Hearing • Taking of Evidence with Cross-Examination • Burden of Proof on Government • Proposed Findings of Fact and Law • Closed Record and Separation of Functions • Arbitrary & Capricious Review • <i>Ultra Vires</i> Review • Substantial Evidence Review
Informal	§§ 553, 706(2)(A)-(D): <ul style="list-style-type: none"> • General Notice • Opportunity to Submit Data or Views • Concise Statement of Purpose • Arbitrary & Capricious Review • <i>Ultra Vires</i> Review 	§§ 555, 706(2)(A)-(C): <ul style="list-style-type: none"> • Prompt Written Denial • Arbitrary & Capricious Review • <i>Ultra Vires</i> Review


All slides courtesy of Aaron Nielson.

And when the APA was enacted, the four boxes all did very different things. At the formal side, the formal rulemaking and formal adjudication, it was like a trial. The procedures were almost the same but it was like a trial. There are burdens of proof, there's cross-examination, there are findings of fact, there's a closed record, and it was a rigorous trial-like procedural process.

When you go to the informal side of things, informal rulemaking and informal adjudication, there were many fewer procedures. So if you look at section 553 of the APA, those are the procedures for informal or notice and comment rulemaking, and they are very, very light. If you look at the procedures for informal adjudication, which is a huge number of things that agencies do, they are almost nonexistent. There are some in section 555, but there are almost no procedures. So it matters a lot which box you are in. So I think it would be useful to kind of look at what has happened to these four boxes since the APA was enacted.

So let's start with formal rulemaking, the Yeti of administrative law. That line comes from Justice Thomas a few years ago with the Supreme Court. Formal rulemaking is essentially dead. There are a few examples. I went back and I hunted, and I found a few. So I've seen a few Yeti citations, but it's essentially dead. So those procedures for that type of rulemaking, you just never really see used. What happened (*see figure 2*)?

Figure 2



Formal Rulemaking: “The Yeti of Administrative Law”


	Rulemaking	Adjudication
Formal	§§ 553(a), 556-557, 706(2)(A)-(E): <ul style="list-style-type: none"> • General Notice • Physical Hearing • Taking of Evidence with Cross-Examination • Burden of Proof on Government • Proposed Findings of Fact and Law • Closed Record and Separation of Functions • Arbitrary & Capricious Review • <i>Ultra Vires</i> Review • Substantial Evidence Review 	§§ 554, 556-557, 706(2)(A)-(E): <ul style="list-style-type: none"> • Notice • Physical Hearing • Taking of Evidence with Cross-Examination • Burden of Proof on Government • Proposed Findings of Fact and Law • Closed Record and Separation of Functions • Arbitrary & Capricious Review • <i>Ultra Vires</i> Review • Substantial Evidence Review
Informal	§§ 553, 706(2)(A)-(D): <ul style="list-style-type: none"> • General Notice • Opportunity to Submit Data or Views • Concise Statement of Purpose • Arbitrary & Capricious Review • <i>Ultra Vires</i> Review 	§§ 555, 706(2)(A)-(C): <ul style="list-style-type: none"> • Prompt Written Denial • Arbitrary & Capricious Review • <i>Ultra Vires</i> Review

Well, in 1973, in a case called *Florida East Coast Railway*, the Supreme Court very, very narrowly read the requirements for when formal rulemaking kicks in. So since then, if the organic statute does not use the magic words “on the record,” even if it requires a hearing, it does not require the formal procedures of formal rulemaking. So that box, one of the four quadrants of administrative law, is gone (see figure 3).

Let’s look at the next box, formal adjudication (see figure 4). Formal adjudication is not gone. It still very much exists, but it is also in retreat. What’s happened? Well, the present trend is to interpret section 554(a), which requires formal adjudication, very narrowly — this is from the Hickman and Pierce Treatise — and a lot of that reasoning also flows from the *Florida East Coast Railway* limited approach of what a hearing requires (see figure 5).

So the two formal boxes of our four quadrants are either gone or very much in retreat. Well, what about what’s happened to our informal boxes? Especially as the formal quadrants have receded, more formality has been put on our informal boxes. So, we say that it’s just a general notice requirement if you look at section 553. Well, it’s actually now not that. Notices of proposed rulemakings can be hundreds of pages long and very detailed. If you look at 553, that does not appear to be how 553 envisioned it. And further down the line, you have the material comments doctrine, which says that if an agency receives a comment that is material, they have to respond to that. If you look at 553, it is unclear if that requirement was there.

Figure 3



Formal Rulemaking: "The Yeti of Administrative Law"

"Since [*United States v. Florida East Coast Railway*, [410 U.S. 224 (1973)]] no organic rulemaking statute that does not contain the specific words 'on the record' has ever been held to require formal rulemaking."

Jack Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 *Geo. Wash. L. Rev.* 856, 857 n.9 (2007).

It is "rather hard to believe that the last sentence of Section 553(c) was directed only to the few legislative spots where the words 'on the record' or their equivalent had found their way into the statute book."

Judge Friendly, *Long Island Railroad Co. v. United States*, 318 F. Supp. 490 (E.D.N.Y. 1970)

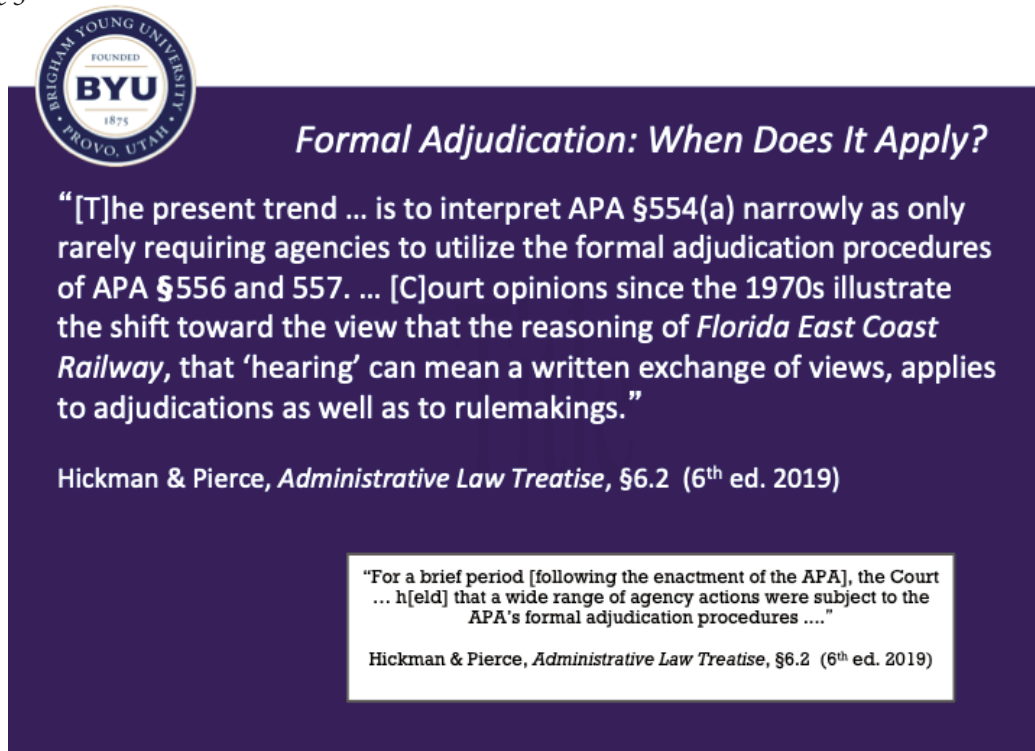
Figure 4



Formal Adjudication: When Does It Apply?

	Rulemaking	Adjudication
Formal	§§ 553(a), 556-557, 706(2)(A)-(E): <ul style="list-style-type: none"> • General Notice • Physical Hearing • Taking of Depositions • Burden of Proof • Proposed Findings and Law • Closed Record • Arbitrary & Capricious Review • <i>Ultra Vires</i> Review • Substantial Evidence Review 	§§ 554, 556-557, 706(2)(A)-(E): <ul style="list-style-type: none"> • Notice • Physical Hearing • Taking of Depositions • Burden of Proof • Proposed Findings of Law • Closed Record • Arbitrary & Capricious Review • <i>Ultra Vires</i> Review • Substantial Evidence Review
Informal	§§ 553, 706(2)(A)-(D): <ul style="list-style-type: none"> • General Notice • Opportunity to Submit Data or Views • Concise Statement of Purpose • Arbitrary & Capricious Review • <i>Ultra Vires</i> Review 	§§ 706(2)(A)-(C): <ul style="list-style-type: none"> • Prompt Written Denial • Arbitrary & Capricious Review • <i>Ultra Vires</i> Review

Figure 5




You have the logical outgrowth doctrine, which says that the proposed rule and the final rule have to have a logical outgrowth connection between them. I think that may be a fair reading of the APA, that you get there by combining section 553 with section 706, but it's unclear. Nonetheless, it is very much a part of the process. So too is hard look review for arbitrary and capricious, the *Portland Cement* doctrine that agencies have to turn over their data, and so on down the line (*see figure 6*).

So the simple process of 553 now looks a little bit more like the formal process of formal rulemaking. What happened here? With *Portland Cement*, then-Judge Kavanaugh was unclear about whether that's tied to the record (*see figure 7*). But I just urge you to look at the text of 553 and then compare it to how things actually work today.

Finally, informal adjudication has also had additional procedures put on it, at least de facto (*see figure 8*). If you do not want to end up in court, there's a very good chance that you are going to contemporaneously explain what you have done, because otherwise you might get a court order telling you to do so. So you act in the shadow of the law and nonetheless you explain your decision, and thus you regularize the procedure for the informal adjudication quadrant (*see figure 9*).

So here it is. This is the change since 1946 (*see figure 10*).


Figure 6



How Informal Is Informal Rulemaking?

	Rulemaking	Adjudication
Formal	§§ 553(a), 556-557, 706(2)(A)-(E): <ul style="list-style-type: none"> • General Notice • Physical Hearing • Taking of Depositions or Examination • Burden of Proof • Proposed Rulemaking • Closed Rulemaking • Arbitrary & Capricious Review • <i>Ultra Vires</i> Review • Substantial Evidence Review 	§§ 554, 556-557, 706(2)(A)-(E): <ul style="list-style-type: none"> • Notice • Physical Hearing • Taking of Depositions or Examination • Burden of Proof • Proposed Rulemaking • Closed Rulemaking • Arbitrary & Capricious Review • <i>Ultra Vires</i> Review • Substantial Evidence Review
Informal	§§ 553, 706(2)(A)-(D): <ul style="list-style-type: none"> • <i>De Facto Specific</i> General Notice • Opportunity to Submit Data or Views • <i>De Facto Detailed</i> Concise Statement of Purpose • Arbitrary & Capricious Review – Hard Look & Substantial Evidence • <i>Ultra Vires</i> Review • <i>Portland Cement</i> • Material Comment • Logical Outgrowth • OIRA Review 	§§ 555, 706(2)(A)-(C): <ul style="list-style-type: none"> • Prompt Written Denial • Arbitrary & Capricious Review • <i>Ultra Vires</i> Review

Figure 7



How Informal Is Informal Rulemaking?


(a) **NOTICE.**—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) **PROCEDURES.**—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

“*Portland Cement* stands on a shaky legal foundation (even though it may make sense as a policy matter in some cases).”

Judge Kavanaugh (writing separately), *American Radio Relay League v. FCC*, 526 F.3d 227 (D.C. Cir. 2008)


Figure 8



How Informal Is Informal Adjudication?

	Rulemaking	Adjudication
Formal	§§ 553(a), 556-557, 706(2)(A)-(E): <ul style="list-style-type: none"> • General Notice • Physical Hearing • Taking of Evidence with Cross-Examination • Burden of Proof on Government • Proposed Findings of Fact and Law • Closed Record • Arbitrary & Capricious Review • Ultra Vires Review • Substantial Evidence Review 	§§ 554, 556-557, 706(2)(A)-(E): <ul style="list-style-type: none"> • Notice • Physical Hearing • Taking of Evidence with Cross-Examination • Burden of Proof on Government • Proposed Findings of Fact and Law • Closed Record and Separation of Functions • Arbitrary & Capricious Review • Ultra Vires Review • Substantial Evidence Review
Informal	§§ 553, 706(2)(A)-(D): <ul style="list-style-type: none"> • <i>De Facto Specific</i> General Notice • Opportunity to Submit Data or Views • <i>De Facto Detailed</i> Concise Statement of Purpose • Arbitrary & Capricious Review – Hard Look & Substantial Evidence • <i>Ultra Vires</i> Review • <i>Portland Cement</i> • Material Comment • Logical Outgrowth • OIRA Review 	§§ 555, 706(2)(A)-(C): <ul style="list-style-type: none"> • Prompt Written Denial • Arbitrary & Capricious Review – Hard Look & Substantial Evidence • <i>Ultra Vires</i> Review • <i>De Facto</i> Statement Requirement

Figure 9




How Informal Is Informal Adjudication?

401 U.S. 402
CITIZENS TO PRESERVE OVERTON
PARK, INC., et al.,
 v.
John A. VOLPE, Secretary, Department
of Transportation, et al.
No. 1066.
 Argued Jan. 11, 1971.
 Decided March 2, 1971.

“The absence of any explicit statutory requirement that an agency state its reasons for taking an action in an informal adjudication creates a major practical problem for reviewing courts ... [A]n agency may prefer simply to state its reasons at the outset rather than face litigation and a court order to do so.”

Hickman & Pierce, *Administrative Law Treatise*, § 6.5 (6th ed. 2019)

Figure 10



The APA's Four (Simplified) Boxes in 2019

	Rulemaking	Adjudication
Formal	§§ 553(a), 556-557, 706(2)(A)-(E): <ul style="list-style-type: none"> • General Notice • Physical Hearing • Taking of Depositions or Examination • Burden of Proof • Proposed Findings of Fact and Law • Closed Rulemaking • Arbitrary & Capricious Review • Ultra Vires Review • Substantial Evidence Review 	§§ 554, 556-557, 706(2)(A)-(E): <ul style="list-style-type: none"> • Notice • Physical Hearing • Taking of Depositions or Examination • Burden of Proof • Proposed Findings of Fact and Law • Closed Rulemaking • Arbitrary & Capricious Review • Ultra Vires Review • Substantial Evidence Review
Informal	§§ 553, 706(2)(A)-(D): <ul style="list-style-type: none"> • De Facto Specific General Notice • Opportunity to Submit Data or Views • De Facto Detailed Concise Statement of Purpose • Arbitrary & Capricious Review – Hard Look & Substantial Evidence • Ultra Vires Review • Portland Cement • Material Comment • Logical Outgrowth • OIRA Review 	§§ 555, 706(2)(A)-(C): <ul style="list-style-type: none"> • Representation/Prompt Written Denial • Arbitrary & Capricious Review – Hard Look & Substantial Evidence • Ultra Vires Review • De Facto Statement Requirement

I have two concluding thoughts. One is, it shows that the APA is due for an update. It is showing its age. The way that we do things now does not very well map onto how it was enacted then.

And the last thought for those of us who are proceduralist-minded, who like formal procedures, you say, “Well, what’s happened to those two boxes of administrative law?” They are either gone or very much in retreat.

MS. MASCOTT: Thank you, Aaron, very much. We look forward to hearing more in the Q and A.

Helgi.

MS. WALKER: So I think on the panel this morning, I’m the voice of the private sector. I’m in private practice. I represent regulated entities subject to the many reams of regulations that govern their business and their operations — more so than statutory law. And that, as everybody in this room knows, is a function of the tremendous growth of the administrative state itself.

So I feel a special obligation here to speak from the point of view of the regulated entities, and let me tell you, it’s cold out here in the wilderness. We live every day in a blizzard of

regulatory documents, FAQs, letter rulings, suggestions from regulators, winks and nods, when it's up to us as lawyers to tell our clients what the relevant rule of law is. So finding your way through that blizzard, that snowstorm, to the warm cozy place where you know what the rule of law is is extremely challenging in this modern age of administrative law. So my view is going to be the view from the trenches, if you will.

Let's start with the concept of administrative lawmaking, and let's assume that that is a legitimate concept — nondelegation doctrine, *Humphrey's Executor*, and all that good stuff notwithstanding. There are some very beneficial parts of the APA and the notice-and-comment procedures that Congress enacted back in the World War II era. Regulated parties can bring their knowledge and their expertise to the regulators and try to inform the best outcome and to properly shape a rule. Congress can at least know that agencies are out there rulemaking under the statutes that Congress created and with which it conferred the authority, hopefully, to the agencies. But most importantly, the people can see in advance the new rules that are coming down the pike, and conform their conduct to those potential standards in time that they can be compliant before the new rules take effect.

But, unfortunately, what I've described — and I think it's not with any bad intention on the part of the many great people who work at federal agencies — is more theory than reality. What we see more and more, as I suggested with my blizzard analogy, is documents that stream out of agencies every day that do impose binding legal standards and substantive norms, yet are not adopted through these beneficial notice-and-comment procedures. What we see more and more is what I call backdoor rulemaking, and that's unfortunate because it is lawmaking without the transparency and the public input that are required by the APA.

I will take one example that we're seeing now at the Securities and Exchange Commission. 12(b)(1) fees are fees that mutual funds pay lawfully to investment advisors under the SEC's own rules. Starting in 2010, the SEC decided it wanted to try to update these rules and essentially heavily regulate 12(b)(1) fees or maybe even outlaw them altogether. That rulemaking failed.

What happened after the rulemaking failed? The enforcement bureau started issuing a series of documents, one called the Share Class Initiative, where — and I'm not making this up — the enforcement bureau encouraged investment advisors to self-report, to confess that they had been violating the 12(b)(1) rule all along — which, again, allows these fees. And the enforcement bureau actually said that parties that did not come forward and turn themselves in would suffer heavier penalties later on. Then the bureau started issuing FAQs and establishing new standards.

Long story short, over a hundred investment advisors have turned themselves in and paid back \$100 million in 12(b)(1) fees when that conduct is entirely legal under the SEC's extant regulations. That is the sort of troubling regulation-by-pressure campaign, instead of by compliance with the APA, that we're seeing out there in the real world.

So I have three suggestions in my remaining time here about what to do as a practical matter. One idea — and this is perhaps too idealistic — but one great idea would be for Congress to actually do its job. Congress could make the hard policy calls to decide whether and how to regulate in a particular area. But Congress, as we know, under this regime that has grown up over the last 75 years, tends to kick the hard policy decisions to the agencies, where the politics and the policy are then fought out. But if Congress really did its job and at least established something more than a bare intelligible principle and made those tough policy calls, we would have more democratic accountability in the first place, and we would not be here talking about how to rein in independent agencies at all.

But assuming that it is too hopeful that one can think that Congress would actually do the hard decision-making, what would I do now? I might make the Congressional Review Act subject to judicial review; Section 805, of course, says there's no private right of action. We might see better compliance with the CRA's requirements that guidance documents actually go to Congress for review and possible overturning.

Second, I might adjust the understanding of final agency action. Since the APA was adopted, we have seen a very formalistic understanding of what is final agency action under *Bennett v. Spear*, but for those of us who are out here in the trenches, it really ought to be expanded to understand the realistic effects of agency pressure to comply with substantive norms and to allow for greater judicial review.

And third, while I loved the Administration's new executive orders, including E.O. 13,891 on guidance documents, I would suggest extending that executive order to independent agencies, which is where so much of the problematic conduct actually occurs. Those are my suggestions for reform. Thanks Jenn.

MS. MASCOTT: Thank you, Helgi. We look forward to exploring those more in the Q and A. We'll now hear from Nick.

MR. PARRILLO: Thanks very much, Jenn. So following directly from Helgi Walker's remarks, the APA dispenses with the mandate for public participation when an agency issues guidance because guidance officially is nonbinding. But as Helgi explained, in real life regulated parties facing guidance often feel that they have no choice but to follow it. And I want to talk about why things have turned out that way, because I think the causes are central things that any reform of the APA would have to grapple with, and there is no perfect way to do it.

And here I'll draw from the study of guidance that I conducted for the Administrative Conference, for which I interviewed 135 individuals across industry NGOs and the agencies themselves. Sometimes agency officials really do intend to change policy in away that binds the public, and they adopt the format of guidance just because they want to avoid the APA's participatory requirements, and that is bad. But I think the most important thing for us to realize is that most of the pressure that regulated parties feel to follow guidance

can be explained just as easily, usually more easily, by causes other than deliberate official circumvention of the APA.

Modern regulatory statutes often, but not always, create such strong incentives for regulated parties to follow the agency's thinking that whenever the agency expresses its views, regulated parties are likely to change their behavior accordingly, regardless of whether the officials seek to coerce anyone.

For example, this occurs if the regulatory statute requires firms to obtain the affirmative permission of the agency merely to do their business. For example, the Food and Drug Act's requirement for pre-market approval. A pre-approval statutory scheme, along with certain other types of statutory structures that I identify in the study that cover most though not all, or many though not all, regulated industries, are what impose the pressure to follow whatever views the agency may express.

Now you may hear all that and say, "Well, then the agency should realize that the views it expresses are inevitably freighted with all this implicit power given the statutory background from the enabling legislation. And if the agency expresses views merely through guidance, then the agency should mitigate this inevitable implicit power that its views carry by treating its views as merely provisional." That is, the agency in any individual matter should be open to the regulated parties' arguments for doing things differently from the guidance. In other words, the agency should be flexible.

Now, all of that is right in principle. The problem is that another word for "flexibility" is "inconsistency," and agencies face very strong pressures, understandable pressures, to be consistent, which does a great deal to explain why they often fail to be flexible. If an agency behaves flexibly and makes a departure from guidance at the behest of one regulated firm, then the competitors of that firm will justly complain that the agency is depriving them of a level playing field. Often what firms mainly want from a regulator is predictability and evenhandedness, and flexibility in guidance undermines both of those things.

Alternatively, a firm that sees its competitor win a special dispensation from the agency may itself go to the agency and say, "Our firm wants that exception too." And to avoid getting overloaded by many such demands, the agency may just say "no" to everybody. In an ideal world, the agency would escape the tradeoff between flexibility and consistency by being flexible, but in a principled way. That is, if the agency accepts a firm's argument for proceeding differently than guidance suggests, the agency would give a public explanation for that departure, and that explanation would then be available to all similarly situated firms going forward. That approach keeps the playing field level, and it maintains predictability going forward.

There is just one problem: Formulating, adopting, and publishing reasons is expensive. It takes data gathering, staff time, and signoff by busy high-level officials.

Just finishing up, given scarce resources, it is rare that agencies can afford to be fully reasoned and principled when they make departures from guidance, and if that's the case, then the agency using guidance either needs to be flexible in an unprincipled, unpredictable way or not be flexible at all, which undermines the APA's participation mandate. So any reform of the APA is going to have to grapple with this tradeoff. The tradeoff can be made in different ways to give different weight to the competing values, but it cannot be entirely avoided, at least not without more agency resources or more efficient use of those resources.

MS. MASCOTT: Thank you, Nick, very much. Now we'll hear from Matt Wiener.

MR. WIENER: Thank you very much. Thank you, Jenn. Thank you, Deputy Attorney General Rosen, for organizing this summit and inviting me. ACUS actually traces its origins back to the Justice Department, so I'm very, very happy to be here on behalf of ACUS.



