Testimony of

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Hearing on re H.R. 3438, the "Require Evaluation Before Implementing Executive Wishlists Act of 2015," and H.R. 2631, the "Regulatory Predictability for Business Growth Act of 2015."

Commentary on H.R. 3438 "Require Evaluation Before Implementing Executive Wishlists Act of 2015" and H.R. 2631 "Regulatory Predictability for Business Growth Act of 2015"

Both H.R. 3438, which requires high-impact rules costing the national economy one billion or more dollars, and H.R. 2631, which works a limited reinstatement of a D.C. Circuit administrative law innovation, are ready to go. *See Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997) *abrogated by Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015). The Congress could pass them into law now without adjustment. Nevertheless, in addition to commending these bills on multiple grounds (constitutional, statutory, and in the vein of keeping up Congress's side of an intelligent and healthy common-law dialogue with the courts), I also offer in my testimony some suggestions for improvement.

Introduction

In the Fall of 1993, I sat in a classroom at the Georgetown Law School before Judge Silberman of the D.C. Circuit, who was acting as my teacher in administrative law. Incidentally, I must say he is one of the finest teachers I have had in any discipline, not just in the law. I recall with fondest all I learned during his class. Much as I now credit my passion for high school and college debate activities for a good part of where I am today, since I now get paid by clients to engage in real-world debates in the federal courts, I now also make a living in part out of the human capital that Judge Silberman poured into me. So I remain grateful because of the paces Judge Silberman put me through in that class. My wife and two of my daughters are in the hearing room today and so, especially for my daughters' collective benefit, this lets me say that paying attention in class can pay significant dividends.

And because it is relevant to the topics for this hearing, I want to relate one particular anecdote about that class to you.

At one point, we were discussing the ability of agencies to issue regulations and then interpret them, especially regulations that attempted to redefine the jurisdictional metes and bounds that Congress had erected to limit a given agency's sphere of power. (*See City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863 (2013).) Judge Silberman asked whether, as a policy matter, agencies should be able to interpret and reinterpret the same regulatory text at will, even when by doing so the agency could interpret ambiguous statutory text to expand its delegated powers beyond what Congress saw fit to give. I responded, "no." Judge Silberman asked why. I said: "Because that collection of powers would together constitute handing over the keys of the kingdom. They would represent an enormous transfer of power away from the Congress, the body to which the Constitution assigned the lawmaking power." Judge Silberman then

posed other questions in this subject area to other students, so I am not sure that he was pleased by my answer. But for my own part I think the answer stands the test of time, even as I have now reached my twentieth year of practice in the law.

Another relevant anecdote is this. My son (who might otherwise be here) is currently a freshman at the University of Iowa. At the start of last month, I visited him while I had a string of arguments in the Midwest. He took me to his favorite bookstore. He knows his Dad well and he brought me to a glass case of books he knew I might like. After a few minutes of browsing, I picked out a finely bound edition of Montesquieu's *Spirit of the Laws*. The Framers were themselves good students who stood on the shoulders of giants of keen political minds like Montesquieu's. His analysis of the separation of powers was to find its way into the U.S. Constitution as one of the principal bulwarks of American liberty. Montesquieu, 267 years on, is as relevant to this hearing as Judge Silberman's question, posed only 22 years ago. Sadly, many of America's college and high school students probably have no idea who Montesquieu is. Yet what is old is new again. *See Mortgage Bankers Ass'n*, 135 S. Ct. at 1215-22 (Thomas, J., concurring) (arguing that administrative law has grown untethered to the separation of powers).

Administrative law, it is often forgotten, is suffused with constitutional law. Really, it ***is*** constitutional law. And how could it be any other way? The whole subject is rife with questions of inter-branch interactions, the powers of one Branch running up against or being accommodated to that of another of the three Branches, and issues of due process in regulating private persons and entities. In that vein, it is my thesis today that both of these bills would help to bring administrative law in the twenty-first century into better alignment with the provisions and tenets of the Constitution.

