TESTIMONY OF EMILY HAMMOND
ASSOCIATE DEAN FOR PUBLIC ENGAGEMENT & PROFESSOR OF LAW
THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

BEFORE THE HOUSE COMMITTEE ON JUDICIARY
EXECUTIVE OVERREACH TASK FORCE
Executive Overreach in Domestic Affairs Part II—
IRS Abuse, Welfare Reform, and Other Issues

APRIL 19, 2016

Thank you, Chairman King, Ranking Member Cohen, and distinguished members of the Task Force, for the opportunity to testify today. It is a pleasure to see many of you again.

I am Associate Dean for Public Engagement and Professor of Law at the George Washington University Law School, and am also a member-scholar of the not-for-profit regulatory think-tank, the Center for Progressive Reform, and the Chair of the Administrative Law Section of the Association of American Law Schools. I am testifying today, however, on the basis of my expertise and not as a partisan or representative of any organization. As a professor and scholar of administrative law, I specialize in the actions of federal agencies and the resulting relationships between Congress, the courts, and the executive branch. My work is published in the country's top scholarly journals as well as in many books and shorter works, and I regularly speak on the subject of administrative law.

In my testimony today, I will first provide a general overview of the structure of administrative law and the Administrative Procedure Act (APA). Next, I will describe the opportunities for oversight built into our system of administrative law. Finally, I will describe how federal agencies have in many ways internalized important administrative law norms.

I. The General Structure of the Administrative Law

Our system of administrative law should permit agencies the flexibility they need to exercise their expertise, while providing numerous mechanisms to ensure that they operate within the bounds of their statutory mandates. To be sure, there is room for political decisionmaking within those statutory bounds, but we should be very reluctant to tinker with administrative law for political purposes because doing so risks a system that operates poorly regardless of which party heads the executive branch.

Our Constitution envisions this kind of system. Congress, of course, may provide as much specificity as it desires in directing agencies how to carry out their work. At the same time, the Vesting and Take Care clauses of Article II permit the President some degree of discretion in executing and enforcing the laws passed by Congress. With respect to federal agencies, the President indeed exerts a great deal of control over their policymaking, but the agencies' behavior is constrained in important ways. One such mechanism for controlling agencies is the APA.

The APA itself was a compromise, between liberal interests that wanted New Deal agencies to have freedom to regulate as they saw fit, and conservative interests that wanted to ensure that freedom was appropriately cabined. The result is a carefully balanced system that permits agency discretion, but only within the limits of the statutory mandate. As originally enacted, the APA includes three structural components: section 553's informal rulemaking provisions; sections 556 and 557's formal rulemaking and adjudicatory provisions; and section 706's standards for judicial review. Later, Congress added the critically important Freedom of Information Act, codified in section 552 of the APA.

Implicit in each of these major structural components is the expectation that agencies will exercise broad discretion within their statutory authority. The judicial review provisions are typically considered among the most important for enforcing those expectations. Indeed, as I testified last month, the judicial review provisions of the APA contemplate that courts will police the jurisdictional boundaries set by Congress, they guard against serious errors, and the fact of review incentivizes agencies to engage in legitimizing behaviors before the fact, such as promoting participation, deliberation, and transparency. In turn, these behaviors and judicial review facilitate external monitoring of agency behavior, whether by interested parties, the press, the executive, or Congress.

The Supreme Court decision *Massachusetts v. EPA*, 549 U.S. 497 (2007), illustrates the limits of presidential control. As you are no doubt aware, the underlying agency action was a rejection of a rulemaking petition to regulate greenhouse gas emissions of new motor vehicles under the Clean Air Act (CAA). EPA denied the petition, relying for its explanation on various presidential policy preferences. The Court held that EPA's reasoning was arbitrary and capricious because it did not relate to the statutory text. Notably, this judicial role in cabining executive discretion operates regardless of the particular political view at issue. Recently, in *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014), the Supreme Court again had occasion to consider EPA's approach to regulating greenhouse gas emissions under the CAA under a different presidential administration with different policy preferences. Once again, the Court held in part that EPA had exceeded its statutory authority, this time for departing from the text and purposes of the statutory provision at issue.

As these examples show, agencies admittedly may push the boundaries of their statutory authority—whether or not at the express direction of the executive. But judicial review is frequently available to rein in agency behavior and bring it back within the confines of its statute. Even when judicial review is not available, moreover, our system includes numerous avenues for external monitoring of agency behavior.

II. External Monitoring of Agency Behavior

Today's hearing relates to agency actions taken with respect to tax enforcement, welfare requirements, and climate change. What is notable about each of these topics is that they all show the power of external monitoring. One type of external monitoring is judicial review, as illustrated by the climate change example above. Other external monitors include the press, the public, Congress, and even oversight authorities within the executive branch like the Office of Information and Regulatory Affairs (OIRA).

Consider, for example, the tax enforcement issue. The reason we know about it is external monitoring. As early as 2012, this institution held oversight hearings in response to constituent complaints. The press closely followed the issue, ultimately publishing significant journalism on the IRS's behavior. Agency officials themselves spoke on the issue, and the Attorney General ordered Justice Department and FBI investigations. After significant attention from Congress, the public, the Administration, and the press, the IRS began work on a rule with the purpose of resolving some of the flaws in existing regulations. But commenters identified numerous deficiencies in the proposed rule, so the agency withdrew it with a plan to redraft. This is precisely what administrative law contemplates—the agency was working to correct itself and learned from the comments offered in response to a proposed rule. Yet Congress has now forbidden the agency from further work on improving its existing flawed regulation, leaving in place the very system that gave rise to the tax enforcement issue in the first place. It is one thing to exercise oversight and bring significant agency wrongdoing to light. It hamstrings the process, however, to prevent an agency from working to improve its own flawed regulations without providing any sensible alternative.

With respect to welfare and work-participation requirements, it is also notable that the need for reforms was identified by the nonpartisan Government Accountability Office—another source of external monitoring. Moreover, the administration's policy was formulated in response to comments from state officials and is fashioned to provide flexibility to states. Even if it is not immediately reviewable in court, the guidance document is available and transparent, and has certainly attracted significant attention since its issuance in 2012. Furthermore, experience with how HHS implements its approach will provide even more opportunities for oversight. And finally, the public will have the opportunity to weigh in on this and numerous other policy matters during the November elections.

III. Agency Behavior and Administrative Law Norms

It is easy to pick a few examples of big agency decisions to criticize, but I want to emphasize that agencies take thousands of actions every day that conform to the administrative law norms of good governance. The expectations of judicial review—in particular, the transparency and reason-giving norms originating from judicial doctrines—have been internalized into agency culture to such a large degree such that they are often present *even for unreviewable agency actions*. As my co-author and I concluded in a 2013 study of agency behavior in the absence of judicial review, agencies often engage in dialogue with regulated entities and interest groups alike; they frequently respond to concerns raised even without attention from Congress or the courts; they typically provide reasons for their responses and treat those who appear before them with respect.[1] And by the way, our study was enabled by one further means of external oversight—the Freedom of Information Act.

[1] *See generally* Emily Hammond & David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 Harv. Envtl. L. Rev. 313 (2013).

IV. Conclusion

Our system of administrative law has a vast array of built-in mechanisms to ensure that agencies conform to their statutory mandates. The best policy approach is to let those mechanisms operate as intended, enabling transparency, robust debate, and improved regulatory governance going forward.

Thank you again for the opportunity to testify today. I look forward to your questions.