My assigned topic today is administrative adjudication. It is probably the easiest topic on the panel. For the answer I give to the title question of the panel, "How can the APA be improved?" at least as far as adjudication is concerned, is that it can't be or perhaps it shouldn't be, and I doubt anyone on this panel or on any of the other panels will give a different answer.

Adjudication certainly occupied a central position in the drafting of the APA. It's largely absent from major legislative reform initiatives introduced over the last several Congresses, although it's been the subject of some excellent scholarship of late. Adjudication is not any less important today than it once was. It is a central feature of the administrative state. Nobody knows exactly how many adjudications there are on an annual basis. Some people would put the number in the tens of millions. The number of adjudications certainly dwarfs the number of federal court cases each year.

What does the APA have to say about adjudication? It provides for trial-like proceedings, formal hearings as they're sometimes called, in adjudications "required by statute to be determined on the record after an opportunity for an agency hearing." That's 5 U.S.C. § 554, which Aaron had put on the screen. These are so-called formal adjudications. I will just call them APA adjudications.

For short, APA adjudications require, as I think most people in this room know, some basic procedures, among them that the agency's decision be based on an exclusive record and not extra-record evidence and materials. And most importantly perhaps, the hearings must be conducted, with two exceptions in the APA that I won't mention, before an administrative law judge (ALJ). And an ALJ is an agency employee whose compensation the agency doesn't control and who under statute may only be removed by the Merit Systems Protection Board upon a showing of cause. Now the cause provision in Title 5 is the subject of some legal controversy, and I'll leave that alone for now.

The overwhelming majority of adjudications, maybe over 90 percent — I think Justice Scalia once put it at that number — are what are traditionally called, perhaps misleadingly, informal adjudications. These are adjudications not subject to the formal hearing proceedings of the APA, and they like all adjudications are really only subject to one APA provision, putting aside the judicial review provisions of the APA. And that's Section 555, which requires, among other things, that parties be given the right to counsel.

Most adjudications in short are not regulated by the APA in any meaningful sense. They could be said to lie outside the APA, in the words of the title of a recent book that ACUS has published entitled *Administrative Adjudication Outside the APA*.

Now the Administrative Conference has spent a lot of time working and trying to improve a subset of non-APA adjudications that might be called trial-like non-APA adjudications. These are adjudications that in many senses are very formal, even though they are not governed by the provisions at APA, and some are indeed much more formal than any number of APA adjudications.

How many of these trial-like non-APA adjudications are there? Hard to count. One way of trying to count is to look at the number of adjudicators. So if we look at the number of ALJs presiding over APA adjudications, the number is about 1,900. If you exclude the Social Security Administration, you're probably only talking about 200 ALJs presiding over APA adjudications. That would suggest that there are not a lot of APA adjudications. There are probably somewhere between 5,000 to 10,000 non-ALJ adjudicators presiding over trial-like non-APA adjudication.

The governing law in non-APA adjudications is not the APA, Section 555 aside. It is statutes in which Congress sometimes has set up elaborate adjudication systems. The patent office would be an example. The immigration system would be an example. But most practices in trial-like non-APA adjudications are governed by agency practices, agency rules of procedure.

I have not heard in the current debates over the APA anyone who seriously has contended that the APA's adjudication provisions need to be amended. The real question perhaps is whether more adjudications should be brought in under the coverage of the APA. I have not seen any reform initiatives in Congress to that end. And if additional adjudications were to be brought under the umbrella of the APA, it would almost certainly require congressional action given what Aaron mentioned is the Court's restrictive interpretation of the gateway provision to APA adjudication.

Perhaps the more important question for Congress — and this is a controversial question — is whether Congress should assign certain adjudications now before agencies to Article III courts or newly established Article I courts. That's a big topic for another day. We do see a bill here and there that would move certain adjudications to Article III courts. They've come up in the context of the SEC and the NLRB, but there have been no ambitious reform initiatives afoot.

My last point here is that my own view is that Congress should attend to problems with adjudication programs agency by agency, program by program, not across the board. It might in some cases prescribe key structural features of adjudication systems but not detailed procedures that would deprive agencies of needed flexibilities to deploy their expertise. Those should be left to agencies, just as Congress has left procedural rulemaking in the federal courts in the hands of the judicial conference and the Supreme Court under the Rules Enabling Act.

MS. MASCOTT: Thank you, Matt, very much.

MR. PARRILLO: Thank you.

MS. MASCOTT: Appreciate everybody's remarks. Before we move to Q and A, do any of the panelists want to comment on each other's discussions? We've heard from Aaron on rulemaking, and Helgi and Nick both addressed guidance and some of the Administration's recent executive orders, Matt with adjudication. Do any of you have comments or responses to the way each of you have characterized the current state of the law?

MR. NIELSON: Sure. I just want to take a minute. I thought that Helgi's remarks were very well-taken, and there's a problem, though. There's an additional problem with backdoor rulemaking, in other words, rulemaking where you are trying to create policy but you are not going through the APA procedures to do that. And that problem is that it inherently has a very short shelf life, and as we see more and more, from administration to administration, we see zigzagging, whip-sawing policy changes.

Well, that's actually really, really hard for the regulated community because you have to make long-term decisions if you are going to build a plant, for instance. What is the nature of the regulation going to be on this plant? And if you cannot know what the law is going to be next year, much less ten years from now, it's really, really hard to make informed decisions. That's a dead-weight loss on society. It would be better if Congress would enact laws because

then they have greater stickiness to it. But if you live in a world of the pen, you die by the pen, and I think that is not an ideal situation for anybody.

MS. MASCOTT: Helgi, did you want to respond to him?

MS. WALKER: I'm so thrilled a law professor thought my comments were well-taken. I feel like I got an A-plus this morning.

(Laughter).

MS. WALKER: I think that is all the more reason, though, why there ought to be notice-and-comment rulemaking because it is harder to undo a rule that has been adopted by notice and comment than it is to undo a guidance document.

As I was listening to Professor Parrillo, one remark I wanted to make in response is that I think the tradeoff between flexibility and consistency is a little bit of a false tension, or at least I think I know the way out of the box. And the way out of the box is with a rational enforcement policy. It is absolutely fine for regulated companies that want to voluntarily conform their conduct to a guideline to do that. That's fine.

The problem is when the agencies enforce these guidelines retroactively and punish the companies that don't voluntarily comply their conduct with the guidelines. So if an agency had an enforcement policy that said: We are going to go after people who violate the clear text of our actual regulations. We are going to concentrate our enforcement resources there. We are not going to pursue people who are out of step, perhaps even within the industry, under a guideline document or an FAQ or this share-class initiative where the enforcement bureau invited people at the SEC to turn themselves in for complying with the actual regulations. That would solve the problem. It is really the retroactive enforcement with punitive measures that is causing the pain in the regulated sector.

MS. MASCOTT: So if the stakes perhaps were lower on what was being done with guidance documents, then some of the tradeoff perhaps would be less significant.

Nick, did you have a thought on Helgi's —

MR. PARRILLO: Sure, sure. I would say that in talking with people who have been on both sides of the enforcement process, to me at least that was the context in which they emphasized the need for consistency even at the cost of flexibility. In part because of the willingness of regulated entities to self-report, the willingness of regulated entities to settle relatively rapidly in a manner that husband's agency resources — that kind of thing depends on a sense on the part of the regulated parties that their competitors will be treated the same way, and so that is part of what induces cooperation, induces self-reporting and settlement and that kind of thing. It makes an enforcement program more feasible.

I also, if I may, wanted to respond to a point by Aaron. Aaron makes this important point that additional process associated with policymaking can be a feature and not a bug because it makes things more sticky. It promotes reliance. It promotes stability in the law. And I wonder — I mean if we are talking about reforming the APA and essentially writing on a blank slate, would it be better for additional process to come in the form of more frequent use of formal rulemaking, which is a kind of lawyerly adversary process, or would it be better to mandate other forms of increased deliberation, such as mandating more advisory committee processes or more National Academy of Science studies or things like that? What are the options as between a more lawyerly adversary process and a more interdisciplinary scientific process, if we are going to spend more resources on process because we think it's important?

MS. MASCOTT: Thank you, Nick. I want to give Aaron a chance to respond to that. But first, Matt, did you have general thoughts on —

MR. WIENER: My only general thought is that I'd like to just associate myself with Helgi Walker's comment that Congress could, in fact, do its job. Now there is too much delegation. I don't think there's more delegation now than there was, say, four decades ago. Perhaps there is less. But Congress most assuredly does abdicate its legislative responsibility in key respects.

I'm a little skeptical of forcing mechanisms of the sort, say, that Judge Neomi Rao has put out in a very good article a number of years ago such as a sort of revival of the nondelegation doctrine. But there is indeed a problem with Congress not adequately legislating and not attending to problems in the administrative state, and personally I'm not someone who traffics in optimism. I do not see any realistic possibility — I hate to be negative — but I don't see any realistic possibility that Congress is going to do anything in the near to mid-term given the political gridlock and dysfunction in our politics generally.

MS. MASCOTT: Thank you. Thank you, all. And so some of the action actually that has taken place recently, even though there has not been legislative reform, of course, is two recent executive orders from President Trump's Administration on guidance. And so I want to make sure that we have time to talk about those, and in particular ask Nick and Helgi if they believe that those executive orders will change some of the practices that have been going on with agency guidance.

But before moving off of Nick and Aaron's exchange about formal rulemaking, Nick, you seem to suggest your question is whether formal rulemaking with trial-like procedures is really the type of procedure that we would want to see added into the rulemaking space if Congress were to engage in reform.

And, Aaron, I was curious as to your thoughts about whether there are unique benefits or things that happen with that trial-like process that maybe we're not necessarily getting through notice and comment, either under the terms of the APA itself or under this kind of heightened hybrid rulemaking in which informal rulemaking now actually has more

procedural constraints that courts are imposing on agencies than in the past? Is that an adequate compromise between the two forms of rulemaking as set out by the APA, or is there something unique that happens with the formal rulemaking procedures?

MR. NIELSON: Sure. So this goes a little bit to the last thought that I was trying to make in my prepared remarks which is, for those of us who are proceduralists, what to make of today. And I'll say this: It's hard to be an empiricist when we have no data. And, so we have formal rulemaking which is the Yeti. We don't have a lot to look at. You can look at the ones that have happened in recent years, but there just is not a lot of data. I think experimentation would actually be quite valuable.

But on the broader point, for what it is worth, when I was a very new law professor, I heard a remark that nobody for 30 years had ever defended formal rulemaking.

And being the kind of person that I am, I said, let's go back and read that article to see what they said 30 years ago. So I went back and I spent a good chunk of a summer looking in the 1970s materials about the debate to figure out what was going on at the time. And there were a lot of very smart people in the '70s who recognized some of the value of a formal rulemaking-like process, in particular cross-examination.



Matt is here from the Administrative Conference. And the Administrative Conference in the 1970s did not think formal rulemaking should be required but recognized in a couple of recommendations the value of it, especially for highly technical matters. I think Nick's point is very well-taken, that maybe we would want science advisory committees or something like that, but there is a lot of value in having a good cross-examination closed record, where you

have the expert on the stand and you say, “This is your analysis. Have you thought about this? Have you thought about this? Have you thought about this,” and go down a checklist. Instead of having a hundred thousand pages in the record, you have a nice transcript page that says this is the key issue. Have they thought about it? I think it makes judicial review easier. I think it makes the issues more fleshed out. Those are the values that I have. But again, it is hard to be an empiricist without data. So I am not sure.

Now the other part of your question is, what about we just ramp up the procedures on the informal side? I think that there are some problems with that as well. I like a lot of the procedures that have developed through a common law way. I think *Portland Cement* makes a lot of sense. Material comments make a ton of sense, for instance. But we do not have that particular benefit of: here is the expert, instead of spending three years in litigation, how about we get this figured out now? You have your expert. We’ve got our people. We are prepared. Let’s get it on a transcript. Let’s figure it out. And none of the embellishments on informal rulemaking do that, and I think that there is value in something like that.

MS. MASCOTT: Thank you, Aaron. And that is an interesting point about experimentation, maybe trying some formal rulemaking, see how it works. One of the points from your scholarship that I found interesting in going back through it, too, is that we sort of have an idea, maybe, that formal rulemaking is going to be so restrictive that nothing will get done, things will grind to a halt. But you, in your paper, go back to some of the examples that did exist and say we almost have a wrong memory in our mind that sometimes those trials were not perhaps as lengthy as even some informal rulemaking that we have today.

Moving to Helgi and Nick’s discussion on agency guidance documents, I’m curious if both of you have thoughts on how, in particular, the recent executive orders — 13,891 on trying to improve agency guidance, making sure agencies post documents in a public way, and then 13,892, on what kinds of documents can be used in enforcement. I wonder, Helgi, how you think that might impact some of the enforcement costs that you are talking about coming from guidance documents. Will these efforts perhaps lower the stakes a little bit by instructing agencies not to rely so heavily on guidance documents?

MS. WALKER: Those of us in the private sector thought the executive orders were a huge breath of fresh air and a wonderful part of the Administration’s effort to grapple with the administrative state and put some practical constraints on it. As I said in my remarks, what I would have loved to have seen on the guidance order is to have independent agencies expressly covered because that’s where the bulk of this rulemaking by guidance is coming from and where the regulation by enforcement is coming from. But I do not want to lose sight of the fact that they were tremendous strides forward in improving this area, and I think the Administration is to be much commended for them.

MS. MASCOTT: And before moving to Nick, one of the other ideas you mentioned is broadening, perhaps, the definition of “final agency action,” and I was curious if you had

thoughts about what courts needed to more clearly bring in under the guise of final agency action so it could be more easily reviewed.

MS. WALKER: Final agency action is a very mushy term, and *Bennett v. Spear* didn't really define it in an overly helpful way. The Supreme Court said it has to be the consummation of the agency's decisionmaking, and legal consequences have to flow from it. Well that's very broad, and that encompasses a lot of the guidance-type documents that we've been discussing this morning.

If I could just come back to a very practical point of view. None of this really matters unless we have judges who are willing to look skeptically at what an agency says about whether its guidance document is binding or not and who kind of understand how the real world works and are willing to say that this thing that is labeled nonbinding is for all practical purposes binding, and the agency is treating it that way.

And to use a Justice Thomas line, which Jenn Mascott will hopefully get and will make her laugh, we need judges who know the deal, right, who know how this works. And I think kind of the high water mark for that kind of an approach for me is Judge Silberman's approach in *Lutheran Church* in 1998, where he said, quote, "No rational firm welcomes a government audit." And on the basis of that kind of understanding, that there is huge pressure for regulated entities to go ahead and comply because there is a threat of an enforcement action with even nonbinding guidance — that's the kind of skeptical judicial review that I think at the end of the day makes the APA meaningful; judges who are willing to recognize what Judge Silberman called "de facto law." There are lots of de facto laws out there, and marrying that notion of de facto laws with final agency action is important to give the judicial review provisions of the APA meaningful effect.

MS. MASCOTT: Thank you, Helgi. And so then turning to Nick, and Nick's study for ACUS is quite comprehensive. And if folks have not had a chance to take a look it, I would encourage you to look at it because, as he mentioned, he did interview many, many folks looking at this from many different sides, and so just in terms of learning what the current practice is, there is a wealth of information there.

And one of the points that you made in your remarks, and also in the report, is about these institutional factors that are almost leading to hydraulic pressure of agencies and regulated parties relying on guidance documents. And so I'm curious if you think that the recent executive orders will bring any change there? And perhaps by putting some more obligations on agencies when they use guidance documents, will that reduce some of the pressure on those sources of standards?

MR. PARRILLO: Sure, I'll speak particularly to Executive Order 13,891 from October, which I think very consequentially says that when agencies issue a significant guidance document, a category that is quite broadly defined, they are required to take pre-adoption notice and comment, they have to promulgate their own binding procedural regulations that

mandate such pre-adoption notice and comment, and furthermore that this sort of notice and comment-lite for guidance documents should include a public response from the agency to major concerns that are raised in the comments.

This has obvious benefits in the sense that it can increase the quality of policy-making in all sorts of ways to hear more comprehensively from the regulated industry and other stakeholders before policy, even officially nonbinding policy, is promulgated. The fear that has been raised is that this will raise the process cost of issuing guidance so much that it will become like legislative rulemaking, and a lot less guidance will be issued and there will therefore be less transparency in regulation.

I am not that worried about that because we do have agencies that are quite experienced in doing a notice-and-comment process pre-adoption for guidance. The FDA has done it pretty comprehensively for 20 years. The EPA has done it ad hoc, but it has been pretty frequent. Other agencies also have experience with it. And what people who have experience with that process will tell you is that it has not caused guidance issuance to become like legislative rulemaking. It has not ossified things nearly as much as legislative rulemaking has been “ossified,” to use the pejorative term. The reason they say is that even though you’re taking comment from the public and learning from the public and enriching the quality of the policy, you’re not looking ahead to judicial review, and you’re not, therefore, obligated to build the enormous record that is needed to bulletproof the policy before an unpredictable panel of three generalist judges.



And so given that the executive order obviously does not affect the judicial reviewability of guidance, this increase in process that is internal to the agency is not likely to be very costly.

It might run into one other pitfall, though, which has happened sometimes at the FDA and elsewhere. It may be that the agency puts out the guidance in draft seeking comment, but the agency has limited resources. It does not have the time to read and process all the comments and write the response because it is being asked to provide draft guidance about other things, and it is being asked to do a million other things. And, therefore, the agency just leaves the guidance in draft more or less forever. But it is draft guidance that expresses what the agency almost certainly wants. So, wink wink, nudge nudge, the regulated parties get it, and they start to do what's in the draft guidance even though it's only a draft.

There's a guidance document at the EPA that was in draft for 27 years, and everyone knew that you needed to follow this draft guidance if you wanted to get the permit that it governed or what-have-you. Given limited resources, it might be that the procedural rules under the executive order will run into that pitfall that guidance just stays in draft for a long time. There are ways to mitigate that, but it is something to look out for.

MS. MASCOTT: Thanks, Nick. Helgi, did you —

MS. WALKER: Can I just point out something that is especially unfair about what Nick just described, again, from the status of the regulated entities? Maybe there is a group of companies that know what the FDA really wants because they know about this draft guidance, and they know that that's what you're supposed to do. But imagine a smaller company. Imagine a business person out in Iowa who is not part of this special club or has not hired the expensive lawyers that know the person at the FDA who knows where the draft 27-year-old guidance document is located and can show it to them. And I think what we are supposed to be thinking about under the APA is the public and the people who don't have access to that kind of special inside information to know what the law is.

MS. MASCOTT: Yeah. And I would imagine some of those concerns are probably what was motivating the instruction in the executive order also to make sure that things are published. So you all are talking about the complexities —

MS. WALKER: Yeah.

MS. MASCOTT: — of draft guidance, but it sounds like it has got to be a multi-pronged approach, that the guidance documents be public and then also that there not be enforcement actions taken on the basis of any of these standards until people know.

And, Matt, we are nearing the end of our panel. We have a few more minutes. I wanted to make sure we touch on some of what you had to say about adjudication. You pointed out that a lot of the reform efforts have been focused more on guidance and rulemaking than adjudication. But I'm curious with your expertise working with a lot of agency adjudicators,

do you think that current practice has struck the balance that was struck historically or that the APA intended between following the formal APA adjudication procedures and informal ones? And in particular I'm thinking of the separation of functions that the APA tries to put into place between those who are investigating potential violations of rules and those who are then making the decision adjudicating folks' rights under those standards.

In your view does it seem like under current practice that as many modes of adjudication are subject to those constraints as would be ideal or was intended?

MR. WIENER: Sure. Before I answer your question, let me just take some credit for the executive orders on behalf of the Administrative Conference. The executive orders are actually in accord with several important recommendations of the Administrative Conference, and I have it on pretty good word that at least in some respects the executive orders were informed by ACUS recommendations, at least one of which was based on Nick Parrillo's excellent report.

In answer to your question, ACUS has done an extraordinary amount of research into administrative adjudication since its refounding in 2010, thanks largely to the efforts of Paul Verkuil, the first or the last chairman of ACUS, and most of the ACUS research has focused on what I've called trial-like non-APA adjudications. And what we found was — and this is a large generalization and it's subject to many exceptions, as any generalization is — most of these non-APA adjudications are conducted in conformity with a lot of the key principles that are set forth in the APA, including the exclusive record principle.

Probably the main difference in many respects is that whereas APA adjudications are presided over by an ALJ, non-APA adjudications are presided over by non-ALJ adjudicators, whether they are called administrative judges or immigration judges or patent judges or what-have-you. And there are some who have suggested that these adjudicators do not enjoy sufficient decisional independence and are too closely aligned with the agencies. They are, after all, civil servants who enjoy the same, and generally no more, protections as other civil servants.

I understand that concerns have been raised about the independence of such adjudicators vis-a-vis their agencies. I'm not convinced that any problem has been demonstrated writ large across agencies, but this perhaps is a subject where more empirical investigation is needed.

MS. MASCOTT: Thank you. So we have a couple of minutes before Panel 1 comes to its conclusion, and I wondered if any of you have closing remarks in response to each other or as you've listened to each other talk as to how you think things should be done moving forward, or just key takeaways of where we are now, 70 years after APA's enactment.