H.R. 2631 "Regulatory Predictability for Business Growth Act of 2015"

I hope you will indulge me in beginning with the bill that revives a good portion of the *Paralyzed Veterans* doctrine. As a constitutional matter, I think it is the far more significant bill, though as a matter of economics, H.R. 3438 is probably the more important bill, at least as long as we have an active, pro-regulatory President with a phone and a pen. *See Obama on Executive Actions: 'I've Got a Pen and I've Got a Phone*," *available at* http://washington.cbslocal.com/2014/01/14/obama-on-executive-actions-ive-got-a-pen-and-ive-got-a-phone/ (Jan. 14, 2014) (last visited Oct. 31, 2015).

Administrative law as it comes to the courts in particular regulatory fights is a curious mix of constitutional doctrine, statutory interpretation, and good-old common law. As relevant to the stage that was set for the Supreme Court's *Mortgage Bankers* case last term, the relevant legal principles and their source of their authority can be summarized on the table at the top of the next page:

Legal Principle	**Source of Authority**
1. Interpretive rules do not need to be adopted via notice and comment.	**Statute:** 5 U.S.C. § 553(b) of the APA.
2. Interpretive rules do ***not*** carry the force and effect of law, only legislative rules[1] do.	**Professes to Be by Statute, But in Reality Is Currently an Administrative Common Law Fiction:** 5 U.S.C. § 551(4) ("'rule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, ***interpret***, ***or prescribe law or policy*** ….") (emphasis added). But in light of *Seminole Rock* deference (a common law decision), in reality interpretive rules ***do, in fact, carry*** the force and effect of law as Justice Scalia explained.
3. Courts are required, under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), to defer to reasonable agency interpretations of ambiguous statutory provisions that have been delegated to such an agency to interpret.	**Administrative Common Law:** No provision of the APA compels such an approach. Indeed, the APA appears to provide to the contrary: "To the extent necessary to decision and when presented, ***the reviewing court shall decide*** all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action …." 5 U.S.C. § 706 (emphasis added). The APA does not repose such decisional power in agencies. *See also Mortgage Bankers*, 135 S. Ct. at 1211 (Scalia, J., concurring in the judgment).
4. Courts are required, under *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), to defer to agency interpretations of the agency's own regulations.	**Administrative Common Law:** No provision of the APA compels such an approach. Same APA tension as in the box immediately above as to *Chevron*.

I agree with the unanimous decision of the Supreme Court that *Paralyzed*

[1] The appellation of "legislative rules" should be curious to anyone who takes the separation of powers seriously. Though that term can perhaps be commended for its candor that when such rules are issued, the Executive Branch is, in fact, legislating and not the body to which this Subcommittee belongs. *Contrast* U.S. Const., art. I, sec. 1 ("***All legislative Powers*** herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.") (emphasis added).

Veterans is contrary to the text of the APA as it stands. But one point I agree with the *Mortgage Bankers* concurrences about (and the point is made most forcefully in Justice Scalia's concurrence) is that it is more than a bit much for the majority opinion, penned by Justice Sotomayor, to claim that Congress explicitly "weighed the costs and benefits of placing more rigorous restrictions on the issuance of interpretive rules." *Mortgage Bankers*, 135 S. Ct. at 1207. The table I set out above should help to explain why. The reason is that the fact that interpretive rules need not go through notice and comment is a statutory determination but both *Chevron* and *Seminole Rock* deference are creatures of the courts alone.[2] Nothing in the APA or its legislative history (or the Attorney General's *Manual on the APA*) shows Congress to have wrestled with how APA Section 553(b) might be used or abused in conjunction with either *Chevron* or *Seminole Rock*. *Chevron* would not be handed down until 36 years ***after*** the APA and *Seminole Rock* was only one week past one year when the APA was enacted in June of 1946.

The APA was, in many ways, intended to codify the administrative law common law decisions (and often constitutional ones) that had been handed down prior to 1946. *See, e.g.,* Attorney General's *Manual on the APA*, 108 (1947). The problem is that the administrative common law process has continued to evolve side-by-side with the textual exegesis of the APA itself. It is true that *Paralyzed Veterans* conflicts with Section 553(b). But it is hard to say that the nature of the conflict differs greatly from the arguable conflict that exists between APA Section 706 and *Chevron* — or between APA 706 and *Seminole Rock*. For that reason, I see *Mortgage Bankers* as a case less about fidelity to the textual APA (though it is certainly that) than about the jealousy by which Supreme Court reserves to itself the power to innovate in the realm of administrative common law. The D.C. Circuit is an important interlocutor in the dialogue that builds out administrative common law, but it is an inferior one. Sometimes it guesses correctly (at least when judged against the standard of what the Supreme Court wants to do) and sometimes it guesses incorrectly — as in *Paralyzed Veterans*.