MR. NIELSON: Just really, really briefly. I would like to second Helgi's thoughts about retroactivity in the law. I think that a lot of the misuse of guidance and things of that sort comes from the ability that an agency has to get you for things you did not know that you

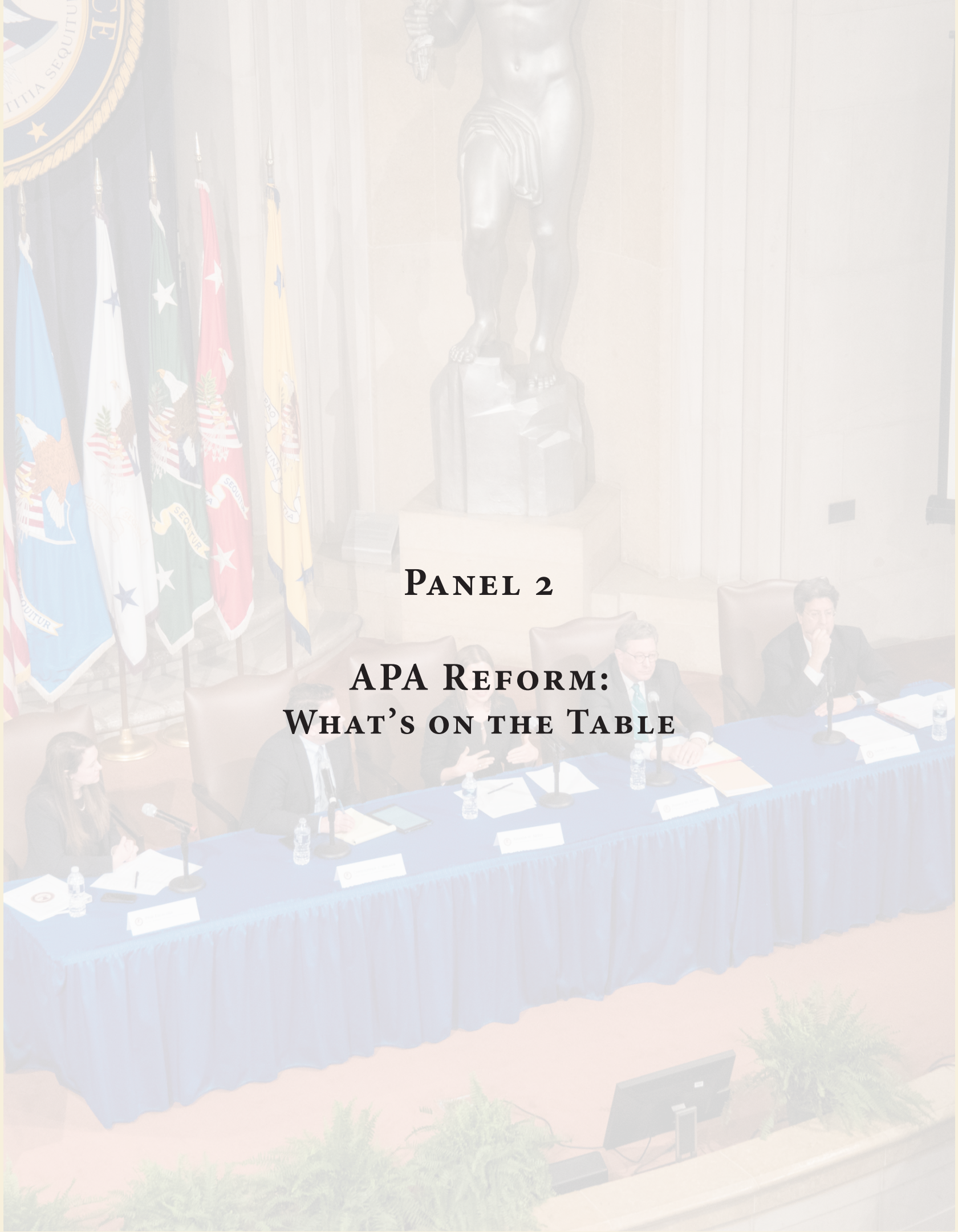
were doing were wrong. And I don't think that's consistent with basic American values. I think that is something that I like the executive orders for trying to address. But as we go forward with reform, I think retroactivity should be very much part of that discussion.

MS. MASCOTT: Any other closing thoughts? Nick, did you —

MR. PARRILLO: I'm sympathetic to Helgi Walker's argument that the courts should take a more functional approach to finality and thereby open up the courthouse doors more to judicial review of guidance. But I qualify that by invoking a point made long ago by Peter Strauss, which is that in an ideal world you would open up judicial review of guidance as to its consistency with the enabling legislation, which is often what regulated parties really care about and where they have the best claims. And, also, it would not be that costly to do that kind of review.

And, also, in an ideal world you would not fully open up judicial review of guidance documents to arbitrary or capricious review because with that type of review, you get the incentive to build up enormous records. That is going to end up chilling the provision of guidance in the first place and render regulation less transparent to begin with. It might be difficult for the courts to construe finality to mean one thing in one context and something else in another context, which is why this would be much better taken care of by Congress.

MS. MASCOTT: So one theme it seems like we've had in our panel is that in many ways procedures have changed over the years, and the stakes are incredibly high because of the increased regulatory activity over the decades, as many folks have mentioned this morning. We appreciate you all talking about the text of the APA, the various procedures, and the complexities of where we are now, and look forward to hearing more from the future panels this morning on what's been happening as far as legislative reform proposals and some ideas for the future. I just really want to thank all of you for setting the stage for that later discussion. Thank you so much.



PANEL 2

APA REFORM: WHAT'S ON THE TABLE

PANEL PARTICIPANTS

Moderator: Prim F. Escalona, Principal Deputy Assistant Attorney General,
Office of Legislative Affairs

Panelists: Daniel Flores, Chief Counsel, Subcommittee on Regulatory Reform,
Commercial and Antitrust Law, Committee on the Judiciary,
U.S. House of Representatives

Ronald M. Levin, William R. Orthwein Distinguished Professor of Law,
Washington University School of Law

Amanda H. Neely, General Counsel, Sen. Rob Portman

Christopher J. Walker, Professor of Law, Moritz College of Law,
The Ohio State University

MR. FEITH: Thank you. We'll try to keep the trains running on time, and people can fill in their seats as we get started. We'll resume now with our second panel, "APA Reform: What's on the Table." I'm pleased to introduce the panel's moderator, Prim Escalona. Prim serves as the Principal Deputy Assistant Attorney General for Legislative Affairs, helping manage the Department's very important relationship with Congress.

Prior to her role at DOJ, Prim was in private practice at Maynard, Cooper and Gale based in Birmingham, Alabama. Prim has previously served the public in a variety of roles, including as Deputy Solicitor General for the State of Alabama, law clerk for Judge William H. Pryor of the 11th Circuit, and legislative assistant for former Senator Jeff Sessions. Prim holds a law degree from the University of Alabama. I'm delighted to turn things over to Prim.

MS. ESCALONA: Thank you. Good morning. We are going to get started with our second panel, "APA Reform: What's on the Table." The legislative amendments to the APA have been few and far between since the law's enactment 73 years ago, but that is not for a lack of ideas. Over the past decade Congress has considered a number of bills that reflect a range of reforms from expanding hybrid informal rulemaking to broadening the scope and rigor of judicial review.

We are fortunate today to have with us several experts in the legislative efforts to reform the APA. I'm going to introduce them now. We have Christopher Walker with us. He is a law professor at the Ohio State University Moritz College of Law. Prior to joining the faculty, Professor Walker clerked for Justice Anthony Kennedy on the Supreme Court and worked on the Civil Appellate staff here at the Department.

His publications have appeared in the *California Law Review*, the *Michigan Law Review*, the *Stanford Law Review* and the *University of Pennsylvania Law Review*, among others. Outside the law school, he serves as one of 40 public members of the Administrative Conference of the United States and is chair-elect of the American Bar Association's Section on Administrative Law and Regulatory Practice.

Next we have Amanda Neely, who serves as the General Counsel to Senator Rob Portman of Ohio as well as Deputy Chief Counsel of the Senate's Permanent Subcommittee on Investigations, which is chaired by Senator Portman. Ms. Neely handles Senator Portman's regulatory reform and infrastructure permitting legislative portfolios, including the Regulatory Accountability Act.

From 2015 to 2017, Ms. Neely served as the Oversight Counsel on the U.S. House Committee on Ways and Means. Previously, she was also an associate at the Washington D.C. office of Gibson Dunn and served as a law clerk to then-Chief Judge David Sentelle on the U.S. Court of Appeals for the D.C. Circuit. Ms. Neely graduated with honors from Duke University School of Law and Princeton University.

We also have Ronald Levin, who is the William R. Orthwein Distinguished Professor of Law at Washington University in St. Louis and specializes in administrative law and related public law issues. He has published numerous articles and book chapters on administrative law topics, including judicial review, rulemaking, and legislative reform of the regulatory process. Professor Levin has been active in the ABA section of administrative law and regulatory practice for more than three decades and served as its chair in 2000 to 2001. He currently represents the section in the ABA House of Delegates. He is also a senior fellow of the Administrative Conference of the United States and has chaired its Judicial Review Committee.

And finally, we have Daniel Flores, who is the Chief Republican Counsel for the House Judiciary Committee's Subcommittee on Antitrust Commercial and Administrative Law. A graduate of the Yale Law School, Mr. Flores has served on the subcommittee since the 110th Congress. He has been involved in all major regulatory reform efforts on which the committee has worked during his tenure, including reform of the APA and other major regulatory process statutes. He serves as a legislative branch liaison to the Administrative Conference of the United States and is a member of the section council of the ABA's Section of Administrative Law and Regulatory Practice. He previously served in the U.S. EPA's Office of General Counsel and the Environmental Defense Section of the Justice Department's Environment and Natural Resources Division, as well as in private practice in Washington D.C.

Our panelists will now take a few minutes to provide a brief overview of the history of the APA and will discuss some of the existing reforms being considered by Congress. We'll then turn to a moderator-led Q and A.

MR. WALKER: Great. Well, it's great to be here, and Solicitor General Francisco started us off on the right foot. It covered a fair amount of what I wanted to start out with, which is the APA is going to celebrate its 75th birthday in 2021. It was a fierce compromise that took over a decade of negotiations between Republicans and Democrats to reset or to set the ground rules for the modern administrative state.

A lot of us, including Justice Scalia and others, have said this is the quasi-constitution of the administrative state, and yet, over the last seven decades Westlaw says it's been amended only 16 times. I think I've counted more, about 19 times in those seven decades. And so it is a statute that has not been amended that often. Now if you look at how it has been amended, there have been four major amendments. In 1966, the Freedom of Information Act was enacted. In 1974, we had the Privacy Act and the Government in the Sunshine Act, and the fourth major legislative change I would say would be in 1976, there were a number of amendments, including addressing the waiver of sovereign immunity.

If you want to read more about that, K.E. Kovacs has a great article called “Scalia’s Bargain” that talks about that. But aside from a modernization amendment in 2016 to the FOIA section, it has been over 20 years since we’ve had any amendment to the Administrative Procedure Act, and it has been over 40 years since one of these major amendments back in the ’70s. So this is a statute that has stayed at least on the books relatively the same as it was in 1946. Yet, a lot has changed in the modern administrative state. Aaron Nielson covered a lot of that ground in the first panel about the changes to the formal procedures of the Administrative Procedure Act.

I want to flag two other major changes that we’ve seen in the modern administrative state. The first one is covered in a fabulous article by Anne Joseph O’Connell and Dan Farber called “The Lost World of Administrative Law.” Their main point is that the reality of how administrative law functions today has departed dramatically from the text of the Administrative Procedure Act and the assumptions that motivated the Administrative Procedure Act.

I like the way they kind of frame it. They say there’s an increasing mismatch between the suppositions of modern administrative law and the realities of modern regulation. Or to put it another way, administrative law seems more and more to be based on legal fictions.



One of the ways that they point this out that Aaron didn’t cover — he was covering a lot — is that we’ve seen a shift in focus from adjudication, which was heavily negotiated in the Administrative Procedure Act, to rulemaking. One way that O’Connell and Farber captured this is by looking at case books. I think this is pretty fascinating. The Gellhorn and Byse casebook even up to the mid-1970s devoted only 22 pages to rulemaking, yet two chapters, 281 pages, to adjudication. There was a 100-page section on judicial review. It had only eight pages on review of informal actions, to tie back to Aaron and the first panel. The first edition of the Davis casebook in 1951 dedicated only three pages to notice-and-

comment rulemaking, though it gave a whole chapter to formal rulemaking, which uses, as Aaron explained, these kind of more formal adjudicative processes. So one big change is we have had this shift from adjudication to rulemaking. The other big change is that we have also had a shift from legislating to rulemaking.

I went and gave a talk to all the third graders at my son's elementary school this week — they are covering civics and the three branches of government. And so I showed, of course, my favorite video, Schoolhouse Rock!, How a Bill Becomes a Law. And as I showed it — five times because it was five different classes — I was shocked. I wanted to say, that's not where most lawmaking happens today, right?

To give one snapshot that will probably drive Ron Levin crazy: The 114th Congress passed 329 public laws, a total of 3,000 pages in the statutes at large. Federal agencies during that same time promulgated more than 7,000 final rules that I think were up to 80,000 pages in the Federal Register during those same two years,— overall there are over a hundred thousand pages. So do you get a sense of the degree of where our lawmaking happens today?

It is happening at these federal agencies, and this is something that I'm sure that the founders of the APA — and we'll call them founders because it is a quasi-constitution — had never contemplated, that we'd have this huge shift away from Congress, that we'd have a shift away from adjudication and towards rulemaking. So there is a need for some reform.

I don't want to spend a lot of time on this. This does not mean that the Administrative Procedure Act has not changed. It has changed a lot. In what we call administrative common law, as Gillian Metzger, John Duffy, and others have explored in depth, we have a lot of ways in which the court has interpreted, which might be one way to say it — or rewrote might be another way to say it — the Administrative Procedure Act. Just to tick off a few examples: Judicial deference doctrines like *Chevron* and *Auer*, hard look, arbitrary capricious review, remand without vacatur, basically eliminating formal rulemaking, as Aaron Nielson mentioned in the first panel, more rigorous requirements for notice-and-comment rulemaking, as Professor Nielson also mentioned. John Duffy has flagged the exhaustion of administrative remedies. K.E. Kovacs has flagged the issue of prudential ripeness doctrines. Nick Bagley has a great piece on the presumption of reviewability. And most recently, as was said at the outset, nationwide injunctions is another one that a number of people, including Sam Bray, have argued is inconsistent with the Administrative Procedure Act.

And so while Congress has done very little to tinker with this governing super-statute of the administrative state, courts have had to step in to do a lot of that. And for some of us, it makes us a little uncomfortable that you go and you read the Administrative Procedure Act, and if that's all you read, you'd be a very, very poor regulatory lawyer when it comes to actually dealing with the administrative state. So modernization of the Administrative Procedure Act is needed but it shouldn't be done by courts. Congress really needs to step up and do that. And so with that point I will turn to the folks that actually are working on the Hill.

MS. NEELY: Thanks, Chris. I think what Chris is telling me is that I need to start doing my job better.

(Laughter).

MS. NEELY: But, seriously, thank you to DOJ for having us here today, to Deputy Attorney General Rosen for hosting this, and for that kind introduction. I have to offer the standard government caveat, which is that all opinions are my own and do not necessarily reflect those of the Senate or Senator Portman.

While the Administration has been busy over the last few years rescinding and revising substantive regulations, the action in Congress has really focused on reforming the process by which agencies create regulations. And I'm really glad that DOJ is hosting this conference today. I feel like last Congress we saw a lot of events like this. I think it is telling that this is the first panel I've sat on on regulatory reform this Congress. The action has slowed down a little bit in Congress, but I hope we can pick it up, and I think events like this are really useful for drawing attention to needed regulatory reform.

So to give us a structure for what I think the rest of the panel will address, I'm just going to give a quick overview of three of the main overarching regulatory reform efforts in Congress. Those are the REINS Act, the Regulatory Accountability Act, and some piecemeal reforms which are incidentally organized probably from the least to most likely to get enacted in the near future.

The REINS Act — REINS stands for Regulations from the Executive In Need of Scrutiny Act — is a bill that would require Congress to pass a resolution of approval in order for a major rule to take effect, and major rules are those that would have \$100 million or more annual effect or a significant increase in cost on consumers or significant adverse effects on the economy.

Congress would have 70 legislative days to consider each major rule, and if Congress did not pass a joint resolution approving that rule, it would not go into effect. And although the bill also creates an expedited procedure for the Senate floor, it has been criticized because it would slow down the rulemaking process and occupy a significant amount of floor time in the Senate, which as we all know is a very limited commodity already, particularly with the nominations process taking a little longer than it used to.

The Government Accountability Office has reported that over the last 10 years, agencies usually issued about 50 or 60 major rules each year, with a peak in 2016 of 120 major rules to a low in 2017 of about 50. That number has crept up a little bit in the last couple of years but not much. So that would mean somewhere between 100 to 240 Senate floor hours each year devoted to considering major regulations if the Senate took up every major regulation. And in a divided government, it would admittedly make it more difficult for agencies to actually promulgate and enforce major rules.

But I think that bill is a really helpful reminder the agencies are acting on congressional authority, and we need to find ways to reinvigorate congressional oversight of agency action.

The second major reform is my favorite. It is the Regulatory Accountability Act (RAA), and I handle that bill for Senator Portman. He has introduced the bill in every Congress since he's been a Senator. It would be the first major overhaul of the Administrative Procedure Act since it was enacted in 1946. And that sounds revolutionary, but many of the parts of the RAA would simply codify and make enforceable current practices that exist under executive orders like E.O. 12,866, and many of the ideas are based on recommendations from organizations like the American Bar Association and the Administrative Conference, or have gained the endorsement of those organization since we have introduced the bill.

The Regulatory Accountability Act would improve the transparency of rulemaking by requiring agencies to engage really early on in the rulemaking process with public outreach through a notice of initiation of rulemaking, which sounds a lot like an advanced notice of proposed rulemaking but would actually back the process out even further to say the agencies would have to say: Here is a problem. Public, what are your thoughts? How do we solve this problem? Rather than saying, here is how the agency is thinking about solving the problem.

It would also codify OMB good guidance practices Senator Portman created when he was the OMB Director to ensure that agencies do not use guidance to skirt rulemaking procedures. We think it would improve the quality of rules by requiring agencies to rely on the best reasonably available scientific data and by requiring agencies to consider a reasonable number of regulatory alternatives, which we have proposed would be roughly around three, which is similar to Circular A-4.

The RAA would require agencies to engage in a more robust cost-benefit analysis and, for major rules, to maximize the net benefits of rules, looking at the costs and benefits within the scope of the statutory provision authorizing the rulemaking. It would allow parties affected by some of the biggest rules to request an agency hearing to examine the facts underlying the agency's proposal, which would draw us a little bit more toward the formal rulemaking process, and it would apply some of the same analytical requirements to both independent agencies and Executive Branch agencies.

Last Congress, the Senate Homeland Security and Governmental Affairs Committee reported the bill on a bipartisan vote, and since then Daniel [Flores] and I and others have been working with the Administration and folks across the aisle to improve the bill. And there are a number of other bills out there to improve the regulatory processes that are more piecemeal. I think Daniel is going to touch on some of those.

Senator Portman has two of them, one that would say that independent agencies could come under presidential executive orders, which is to confirm that authority to subject them to the same regulatory analysis requirements as Executive Branch agencies. We also have

the Unfunded Mandates Accountability Act, which would update the Unfunded Mandates Reform Act. And then Senators Johnson and Lankford also have some good ideas regarding guidance and advanced notices of proposed rulemaking.

The road to enactment is long. It's hard to pass anything in Congress right now, as you all may have seen, but I've got some hope for the future. In 2017, Cass Sunstein, one of President Obama's OIRA administrators, wrote a column with my favorite headline of that year. It was entitled, "A Regulatory Reform Bill That Everyone Should Like." And about the co-sponsors, he said, "They've produced an intelligent constructive, complex imperfect bill that deserves careful attention." I appreciated that assessment and I hope we can continue to work on constructive efforts going forward together. Ron.

MR. LEVIN: Okay. Well, thank you, and I appreciate the opportunity to talk to you today. In case you haven't figured it out yet, I am the Regulatory Accountability Act skeptic on this panel. My involvement in the current regulatory reform debates stems from my participation in writing comments of the ABA Administrative Law Section on the initial House version of the RAA. Those comments endorse some provisions of the bill and criticized other provisions, and since then I've done more writing about the bills. Individually, I've continued to support some aspects of the RAA and cast doubt on the wisdom of other aspects.

During 2015, I participated in a project by the ABA Administrative Law Section to develop a set of American Bar Association recommendations for revision of the APA, and that was a truly cooperative endeavor among members with a wide variety of political points of view. Jeff Rosen was Chair of the section at that time and a principal mover of the project, and I was the section's delegate who actually presented the recommendations to the House of Delegates, which adopted them without opposition.

The resolution contained a variety of measures that would codify rulemaking procedures that are already widely observed or that would make minor adjustments in the existing APA rulemaking structure. They include, for example, codification of the *Portland Cement* rule, which as you've heard requires disclosure of the factual data underlying a proposed rule, and creation of a procedure by which members of the public can nominate existing rules as promising candidates for retrospective review, and explicit authority for an incoming presidential administration to delay the effective day of midnight rules for a short period so that it can study them.

Each of these ideas did appear in one or more versions of the RAA, and as far as I can see, APA revision proposals like these would stand a good chance of passing Congress with broad bipartisan support. On the other hand, the RAA bills also include the number of more drastic and provocative proposals that in my view should have never been on the menu in the first place, and in the limited time I have left I will mention a few of these.

First, as has been discussed, the bills would have provided a right to trial-type hearings to resolve technical issues in high-cost rulemaking proceedings. This is a procedure that Congress has completely stopped adopting over at least four decades. So the claim that resurrecting it is a good way to modernize the APA seems odd to me, but more substantively no one has demonstrated any need to resuscitate this long disfavored procedure. As best I can discover, none of the RAA proponents has cited a single example of a rulemaking proceeding conducted during the past 40 years in which, according to them, they were unable to make their case effectively using notice-and-comment rulemaking but could have done so if trial-type procedure had been available. I think the burden of justification should rest with those who would depart so dramatically from the status quo, and I think they have not really tried to carry it.

Second, the bills would have prescribed a variety of so-called rulemaking considerations that an agency would be required to address in every rulemaking proceeding. And unlike the executive orders from which they are drawn, these requirements would be judicially enforceable. But why insert these requirements into the APA with all the litigation encouraging consequences inherent in that move? If an interested person wants the agency to address these or other considerations, all he has to do is file a rulemaking comment because the agency has a duty to respond to all significant comments. I see no reason to require an agency to address a variety of issues that nobody chose to raise.

Third, the bill prescribed judicially enforceable cost-benefit analysis obligations for major rules. Now I do support cost-benefit analysis as it currently operates under Executive Order 12,866. That is, courts do not enforce compliance with the executive order as such, but the cost-benefit analysis becomes part of the rulemaking record, and the agency needs to respond to its conclusions in order for its regulation to survive judicial review on the merits.



That system has worked reasonably well for decades, and I doubt that we need to supplement it with a regime in which a failure to comply with each and every one of the detailed and technical requirements for cost-benefit analysis becomes an error of law that could result in the court setting the rule aside. Judicial application of the vague terms of the APA amendment with de novo review, because it is part of the APA, would call for sophisticated policy analysis judgments that are out of sync with the tasks that we usually ask generalist judges to perform.

Fourth and relatedly, I recognize that many lawyers favor the RAA because the bill would extend cost-benefit analysis requirements to major rules issued by independent agencies. However, a much better way to accomplish that goal would be through a different bill that Senator Portman has sponsored, the Independent Agency Regulatory Analysis Act.

Essentially, that bill would bring independent agencies into the Executive Order 12,866 regime. I'm a public supporter of that bill. Broadly speaking, it would accomplish the same result without the judicial review complications that would result from incorporating cost-benefit criteria into the APA, and it would probably be more politically saleable as well. So because a better solution is available, these lawyers' goal does not seem to me a good reason to support the RAA.

And finally, I should say a word about the REINS Act, which Amanda brought up. This is a measure that I consider grossly unworkable. Just imagine the difficulty of getting the agency, the House, the Senate, and the President to agree on the terms of a complex, economically significant regulation which they cannot amend, and imagine having to do this in a period of divided government in which partisanship and lack of compromise are commonplace. And then bear in mind that this regulation would also have to survive hard-look review on the merits. Major rulemaking under the REINS Act would become next to impossible, a result that I consider unacceptable.

So to sum up, the most promising pathway to APA revision, in my view, is to abandon dubious and divisive proposals like the ones I have just mentioned, and instead the sponsor should narrow the RAA to encompass only moderate measures like those in the ABA resolution, measures that probably could elicit buy-in or at least acquiescence from lawyers across the political spectrum. It seems clear to me that in a period of divided government that approach is the most constructive option if the goal is to move beyond political messaging and wind up with enactment of durable legislation.

Thank you, and I look forward to further discussions with the panel.

MR. FLORES: Hi. I'm Daniel Flores. I want to thank the Department for holding this summit, and I want to echo Solicitor General Francisco's comments about how important the Department was to the original framing and enactment of the APA. So we are in debt to the Department today and have been for quite some time.

I would also like to offer a caveat as Amanda did. My views that I'm expressing this morning are from my personal capacity. I am not speaking on behalf of Ranking Member Collins of the Committee or on behalf of the Committee.

But what I'd like to do is share with you some thoughts about the big picture here and how it has informed efforts in Congress to pursue Administrative Procedure Act modernization. As we all know, a vast amount of federal lawmaking has been undertaken over the years to regulate the American economy, and our focus today is on lawmaking that happens through rulemaking by federal agencies.

For years the number of new federal regulations promulgated each year has exceeded 3,000. There are numerous estimates of the burden this regulatory output has placed on the American economy. To choose one that is based on compliance cost figures agencies themselves have relied upon in their own official cost estimates, as well as economic and Gross Domestic Product losses and social costs, one prominent thinktank here in Washington last year estimated the total annual burden to be \$1.9 trillion. That is equivalent to more than 40 percent of annual federal spending and nine percent of the United States Gross Domestic Product. It rivals total U.S. individual and corporate income taxes. Spread over all U.S. households, it would equal \$14,615 per household, equal to 23 percent of median U.S. household income in 2018.

If these costs were the GDP of a country, that country's economy would be the ninth largest economy in the world. No one disputes — and this applies to Congress and I'm sure to all of you here — that many benefits have been achieved by federal regulation, but those cost figures I just cited to you are figures that I think should take one's breath away. Given how long we have been at the regulatory grindstone, it would be wise, I would suggest, to bear in mind Associate Justice Stephen Breyer's observation during the 1990s that it can become extremely costly to harvest the last 10 percent of benefits.

In the current economic environment there is more reason than ever to bear that observation in mind. America is no longer the lone economic giant it was in the post-World War II era, when the APA was framed and practice under it developed. China is looming very large in our rearview mirror and attempting to pass us, and it is far from the only evolving competitor we front. At a minimum, I would submit we should be thinking of ways in which to make sure that new regulation is more cost-effective and efficient as it seeks to attain new benefits. And Congress has been thinking about that hard for some time now.

Let me offer you one additional perspective. The 3,000-plus regulations issued each year dwarf the number of statutes enacted each year, as Professor Walker alluded to earlier. The typical ratio is greater than 10 to 1. As we all know, the framers established a rigorous system of checks and balances to constrain the ability of Congress to legislate unwisely and end up doing more harm than good. The APA establishes constraints as well, but by comparison, they are quite light-handed. An agency can easily propose a preferred outcome, go through

the motions of notice and comment, shrug off objections to its preference, promulgate its preference, and see its preference survive judicial review, so long as the agency's choice wasn't arbitrary or capricious and displayed a minimally rational connection to the administrative record.

It is a fair question to ask whether over 90 percent of lawmaking happening under our Constitution should happen without more requirements than that to guide it, and Congress has asked that question. On the House Judiciary Committee, efforts to undertake APA reform began in the late 2000s during the 110th Congress based in large part on these considerations. This was part of an overall project to strengthen administrative law, following up on sustained oversight the Committee had done in the preceding two Congresses.

The fundamental concept has been always, first, to strengthen the central edifice of the APA, and second, to improve the buttresses around it. Thus arose the Regulatory Accountability Act, along with the REINS Act, the Small Business Regulatory Flexibility Improvements Act, and other surrounding bills. In the RAA itself the central concept was to look to modernizing tools that had already been proven to work and had inherently bipartisan support.

The Committee looked largely to Executive Order 12,866, as Amanda mentioned, and related executive orders and sought to render into statute core elements of those orders that actually could be rendered readily into statutorily binding terms. And as it did that, Congress tried to focus — or the Committee tried to focus — on the rulemakings that were most important, which are the major rulemakings. Developmental work on the bill continued throughout the 111th Congress, grew to include the Senate, and ultimately yielded bipartisan, bicameral companion bills offered first during the 112th Congress by former Chairman Lamar Smith and Representative Peterson of Minnesota in the House, and Senator Portman and former Senator Pryor of Arkansas in the Senate.

As one can see by looking at the bill, we included the basic menu of rulemaking considerations that Professor Levin mentioned. The key provisions of the bill increased the use of advanced notice of proposed rulemaking for major rules, instituted a statutory cost-benefit analysis requirement, included a final standard that would better ensure the benefits of final rules, justify their costs, increased retrospective review for major rules, and adopted basic corresponding reforms for major guidance.

There has been discussion along the way about whether some portions of the bill ought to or ought not to be there, but at least three things have remained very consistent: bipartisan, bicameral sponsorship and recognition of the need for modernization; the overall contours of the bill; and the big picture economic considerations and constitutional considerations that should drive us all to the conclusion, I would submit, that the APA that was good for 1946 needs to be modernized to assure smarter, more cost-effective, more efficient, and more accountable regulation as America strives to compete in the 21st century.

It remains our hope, as Amanda mentioned, that in the end we can effectuate this reform and modernize the APA based on sound reforms rooted in bipartisan thinking. So I look forward to the continued discussion and yield back.

MS. ESCALONA: Thank you, Daniel. The last panel and some members of this panel have been pretty pessimistic about Congress's ability to pass any reforms in this area or maybe any area. In our current political environment, Daniel, Amanda, is passing a bipartisan APA reform package really realistic?

MR. FLORES: I'll start on that. I think it is.

(Laughter).

MR. FLORES: I think it is, and mostly for the reasons I mentioned, which is that there's a sound common sense case to be made for modernization. It's long overdue. There's always been bipartisan support for the legislation we've undertaken. We, in fact, came extremely close last term to getting legislation done. In the end we didn't, but we are keeping at it, and we hope that in the future we'll be able to get it done.

MS. NEELY: I think the RAA has some selling points that should be appreciated by both parties. Primarily, not only do Democratic Administration regulations have to go through increased scrutiny, so do Republican Administration regulations. When I was working with Senator Heitkamp's staff, we reached a compromise to say not only do regulations that have \$100 million or more in cost to the economy, but also those that just have \$100 million more *effect* on the economy should get the same level of scrutiny, just because these are going to be very big rules that have a very big effect on the economy. And that would include rulemaking proceedings to rescind or amend previous rules.



So I think that if we continue to talk about those aspects of regulatory reform and continue to work in good faith with each other, which I think Senator Portman has with Senators Heitkamp and Pryor and Manchin, it will be more likely that we will be able to move something in the future.

MS. ESCALONA: And if a package were to move, in your view, what is the number one item that must be included in any final package?

MR. FLORES: I'll jump in on that one too. Of course, I have to defer to the members on this. My own personal view is that at least a good candidate for that would be a standard for final rules that assures agencies always do more good than harm, with an emphasis on the benefits being achieved being within the scope of the statutory provision being implemented exceeding the costs of achieving those benefits.

MS. NEELY: Similarly I would say — and again my own view — but increased cost-benefit analysis and transparency that are judicially reviewable, to hold agencies accountable to doing their homework and doing it publicly.

MR. LEVIN: I don't think I would endorse that one. But as I was saying earlier, there are provisions in the RAA that already have support from the ABA and the Administrative Conference that can be accepted across the political spectrum. Some of my fellow panelists are talking about bipartisanship in a different sense from what I have in mind. Getting two Democratic Senators to support an otherwise completely Republican-supported bill is one definition of bipartisan, but I would be thinking more of things that would have broad support across the spectrum, with the kind of things I mentioned falling in that category. And having judicially enforced cost-benefit criteria where the courts are managing the intricacies of cost-benefit criteria would not be in that category, and in my view shouldn't be.

MR. WALKER: I don't know if I have one favorite, but I do think the architecture at least of the Senate version of the Regulatory Accountability Act, which recognizes that process goes with how important the rule is, is a really important feature. The elephant in the room is the nondelegation doctrine and the idea that agencies are deciding really big important questions that maybe Congress should be the one to decide, right? And I think when you look at the Regulatory Accountability Act, Ron gave a good critique of the formal-ish rulemaking requirements that would be required, but those would only actually be required for \$1-billion rules. And the fact we are even talking about \$1-billion rules kind of scares me. And then for \$100-million rules, [the formal-ish rulemaking requirements] can be required, but agencies have some flexibility to say they are not needed. And I think that is the important essence: that for your run-of-the-mill, everyday rules, the requirements of economic analysis and others are going to be much, much less stringent, if not nonexistent.

But the more expensive or the more important the rule gets, the more process we want the agency to have to go through in order to make sure that they make the right decisions and so that it elevates the issue from a resources perspective to Congress's attention and the

like. And I like that part of that, the idea — the architecture behind it — of really trying to tie process to how close you get to a nondelegation issue.

MS. NEELY: And to be clear, that would be only about one or two rules a year max usually.

MR. WALKER: But if that is not bipartisan on \$1-billion rules, I don't know what —

MR. LEVIN: Well, I can't speak for the Democrats in Congress who are not represented on this program, whether you think that's a good idea or a bad idea, but my own view would be, no, it's not a good idea. You heard Aaron say in the previous panel that cross-examination has its uses in some contexts, but maybe not for scientific and technical points.

Well, that is what would be the subject of this hybrid rulemaking under the bills. It's a mismatch, in other words, and I don't think you should bring in procedures that are dysfunctional and thereby delay or impede the adoption of rules in which, yes, there could be a billion-dollar cost but by hypothesis, the agency proceeds and will have to make a case that the benefits far exceed that. So be cognizant that rules bestow benefits and do not adopt procedures that make it overly difficult to bring those benefits to the public.

MR. FLORES: And perhaps I could jump in. You know, as a former DOJ litigator I could ask the audience — some of you are fitting that description, some of you litigate against those litigators, but you're litigators — I would suggest that a good litigator would understand the benefits of cross-examination in cases of that magnitude that they are handling in front of the courts. And I can refer to one of my most vivid memories of my litigation days involving a case about safe drinking water standards in the D.C. Circuit, in which we had a three-and-a-half hour oral argument that was largely dominated by former Chief Judge Garland exploring very deeply the very deep administrative record over the scientific and technical issues that were informing those standards, which were for radionuclides in drinking water. So I think the courts are up to it.

One of the key things about the architecture of the bill to which Chris alluded is that there's really an emphasis on opening up earlier in the process to get the formation of the record to the public to get more good information in front of the agency to better inform its choices, better inform its decision-making, and ultimately bump out a much more robust administrative record that can enable the courts to engage in the searching review that they should.

MR. WALKER: I'm just going to add one other quick point on that. Well, I think on the formal rulemaking, I think Aaron's article actually is that if it is a scientific issue, that is good for cross-examination — but again I could be wrong. The other part of that architecture in the Senate that I wanted to point out is that I like how the Senate version would change *Auer* deference to agency regulatory interpretation to *Skidmore*, but it would preserve *Chevron* deference. I think that's important — although, Daniel, the House Bill did

not have that — because if you are going to make rulemaking harder in some circumstances for higher-impact rules, you want to still encourage the agency to engage in that rulemaking. And by preserving *Chevron*, it keeps the reward there, and I'm borrowing from one of Aaron Nielson's prior articles. But it kind of takes the reward of going to the substitute of guidance instead of rulemaking.

MR. FLORES: Maybe I could offer a general correction there. Actually, the Regulatory Accountability Act proper never has taken on *Chevron* deference. We had an omnibus Regulatory Accountability Act that included other titles last term, in which the Separation of Powers Restoration Act, which would legislatively overturn *Chevron*, was included. But the RAA in the House and the Senate, strictly speaking, has been of the nature that Amanda described.

MR. LEVIN: Can I respond to Chris on that issue as well? No, it did not undertake to codify *Skidmore*. It undertook to adopt a test that looked a little bit like *Skidmore* but changed some of the language, and so the bill that came out of Amanda's committee would have proposed adopting a totally new, totally untested standard of review for review of interpretations of regulations.

I think Congress should not be legislating on that point. I've said, you know, the RAA and APA reform in general can be pursued a number of ways, but the courts stay out of scope of review because they don't do it correctly.

MS. NEELY: Courts or Congress?

MR. LEVIN: What?

MS. NEELY: Courts or Congress?



MR. LEVIN: Congress should stay out of it because the courts are in fact doing it. I mean, *Auer* deference was examined extensively and closely by the Supreme Court last term, and they wrote an opinion that is detailed in some ways but also susceptible of evolution. And so I think that's the right way for it to be handled. Whereas, if you codify things, you can be overly procrustean, and you can sometimes make drafting mistakes — as Amanda's bill also provided that a policy statement may not be reviewed for its constitutionality or for being ultra vires. I don't think they intended to do that, but it's what it plainly says. Congress, I think, should leave that type of work to the courts.

MR. FLORES: And I would vigorously attempt to rebut that assertion. The APA after all, itself, in its original 1946 terms broadly defines the scope of judicial review. And that's entirely appropriate because what is happening in cases brought under the APA is challenge to final agency action under a waiver of sovereign immunity. The sovereign is entirely entitled to define the terms through which the review happening under the waiver should take place. Congress has proven quite able to do that, and I would remind everybody that Congress also by statute has adopted the Federal Rules of Evidence, the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, et cetera, et cetera.

So Congress knows how to deal with judicial review provisions. It typically does them in concert with the expertise residing and the authority residing in the Judicial Branch, and so there's quite a bit that we can access to make sure that we make good decisions. But in the end we're talking about waivers of sovereign immunity and how they're framed. So —

MS. ESCALONA: Amanda, do you have any thoughts on that?

(Laughter).

MR. WALKER: Amanda's bill.

MS. NEELY: Yeah, yeah, it's Amanda's bill. Senator Portman will not be —

MS. ESCALONA: Amanda was recently elected to the Senate.

MS. NEELY: Thank you for the promotion. I agree with Daniel — no surprise — that Congress is perfectly capable of dealing with standards of review, and relying on the Supreme Court to solve our problems for us, I think, is inappropriate. We're doing it way too much these days. I think the Supreme Court — I'm not speaking for them, but my sense is that they feel like we're relying on them way too much to solve congressional problems these days. And, again, we tried to take a relatively modest approach in the Senate RAA with addressing the *Auer* issue and requiring courts to look at agency interpretations of their own regulations based on the evidence and the support that the agencies provide for those interpretations. And we think that provides a little bit more accountability for the agencies to write clear regulations. And we don't take on *Chevron* because we do understand that that would be politically infeasible these days, frankly. So, no, I agree with Daniel that it would be an appropriate measure in the RAA.

MS. ESCALONA: We talked a lot about a big package, the RAA or a more comprehensive reform. We know that oftentimes in Congress it is very difficult to move a big package or a big vehicle through both chambers and then to signature by the President. Are there smaller things that could be done that would have that bipartisan support that would be able to move either by [unanimous consent] or be attached to some other vehicle that would be impactful?

MS. NEELY: There are smaller proposals out there. I think Ron and I both mentioned the Independent Agency Regulatory Analysis Act, which would just simply affirm that the President has authority to bring independent agencies under executive orders requiring cost-benefit analysis. Even more restrained measures like that have struggled to get bipartisan support right now, and that's been an interesting development. Regulatory reform has largely, historically been more of a bipartisan exercise, and right now the dialogue on everything is a little bit heated. So, I think over time people will maybe come back to having interest in these more restrained measures. Senators Lankford and Sinema have a good proposal on advanced notices of proposed rulemaking that has gotten some good support in committee. Senator Johnson had a good bill on just requiring agencies to post guidance online. I can't imagine how that receives any opposition, but maybe it does these days.

MR. FLORES: Yeah, I agree with Amanda, there are some good smaller bills out there. Some of them are attempts to excise one portion or another of the RAA and put it into a standalone bill. Others are of a different genesis, but there are some good ones. The ANPRMs bill that Senator Lankford had is one. A bill on retrospective review is another good one. Perhaps there could be a bill that would be smaller that could legislate a requirement for replied comments. That would be a good thing too.

But I think the overarching imperative here is that the problem at hand with the current regulatory burden is so grave that small measures are not really adequate to the problem. If we were talking in 1960 or 1970 and taking a good look back at how the '46 Act were working, then I think it would be entirely appropriate to be focusing on smaller bore measures. But it is 2019, and the figures I mentioned at the outset are real.

There was another study that was done quite recently under the auspices of the Mercatus Center at George Mason that took a look at what the U.S. GDP would have been had federal rulemaking stopped in 1980 — essentially if we didn't have the rules adopted since then. Obviously, a lot of very good rules have been adopted since then, and a lot of very good benefits have been obtained.

But what the study found was that the U.S. GDP right now would be 25 percent larger if that were the case, and one-quarter of U.S. GDP activity is also something that produces an enormous amount of benefits for America, its citizens, and the world. So I think what we need really is a bigger bore measure to make sure that as we achieve benefits, we do so in a way that is tractable but it's more cost efficient, it's more effective, it's just plain smarter, and that's why we focused on the RAA.

MS. ESCALONA: We know that when legislation is passed, there are always unintended consequences, right? What are your concerns about the intended consequences of APA reform, if any? Professor Levin?

MR. LEVIN: I think everything I was talking about was unintended consequences. But I'm not opposed to the idea of modernizing the APA. I think that makes some sense, and certainly in some ways it can be desirable to put some of what is already developed as common law into statutory form so that it will have a little more stability and a little more legitimacy. However, I don't think that we should rush ahead and do things that aren't thoroughly thought through.

Administrative law has always had a very substantial common law component. It's not inherently bad to have it. If you can come up with good statutory reform, that is fine, but just because things are dealt with in case law is not a terrible thing, in my view. It's an inevitable thing, and so we should be cautious about the unintended consequences of various measures. I mentioned only a few, but the the 40-page critique of the original RAA bill that the Administrative Law Section submitted has a lot of comments about the particulars, and I think would bear close attention if the RAA gets reworked. I think as a first stab there's a lot for us to talk about, but I think it needs substantial change. The original APA began as a strong counterforce move against the Roosevelt Administration, against the New Deal, but it culminated in a compromise that was passed by Congress unanimously. I don't think we're very close to coming up with measures that would get that broad support.

MR. FLORES: If I could jump in, I think it's an important question. It's one that we've wrestled with. We tried to deal with it accountably. I would also put in a note of caution about the unintended consequences of the 3,000-plus laws promulgated by the federal agencies each year. I think we'll have a whole lot more unintended consequences through them, particularly the major rules, which is why we need the kinds of reforms that we are trying to take on in the RAA.

MR. WALKER: I would just add a few other [potential unintended consequences]. You know, obviously, anytime you tinker with one process, the agency could shift to other processes, right? And, again, Aaron Nielson has talked a lot about one worry, which is that if you make rulemaking tougher, they're going to switch to adjudication or to guidance. On the adjudication front, we could have a whole panel on reforming adjudication and that would be a very hard panel to have. There are a lot of issues there right now under the APA but more importantly under organic statutes.

And second, as Nick Parrillo mentioned in the last panel on guidance, you can try to reform guidance, and I'm glad we're not diving too much into guidance there because if you make it too hard — I mean, businesses want guidance too, right? Nick's report really does a really fair and detailed exploration of the tensions for businesses between the benefits

of guidance and the cost of guidance. And so I just think there are a lot of unintended consequences to doing reforms. You have got to think very carefully through that before you proceed.

MS. ESCALONA: Thank you. I believe that we are out of time. That was a perfect — the red light came up just as you were finishing. I'd like to thank all of our panelists for being with us here today. Thank you all.

A panel discussion featuring three men seated at a long table covered with a blue cloth. Behind them are several flags, including the United States flag and the Department of Justice seal. The man on the left is wearing glasses and a red tie. The man in the center is wearing a blue tie. The man on the right is wearing a striped tie. A water bottle and papers are on the table. The text 'PANEL 3' is overlaid in the center.

PANEL 3

**REFORM FROM THE FIELD:
CODIFYING THE ADMINISTRATION'S
BEST PRACTICES**

PANEL PARTICIPANTS

Moderator: Jeffrey Bossert Clark, Assistant Attorney General,
Environment and Natural Resources Division

Panelists: Steven G. Bradbury, Acting Deputy Secretary and General Counsel,
Department of Transportation

Eric D. Hargan, Deputy Secretary,
Department of Health and Human Services

Andrew Olmem, Deputy Assistant to the President and
Deputy Director, National Economic Council

MR. FEITH: Our final panel this morning will discuss the reforms undertaken by the Trump Administration to improve the regulatory process. And we're particularly fortunate to have as our moderator someone who's played a key role in those reforms, Jeffrey Bossert Clark. Jeff is the Assistant Attorney General of the Environment and Natural Resources Division. From 2001 to 2005, he served as Deputy Assistant Attorney General of the same division during the administration of President George W. Bush. In between those roles, Jeff was a partner at Kirkland & Ellis. He holds a bachelor's degree from Harvard University, a masters in urban affairs and public policy from the School of Public Policy and Administration at the University of Delaware, and a J.D. from the Georgetown University Law Center. Please join me in welcoming Jeff Clark.

(Applause).

MR. CLARK: Thanks a lot, Dan. And thanks to the Deputy Attorney General, Jeff Rosen, for organizing this summit. I look forward very much to his keynote address, which follows this third panel. So we have three fantastic panelists for you to hear from today, each of whom are experts on administrative law and in particular subject matters.

We have Steve Bradbury, who is the Acting Deputy Secretary and General Counsel of the U.S. Department of Transportation. Before joining DOT, Mr. Bradbury was a litigation partner at the law firm of Dechert in Washington, D.C., where his practice focused on regulatory enforcement and investigations, rulemaking and judicial review of agency actions, appellate cases, and antitrust matters. In private practice he gained experience with automotive safety and aviation competition issues, including before DOT. From 2005 to 2009, Mr. Bradbury headed the Office of Legal Counsel at the U.S. Department of Justice. So, welcome back, Steve.

And before serving in the Justice Department, Mr. Bradbury was a law partner at Kirkland & Ellis for 10 years, where he actually supervised my first Kirkland assignment. So I'm gratified to be on this panel with him. He clerked for Justice Clarence Thomas on the Supreme Court and for Judge James L. Buckley on the D.C. Circuit. Mr. Bradbury graduated from Michigan Law School and received his B.A. from Stanford University.

Our second panelist is Eric Hargan. He is the Deputy Secretary of the Department of Health and Human Services. From 2003 to 2007, Mr. Hargan served in HHS in a variety of capacities, including holding the position of Acting Deputy Secretary. During his tenure at HHS, Mr. Hargan also served as the Department's Regulatory Policy Officer, where he oversaw the development and approval of all HHS, CMS, and FDA regulations and significant guidance documents. In between his tours of duty at HHS, Mr. Hargan taught at Loyola Law School in Chicago, focusing on administrative law and health care regulation. He received his B.A. from Harvard University and his J.D. from Columbia University Law School, where he was senior editor of the *Columbia Law Review*.