As a policy matter, though, I agree with the wisdom of *Paralyzed Veterans*, which held, in relevant respect: "Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking." *Paralyzed Veterans*, 117 F.3d at 586. In policy terms I would only change the word "can" to "should." But since the text adopted by the Congress after it runs the constitutional gauntlet of bicameralism

[2] An argument could be made that Congress acquiesced in these decisions. I think the situation is more one where Congress has, unfortunately, become somewhat somnolent about defending its prerogatives to make the law as the Peoples' representatives in our Republican form of government and that the reality is not that Congress opted, after much heavy deliberation, to sit on the sidelines and explicitly defer to the Supreme Court in its *Chevron* and *Seminole Rock* jurisprudence. In any event, this is a complex set of topics beyond the scope of this testimony. In that vein, the Subcommittee may wish to review Michael Greve & Ashley C. Parrish, *Administrative Law Without Congress*, 22 GEO. MASON L. REV. 501 (2015).

and presentment should control over mere administrative common law, I agree that *Paralyzed Veterans* had to go.

In the excellent bill, the Regulatory Predictability for Business Growth Act of 2015," H.R. 2631, the issue is now whether to resurrect the policy behind *Paralyzed Veterans* and make it Congress's own dictate of law. Congress should do so. Justice Scalia noted that the D.C. Circuit was wrong to enact its view of policy even though it was just taking one small step toward cabining the immense powers conferred on agencies by the combination of (1) not having to use notice-and-comment procedures for interpretive rules; (2) the legal reality (not fiction[3]) that interpretive rules carry the force of law; (3) *Chevron*; and (4) *Mortgage Bankers*. He was right that because *Seminole Rock* is mere administrative common law, it is a principle that the Supreme Court is free to change. And thus as Justices Scalia, Thomas, and Alito all argued in their separate concurrences, *Seminole Rock* should be reconsidered in appropriate case. But this legislative Branch does not suffer under the same restriction that Supreme Court faces as the interpretive Branch. You can change the law. You can readopt *Paralyzed Veterans*. By doing so, you can rightfully curb the immense powers conferred on agencies by the unforeseen-to-the-Congress-of-1946 problems created by the adverse synergy of *Chevron* and *Seminole Rock* administrative common law with the express statutory differences between interpretive and substantive rules established in the APA.

I submit to you that H.R. 2631 carries the following advantages:

(1) Advancing Congress's Own Powers to Write the Laws: Whenever Congress considers APA reforms, the shop-worn argument that this would "ossify" agency processes is pulled out. *See, e.g.*, Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483 (1997). You should pay no heed to that. Administrative agencies are not mentioned in the Constitution. A purported principle that such unmentioned-administrative agencies must, as a moral imperative, be allowed to act with maximum dispatch is thus even more foreign to our intended system of government. ***First***, as a constitutional matter (as elaborated on below), passing H.R. 2631 would enhance the separation of powers and that trumps any mere policy concerns about agencies being able to act more quickly. ***Second***, ***you***, not the Executive Branch — and not the legal professoriate — define what the country's policy aims are via legislation. It was the aim of Congress, egged on by the professoriate in the 1930s and 1940s, to empower an unelected and supposedly expert bureaucracy. *See, e.g.*, James Landis, THE ADMINISTRATIVE

[3] The fiction that interpretive rules do not have the force of law traces to *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995) — and now to *Mortgage Bankers*' reaffirmance of that principle.

PROCESS 24 (1938) ("If the administrative process is to fill the need for expertness, obviously, as regulation increases, the number of our administrative authorities must increase.… Efficiency in the processes of governmental regulation is best served by the creation of more rather than less agencies."). That does not have to be your unalloyed, single-minded objective in 2015 (and whether it ever should have been a worthy objective even in the past is quite dubious). Moreover, policy experience has not stood still since 1938 or 1946. We can now see there are not just upsides to government by so-called experts but significant downsides.[4] You can adjust the relative reliance on bureaucrats and the speed with which they can act out their wills. And H.R. 2631 is just a small step in that direction.