Finally, we have Andrew Olmem. Andrew Olmem is the Deputy Assistant to the President and Deputy Director of the National Economic Council. Prior to working at the White House, Mr. Olmem was a partner in the financial services and legislative and government affairs practice groups at Venable LLP. From 2005 to 2013, he acted as Deputy Staff Director and Chief Counsel for the U.S. Senate Committee on Banking, Housing, and Urban Affairs. Mr. Olmem graduated from Washington and Lee University School of Law and also received his B.A. from Washington and Lee University.

We are going to kick things off with introductory remarks from each of our three panelists, and Steve drew the straw of going first. So, Steve, if you would like to give those remarks, that would be very helpful.

MR. BRADBURY: Great. Well, thanks a lot, Jeff. Wonderful to be here. Always great to come back to DOJ and terrific to see the new DAG. This is timely for us because in terms of administrative practice and administrative procedure, we at the Department of Transportation just yesterday, very proudly, posted on our website and sent to the Federal Register what the *Washington Post* this morning called the “Rule on Rules.” It is a comprehensive statement of all of the current rulemaking policies and procedures that we apply at DOT, and it is on our website publicly available. It is going to be codified in the Code of Federal Regulations. In addition to rulemaking procedures, it also addresses the review and clearance and use of guidance documents, and thirdly, it addresses our enforcement actions, putting in place policies and procedures to ensure due process in the Department’s enforcement actions.

All three of these procedural areas are combined into one mega-rule, if you will, which is a very public statement, very detailed statement, and comprehensively captures the policy reforms that we’ve put in place during the current administration. It’s actually not a new set of policies and procedures for us. About a year ago we published on our website a departmental order on our rulemaking procedures and also two general counsel memos, one on guidance documents and one on enforcement actions, and the rule that we published yesterday codifies all of these reforms into a more formal form as a published regulation that’s going to go in the CFR. But it also goes further and makes some tweaks and updates to our policies to reflect the requirements of the executive orders that the President issued just a few weeks ago on use of guidance documents and on enforcement actions.

And just to summarize very quickly, what you’ll see when you look at this rule on rules with regard to rulemaking, let me focus first on rulemaking. Maybe later we can talk about guidance documents. But on rulemaking the reforms you’ll see which we follow at DOT include several areas. Number one, it sets out very clearly our policies for rulemaking, the fact that there should be no more rules than are necessary. The fact that rules should address market failures unless there is some compelling safety need or there is a statutory requirement. The fact that we strive to ensure that the benefits of rules outweigh the costs, that we look to the most cost effective alternatives in our rulemaking and try to impose the least burden to achieve the regulatory goal.



It also captures the structure that we put in place pursuant to the President's executive orders on rulemaking that he introduced at the beginning of the Administration: The two-for-one requirement for two deregulatory actions for each new significant regulatory rule, and also the Regulatory Reform Task Force (RRTF) structure, which we've taken to heart at DOT, taken it very seriously, initially under Jeff Rosen's leadership there when he was Deputy Secretary, and we've carried that on where we have a very active RRTF structure, and every single rule at the Department, whether significant or non-significant, now gets approved by the General Counsel and by the Secretary. So that's something that is just fundamentally an important reform. And so that whole structure of the RRTF and that process you'll see set out in the regulation and now institutionalized. We hope it will become more permanent as a result of this rulemaking.

In the rule, we also have captured our policies on providing greater process for the most high impact rules so that there's more opportunity for public participation, more opportunities for public comment and the potential for formal hearings with regard to material issues of fact that are disputed in a rulemaking and may have a significant effect on the outcome of the rulemaking determinations.

So those procedures you'll see in the rule, and some of those ideas will look familiar to those of you who know about the Regulatory Accountability Act, a legislative proposal that actually passed the House of Representatives and has been under serious consideration for some time in Congress. We've taken some of the good ideas from that legislative proposal and made them a matter of administrative procedure and policy at DOT.

So we're really proud of this. We think it's a model for the Executive Branch and very much carries forward the President's emphasis on regulatory reform and the initiatives of the Trump Administration, which are really having, we think, a very significant positive impact on the U.S. economy. Thanks.

MR. CLARK: Thanks, Steve. Eric, your remarks.

MR. HARGAN: Again, thank you all here at Department of Justice for hosting us here today. I think this is very timely — actually it's very timely just because DOT has come out with this good new rule that is actually very similar to something that we are sort of working on at HHS, but they've stolen a march on us at Transportation, but we'll get there.

Obviously as you heard from the introduction, a particular passion of mine is administrative law and regulation. I was a regulatory policy officer when I was at HHS under President Bush, a position that was cancelled under the previous administration, and I'm now Chief Regulatory Officer again. I was actually Deputy General Counsel for Regulations. That was my first position at HHS. And as I said, I taught regulatory administrative law at Loyola. I was a regulatory lawyer at Greenberg Traurig in the Health Care Department before I came back into the Administration.

One of the things we have focused on is some of the regulatory initiatives that are new to this Administration. HHS — I'm going to do a little bragging here — in fiscal year '18 accounted for over half the deregulatory savings for the entire federal government of \$12 billion. In fiscal year '19, we're again the leader on deregulatory savings, and we're six for one on our regulatory versus our deregulatory actions. So I think we're kind of leading the pack so far. I think DOT might beat us if they get some of their stuff done this year. We have really no chance, even though we're the largest department, \$1.3 trillion budget, but still, nevertheless, I think DOT has a good chance of beating us thanks to Jeff's good work preparing and Steve's continuing work on that. So we're going to do our best at keeping up with Transportation this year.

MR. BRADBURY: It's a healthy competition.

MR. HARGAN: It's a healthy competition. You can ask Pat Pizzella at Labor. We came in on September 30th with a new deregulatory action to beat Labor this year. At the last second he put something in on September 27th. We came in on September 30th. But it's that kind of competition, I think, that is necessary when you see the overgrowth of many of the regulations that have lain fallow and have built on themselves for a period of decades — that it's frankly healthy to the system to have a new approach to administration and to regulation, and that we do think about these things.

We think about the costs and we participate in some informal competition in some ways, but it's informal. We still have a lot of laws to administer, and we have to do it in a thoughtful way, respectful of the laws that we have to enforce. Part of that is the Deputy

Secretary's regulatory sprint to coordinated care where I'm sponsoring a regulatory reform initiative across four different regulatory regimes within HHS: the Anti-Kickback Statute, the Stark Law, which deals with physician self-referral, HIPPA, and 42 CFR-Part 2, which is a substance use confidentiality statute.

In many cases, these regulations had not been reformed or even looked at for 20 or 30 years and had really stymied some of the transition away from the old model that really three Administrations have tried to get away from, which is Fee for Service in Medicare, onto what we call Value Based Care System. Coordinated care, meaning that patients can kind of go from one care setting to another, is something that a lot of well-meaning statutes had stymied, and so we're working on undoing that. And really getting four agencies to work with one another across a range of coordinated care is itself a matter of coordination.

So it's getting elephants to dance in a regulatory way, which has been an interesting endeavor. So we've got three of those four done at this point. HIPPA still remains. I've read the NPRM, and we've done a good amount of internal changes within HHS. For example, I now get a predevelopment memo before we ever start drafting an NPRM, to kind of look through what an agency is proposing. So we've put new processes in place to make sure that we are thinking about it before we launch a new proposed regulation.

And again, we have an RRTE, Regulatory Reform Task Force, similar to DOT that also looks at these things at a more granular level before they come in to us. So we're happy to be participating in this, and I think that within the Administration we've got a good aim at regulatory reform that has, I think, really enlivened a lot of the conversations, at least inside HHS and I think administration-wide, on achieving the right balance of regulation over the industries that we oversee. In our case it is well over a quarter of the American economy, whether it is FDA, Medicare, Medicaid, or what-have-you, and the largest single department. So it is a tremendous endeavor, but at least we have the wind in our sails from the point of view of administrative reform and regulatory reform specifically. So I look forward to this discussion.

MR. CLARK: Eric, thanks a lot. Andrew, you're up.

MR. OLMEM: Thank you for having me here today, and I really appreciate the opportunity to talk about what the Administration's doing on regulatory reform and particularly how it is impacted by the Administrative Procedure Act and potential reform for the APA. You know, we at the NEC are the body that is responsible for helping to devise and coordinate the Administration's economic policies, so we work with all of the agencies across the board and, as a result, it really is a great place to kind of see perspective on how regulation works and is implemented.

And for us, we believe regulation and improving the quality of the regulation are essential to our mission, which is improving the economic growth rate for the United States. That is our primary objective at the NEC. And when we think about the impact regulation has on

the economy, it becomes very obvious that having a better regulatory process, to have better regulations and potentially have fewer regulations is good for the economy.

If we look at the U.S. economy right now, we are growing at a rate that is basically double the rest of the western world. And you ask yourselves, why is our performance so much better? And if you look at the job numbers today which are just — I've just got to say, just take a minute, do a quick victory lap — just a blockbuster number we're very proud of. We blew expectations out of the water, and it shows that the United States's economy still continues to be the most robust and dynamic place to do business in the world.

But we know that in order to keep our amazing economy going and really improve the growth rate from where it's at, we still need to do a lot of reforms. We still think we can do better. And one of those areas is improving our regulatory process. And why is that so important? Certainly you've already heard today about the overall cost of regulations on the U.S. economy. By some estimates it is about \$1.9 trillion, which is more, just for comparison, than federal tax receipts. So when we talk about impact on the economy, regulation is front and center.

Certainly that hits all businesses. It hits all consumers. And when there are inefficiencies there, we all pay for it in terms of not only higher costs, deadweight costs to society, fewer goods and services, fewer jobs. But one area that I think doesn't get enough attention that we at the NEC have a particular focus on, and why we're very interested in making sure we have a better regulatory process, is the impact on entrepreneurs, who are really the turbine engines of the U.S. economy. Entrepreneurs are the ones who come up with our new ideas, the new innovations that really spur the U.S. economy on, and our entrepreneurial culture is what differentiates the United States from pretty much every other major industrialized economy.

We just have this amazing entrepreneurial culture where any American can look out and say, "I'm going to start a business." Whether that is going to be a small business in their local community, you know, a gas station, a bowling alley, pizza parlor, or a new tech company that in 10 years will be a global, big public company. Entrepreneurship as a culture is one of the strengths of the U.S. economy.

But it's also something that's greatly impacted by regulations that are overly broad and not well thought out because they can impose unnecessary, and in many cases overly burdensome regulations on entrepreneurs to make it impossible for them to get their new ventures off the ground. And that in the long term really hurts economic growth. So when we think about regulation, we are really and particularly thinking about those entrepreneurs and how those regulations will impact them.

Certainly for larger companies, we want to make sure the regulations are workable, but they tend to have a little bit easier time amortizing some of the regulatory costs. Whereas for entrepreneurs, it can be a binary. If the regulation goes through, either I can comply, or I'm out of business or I can't get my new venture up. And also regulation can have an impact on

competition, because if those entrepreneurs aren't able to get up and compete, that means we have less competitive and less dynamic markets. So having really good regulation is critical for our mission at the NEC.

I quickly just want to show you some of the things that we've been able to do to improve the quality of regulation. The first thing is we've been aggressive advocates of the use of the Congressional Review Act. I think we are now up to 17 or 18 CRA's. I've kind of lost track. We've used it so often. The President's signed so many of them. Before this Administration, there had only been one. So that's one, is just taking care of overhanging regulation that has already been out there.

Second, the President has signed two executive orders, which were mentioned earlier, clarifying the use of guidance in enforcement matters and also revising the process for the issuance of guidance, so that guidance will no longer be viewed by the public or by agencies as a de facto rule that has not gone through the APA.

The APA is really important for making sure that in an economy of 300 million people, that has 30 million businesses and is incredibly diverse, regulators are acting in an informed process. And without making sure we understand how regulation impacts the economy through that public notice process, we oftentimes get regulation that unnecessarily has an adverse impact when it doesn't need to, and issuing guidance that doesn't have that safeguard creates a really dangerous way for agencies to work.

And then two final things I'll just mention because I think they're worth noting is, the federal financial regulators also issued a really interesting interagency document on their view on guidance that reflects very much the tone of the executive order. And then finally, the FDIC just last month issued an RFI that is worth looking at, that requests comments on how they should redo their regulatory analysis, focus it, and streamline that process so that they have better public comments and also so that their regulatory analysis is more focused on their core missions. For example, they ask for how they can analyze rules better to make sure that they don't have an adverse impact on safety and soundness or on access to credit for underserved communities. In other words, how do they improve their regulatory analysis so it actually serves the mission of the agency better?

Those are just a couple of the areas that we have been working on improving our regulatory process, and we are very excited also about the work both HHS and DOT are doing to fulfill the President's wishes on this topic. Thank you.

MR. CLARK: Thanks a lot, Andrew, for your remarks as well. So the first question I have is going to go to Steve, and I'm going to riff off one of the things you said in particular about your meta-rule, your rule on rules. So you have a wide array of proposed rules or final rules that run the gamut from airport safety, pilot training, medivac pilot training, bridge inspection standards, alcohol and drug testing, fuel efficiency standards for a range of

vehicles, and pipeline and hazardous material safety. So the first part of the question is, how do you prioritize that? Does the rule on rules help you to do that? And then to riff off of something you said, which I found particularly intriguing in terms of trying to modernize the APA, is to ask the fundamental question before you start regulating, what is the market failure that you're trying to address? Because I've found that is a methodology, a way of looking at regulatory issues that came into being after the APA. There was a lot of optimism in the New Deal stage about having technocrats address issues that Congress was seen as not really able to address. But I think in the '70s and the '80s came economic critiques, and those economic critiques tried to ask the fundamental question of, what do we really need this regulation for? So that is the first question for you, Steve.



MR. BRADBURY: Well, thanks. You know, one of Secretary Chao's big priorities coming in as Secretary of Transportation is to centralize review and harmonize review of rulemaking and enforcement decisions across the various what we call modes of DOT. There are operating administrations. As you referenced, we have a wide range of operating administrations, mostly addressing safety regulation of different transportation modes in the country — aviation, railroads, motor carriers, manufacturing of motor vehicle equipment, transit authorities, et cetera.

So there's a wide range, and these represent different statutory authorities Congress has granted mostly to the Secretary of Transportation that have then been delegated down to these different operating administrations. But they are not independent actors that operate independently of the review by the Secretary. So one of the things that we really have institutionalized in this new rule on rules and in the procedures we've put in place in the last

three years at DOT is to ensure greater accountability through the Office of the Secretary's high level review and coordination of the different rulemaking and enforcement actions across the modes.

Now an equally high priority — actually the number one priority — for the Secretary is safety and achieving the safety mission efficiently and effectively that Congress has granted to the Department. So that goes hand in hand with regulatory reform decisions. But when you have a coordinated senior-level review working closely with the administrators of the different operating administrations through the Regulatory Reform Task Force, and ultimately Secretarial signoff on each action, you really have the ability to see across this varied landscape of enforcement authorities and ensure rational coordination, so that we're not working at cross-purposes in trying to achieve that critical safety mission by taking different regulatory approaches that are sending confusing messages.

Now, obviously, if we have a mandate or a critical safety need in one area, that's going to take precedence over regulatory reform objectives or coordination. But the act of synthesizing and reviewing in a coordinated way has real benefits in terms of achieving more efficiency and better compliance results in the safety mission, and that just can't be denied. When you eliminate rules that are economically irrational, that do not produce more benefits than the cost they impose, that may be hard to understand, that may be duplicative of other regulatory requirements, you are going to have a [positive] effect on safety compliance.

Rather, if you clean up those irrationalities, eliminate duplication, focus in on requirements that are economically sound and that are written in plain English and clear to understand for the average regulated entity or person out there in the economy, you're going to achieve higher levels of safety compliance. So we really see — and I think the Secretary has emphasized this — a hand-in-glove fit between our regulatory reform efforts and our safety mission.

I just want to say, institutionally, one thing we've done as a kind of working approach to the question you raised is we actually, at least for internal management administration purposes, have applied the two-for-one requirement of the President's executive order mode by mode at DOT. So when we work through the Regulatory Reform Task Force with each mode, each operating administration, we try to identify two deregulatory actions that that operating administration can propose to take in conjunction with each new significant regulatory rule. Now, it doesn't always work out that way, and it's not a hard and fast requirement; it's just a discipline. It's really just a mindset and a discipline that helps us unify that effort across the Department and achieve more consistency, and I think for that reason, effectiveness. Thanks.

MR. CLARK: Thanks, Steve. So, Eric, the second question goes to you. On November 1st of this year, you issued a proposed rule informing the public that certain regulatory provisions in the Uniform Administrative Requirements Cost Principles and audit requirements for HHS Awards will not be enforced because of serious concerns regarding the prior Administration's implementation of the Regulatory Flexibility Act.

The Regulatory Flexibility Act, passed in 1980, was one of the earliest attempts to balance social goals and federal regulation with the needs and capabilities of small business, and I think was part of that wave that came in the '70s and '80s of recognizing that one needs to look at costs and market failures. The Act has saved small businesses hundreds of billions of dollars over the decades by seeking to ensure that the federal government regulates at a scale that's appropriate to the size of smaller businesses.

What prompted HHS to issue that proposed rule, and how can we more effectively use the Reg Flex Act to ensure that we regulate at an appropriate scale?

MR. HARGAN: Well, I think we have undertaken kind of a very serious look at all of our regulations at HHS. We've even, believe it or not, put all of our regulations through an AI at HHS. We fed them all in, and on the first pass we did kind of a machine learning process on our regulations. And on the first pass we found that we had broken cross-references. We had laws that we had regulations about that don't exist anymore. We had orphaned regs that had never been assigned to an agency. We still had requirements for using the telegram or telegraph. We still had requirements for posting at the general post office, which I've been to, and there are no HHS notices to the public being posted at the general post office. So there were a lot of these requirements for triplicate and quadruplicate paper filings with the Department that were no longer being enforced.

So just on the first pass we found 1,200 of these kinds of problems within our regulations. We're going to be working on that. It's actually a more complicated process when you have a lot of agencies. Are we going to actually file it in one big issue? Are we going to break some off? Are we going to make the agencies do them and all of them do them? Are we going to do it through the Secretary? It's more complicated than it seems to draft a preamble for 1,200 regulations changes. It's a very complicated process.

It doesn't exactly address your question, but the question of what we did with the Regulatory Flexibility Act is that we have undertaken a look at a lot of the things that have been done, and in the waning hours of any administration — and certainly the previous one — there were certain times that RFA rules or other rules were not done, even in a cursory manner. We have had serious concerns about whether the RFA had been followed at all with regard to [certain] regulations, which means by its terms that it was void 180 days after it was promulgated.

So in some ways it was a recognition that the rule wasn't in place at that time. It was already lapsed in the middle of 2017. So in some ways we were going to repromulgate that. It's a grants regulation that needed to be in place. We repromulgated most of the provisions of that but made sure that we took account of all applicable Supreme Court precedent. There were a lot of things in that rule that we had some concerns about their adequate accommodation to other laws and to all applicable Supreme Court precedents. So we made sure that when we repromulgated, that it's going to take all of those things into account and that we actually follow the RFA.

I mean, as you noted, the law is there to make sure that we regulate at an appropriate scale. And when you have regulatory agencies that span everything from healthcare through food and drug regulation through research, medical research, social services — the whole area that we regulate is pretty vast, and to have a fundamental regulation that didn't really address a major concern of small businesses that are definitely going to be affected by us, we had to make sure that we had that assessment done, and so we're having to repromulgate the regulations.

In some ways, we would have done that anyway because we knew that there were protections that were not addressed in that grants regulation, particularly with regard to religious liberty, that had not been addressed in that regulation and that had to be addressed. And so we both accommodated to make sure that RFA is addressed, that we take that seriously which had to be taken seriously, that we addressed the fact that by its terms the regulation didn't exist. We believed that we had strong concerns about it, and we made sure that we addressed all those concerns. So that was the idea. I mean, we've been prompted to kind of look back on regulations generally, and some of that is needful. So that was one of the ones that got addressed when we found something that was fairly seriously not addressing the RFA.



MR. CLARK: Well, it's great to hear especially about your efforts not only to breathe life into the Reg Flex process but also to use AI, right, to —

MR. HARGAN: Yes.

MR. CLARK: — show that government can keep up to date with what's happening in the larger dynamic area, the American economy.

MR. HARGAN: Yeah, and at least in some ways, I mean, how many teams of lawyers would we have had to put on that to read all of our regulations across FDA, Medicare, Medicaid and everything? Instead, the AI, at least in its limited way, when we tell it what to look for, could find these things relatively quickly.

MR. CLARK: Right. It's a perfect use of it.

MR. HARGAN: Yeah.

MR. CLARK: It can't do the deeper thinking.

MR. HARGAN: Yeah.

MR. CLARK: But that kind of thing is excellent.

MR. HARGAN: Yeah.

MR. CLARK: Well, Andrew, the next question is for you, and it won't surprise you that it's going to be about cost-benefit analysis.

MR. OLMEM: Yeah.

MR. CLARK: And so the weighing of cost-benefit, cost and benefits has been a key part of the federal rulemaking process ever since President Reagan issued Executive Order 12,291 in 1981, and yet there are still some regulations and rulemakings that are done without weighing benefits and costs, for instance, where the agency questions its authority to do so. The Supreme Court has insisted on cost-benefit analysis in several cases in recent years, including *Entergy v. Riverkeeper* from 2009 and *Michigan v. EPA* in 2015. Should cost-benefit analysis be required across the board as part of the default rulemaking process that agencies apply? And how can agencies use cost-benefit analysis and other economic tools to improve their rulemaking process?

MR. OLMEM: Yeah. You know, at the core, cost-benefit analysis, in my view, is making sure that there's an informed decision. Most of the rules — the vast, vast majority of the rules that are issued — involve some type of financial impact or obligation on parties or otherwise impact on the economy. And one of the key principles, I think, of a democratic society is that government doesn't act in an arbitrary and capricious way, and that the public has the right to expect that its government goes off and informs itself before it acts. That to me seems to

be, at a very fundamental level, something that we should rightfully expect any government actor to comply with absent unique circumstances. It's very difficult to come up with these rules without first going off and asking some basic questions about which parties would be affected and how would they comply.

You know, the basic work to put together a rule to accomplish whatever statutory mandate is going to require you to go off and ask those same types of questions, collect that type of information. So you're going to be collecting that information to come up with the rule. It's hard for me to see in most cases why an agency wouldn't then use that information to make sure that they're moving in the most efficient manner possible. That's just a basic good government approach.

And also from the public's perspective — and this is also from the economic perspective — the ability then to weigh in as part of the notice-and-comment period that the APA provides gives agencies the ability to modify their rules so that they can still hit their statutory objective but also avoid unintended consequences on particular parties. And that's a really important part of where cost-benefit analysis, in my view, comes in.

Linking up what I mentioned earlier about the impact on entrepreneurs, the unintended consequences of regulations can be huge. We have such a diverse economy here. It is just amazing to me how many people have businesses that interact with federal regulations in ways that you can't anticipate, and this is where I think cost-benefit analysis also requires regulators to have a little bit of humility about their ability to understand the impact of their regulations.

There is this idea, going on back to the Progressive Era that you would have really smart regulators who would go in, look at all the data, and based on that they would come up with the scientific rule that would be kind of perfect, and there would be only one answer. But I think anybody who's worked in government over the last hundred years, since that Progressive approach was first promulgated, knows that there are a lot of important tradeoffs that need to be made and that rules have an impact that regulators may not actually be aware of.

No one person can really understand the U.S. economy. And so having a robust notice-and-comment period where regulators can see from the public the impact of their rule is really important. As I mentioned in my bio, I worked at the Senate Banking Committee for a long time, and particularly I was there when the Dodd Frank regulations were coming through, and that's a 10-year-plus — actually it's still going on — a 10-year regulatory reform process.

And having the APA requirement that all these rules go through notice and comment has been very helpful, I think, to that process in mitigating some real problems with the Act to begin with. But there's no doubt that the notice-and-comment provisions there have helped a lot of those regulations avoid a lot of adverse impacts on parties, which otherwise

wouldn't be mitigated. So I think we just owe it to the public to have a cost-benefit analysis. It improves the rule. The downside, I think, is very, very minimal, and it's something that the public benefits from and also simply makes us do our work better.

The one last comment I'd make on the cost-benefit analysis is that it actually does also, I think, help come up with a unified approach through the federal government because we have so many agencies, so many different rulemaking authorities out there. As part of the OIRA process, which tries to centralize and come up with a consistent approach, cost-benefit analysis is core to making sure that any Administration can have consistent, coherent policies across the federal government. And so, therefore, naturally I think cost-benefit analysis is a really valuable tool for regulatory agencies.

MR. CLARK: Thanks, Andrew. I mean, we heard from Dan Flores, who was on the immediately prior panel, that the regulatory costs of this nation are equivalent to the ninth largest nation by GDP, and it would seem that inherent in that, you have to have some transparency. Otherwise those costs would be hidden, right? That can't be rational decision-making.

MR. OLMEM: And to try and mitigate them too. If you can achieve a statutory mandate in a cheaper way, what's the argument for not doing that, right? It has to be pretty substantial. And, again, just informing yourself in a reasonable manner is an important value.

Certainly, regulators have to make decisions, and an information collection process has to come to an end at some point, right? But at least the notice-and-comment period will help inform the regulators to get the best information they can, along with their own analysis, put it out for the public, and get comment on it, and then they can make a decision and move along. When you have regulations that have billions and billions of dollars of impact, that's a small kind of transaction cost to making sure that that regulation is done in the most efficient manner.

MR. CLARK: Absolutely. So I have some general questions. You know, first, I think I would commend everyone in attendance and the other panelists to look at DOT's rule on rules, which I think would prove a model for administrative law reform, and I think is consistent with the title of this panel, which is about best practices of the current Administration.

But I want to talk about another set of best practices. In part it's about implementation inside your two agencies, and then for Andrew, the form of the question would be participating in the development of this.

President Trump — and it's been referred to several times earlier today — signed two executive orders that are aimed at curtailing agency abuse of guidance documents. The first EO was called "Promoting the Rule of Law Through Improved Agency Guidance Documents." It increases transparency around guidance documents. It requires federal agencies to establish a repository page on their website where all of the agencies guidance documents can be found.

And the second EO is called “Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication.” It deals with penalties stemming from guidance documents and other unannounced policy interpretations.

So for those in the chairs of running the substantive agencies, how do you make use of informal guidance as a tool for informing the public and regulated entities? To what extent do you do that? How has your agency sought to strike the appropriate balance between the benefits of guidance and its harmful aspects? There, I guess, I’d refer you to Professor Parrillo’s remarks from the first panel about his study trying to look at those kinds of tradeoffs. And finally, what can be done to ensure that guidance documents are not misused?

MR. BRADBURY: Great. Thanks. Well, I love this topic. It’s kind of an easy answer because it’s also covered by our rule on rules regulation.

MR. CLARK: Yeah.

MR. BRADBURY: As I mentioned at the beginning, it has three areas it addresses: rulemaking procedures, but also review and clearance of guidance documents, and due process and enforcement actions. So the last two get into the subject you’re talking about in there, the subject also of the President’s executive orders from a few weeks ago.

So, just as a reminder to everyone up front, guidance documents can be extremely helpful to regulate a community because they provide information. They can be a positive regulatory tool in terms of giving regulated entities a clear idea of what’s expected for purposes of compliance with an existing law or regulation.

The critical things are: Number one, they be published and known to all potentially interested affected parties. Number two, they do not impose new legal obligations in their own right that go beyond existing statutory obligations or regulations. Number three, they’re not used in an enforcement action as an independent basis to penalize somebody.

So, in other words, they’re advice, they’re precatory, they’re giving you helpful instructions as to what the regulator thinks is a good way to go. But they’re not in and of themselves legally binding beyond what’s in an existing rule and regulation.

And then the last point is that we recognize that as helpful as they may be, guidance documents can result in real economic costs out in the economy for private parties. Because just face it: Let’s say the regulator is regulating the financial accounting of certain entities, and the regulation says you have to have sound financial accounting for your business in place. And then they put out a guidance document, and the guidance document very helpfully says, if you hire two independent financial accountants to do your books, we’ll treat that as a safe harbor, and we won’t bring any enforcement action. So it’s basically a “should.” It’s not required. It’s a “should.”



All right. So we have to face the fact that a lot of regulated entities will take that, and they'll expend money to follow that suggestion because they want to avoid the potential for an enforcement action. So there's going to be a number of entities, probably a pretty predictable number, who don't currently use two sets of accountants to do their books, who will go out and incur that cost just to come into compliance with what the guidance says the agency thinks they *should* do as a good compliance practice. So that is a real cost, and it should be accounted for.

And so the other principle, the final principle, is when there's good reason to believe — and the agency should know this — that a guidance document is likely to result in significant costs to the economy — and just use the hundred-million-dollar annual cost that is used for significant rulemaking by OIRA — then the agency should do a cost-benefit analysis and should put that guidance document out for public comment. Maybe it doesn't have to be published in the Federal Register. Maybe you could use a more informal process.

But these are the elements that we've got in our procedures. We put them in place a year ago, and they're also reflected in the President's executive order. All guidance documents are now put on the website. So everybody who's affected can see what the operative guidance is. It's clearly stated in the guidance document that it does not have force and effect of law in its own right and won't be used as a basis for an enforcement action. We try to avoid using "shall" and "must" in the guidance documents. Rather, it's "should" or "may consider," et cetera. And then if there's reason to think it will have significant costs, we do cost-benefit analysis. We put it out for public comment.

And these are some of the same elements that the President has instructed agencies to follow in the executive order of a few weeks ago. So we think that guidance can be very positive and useful. It shouldn't be eliminated. But, if done in the right way, these are fundamentally important reforms.

And then just the last thing I'll say about enforcement actions is: As you'll see again in our regulation on enforcement actions, we should be upfront, open, and transparent as to what the legal requirements are we expect of parties before we go in and do inspections and bring enforcement actions against them in an attempt to penalize parties. It's just fundamental due process — give them notice and then an opportunity to be heard in an enforcement action. Don't play "gotcha."

Also, as you'll see in there, we're not going to use the *Chevron* doctrine of judicial deference as an excuse or device to expand the envelope and go as far as we can go on what our authorities will allow for in an enforcement action. We're going to stick to what is a reasonable best interpretation of the authority. And, again, these are just fundamental.

We have some other interesting reforms in there, some DOJ may be interested to see. As a matter of enforcement policy at DOT, we're actually going to apply a version of the *Brady* Rule in the administrative enforcement context. That is to say, consistent with the integrity of the enforcement effort, we will share with the regulated entity the material evidence we have on both sides of the issue before trying to bring the hammer down for a violation. Thanks.

MR. CLARK: Yes, thanks. Eric, do you want to take that?

MR. HARGAN: Yeah. So, HHS is no stranger to guidance and informal guidance documents. It is very widespread within our agencies. As many of you may know, there's a recent Supreme Court case involving Medicare on this very issue — *Allina Health Services* — that was decided earlier this year and found that the notice-and-comment requirements were different in the Medicare Act and in the APA, and whereas some interpretive rules were exempted from notice-and-comment rulemaking under the APA, they weren't under the Medicare Act.

And so we're actually having to kind of revise the procedures of our largest single program to reflect the fact that guidance is going to be treated differently in that area in accordance with the Supreme Court decision on that. So we have to undergo a stronger amount of notice-and-comment process for Medicare. So radiating through the Department right now is the fact that we have these new requirements under *Allina*.

To echo what Steve said, we also have the fact that, for us, pharmaceutical companies, medical device companies, food and beverage companies, hospitals, doctors, and all healthcare providers one way or another usually participate some way in one of our agencies, and they need guidance in that informal way. Nevertheless, the impact of it is huge. Even the markers

that you put down — a hundred million dollars — in the context of our programs sweeps in an enormous amount of material from an HHS point of view just because the dollar amounts that we deal with in the healthcare sector are so large for a multi-trillion-dollar sector of the economy. So it's a bar for some areas and in some agencies, but it sweeps a lot of material into our process, necessarily so.

I mean, the impact that we're talking about is vast, but it's also necessary that we approach guidance in a new way. So I would say to watch this space. We're probably a little bit behind DOT in this area just in terms of timing for us to get around to this, but we're acting both under Supreme Court direction in the *Allina* case, where we are going to have to comply with new requirements on us in the Medicare context, and also the two EOs that I think provide a very useful amount of direction for us to put this in place.

The same issue came up under President Bush as well, in OIRA, under the idea of the significant guidance issues that came up then Director Graham. So our team — many of us were there before under President Bush — are well aware of the issue. So we're coming back to this issue once again of the role of guidance, the demands for it on the part of industry. Because trying to undertake a highly technical, complex, and often scientific or technological issues for industry, on the one hand, which have to retain a certain amount of flexibility and need to move rapidly on the ground, but on the other hand the amount of money and expense that industry is going to expend on the basis of that guidance, has to be balanced on that side as well.

So it's a complex area, but I would say watch this space. We'll be coming out with something as well — additional safeguards to make sure guidance isn't misused in the future, that we had cabined in some ways the process that we're undertaking at the Department.

MR. CLARK: So, Andrew, we have about — thank you, Eric — we have about three minutes left. So we could have some concluding quick remarks or you could say something about guidance.

MR. OLMEM: Well, let me say quickly on guidance, then, that just for perspective here on what we've been doing is that you look at the APA. It was enacted in 1946. Guidance simply did not play the role that it does today in the agency process, and also technology has changed just a little bit since 1946. And that means the ease of communications and the ability for agencies to put out guidance has really, really increased.

In addition, guidance is also something that is increasingly used by professional staff as opposed to appointed and Senate-confirmed officials. And so if you look at the reforms that we've implemented through the EOs and that our agencies are now implementing, they do two big things, I think. One is make sure that there's direct accountability within the agencies by requiring that the agency head sign off on any significant guidance. So we have accountability within the agency.

And then two, it requires significant guidance to go through OIRA, making sure that the President then also has a chance to weigh in and be informed about any significant guidance. If guidance is going to have an impact of a hundred million dollars or greater, that's something that we need to have direct accountability for both within the agency but also overall from the Administration, from the President's perspective as well. So we think both reforms will help improve the accountability and, therefore, hopefully the outcome on how we use guidance going forward. And finally, that will also be a good thing for the public in making sure there's transparency and that agency officials don't simply issue guidance without making sure the elected officials are aware of what's going on.

MR. CLARK: Well, thanks to all of our panel members, and thanks to you for your attention to their comments.



APPENDIX

A. EXECUTIVE ORDER 12,866

Federal Register
Vol. 58, No. 190
Monday, October 4, 1993

Presidential Documents

Title 3—

Executive Order 12866 of September 30, 1993

The President

Regulatory Planning and Review

The American people deserve a regulatory system that works for them, not against them: a regulatory system that protects and improves their health, safety, environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society; regulatory policies that recognize that the private sector and private markets are the best engine for economic growth; regulatory approaches that respect the role of State, local, and tribal governments; and regulations that are effective, consistent, sensible, and understandable. We do not have such a regulatory system today.

With this Executive order, the Federal Government begins a program to reform and make more efficient the regulatory process. The objectives of this Executive order are to enhance planning and coordination with respect to both new and existing regulations; to reaffirm the primacy of Federal agencies in the regulatory decision-making process; to restore the integrity and legitimacy of regulatory review and oversight; and to make the process more accessible and open to the public. In pursuing these objectives, the regulatory process shall be conducted so as to meet applicable statutory requirements and with due regard to the discretion that has been entrusted to the Federal agencies.

Accordingly, by the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Statement of Regulatory Philosophy and Principles.

(a) *The Regulatory Philosophy.* Federal 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 to protect or improve the health and safety of the public, the environment, or the well-being of the American people. In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.

(b) *The Principles of Regulation.* To ensure that the agencies' regulatory programs are consistent with the philosophy set forth above, agencies should adhere to the following principles, to the extent permitted by law and where applicable:

- (1) Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem.
- (2) Each agency shall 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.

(3) Each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

(4) In setting regulatory priorities, each agency shall consider, to the extent reasonable, the degree and nature of the risks posed by various substances or activities within its jurisdiction.

(5) When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall design its regulations in the most cost-effective manner to achieve the regulatory objective. In doing so, each agency shall consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity.

(6) Each agency shall assess both the costs and the benefits of the 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.

(7) Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation.

(8) Each agency shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt.

(9) Wherever feasible, agencies shall seek views of appropriate State, local, and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those governmental entities. Each agency shall assess the effects of Federal regulations on State, local, and tribal governments, including specifically the availability of resources to carry out those mandates, and seek to minimize those burdens that uniquely or significantly affect such governmental entities, consistent with achieving regulatory objectives. In addition, as appropriate, agencies shall seek to harmonize Federal regulatory actions with related State, local, and tribal regulatory and other governmental functions.

(10) Each agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies.

(11) Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations.

(12) Each agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.

Sec. 2. Organization. An efficient regulatory planning and review process is vital to ensure that the Federal Government's regulatory system best serves the American people.

(a) *The Agencies.* Because Federal agencies are the repositories of significant substantive expertise and experience, they are responsible for developing regulations and assuring that the regulations are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order.

(b) *The Office of Management and Budget.* Coordinated review of agency rulemaking is necessary to ensure that regulations are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order, and that decisions made by one agency do not conflict with the policies or actions taken or planned by another agency. The Office of Management and Budget (OMB) shall carry out that review function. Within OMB, the Office of Information and Regulatory Affairs (OIRA) is the repository of expertise concerning regulatory issues, including methodologies and procedures that affect more than one agency, this Executive order, and the President's regulatory policies. To the extent permitted by law, OMB shall provide guidance to agencies and assist the President, the Vice President, and other regulatory policy advisors to the President in regulatory planning and shall be the entity that reviews individual regulations, as provided by this Executive order.

(c) *The Vice President.* The Vice President is the principal advisor to the President on, and shall coordinate the development and presentation of recommendations concerning, regulatory policy, planning, and review, as set forth in this Executive order. In fulfilling their responsibilities under this Executive order, the President and the Vice President shall be assisted by the regulatory policy advisors within the Executive Office of the President and by such agency officials and personnel as the President and the Vice President may, from time to time, consult.

Sec. 3. Definitions. For purposes of this Executive order: (a) "Advisors" refers to such regulatory policy advisors to the President as the President and Vice President may from time to time consult, including, among others: (1) the Director of OMB; (2) the Chair (or another member) of the Council of Economic Advisers; (3) the Assistant to the President for Economic Policy; (4) the Assistant to the President for Domestic Policy; (5) the Assistant to the President for National Security Affairs; (6) the Assistant to the President for Science and Technology; (7) the Assistant to the President for Intergovernmental Affairs; (8) the Assistant to the President and Staff Secretary; (9) the Assistant to the President and Chief of Staff to the Vice President; (10) the Assistant to the President and Counsel to the President; (11) the Deputy Assistant to the President and Director of the White House Office on Environmental Policy; and (12) the Administrator of OIRA, who also shall coordinate communications relating to this Executive order among the agencies, OMB, the other Advisors, and the Office of the Vice President.

(b) "Agency," unless otherwise indicated, means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10).

(c) "Director" means the Director of OMB.

(d) "Regulation" or "rule" means an agency statement of general applicability and future effect, which the agency intends to have the force and effect of law, that is designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency. It does not, however, include:

- (1) Regulations or rules issued in accordance with the formal rulemaking provisions of 5 U.S.C. 556, 557;
- (2) Regulations or rules that pertain to a military or foreign affairs function of the United States, other than procurement regulations and regulations involving the import or export of non-defense articles and services;
- (3) Regulations or rules that are limited to agency organization, management, or personnel matters; or
- (4) Any other category of regulations exempted by the Administrator of OIRA.

(e) "Regulatory action" means any substantive action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices

of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking.

(f) "Significant regulatory action" means any regulatory action that is likely to result in a rule that may:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

Sec. 4. *Planning Mechanism.* In order to have an effective regulatory program, to provide for coordination of regulations, to maximize consultation and the resolution of potential conflicts at an early stage, to involve the public and its State, local, and tribal officials in regulatory planning, and to ensure that new or revised regulations promote the President's priorities and the principles set forth in this Executive order, these procedures shall be followed, to the extent permitted by law:

(a) *Agencies' Policy Meeting.* Early in each year's planning cycle, the Vice President shall convene a meeting of the Advisors and the heads of agencies to seek a common understanding of priorities and to coordinate regulatory efforts to be accomplished in the upcoming year.

(b) *Unified Regulatory Agenda.* For purposes of this subsection, the term "agency" or "agencies" shall also include those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10). Each agency shall prepare an agenda of all regulations under development or review, at a time and in a manner specified by the Administrator of OIRA. The description of each regulatory action shall contain, at a minimum, a regulation identifier number, a brief summary of the action, the legal authority for the action, any legal deadline for the action, and the name and telephone number of a knowledgeable agency official. Agencies may incorporate the information required under 5 U.S.C. 602 and 41 U.S.C. 402 into these agendas.

(c) *The Regulatory Plan.* For purposes of this subsection, the term "agency" or "agencies" shall also include those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10). (1) As part of the Unified Regulatory Agenda, beginning in 1994, each agency shall prepare a Regulatory Plan (Plan) of the most important significant regulatory actions that the agency reasonably expects to issue in proposed or final form in that fiscal year or thereafter. The Plan shall be approved personally by the agency head and shall contain at a minimum:

- (A) A statement of the agency's regulatory objectives and priorities and how they relate to the President's priorities;
- (B) A summary of each planned significant regulatory action including, to the extent possible, alternatives to be considered and preliminary estimates of the anticipated costs and benefits;
- (C) A summary of the legal basis for each such action, including whether any aspect of the action is required by statute or court order;
- (D) A statement of the need for each such action and, if applicable, how the action will reduce risks to public health, safety, or the environment, as well as how the magnitude of the risk addressed by the action relates to other risks within the jurisdiction of the agency;
- (E) The agency's schedule for action, including a statement of any applicable statutory or judicial deadlines; and

(F) The name, address, and telephone number of a person the public may contact for additional information about the planned regulatory action.

(2) Each agency shall forward its Plan to OIRA by June 1st of each year.

(3) Within 10 calendar days after OIRA has received an agency's Plan, OIRA shall circulate it to other affected agencies, the Advisors, and the Vice President.

(4) An agency head who believes that a planned regulatory action of another agency may conflict with its own policy or action taken or planned shall promptly notify, in writing, the Administrator of OIRA, who shall forward that communication to the issuing agency, the Advisors, and the Vice President.

(5) If the Administrator of OIRA believes that a planned regulatory action of an agency may be inconsistent with the President's priorities or the principles set forth in this Executive order or may be in conflict with any policy or action taken or planned by another agency, the Administrator of OIRA shall promptly notify, in writing, the affected agencies, the Advisors, and the Vice President.

(6) The Vice President, with the Advisors' assistance, may consult with the heads of agencies with respect to their Plans and, in appropriate instances, request further consideration or inter-agency coordination.

(7) The Plans developed by the issuing agency shall be published annually in the October publication of the Unified Regulatory Agenda. This publication shall be made available to the Congress; State, local, and tribal governments; and the public. Any views on any aspect of any agency Plan, including whether any planned regulatory action might conflict with any other planned or existing regulation, impose any unintended consequences on the public, or confer any unclaimed benefits on the public, should be directed to the issuing agency, with a copy to OIRA.

(d) *Regulatory Working Group.* Within 30 days of the date of this Executive order, the Administrator of OIRA shall convene a Regulatory Working Group ("Working Group"), which shall consist of representatives of the heads of each agency that the Administrator determines to have significant domestic regulatory responsibility, the Advisors, and the Vice President. The Administrator of OIRA shall chair the Working Group and shall periodically advise the Vice President on the activities of the Working Group. The Working Group shall serve as a forum to assist agencies in identifying and analyzing important regulatory issues (including, among others (1) the development of innovative regulatory techniques, (2) the methods, efficacy, and utility of comparative risk assessment in regulatory decision-making, and (3) the development of short forms and other streamlined regulatory approaches for small businesses and other entities). The Working Group shall meet at least quarterly and may meet as a whole or in subgroups of agencies with an interest in particular issues or subject areas. To inform its discussions, the Working Group may commission analytical studies and reports by OIRA, the Administrative Conference of the United States, or any other agency.

(e) *Conferences.* The Administrator of OIRA shall meet quarterly with representatives of State, local, and tribal governments to identify both existing and proposed regulations that may uniquely or significantly affect those governmental entities. The Administrator of OIRA shall also convene, from time to time, conferences with representatives of businesses, nongovernmental organizations, and the public to discuss regulatory issues of common concern.

Sec. 5. Existing Regulations. In order to reduce the regulatory burden on the American people, their families, their communities, their State, local, and tribal governments, and their industries; to determine whether regulations promulgated by the executive branch of the Federal Government have become unjustified or unnecessary as a result of changed circumstances; to confirm that regulations are both compatible with each other and not

duplicative or inappropriately burdensome in the aggregate; to ensure that all regulations are consistent with the President's priorities and the principles set forth in this Executive order, within applicable law; and to otherwise improve the effectiveness of existing regulations: (a) Within 90 days of the date of this Executive order, each agency shall submit to OIRA a program, consistent with its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified or eliminated so as to make the agency's regulatory program more effective in achieving the regulatory objectives, less burdensome, or in greater alignment with the President's priorities and the principles set forth in this Executive order. Any significant regulations selected for review shall be included in the agency's annual Plan. The agency shall also identify any legislative mandates that require the agency to promulgate or continue to impose regulations that the agency believes are unnecessary or outdated by reason of changed circumstances.

(b) The Administrator of OIRA shall work with the Regulatory Working Group and other interested entities to pursue the objectives of this section. State, local, and tribal governments are specifically encouraged to assist in the identification of regulations that impose significant or unique burdens on those governmental entities and that appear to have outlived their justification or be otherwise inconsistent with the public interest.

(c) The Vice President, in consultation with the Advisors, may identify for review by the appropriate agency or agencies other existing regulations of an agency or groups of regulations of more than one agency that affect a particular group, industry, or sector of the economy, or may identify legislative mandates that may be appropriate for reconsideration by the Congress.