(2) Advancing the Separation of Powers and Checks & Balances: Under their *Chevron* powers, the agencies are writing vast bodies of laws. Yet the principal law writers should be the Congress. By adopting H.R. 2631, you not only wrest some general law-writing power delegated to agencies back from them, you also ensure that you have the time to step in to correct agency mis-readings of the congressional will that you are content to leave delegated.

Look at it this way: As is a common place in administrative law (including in the realm of *Skidmore* deference[5]) the first agency to interpret a new law is the one closest to the congressional will. Agencies know that an infant law is closely watched by its proud parents in Congress and thus the agencies will be on their best behavior while under such watchful eyes. But now that *Paralyzed Veterans* is no more, as a law grows old, agencies may change their interpretations (and under *Seminole Rock* they are empowered to hold regulated parties' feet to the fire of any new interpretations), effectively ***turning on a dime***. By imposing notice-and-comment procedures on attempts to change early regulatory interpretations, you are not faced with *faits*

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[4] In this vein, I always think of the Nobel Prize-winning creation of public choice economics as expounded in works like the *Calculus of Consent: Logical Foundations of Constitutional Democracy*, by James M. Buchanan and Gordon Tullock. Indeed, Buchanan's own intellectual evolution illustrates the same point. He went from adhering to socialism earlier in his life to becoming a defender of the market order in his economic works. *See* Niclas Berggren, *James M. Buchanan Jr.*, 10 ECON J. WATCH 292, 292 (2013), *available at* http://econjwatch.org/file_download/718/BuchananIPEL.pdf (last visited Nov.1, 2015).

[5] *See also, e.g., Cleary ex rel. Cleary v. Waldman*, 167 F.3d 801, 808 (3d Cir. 1999) ("Under the *Skidmore* [*v. Swift & Co.*, 323 U.S. 134 (1944)] analysis outlined above, we must probe further to determine whether the interpretation is consistent and contemporaneous with other pronouncements of the agency and whether it is reasonable given the language and purpose of the Act."). As an aside, *Skidmore*, among the various species of deference including *Chevron* and *Seminole Rock*, is particularly candid in noting that it is a common law judicial creation: "There is no statutory provision as to what, if any, deference courts should pay to the Administrator's conclusions." *Skidmore*, 323 U.S. at 139.

accomplis. Instead, not only the regulated public, but this body would receive advance notice and could exercise its oversight to deter changed interpretations you disapprove of. H.R. 2631 thus gives you a tool to check the Executive Branch when needed.

And, of course, it goes without saying that since the task of interpreting the law is principally one entrusted to the Judicial Branch, H.R. 2631 will also help advance the separation of powers in that realm as well by ensuring that changed agency interpretations will be more deliberate and will inherently be subjected to more penetrating judicial review. *See* Advantage (5) below.

(3) Advancing Due Process Interests: Regulations in America effect all aspects of law — from civil to criminal, and thus from areas impinging on property to areas impinging on liberty. By imposing notice-and-comment procedures on changes in the longstanding regulatory interpretations you give regulated parties the chance to both timely and meaningfully oppose changes in regulatory interpretations or simply to adjust their affairs to take account of a new regulatory world. Doing that is just a species of fundamental fairness.

(4) Advancing the Protection of Private (and Public) Property: Millions or more dollars in the private sector can be invested in reliance on specific agency interpretations of statutes or regulations. Economic surpluses that grow not just business profits but that create or sustain jobs should not be able to be made to go "poof" with a flick of the bureaucratic pen. The Fifth Amendment's bulwark of property protections are also advanced by H.R. 2631. The Judiciary Committee and this Subcommittee have embedded a recognition of these points in the very title of the bill, noting that the bill is designed to enhance regulatory predictability (both a property and a due process value) and to enhance business growth (a property value).

Indeed, since in America we have a peculiar system where one agency can regulate another, especially in the environmental area (where the rulemakings are the most expensive), reliance interests in public property are similarly defended. As I learned up close and personal while the Deputy Assistant Attorney General for appellate litigation in the Environment and Natural Resources Division of the Department of Justice, EPA and the Interior Department, for instance, frequently issue rules that can impinge on the Defense Department or on the use and administration of federal property owned by any agency. Notice would thus give other parts of the federal family the time to react to potentially expensive and burdensome changes in federal regulatory interpretation. Accordingly, the advantages of H.R. 2631

would not accrue to private parties alone.