Sec. 6. Centralized Review of Regulations. The guidelines set forth below shall apply to all regulatory actions, for both new and existing regulations, by agencies other than those agencies specifically exempted by the Administrator of OIRA:

(a) *Agency Responsibilities.* (1) Each agency shall (consistent with its own rules, regulations, or procedures) provide the public with meaningful participation in the regulatory process. In particular, before issuing a notice of proposed rulemaking, each agency should, where appropriate, seek the involvement of those who are intended to benefit from and those expected to be burdened by any regulation (including, specifically, State, local, and tribal officials). In addition, each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days. Each agency also is directed to explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

(2) Within 60 days of the date of this Executive order, each agency head shall designate a Regulatory Policy Officer who shall report to the agency head. The Regulatory Policy Officer shall be involved at each stage of the regulatory process to foster the development of effective, innovative, and least burdensome regulations and to further the principles set forth in this Executive order.

(3) In addition to adhering to its own rules and procedures and to the requirements of the Administrative Procedure Act, the Regulatory Flexibility Act, the Paperwork Reduction Act, and other applicable law, each agency shall develop its regulatory actions in a timely fashion and adhere to the following procedures with respect to a regulatory action:

(A) Each agency shall provide OIRA, at such times and in the manner specified by the Administrator of OIRA, with a list of its planned regulatory actions, indicating those which the agency believes are significant regulatory actions within the meaning of this Executive order. Absent a material change in the development of the planned regulatory action, those not designated as significant will not be subject to review under this section unless, within 10 working days of receipt

of the list, the Administrator of OIRA notifies the agency that OIRA has determined that a planned regulation is a significant regulatory action within the meaning of this Executive order. The Administrator of OIRA may waive review of any planned regulatory action designated by the agency as significant, in which case the agency need not further comply with subsection (a)(3)(B) or subsection (a)(3)(C) of this section.

(B) For each matter identified as, or determined by the Administrator of OIRA to be, a significant regulatory action, the issuing agency shall provide to OIRA:

- (i) The text of the draft regulatory action, together with a reasonably detailed description of the need for the regulatory action and an explanation of how the regulatory action will meet that need; and
- (ii) An assessment of the potential costs and benefits of the regulatory action, including an explanation of the manner in which the regulatory action is consistent with a statutory mandate and, to the extent permitted by law, promotes the President's priorities and avoids undue interference with State, local, and tribal governments in the exercise of their governmental functions.

(C) For those matters identified as, or determined by the Administrator of OIRA to be, a significant regulatory action within the scope of section 3(f)(1), the agency shall also provide to OIRA the following additional information developed as part of the agency's decision-making process (unless prohibited by law):

- (i) An assessment, including the underlying analysis, of benefits anticipated from the regulatory action (such as, but not limited to, the promotion of the efficient functioning of the economy and private markets, the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias) together with, to the extent feasible, a quantification of those benefits;
- (ii) An assessment, including the underlying analysis, of costs anticipated from the regulatory action (such as, but not limited to, the direct cost both to the government in administering the regulation and to businesses and others in complying with the regulation, and any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment, and competitiveness), health, safety, and the natural environment), together with, to the extent feasible, a quantification of those costs; and
- (iii) An assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, identified by the agencies or the public (including improving the current regulation and reasonably viable nonregulatory actions), and an explanation why the planned regulatory action is preferable to the identified potential alternatives.

(D) In emergency situations or when an agency is obligated by law to act more quickly than normal review procedures allow, the agency shall notify OIRA as soon as possible and, to the extent practicable, comply with subsections (a)(3)(B) and (C) of this section. For those regulatory actions that are governed by a statutory or court-imposed deadline, the agency shall, to the extent practicable, schedule rule-making proceedings so as to permit sufficient time for OIRA to conduct its review, as set forth below in subsection (b)(2) through (4) of this section.

(E) After the regulatory action has been published in the **Federal Register** or otherwise issued to the public, the agency shall:

- (i) Make available to the public the information set forth in subsections (a)(3)(B) and (C);
- (ii) Identify for the public, in a complete, clear, and simple manner, the substantive changes between the draft submitted to OIRA for review and the action subsequently announced; and

(iii) Identify for the public those changes in the regulatory action that were made at the suggestion or recommendation of OIRA.

(F) All information provided to the public by the agency shall be in plain, understandable language.

(b) *OIRA Responsibilities.* The Administrator of OIRA shall provide meaningful guidance and oversight so that each agency's regulatory actions are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order and do not conflict with the policies or actions of another agency. OIRA shall, to the extent permitted by law, adhere to the following guidelines:

(1) OIRA may review only actions identified by the agency or by OIRA as significant regulatory actions under subsection (a)(3)(A) of this section.

(2) OIRA shall waive review or notify the agency in writing of the results of its review within the following time periods:

(A) For any notices of inquiry, advance notices of proposed rulemaking, or other preliminary regulatory actions prior to a Notice of Proposed Rulemaking, within 10 working days after the date of submission of the draft action to OIRA;

(B) For all other regulatory actions, within 90 calendar days after the date of submission of the information set forth in subsections (a)(3)(B) and (C) of this section, unless OIRA has previously reviewed this information and, since that review, there has been no material change in the facts and circumstances upon which the regulatory action is based, in which case, OIRA shall complete its review within 45 days; and

(C) The review process may be extended (1) once by no more than 30 calendar days upon the written approval of the Director and (2) at the request of the agency head.

(3) For each regulatory action that the Administrator of OIRA returns to an agency for further consideration of some or all of its provisions, the Administrator of OIRA shall provide the issuing agency a written explanation for such return, setting forth the pertinent provision of this Executive order on which OIRA is relying. If the agency head disagrees with some or all of the bases for the return, the agency head shall so inform the Administrator of OIRA in writing.

(4) Except as otherwise provided by law or required by a Court, in order to ensure greater openness, accessibility, and accountability in the regulatory review process, OIRA shall be governed by the following disclosure requirements:

(A) Only the Administrator of OIRA (or a particular designee) shall receive oral communications initiated by persons not employed by the executive branch of the Federal Government regarding the substance of a regulatory action under OIRA review;

(B) All substantive communications between OIRA personnel and persons not employed by the executive branch of the Federal Government regarding a regulatory action under review shall be governed by the following guidelines: (i) A representative from the issuing agency shall be invited to any meeting between OIRA personnel and such person(s);

(ii) OIRA shall forward to the issuing agency, within 10 working days of receipt of the communication(s), all written communications, regardless of format, between OIRA personnel and any person who is not employed by the executive branch of the Federal Government, and the dates and names of individuals involved in all substantive oral communications (including meetings to which an agency representative was invited, but did not attend, and telephone conversations between OIRA personnel and any such persons); and

(iii) OIRA shall publicly disclose relevant information about such communication(s), as set forth below in subsection (b)(4)(C) of this section.

(C) OIRA shall maintain a publicly available log that shall contain, at a minimum, the following information pertinent to regulatory actions under review:

(i) The status of all regulatory actions, including if (and if so, when and by whom) Vice Presidential and Presidential consideration was requested;

(ii) A notation of all written communications forwarded to an issuing agency under subsection (b)(4)(B)(ii) of this section; and

(iii) The dates and names of individuals involved in all substantive oral communications, including meetings and telephone conversations, between OIRA personnel and any person not employed by the executive branch of the Federal Government, and the subject matter discussed during such communications.

(D) After the regulatory action has been published in the **Federal Register** or otherwise issued to the public, or after the agency has announced its decision not to publish or issue the regulatory action, OIRA shall make available to the public all documents exchanged between OIRA and the agency during the review by OIRA under this section.

(5) All information provided to the public by OIRA shall be in plain, understandable language.

Sec. 7. Resolution of Conflicts. To the extent permitted by law, disagreements or conflicts between or among agency heads or between OMB and any agency that cannot be resolved by the Administrator of OIRA shall be resolved by the President, or by the Vice President acting at the request of the President, with the relevant agency head (and, as appropriate, other interested government officials). Vice Presidential and Presidential consideration of such disagreements may be initiated only by the Director, by the head of the issuing agency, or by the head of an agency that has a significant interest in the regulatory action at issue. Such review will not be undertaken at the request of other persons, entities, or their agents.

Resolution of such conflicts shall be informed by recommendations developed by the Vice President, after consultation with the Advisors (and other executive branch officials or personnel whose responsibilities to the President include the subject matter at issue). The development of these recommendations shall be concluded within 60 days after review has been requested.

During the Vice Presidential and Presidential review period, communications with any person not employed by the Federal Government relating to the substance of the regulatory action under review and directed to the Advisors or their staffs or to the staff of the Vice President shall be in writing and shall be forwarded by the recipient to the affected agency(ies) for inclusion in the public docket(s). When the communication is not in writing, such Advisors or staff members shall inform the outside party that the matter is under review and that any comments should be submitted in writing.

At the end of this review process, the President, or the Vice President acting at the request of the President, shall notify the affected agency and the Administrator of OIRA of the President's decision with respect to the matter.

Sec. 8. Publication. Except to the extent required by law, an agency shall not publish in the **Federal Register** or otherwise issue to the public any regulatory action that is subject to review under section 6 of this Executive order until (1) the Administrator of OIRA notifies the agency that OIRA has waived its review of the action or has completed its review without any requests for further consideration, or (2) the applicable time period in section 6(b)(2) expires without OIRA having notified the agency that it is returning the regulatory action for further consideration under section 6(b)(3), whichever occurs first. If the terms of the preceding sentence have not been satisfied and an agency wants to publish or otherwise issue a

regulatory action, the head of that agency may request Presidential consideration through the Vice President, as provided under section 7 of this order. Upon receipt of this request, the Vice President shall notify OIRA and the Advisors. The guidelines and time period set forth in section 7 shall apply to the publication of regulatory actions for which Presidential consideration has been sought.

Sec. 9. Agency Authority. Nothing in this order shall be construed as displacing the agencies' authority or responsibilities, as authorized by law.

Sec. 10. Judicial Review. Nothing in this Executive order shall affect any otherwise available judicial review of agency action. This Executive order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

Sec. 11. Revocations. Executive Orders Nos. 12291 and 12498; all amendments to those Executive orders; all guidelines issued under those orders; and any exemptions from those orders heretofore granted for any category of rule are revoked.



THE WHITE HOUSE,
September 30, 1993.

[FR citation 58 FR 51735]

B. EXECUTIVE ORDER 13,771

Presidential Documents

Executive Order 13771 of January 30, 2017

Reducing Regulation and Controlling Regulatory Costs

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Budget and Accounting Act of 1921, as amended (31 U.S.C. 1101 *et seq.*), section 1105 of title 31, United States Code, and section 301 of title 3, United States Code, it is hereby ordered as follows:

Section 1. Purpose. It is the policy of the executive branch to be prudent and financially responsible in the expenditure of funds, from both public and private sources. In addition to the management of the direct expenditure of taxpayer dollars through the budgeting process, it is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations. Toward that end, it is important that for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.

Sec. 2. Regulatory Cap for Fiscal Year 2017. (a) Unless prohibited by law, whenever an executive department or agency (agency) publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall identify at least two existing regulations to be repealed.

(b) For fiscal year 2017, which is in progress, the heads of all agencies are directed that the total incremental cost of all new regulations, including repealed regulations, to be finalized this year shall be no greater than zero, unless otherwise required by law or consistent with advice provided in writing by the Director of the Office of Management and Budget (Director).

(c) In furtherance of the requirement of subsection (a) of this section, any new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations. Any agency eliminating existing costs associated with prior regulations under this subsection shall do so in accordance with the Administrative Procedure Act and other applicable law.

(d) The Director shall provide the heads of agencies with guidance on the implementation of this section. Such guidance shall address, among other things, processes for standardizing the measurement and estimation of regulatory costs; standards for determining what qualifies as new and offsetting regulations; standards for determining the costs of existing regulations that are considered for elimination; processes for accounting for costs in different fiscal years; methods to oversee the issuance of rules with costs offset by savings at different times or different agencies; and emergencies and other circumstances that might justify individual waivers of the requirements of this section. The Director shall consider phasing in and updating these requirements.

Sec. 3. Annual Regulatory Cost Submissions to the Office of Management and Budget. (a) Beginning with the Regulatory Plans (required under Executive Order 12866 of September 30, 1993, as amended, or any successor order) for fiscal year 2018, and for each fiscal year thereafter, the head of each agency shall identify, for each regulation that increases incremental cost, the offsetting regulations described in section 2(c) of this order, and provide the agency's best approximation of the total costs or savings associated with each new regulation or repealed regulation.

(b) Each regulation approved by the Director during the Presidential budget process shall be included in the Unified Regulatory Agenda required under Executive Order 12866, as amended, or any successor order.

(c) Unless otherwise required by law, no regulation shall be issued by an agency if it was not included on the most recent version or update of the published Unified Regulatory Agenda as required under Executive Order 12866, as amended, or any successor order, unless the issuance of such regulation was approved in advance in writing by the Director.

(d) During the Presidential budget process, the Director shall identify to agencies a total amount of incremental costs that will be allowed for each agency in issuing new regulations and repealing regulations for the next fiscal year. No regulations exceeding the agency's total incremental cost allowance will be permitted in that fiscal year, unless required by law or approved in writing by the Director. The total incremental cost allowance may allow an increase or require a reduction in total regulatory cost.

(e) The Director shall provide the heads of agencies with guidance on the implementation of the requirements in this section.

Sec. 4. Definition. For purposes of this order the term "regulation" or "rule" means an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency, but does not include:

(a) regulations issued with respect to a military, national security, or foreign affairs function of the United States;

(b) regulations related to agency organization, management, or personnel; or

(c) any other category of regulations exempted by the Director.

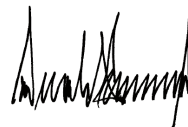
Sec. 5. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) 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, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

A handwritten signature in black ink, appearing to be "Donald Trump", located to the right of the main text block.

THE WHITE HOUSE,
January 30, 2017.

[FR Doc. 2017-02451
Filed 2-2-17; 11:15 am]
Billing code 3295-F7-P

C. EXECUTIVE ORDER 13,777

12285

Federal Register

Vol. 82, No. 39

Wednesday, March 1, 2017

Presidential Documents

Title 3—

Executive Order 13777 of February 24, 2017

The President

Enforcing the Regulatory Reform Agenda

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to lower regulatory burdens on the American people by implementing and enforcing regulatory reform, it is hereby ordered as follows:

Section 1. Policy. It is the policy of the United States to alleviate unnecessary regulatory burdens placed on the American people.

Sec. 2. Regulatory Reform Officers. (a) Within 60 days of the date of this order, the head of each agency, except the heads of agencies receiving waivers under section 5 of this order, shall designate an agency official as its Regulatory Reform Officer (RRO). Each RRO shall oversee the implementation of regulatory reform initiatives and policies to ensure that agencies effectively carry out regulatory reforms, consistent with applicable law. These initiatives and policies include:

(i) Executive Order 13771 of January 30, 2017 (Reducing Regulation and Controlling Regulatory Costs), regarding offsetting the number and cost of new regulations;

(ii) Executive Order 12866 of September 30, 1993 (Regulatory Planning and Review), as amended, regarding regulatory planning and review;

(iii) section 6 of Executive Order 13563 of January 18, 2011 (Improving Regulation and Regulatory Review), regarding retrospective review; and

(iv) the termination, consistent with applicable law, of programs and activities that derive from or implement Executive Orders, guidance documents, policy memoranda, rule interpretations, and similar documents, or relevant portions thereof, that have been rescinded.

(b) Each agency RRO shall periodically report to the agency head and regularly consult with agency leadership.

Sec. 3. Regulatory Reform Task Forces. (a) Each agency shall establish a Regulatory Reform Task Force composed of:

(i) the agency RRO;

(ii) the agency Regulatory Policy Officer designated under section 6(a)(2) of Executive Order 12866;

(iii) a representative from the agency's central policy office or equivalent central office; and

(iv) for agencies listed in section 901(b)(1) of title 31, United States Code, at least three additional senior agency officials as determined by the agency head.

(b) Unless otherwise designated by the agency head, the agency RRO shall chair the agency's Regulatory Reform Task Force.

(c) Each entity staffed by officials of multiple agencies, such as the Chief Acquisition Officers Council, shall form a joint Regulatory Reform Task Force composed of at least one official described in subsection (a) of this section from each constituent agency's Regulatory Reform Task Force. Joint Regulatory Reform Task Forces shall implement this order in coordination with the Regulatory Reform Task Forces of their members' respective agencies.

(d) Each Regulatory Reform Task Force shall evaluate existing regulations (as defined in section 4 of Executive Order 13771) and make recommendations to the agency head regarding their repeal, replacement, or modification, consistent with applicable law. At a minimum, each Regulatory Reform Task Force shall attempt to identify regulations that:

- (i) eliminate jobs, or inhibit job creation;
- (ii) are outdated, unnecessary, or ineffective;
- (iii) impose costs that exceed benefits;
- (iv) create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies;
- (v) are inconsistent with the requirements of section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note), or the guidance issued pursuant to that provision, in particular those regulations that rely in whole or in part on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard for reproducibility; or
- (vi) derive from or implement Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified.

(e) In performing the evaluation described in subsection (d) of this section, each Regulatory Reform Task Force shall seek input and other assistance, as permitted by law, from entities significantly affected by Federal regulations, including State, local, and tribal governments, small businesses, consumers, non-governmental organizations, and trade associations.

(f) When implementing the regulatory offsets required by Executive Order 13771, each agency head should prioritize, to the extent permitted by law, those regulations that the agency's Regulatory Reform Task Force has identified as being outdated, unnecessary, or ineffective pursuant to subsection (d)(ii) of this section.

(g) Within 90 days of the date of this order, and on a schedule determined by the agency head thereafter, each Regulatory Reform Task Force shall provide a report to the agency head detailing the agency's progress toward the following goals:

- (i) improving implementation of regulatory reform initiatives and policies pursuant to section 2 of this order; and
- (ii) identifying regulations for repeal, replacement, or modification.

Sec. 4. *Accountability.* Consistent with the policy set forth in section 1 of this order, each agency should measure its progress in performing the tasks outlined in section 3 of this order.

(a) Agencies listed in section 901(b)(1) of title 31, United States Code, shall incorporate in their annual performance plans (required under the Government Performance and Results Act, as amended (see 31 U.S.C. 1115(b))), performance indicators that measure progress toward the two goals listed in section 3(g) of this order. Within 60 days of the date of this order, the Director of the Office of Management and Budget (Director) shall issue guidance regarding the implementation of this subsection. Such guidance may also address how agencies not otherwise covered under this subsection should be held accountable for compliance with this order.

(b) The head of each agency shall consider the progress toward the two goals listed in section 3(g) of this order in assessing the performance of the Regulatory Reform Task Force and, to the extent permitted by law, those individuals responsible for developing and issuing agency regulations.

Sec. 5. *Waiver.* Upon the request of an agency head, the Director may waive compliance with this order if the Director determines that the agency generally issues very few or no regulations (as defined in section 4 of Executive Order 13771). The Director may revoke a waiver at any time. The Director shall publish, at least once every 3 months, a list of agencies with current waivers.

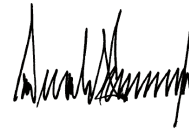
Sec. 6. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) 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, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
February 24, 2017.

[FR Doc. 2017-04107
Filed 2-28-17; 11:15 am]
Billing code 3295-F7-P

D. EXECUTIVE ORDER 13,891

55235

Federal Register

Vol. 84, No. 199

Tuesday, October 15, 2019

Presidential Documents

Title 3—

Executive Order 13891 of October 9, 2019

The President

Promoting the Rule of Law Through Improved Agency Guidance Documents

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to ensure that Americans are subject to only those binding rules imposed through duly enacted statutes or through regulations lawfully promulgated under them, and that Americans have fair notice of their obligations, it is hereby ordered as follows:

Section 1. Policy. Departments and agencies (agencies) in the executive branch adopt regulations that impose legally binding requirements on the public even though, in our constitutional democracy, only Congress is vested with the legislative power. The Administrative Procedure Act (APA) generally requires agencies, in exercising that solemn responsibility, to engage in notice-and-comment rulemaking to provide public notice of proposed regulations under section 553 of title 5, United States Code, allow interested parties an opportunity to comment, consider and respond to significant comments, and publish final regulations in the *Federal Register*.

Agencies may clarify existing obligations through non-binding guidance documents, which the APA exempts from notice-and-comment requirements. Yet agencies have sometimes used this authority inappropriately in attempts to regulate the public without following the rulemaking procedures of the APA. Even when accompanied by a disclaimer that it is non-binding, a guidance document issued by an agency may carry the implicit threat of enforcement action if the regulated public does not comply. Moreover, the public frequently has insufficient notice of guidance documents, which are not always published in the *Federal Register* or distributed to all regulated parties.

Americans deserve an open and fair regulatory process that imposes new obligations on the public only when consistent with applicable law and after an agency follows appropriate procedures. Therefore, it is the policy of the executive branch, to the extent consistent with applicable law, to require that agencies treat guidance documents as non-binding both in law and in practice, except as incorporated into a contract, take public input into account when appropriate in formulating guidance documents, and make guidance documents readily available to the public. Agencies may impose legally binding requirements on the public only through regulations and on parties on a case-by-case basis through adjudications, and only after appropriate process, except as authorized by law or as incorporated into a contract.

Sec. 2. Definitions. For the purposes of this order:

(a) “Agency” has the meaning given in section 3(b) of Executive Order 12866 (Regulatory Planning and Review), as amended.

(b) “Guidance document” means an agency statement of general applicability, intended to have future effect on the behavior of regulated parties, that sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation, but does not include the following:

- (i) rules promulgated pursuant to notice and comment under section 553 of title 5, United States Code, or similar statutory provisions;
- (ii) rules exempt from rulemaking requirements under section 553(a) of title 5, United States Code;

- (iii) rules of agency organization, procedure, or practice;
 - (iv) decisions of agency adjudications under section 554 of title 5, United States Code, or similar statutory provisions;
 - (v) internal guidance directed to the issuing agency or other agencies that is not intended to have substantial future effect on the behavior of regulated parties; or
 - (vi) internal executive branch legal advice or legal opinions addressed to executive branch officials.
- (c) “Significant guidance document” means a guidance document that may reasonably be anticipated to:
- (i) lead to an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
 - (ii) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
 - (iii) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
 - (iv) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles of Executive Order 12866.
- (d) “Pre-enforcement ruling” means a formal written communication by an agency in response to an inquiry from a person concerning compliance with legal requirements that interprets the law or applies the law to a specific set of facts supplied by the person. The term includes informal guidance under section 213 of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (Title II), as amended, letter rulings, advisory opinions, and no-action letters.

Sec. 3. Ensuring Transparent Use of Guidance Documents. (a) Within 120 days of the date on which the Office of Management and Budget (OMB) issues an implementing memorandum under section 6 of this order, each agency or agency component, as appropriate, shall establish or maintain on its website a single, searchable, indexed database that contains or links to all guidance documents in effect from such agency or component. The website shall note that guidance documents lack the force and effect of law, except as authorized by law or as incorporated into a contract.

(b) Within 120 days of the date on which OMB issues an implementing memorandum under section 6 of this order, each agency shall review its guidance documents and, consistent with applicable law, rescind those guidance documents that it determines should no longer be in effect. No agency shall retain in effect any guidance document without including it in the relevant database referred to in subsection (a) of this section, nor shall any agency, in the future, issue a guidance document without including it in the relevant database. No agency may cite, use, or rely on guidance documents that are rescinded, except to establish historical facts. Within 240 days of the date on which OMB issues an implementing memorandum, an agency may reinstate a guidance document rescinded under this subsection without complying with any procedures adopted or imposed pursuant to section 4 of this order, to the extent consistent with applicable law, and shall include the guidance document in the relevant database.

(c) The Director of OMB (Director), or the Director’s designee, may waive compliance with subsections (a) and (b) of this section for particular guidance documents or categories of guidance documents, or extend the deadlines set forth in those subsections.

(d) As requested by the Director, within 240 days of the date on which OMB issues an implementing memorandum under section 6 of this order, an agency head shall submit a report to the Director with the reasons for maintaining in effect any guidance documents identified by the Director.

The Director shall provide such reports to the President. This subsection shall apply only to guidance documents existing as of the date of this order.

Sec. 4. *Promulgation of Procedures for Issuing Guidance Documents.* (a) Within 300 days of the date on which OMB issues an implementing memorandum under section 6 of this order, each agency shall, consistent with applicable law, finalize regulations, or amend existing regulations as necessary, to set forth processes and procedures for issuing guidance documents. The process set forth in each regulation shall be consistent with this order and shall include:

(i) a requirement that each guidance document clearly state that it does not bind the public, except as authorized by law or as incorporated into a contract;

(ii) procedures for the public to petition for withdrawal or modification of a particular guidance document, including a designation of the officials to which petitions should be directed; and

(iii) for a significant guidance document, as determined by the Administrator of OMB's Office of Information and Regulatory Affairs (Administrator), unless the agency and the Administrator agree that exigency, safety, health, or other compelling cause warrants an exemption from some or all requirements, provisions requiring:

(A) a period of public notice and comment of at least 30 days before issuance of a final guidance document, and a public response from the agency to major concerns raised in comments, except when the agency for good cause finds (and incorporates such finding and a brief statement of reasons therefor into the guidance document) that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest;

(B) approval on a non-delegable basis by the agency head or by an agency component head appointed by the President, before issuance;

(C) review by the Office of Information and Regulatory Affairs (OIRA) under Executive Order 12866, before issuance; and

(D) compliance with the applicable requirements for regulations or rules, including significant regulatory actions, set forth in Executive Orders 12866, 13563 (Improving Regulation and Regulatory Review), 13609 (Promoting International Regulatory Cooperation), 13771 (Reducing Regulation and Controlling Regulatory Costs), and 13777 (Enforcing the Regulatory Reform Agenda).

(b) The Administrator shall issue memoranda establishing exceptions from this order for categories of guidance documents, and categorical presumptions regarding whether guidance documents are significant, as appropriate, and may require submission of significant guidance documents to OIRA for review before the finalization of agency regulations under subsection (a) of this section. In light of the Memorandum of Agreement of April 11, 2018, this section and section 5 of this order shall not apply to the review relationship (including significance determinations) between OIRA and any component of the Department of the Treasury, or to compliance by the latter with Executive Orders 12866, 13563, 13609, 13771, and 13777. Section 4(a)(iii) and section 5 of this order shall not apply to pre-enforcement rulings.

Sec. 5. *Executive Orders 12866, 13563, and 13609.* The requirements and procedures of Executive Orders 12866, 13563, and 13609 shall apply to guidance documents, consistent with section 4 of this order.

Sec. 6. *Implementation.* The Director shall issue memoranda and, as appropriate, regulations pursuant to sections 3504(d)(1) and 3516 of title 44, United States Code, and other appropriate authority, to provide guidance regarding or otherwise implement this order.

Sec. 7. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) 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, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) Notwithstanding any other provision in this order, nothing in this order shall apply:

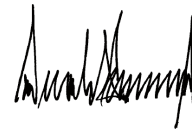
(i) to any action that pertains to foreign or military affairs, or to a national security or homeland security function of the United States (other than guidance documents involving procurement or the import or export of non-defense articles and services);

(ii) to any action related to a criminal investigation or prosecution, including undercover operations, or any civil enforcement action or related investigation by the Department of Justice, including any action related to a civil investigative demand under 18 U.S.C. 1968;

(iii) to any investigation of misconduct by an agency employee or any disciplinary, corrective, or employment action taken against an agency employee;

(iv) to any document or information that is exempt from disclosure under section 552(b) of title 5, United States Code (commonly known as the Freedom of Information Act); or

(v) in any other circumstance or proceeding to which application of this order, or any part of this order, would, in the judgment of the head of the agency, undermine the national security.



THE WHITE HOUSE,
October 9, 2019.

E. EXECUTIVE ORDER 13,892

Presidential Documents

Executive Order 13892 of October 9, 2019

Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Policy. The rule of law requires transparency. Regulated parties must know in advance the rules by which the Federal Government will judge their actions. The Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, was enacted to provide that “administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations.” *Morton v. Ruiz*, 415 U.S. 199, 232 (1974). The Freedom of Information Act, America’s landmark transparency law, amended the APA to further advance this goal. The Freedom of Information Act, as amended, now generally requires that agencies publish in the *Federal Register* their substantive rules of general applicability, statements of general policy, and interpretations of law that are generally applicable and both formulated and adopted by the agency (5 U.S.C. 552(a)(1)(D)). The Freedom of Information Act also generally prohibits an agency from adversely affecting a person with a rule or policy that is not so published, except to the extent that the person has actual and timely notice of the terms of the rule or policy (5 U.S.C. 552(a)(1)).

Unfortunately, departments and agencies (agencies) in the executive branch have not always complied with these requirements. In addition, some agency practices with respect to enforcement actions and adjudications undermine the APA’s goals of promoting accountability and ensuring fairness.

Agencies shall act transparently and fairly with respect to all affected parties, as outlined in this order, when engaged in civil administrative enforcement or adjudication. No person should be subjected to a civil administrative enforcement action or adjudication absent prior public notice of both the enforcing agency’s jurisdiction over particular conduct and the legal standards applicable to that conduct. Moreover, the Federal Government should, where feasible, foster greater private-sector cooperation in enforcement, promote information sharing with the private sector, and establish predictable outcomes for private conduct. Agencies shall afford regulated parties the safeguards described in this order, above and beyond those that the courts have interpreted the Due Process Clause of the Fifth Amendment to the Constitution to impose.

Sec. 2. Definitions. For the purposes of this order:

(a) “Agency” has the meaning given to “Executive agency” in section 105 of title 5, United States Code, but excludes the Government Accountability Office.

(b) “Collection of information” includes any conduct that would qualify as a “collection of information” as defined in section 3502(3)(A) of title 44, United States Code, or section 1320.3(c) of title 5, Code of Federal Regulations, and also includes any request for information, regardless of the number of persons to whom it is addressed, that is:

- (i) addressed to all or a substantial majority of an industry; or
- (ii) designed to obtain information from a representative sample of individual persons in an industry.

(c) “Guidance document” means an agency statement of general applicability, intended to have future effect on the behavior of regulated parties, that sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation, but does not include the following:

(i) rules promulgated pursuant to notice and comment under section 553 of title 5, United States Code, or similar statutory provisions;

(ii) rules exempt from rulemaking requirements under section 553(a) of title 5, United States Code;

(iii) rules of agency organization, procedure, or practice;

(iv) decisions of agency adjudications under section 554 of title 5, United States Code, or similar statutory provisions;

(v) internal guidance directed to the issuing agency or other agencies that is not intended to have substantial future effect on the behavior of regulated parties; or

(vi) internal executive branch legal advice or legal opinions addressed to executive branch officials.

(d) “Legal consequence” means the result of an action that directly or indirectly affects substantive legal rights or obligations. The meaning of this term should be informed by the Supreme Court’s discussion in *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1813–16 (2016), and includes, for example, agency orders specifying which commodities are subject to or exempt from regulation under a statute, *Frozen Food Express v. United States*, 351 U.S. 40, 44–45 (1956), as well as agency letters or orders establishing greater liability for regulated parties in a subsequent enforcement action, *Rhea Lana, Inc. v. Dep’t of Labor*, 824 F.3d 1023, 1030 (DC Cir. 2016). In particular, “legal consequence” includes subjecting a regulated party to potential liability.

(e) “Unfair surprise” means a lack of reasonable certainty or fair warning of what a legal standard administered by an agency requires. The meaning of this term should be informed by the examples of lack of fair notice discussed by the Supreme Court in *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 & n.15 (2012).

(f) “Pre-enforcement ruling” means a formal written communication from an agency in response to an inquiry from a person concerning compliance with legal requirements that interprets the law or applies the law to a specific set of facts supplied by the person. The term includes informal guidance under section 213 of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (Title II), as amended (SBREFA), letter rulings, advisory opinions, and no-action letters.

(g) “Regulation” means a legislative rule promulgated pursuant to section 553 of title 5, United States Code, or similar statutory provisions.

Sec. 3. Proper Reliance on Guidance Documents. Guidance documents may not be used to impose new standards of conduct on persons outside the executive branch except as expressly authorized by law or as expressly incorporated into a contract. When an agency takes an administrative enforcement action, engages in adjudication, or otherwise makes a determination that has legal consequence for a person, it must establish a violation of law by applying statutes or regulations. The agency may not treat noncompliance with a standard of conduct announced solely in a guidance document as itself a violation of applicable statutes or regulations. When an agency uses a guidance document to state the legal applicability of a statute or regulation, that document can do no more, with respect to prohibition of conduct, than articulate the agency’s understanding of how a statute or regulation applies to particular circumstances. An agency may cite a guidance document to convey that understanding in an administrative enforcement action or adjudication only if it has notified the public of such document in advance through publication, either in full or by citation if publicly available, in the *Federal Register* (or on the portion of the agency’s website

that contains a single, searchable, indexed database of all guidance documents in effect).

Sec. 4. *Fairness and Notice in Administrative Enforcement Actions and Adjudications.* When an agency takes an administrative enforcement action, engages in adjudication, or otherwise makes a determination that has legal consequence for a person, it may apply only standards of conduct that have been publicly stated in a manner that would not cause unfair surprise. An agency must avoid unfair surprise not only when it imposes penalties but also whenever it adjudges past conduct to have violated the law.

Sec. 5. *Fairness and Notice in Jurisdictional Determinations.* Any decision in an agency adjudication, administrative order, or agency document on which an agency relies to assert a new or expanded claim of jurisdiction—such as a claim to regulate a new subject matter or an explanation of a new basis for liability—must be published, either in full or by citation if publicly available, in the *Federal Register* (or on the portion of the agency's website that contains a single, searchable, indexed database of all guidance documents in effect) before the conduct over which jurisdiction is sought occurs. If an agency intends to rely on a document arising out of litigation (other than a published opinion of an adjudicator), such as a brief, a consent decree, or a settlement agreement, to establish jurisdiction in future administrative enforcement actions or adjudications involving persons who were not parties to the litigation, it must publish that document, either in full or by citation if publicly available, in the *Federal Register* (or on the portion of the agency's website that contains a single, searchable, indexed database of all guidance documents in effect) and provide an explanation of its jurisdictional implications. An agency may not seek judicial deference to its interpretation of a document arising out of litigation (other than a published opinion of an adjudicator) in order to establish a new or expanded claim or jurisdiction unless it has published the document or a notice of availability in the *Federal Register* (or on the portion of the agency's website that contains a single, searchable, indexed database of all guidance documents in effect).

Sec. 6. *Opportunity to Contest Agency Determination.* (a) Except as provided in subsections (b) and (c) of this section, before an agency takes any action with respect to a particular person that has legal consequence for that person, including by issuing to such a person a no-action letter, notice of noncompliance, or other similar notice, the agency must afford that person an opportunity to be heard, in person or in writing, regarding the agency's proposed legal and factual determinations. The agency must respond in writing and articulate the basis for its action.

(b) Subsection (a) of this section shall not apply to settlement negotiations between agencies and regulated parties, to notices of a prospective legal action, or to litigation before courts.

(c) An agency may proceed without regard to subsection (a) of this section where necessary because of a serious threat to health, safety, or other emergency or where a statute specifically authorizes proceeding without a prior opportunity to be heard. Where an agency proceeds under this subsection, it nevertheless must afford any person an opportunity to be heard, in person or in writing, regarding the agency's legal determinations and respond in writing as soon as practicable.

Sec. 7. *Ensuring Reasonable Administrative Inspections.* Within 120 days of the date of this order, each agency that conducts civil administrative inspections shall publish a rule of agency procedure governing such inspections, if such a rule does not already exist. Once published, an agency must conduct inspections of regulated parties in compliance with the rule.

Sec. 8. *Appropriate Procedures for Information Collections.* (a) Any agency seeking to collect information from a person about the compliance of that person or of any other person with legal requirements must ensure that such collections of information comply with the provisions of the Paperwork Reduction Act, section 3512 of title 44, United States Code, and section

1320.6(a) of title 5, Code of Federal Regulations, applicable to collections of information (other than those excepted under section 3518 of title 44, United States Code).

(b) To advance the purposes of subsection (a) of this section, any collection of information during the conduct of an investigation (other than those investigations excepted under section 3518 of title 44, United States Code, and section 1320.4 of title 5, Code of Federal Regulations, or civil investigative demands under 18 U.S.C. 1968) must either:

- (i) display a valid control number assigned by the Director of the Office of Management and Budget; or
- (ii) inform the recipient through prominently displayed plain language that no response is legally required.

Sec. 9. Cooperative Information Sharing and Enforcement. (a) Within 270 days of the date of this order, each agency, as appropriate, shall, to the extent practicable and permitted by law, propose procedures:

- (i) to encourage voluntary self-reporting of regulatory violations by regulated parties in exchange for reductions or waivers of civil penalties;
- (ii) to encourage voluntary information sharing by regulated parties; and
- (iii) to provide pre-enforcement rulings to regulated parties.

(b) Any agency that believes additional procedures are not practicable—because, for example, the agency believes it already has adequate procedures in place or because it believes it lacks the resources to institute additional procedures—shall, within 270 days of the date of this order, submit a report to the President describing, as appropriate, its existing procedures, its need for more resources, or any other basis for its conclusion.

Sec. 10. SBREFA Compliance. Within 180 days of the date of this order, each agency shall submit a report to the President demonstrating that its civil administrative enforcement activities, investigations, and other actions comply with SBREFA, including section 223 of that Act. A copy of this report, subject to redactions for any applicable privileges, shall be posted on the agency's website.

Sec. 11. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

- (i) the authority granted by law to an executive department or agency, or the head thereof; or
- (ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented in a manner consistent with applicable law and subject to the availability of appropriations.

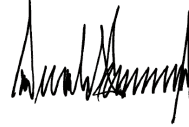
(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) Notwithstanding any other provision in this order, nothing in this order shall apply:

- (i) to any action that pertains to foreign or military affairs, or to a national security or homeland security function of the United States (other than procurement actions and actions involving the import or export of non-defense articles and services);
- (ii) to any action related to a criminal investigation or prosecution, including undercover operations, or any civil enforcement action or related investigation by the Department of Justice, including any action related to a civil investigative demand under 18 U.S.C. 1968;
- (iii) to any action related to detention, seizure, or destruction of counterfeit goods, pirated goods, or other goods that infringe intellectual property rights;

(iv) to any investigation of misconduct by an agency employee or any disciplinary, corrective, or employment action taken against an agency employee; or

(v) in any other circumstance or proceeding to which application of this order, or any part of this order, would, in the judgment of the head of the agency, undermine the national security.

A handwritten signature in black ink, appearing to be "Donald Trump", located to the right of the text.

THE WHITE HOUSE,
October 9, 2019.

[FR Doc. 2019-22624
Filed 10-11-19; 11:15 am]
Billing code 3295-F0-P

F. SESSIONS MEMO



Office of the Attorney General
Washington, D. C. 20530

November 16, 2017

MEMORANDUM FOR ALL COMPONENTS

FROM: THE ATTORNEY GENERAL

SUBJECT: Prohibition on Improper Guidance Documents

The Department of Justice has the duty to uphold the laws of the United States and to ensure the fair and impartial administration of justice. Therefore, when the Department engages in regulatory activity, it should model the lawful exercise of regulatory power.

In promulgating regulations, the Department must abide by constitutional principles and follow the rules imposed by Congress and the President. These principles and rules include the fundamental requirement that agencies regulate only within the authority delegated to them by Congress. They also include the Administrative Procedure Act's requirement to use, in most cases, notice-and-comment rulemaking when purporting to create rights or obligations binding on members of the public or the agency. Not only is notice-and-comment rulemaking generally required by law, but it has the benefit of availing agencies of more complete information about a proposed rule's effects than the agency could ascertain on its own, and therefore results in better decision making by regulators.

Not every agency action is required to undergo notice-and-comment rulemaking. For example, agencies may use guidance and similar documents to educate regulated parties through plain-language restatements of existing legal requirements or provide non-binding advice on technical issues through examples or practices to guide the application or interpretation of statutes and regulations. But guidance may not be used as a substitute for rulemaking and may not be used to impose new requirements on entities outside the Executive Branch. Nor should guidance create binding standards by which the Department will determine compliance with existing regulatory or statutory requirements.

It has come to my attention that the Department has in the past published guidance documents—or similar instruments of future effect by other names, such as letters to regulated entities—that effectively bind private parties without undergoing the rulemaking process.

The Department will no longer engage in this practice. Effective immediately, Department components may not issue guidance documents that purport to create rights or obligations binding on persons or entities outside the Executive Branch (including state, local,

and tribal governments). To avoid circumventing the rulemaking process, Department components should adhere to the following principles when issuing guidance documents:

- Guidance documents should identify themselves as guidance, disclaim any force or effect of law, and avoid language suggesting that the public has obligations that go beyond those set forth in the applicable statutes or legislative rules.
- Guidance documents should clearly state that they are not final agency actions, have no legally binding effect on persons or entities outside the federal government, and may be rescinded or modified in the Department's complete discretion.
- Guidance documents should not be used for the purpose of coercing persons or entities outside the federal government into taking any action or refraining from taking any action beyond what is required by the terms of the applicable statute or regulation.
- Guidance documents should not use mandatory language such as "shall," "must," "required," or "requirement" to direct parties outside the federal government to take or refrain from taking action, except when restating—with citations to statutes, regulations, or binding judicial precedent—clear mandates contained in a statute or regulation. In all cases, guidance documents should clearly identify the underlying law that they are explaining.
- To the extent guidance documents set out voluntary standards (e.g., recommended practices), they should clearly state that compliance with those standards is voluntary and that noncompliance will not, in itself, result in any enforcement action.

All components shall implement these principles immediately with respect to all future guidance documents, in consultation with the Office of Legal Policy. Components should also implement these principles consistent with policies issued by the Office of Management and Budget, including its Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007). Furthermore, I direct the Associate Attorney General, as Chair of the Department's Regulatory Reform Task Force, to work with components to identify existing guidance documents that should be repealed, replaced, or modified in light of these principles.

For purposes of this memorandum, guidance documents include any Department statements of general applicability and future effect, whether styled as guidance or otherwise that are designed to advise parties outside the federal Executive Branch about legal rights and obligations falling within the Department's regulatory or enforcement authority. This memorandum does not apply to adjudicatory actions that do not have the aim or effect of binding anyone beyond the parties involved, and it does not address documents informing the public of the Department's enforcement priorities or factors the Department considers in exercising its prosecutorial discretion. Nor does it address internal directives, memoranda, or training materials for

Memorandum for the Attorney General
Subject: Improper Guidance Documents

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Department personnel directing them on how to carry out their duties, positions taken by the Department in litigation, or advice provided by the Attorney General or the Office of Legal Counsel. This memorandum is an internal Department of Justice policy directed at Department components and employees. As such, it is not intended to, does not, and may not be relied upon to, create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.

G. BRAND MEMO



U. S. Department of Justice

Office of the Associate Attorney General

The Associate Attorney General

Washington, D.C. 20530

January 25, 2018

MEMORANDUM FOR: HEADS OF CIVIL LITIGATING COMPONENTS
UNITED STATES ATTORNEYS

CC: REGULATORY REFORM TASK FORCE

FROM: THE ASSOCIATE ATTORNEY GENERAL *PJB*

SUBJECT: Limiting Use of Agency Guidance Documents
In Affirmative Civil Enforcement Cases

On November 16, 2017, the Attorney General issued a memorandum (“Guidance Policy”) prohibiting Department components from issuing guidance documents that effectively bind the public without undergoing the notice-and-comment rulemaking process. Under the Guidance Policy, the Department may not issue guidance documents that purport to create rights or obligations binding on persons or entities outside the Executive Branch (including state, local, and tribal governments), or to create binding standards by which the Department will determine compliance with existing statutory or regulatory requirements.

The Guidance Policy also prohibits the Department from using its guidance documents to coerce regulated parties into taking any action or refraining from taking any action beyond what is required by the terms of the applicable statute or lawful regulation. And when the Department issues a guidance document setting out voluntary standards, the Guidance Policy requires a clear statement that noncompliance will not in itself result in any enforcement action.

The principles from the Guidance Policy are relevant to more than just the Department’s own publication of guidance documents. These principles also should guide Department litigators in determining the legal relevance of other agencies’ guidance documents in affirmative civil enforcement (“ACE”).¹

¹ As used in this memorandum, “guidance document” means any agency statement of general applicability and future effect, whether styled as “guidance” or otherwise, that is designed to advise parties outside the federal Executive Branch about legal rights and obligations. This memorandum does not apply to adjudicatory actions that do not have the aim or effect of binding anyone beyond the parties involved, documents informing the public of agency enforcement priorities or factors considered in exercising prosecutorial discretion, or internal directives, memoranda, or training materials for agency personnel. For more information, see “Memorandum for All Components: Prohibition of Improper Guidance Documents,” from Attorney General Jefferson B. Sessions III, November 16, 2017. “Affirmative civil enforcement” refers to the Department’s filing of civil lawsuits on behalf of the United States to

Guidance documents cannot create binding requirements that do not already exist by statute or regulation.

Accordingly, effective immediately for ACE cases, the Department may not use its enforcement authority to effectively convert agency guidance documents into binding rules.

Likewise, Department litigators may not use noncompliance with guidance documents as a basis for proving violations of applicable law in ACE cases.

The Department may continue to use agency guidance documents for proper purposes in such cases. For instance, some guidance documents simply explain or paraphrase legal mandates from existing statutes or regulations, and the Department may use evidence that a party read such a guidance document to help prove that the party had the requisite knowledge of the mandate.

However, the Department should not treat a party's noncompliance with an agency guidance document as presumptively or conclusively establishing that the party violated the applicable statute or regulation. That a party fails to comply with agency guidance expanding upon statutory or regulatory requirements does not mean that the party violated those underlying legal requirements; agency guidance documents cannot create any additional legal obligations.

This memorandum applies only to future ACE actions brought by the Department, as well as (wherever practicable) those matters pending as of the date of this memorandum. This memorandum is an internal Department of Justice policy directed at Department components and employees. Accordingly, it is not intended to, does not, and may not be relied upon to, create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.

recover government money lost to fraud or other misconduct or to impose penalties for violations of Federal health, safety, civil rights or environmental laws. For example, this memorandum applies when the Department is enforcing the False Claims Act, alleging that a party knowingly submitted a false claim for payment by falsely certifying compliance with material statutory or regulatory requirements.