(5) Bolstering Effective Judicial Review: As you are aware, judicial review is confined to review judged against the four corners of an administrative record. If agencies do not have to give advance notice of potential changes in their legal interpretations, and especially where they do not have to grapple with the comments filed by interested parties, the administrative record can tend to be rather a one-sided affair. More than that, agencies can be tempted to abuse their powers to skew the administrative record toward including only materials that support the changed interpretation. The antidote to that is the introduction of adversariness. This will ensure that all relevant legal and policy concerns are aired before a changed agency interpretation can truly lock in. And H.R. 2631 will do just that.

(6) Countering the Strategic Potential for Abuse of *Seminole Rock* Deference: As the concurring *Mortgage Bankers* Justices recognized, Professor John Manning spotted the potential for abuse that in part led to *Paralyzed Veterans*. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996), *cited in Paralyzed Veterans*, 117 F.3d at 584. The concern is that under *Seminole Rock*, if agencies must be deferred to when their regulations are ambiguous, then they are given every incentive to write such regulations precisely so they can maximize their power to interpret them in the future. This temptation grows over time, especially in periods where Congress is not passing large numbers of new statutes. Agencies are then incentivized in many cases to look for ways to make new policy on its own. The full antidote to the strategic overreaching that *Seminole Rock* can lead to would be for the Supreme Court to overrule that case, which two Justices (Scalia and Thomas) appear to be calling for and which a third (Alito) thinks should be on the table for judicial consideration. But shy of the full antidote, restoring *Paralyzed Veterans* in a core of important cases would prove a welcome second-best measure. This is because (as per Advantage (5) above), by giving sharper teeth to judicial review, agencies would face more challenges and ones from better-equipped challengers when they were arbitrarily altering long-settled interpretive decisions. In short, H.R. 2631 solves the problem of negative synergies between, on the one hand, the *Seminole Rock* powers agencies possess to write ambiguous regulations, thereby enlarging their powers, and, on the other, the ability to costlessly interpret and reinterpret, as they see fit, their interpretations to push the reach of regulations ever outward.

Turning from general advantages to the specific stopping points of this bill, I also

commend the sponsors for what they have done in H.R. 2631. The bill does not restore all of *Paralyzed Veterans* but instead limits itself to requiring notice-and-comment procedures only for changes to "longstanding interpretive rule[s],"[6] *i.e.*, those that have been in place for at least one year. This reflects a balancing that requires a period of time before reliance interests will be presumed to have truly built up around a rule.

In sum, I lend my expert support for H.R. 2631. I cannot think of how it can be improved. There are those who might argue that you should tackle dismantling *Seminole Rock* deference first. And I share Professor Manning's (and several jurists') concerns about that doctrine. But the aims of H.R. 2631 are appropriately more modest and more targeted to bringing back the benefits (as modulated ever so slightly) of *Paralyzed Veterans* back to administrative law. Incrementalism is not to be scoffed at.

H.R. 3438 "REVIEW Act of 2015"

I similarly support the REVIEW Act of 2015, which would impose an automatic stay pending judicial review of any regulations that involve costs of one-billion dollars or more. Even in the twenty-first century, a billion dollars is "real money." *See* Wikiquotes ("A billion here, a billion there, pretty soon, you're talking real money.") (explaining that Senator Dirksen, to whom this quotation is often attributed, appears never to have actually uttered these words, quoting the Senator as saying: "Oh, I never said that. A newspaper fella misquoted me once, and I thought it sounded so good that I never bothered to deny it."), *available at* https://en.wikiquote.org/wiki/Everett_Dirksen (last visited Nov. 1, 2015).

Judicial stays can be quite difficult to come by. Sometimes I tell other lawyers in the field that the D.C. Circuit has a computer macro that spits out a denial of rulemaking stays citing to a case involving *WMATA*. *See WMATA v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977). Such decisions usually go unpublished and rarely set out explicit reasoning for denial. Experienced D.C. Circuit practitioners have a "feel" for what kinds of rulemakings can chin the bar (though they are *rarae aves*). The four factors in *WMATA* or the other famous D.C. Circuit stay case, *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958), are basically just an application of the basic

[6] Indeed (while fully recognizing this remark is tongue-in-cheek), the bill also seems to be worth the price of admission just because it eliminates the cumbersome term "interpretative" from the text of the APA and replaces it with the more felicitous term "interpretive." This will save me from having to edit out the word "interpretive" from the text of briefs that come to me in first draft from a law-firm associate (or, that came to me from 2001-2005 from federal lawyers, for that matter). It can be hard enough in administrative law cases to simplify complex statutes, complex regulations, and complex scientific and economic facts. The last thing one needs on top of that is needlessly complex terminology that no one uses outside this field of law. When was the last time any ordinary speaker of the English language announced: "My friends, we have an interpretative dispute on our hands"?

rules of equity. *See, e.g., eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391-92 (2006). As with doctrines of the common law, nothing prevents Congress from overriding the background law of equity and fashioning a rule better to its liking. And the modification here of the discretionary stay approach under the four-factor balancing test in *WMATA* and *Petroleum Jobbers* — and their progeny —is quite modest. It applies only to billion-dollar-plus rules. While such rules are on the rise, they are not everyday events.[7] Critics of H.R. 3438 would likely argue that rules of this magnitude are often in the environmental area and thus an automatic stay will deprive people of the health benefits of these rules. A critique of how EPA and other environmental agencies reckon the benefits of environmental rules is beyond the scope of this testimony but it is possible to make some basic observations that cut against this critique.

First, the economy continues to be anemic while the pace of new regulations is decidedly not. *See supra* n.6. Agency claims they have accurately calculated costs and benefits should not be conclusively presumed, but instead should first be tested in courts. This is a mere anecdote, but I will note I am involved in Seventh Circuit litigation for a client where the Department of Energy reckoned costs and benefits in an energy-efficiency rule that applies to supermarket refrigeration equipment by assuming that no reduction in demand would occur even where equipment prices would increase significantly. That's patently absurd. DOE also blew hot and cold on whether they were justifying the rule based on the so-called "social cost of carbon." DOE said one thing in the *Federal Register* and quite another to the Seventh Circuit in briefing. The view that expert agencies are accurately calculating costs and benefits in practice is much overstated. Leaving anecdotes and shifting to broader, objective measures, consider that 97.2% of the benefits of all EPA rules stem from the $PM_{2.5}$ rule. *See* U.S. Chamber of Commerce, *Charting Federal Costs and Benefits*, at Figure 8 (2014), *available at* https://www.uschamber.com/sites/default/files/021615_fed_regs_costs_benefits_2014reportrevise_jrp_fin_1.pdf (last visited Nov. 1, 2015).

Second, H.R. 3438 holds up only rules that generate actual judicial challenges. And it is not easy to mount a challenge to a major rulemaking. Such challenges are expensive. And given all of the deference doctrines that can come into play both on

[7] *See* House Energy & Commerce Committee, *EPA's List of Billion-Dollar Rules Long and Growing*, Press Release (July 10, 2013), *available at* http://energycommerce.house.gov/press-release/epas-list-billion-dollar-rules-long-and-growing (last visited Nov. 1, 2015) (listing nine final rules and, at that point, 4-6 other rules in the pipeline that were expected to exceed $1 billion in costs); s*ee also* James L. Gattuso & Diane Katz, *Red Tape Rising: Six Years of Escalating Regulation Under Obama*, (May 11, 2015), *available at* http://www.heritage.org/~/media/infographics/2015/05/b3015/bg-red-tape-rising-2015-chart-1-825.ashx (last visited Nov. 1, 2015) (noting that the first six years of the Obama Administration issued twice as many "major regulations," *i.e.,* those costing $100 million or more, as the Bush 43 Administration did during its first six years).

legal questions (see the discussion above of H.R. 2631) ***and on questions of fact***, such challenges are not mounted frivolously. It does not seem too high a price to pay for monumental rulemaking challenges, where the amounts of money at stake are staggering, for agencies to face a waiting period until judicial review can be completed. Numerous challenges are not pursued when I explain to prospective clients that the prospects of obtaining stays, even of highly significant rules, is quite low. This is because they know that they will have to begin complying before they will learn whether they win a court case or not. Since the capital expenditures involved in compliance can be enormous and will be sunk costs, this often precludes challenges that should be made. Agencies should not be able to exploit such risks. In my experience, they have become prone to do so by issuing lots of rules at the same time knowing either that (a) any interim compliance they achieve advances their objectives, even if they lose litigation; and (b) industry cannot challenge every potential rule they face.

Third, any rule that is truly needed on an urgent basis could be adopted by Congress in the form of direct legislation. H.R. 3438 would have no impact at all on that congressional power. Yet it is precisely because the regulations and regulatory policies being pursued are often highly contestable and contested, that the proponents of the regulatory state and its growth do not wish to see major regulations subjected to the democratic process of legislative debate and analysis.

Turning to how the bill might be improved, I reiterate that H.R. 3438 could be adopted as written. It is an important step in the right direction. But, as contrasted with H.R. 2631, there are several ways in which H.R. 3438 might be improved. Please consider the following suggestions in that regard:

First, Congress may wish to consider a lower threshold than $1 billion in costs. The $1 billion definitely has the effect of focusing on most rules that would cry out for an automatic legislative stay. But note that the impact of a rule on the national economy can vary based on variables other than aggregate costs alone. Other variables include how concentrated or diffuse such cost impacts will be. A rule of $500 million or even $250 million imposed predominantly on small businesses could be crippling, and perhaps even more crippling than a $1 billion rule imposed on a large grouping of multiple national industries. Note that economic incidence analysis is also relevant. If demand is relatively inelastic, then a higher share of newly imposed regulatory costs can be passed on to consumers (though this can create its own problems for American families, of course), whereas if demand is elastic, then manufacturers will bear the brunt of regulatory costs and thus impacts on the regulated industry can turn out to be more troubling. Lowering the threshold would help to pick up more rules where factors such as the concentration of costs and cost incidence would warrant an automatic stay.

Second, consider extending H.R. 3438 to independent agencies. The SEC and the FCC, just to name two such bodies, clearly have the prospect to impose significant costs on the national economy. Making the trigger for application of the bill a cost calculation by the Administrator of OIRA is useful and reaches "unitary executive" agencies but they are not the entirety of what Congress should be concerned with.

Third, I am not sure that simply directing agencies to postpone the effective date of their rules pursuant to APA Section 705 will solve all controversies. Sometimes organic statutes are quite prescriptive in setting out the timetables for rules. A simple amendment to the bill to ensure that the automatic stay is intended by Congress to apply ***notwithstanding anything in an organic statute to the contrary*** would fix this issue. The idea is to get the baseline right. In general, rules surpassing the relevant threshold (whether $1 billion, $500 million, etc.) should be automatically stayed pending judicial review. And if Congress wants to relieve particular rules from the automatic stay — or wants particular new statutes to operate differently than the contemplated changes to the default provision of APA Section 705 that would impose an automatic stay — then Congress can make such particularized exceptions.

Fourth, costs are often reckoned in ranges and not as point estimates. Thus, H.R. 3438 should clarify that if any portion of a cost range exceeds the threshold (currently $1 billion), then that would trigger application of the automatic legislative stay.

Fifth, and this is more of a question. I have not engaged in a comprehensive survey but the Subcommittee may want to consider whether there are statutes that create pre-enforcement judicial review periods that exceed 60 days. The same concern could be put the other way — there are some statutes that may require seeking review within 30 days. One amendment the sponsors may wish to consider is thus to apply the automatic stay to a suit filed within the requisite time period for seeking judicial review (whatever that may be under the applicable pre-enforcement review organic statute), or 60 days if no such period is specified by other law. That way, you are sure to establish a time certain as a clear signal to regulated parties by which they must bring a case if they wish to obtain an automatic stay, but by the same token you would not be setting a different period in which a suit must be filed than would apply to the need to otherwise bring the relevant challenge. Creating divergences in jurisdictional time periods in which to sue to obtain judicial review itself vs. the APA Section 705 time period in which to bring suit to ensure triggering an automatic legislative stay would seem to just be creating a trap for the unwary. Though I note that concern is mitigated by the fact that H.R. 3438 would only apply to large rulemakings, which would tend to ensure that counsel for the petitioners are more likely to be skilled enough to avoid such pitfalls.

I sincerely thank the Subcommittee for the opportunity to testify today.