"*The Administrative Procedure Act at 75: Ensuring the Rulemaking Process is Transparent, Accountable, and Effective*"

U.S. House Committee on the Judiciary
Subcommittee on Antitrust, Commercial, and Administrative Law

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Dear Chairman Nadler, Ranking Member Jordan, and Members of the Committee,

Thank you for the invitation to appear today to testify regarding greater transparency in the administrative rulemaking process. I teach and write in the areas of administrative law, the separation of powers, constitutional law and interpretation, and federal courts, and I co-lead the C. Boyden Gray Center for the Study of the Administrative State at the Antonin Scalia Law School. Previously I served as a Deputy Assistant Attorney General in the Office of Legal Counsel, as an Associate Deputy Attorney General within the U.S. Department of Justice, and as a law clerk to Justice Clarence Thomas and then-Judge Brett M. Kavanaugh.

My prepared statement will address methods for increasing transparency and accountability in rulemaking that include a return to the textual standards of the Administrative Procedure Act ("APA"), the statutory adoption of more detailed standards for judicial review and agency procedures, the provision of greater clarity and detail in statutory authorizations of agency action, and the imposition of statutory requirements for transparency in the issuance of agency policy guidance. In addition, this statement will address the need for greater transparency and accountability within agency adjudication, particularly those matters in which agency adjudicators have authority to impose penalties and other sanctions against regulated parties that have been subject to the agency's own internal investigation.

APA Textual Standards and Contemporary Practice

Over the decades since enactment of the APA in 1946, agency practice and judicially imposed procedural requirements have combined to make agency rulemaking practice inconsistent with the plain textual requirements of the APA.[1] One first step in enhancing agency accountability could be a general reconsideration of ways in which general agency formal and informal rulemaking procedures should be more closely aligned with the statutory textual requirements that purportedly govern them. Adherence to this approach would

[1] *See, e.g.*, 5 U.S.C. § 553 (informal rulemaking); *id.* § 554 (formal adjudication); *id.* § 706 (judicial review standards). Many of these observations are detailed further in sources like Gary Lawson, FEDERAL ADMINISTRATIVE LAW (8th ed. 2019) and *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

involve application of a kind of APA "originalism." If Congress were to determine that the general administrative procedural requirements embodied in the statutory terms of the 1946 APA were no longer optimal for twenty-first century practice, then Congress could develop statutory changes. But the greater the detail in the procedural instructions that Congress provides to administrative agencies and the greater the consistency between agency practice and the statutory procedural requirements governing that action, the greater the accountability and transparency in the exercise of administrative power.

Following are several examples of current understandings and practices under the APA that likely deviate from the original meaning of the statute's terms. First, in 1973, the Supreme Court in *United States v. Florida East Coast Railway* gave a very constrained, likely extratextual, interpretation to the phrase "on the record after opportunity for an agency hearing" in section 553 of the APA.[2] The practical effect of that interpretation was to raise the threshold trigger for agency statutory procedures to require formal rulemaking procedures[3] as opposed to the much more relaxed informal rulemaking procedures of section 553 of the APA. Therefore, as a practical matter, very little agency rulemaking today is conducted through formal rulemaking, which means the procedural constraints of the APA for such procedures are rarely used.[4]

Consequently, as more agency practice was shifted to informal rulemaking procedures, in the latter half of the twentieth century the U.S. Court of Appeals for the D.C. Circuit imposed heightened procedural requirements on notice-and-comment rulemaking. The text of section 553 of the APA requires only that an agency provide an opportunity to participate in the rulemaking in written or oral form and the incorporation of a "concise general statement of [the rule's] basis and purpose" in the final rule.[5] The Supreme Court in *Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council*[6] rejected judicial attempts to require more than just written participation during notice-and-comment rulemaking. But other judicial rulings have led to the promulgation of rules that are hundreds of pages in length because of the enhanced explanations that courts expect to see when providing judicial review of final informal agency rules.

The increased procedural burdens on agencies via the section 553 notice-and-comment procedures might indirectly improve transparency by ensuring that agencies provide more detailed responses to comments that they receive from the public during the section 553 rulemaking process. But extrastatutory judicially imposed procedural requirements are never a positive development under the rule of law. And judicially imposed procedural requirements often can serve to move the goalposts on requirements for agency action and create inconsistencies between agencies. In addition, the contemporary reality of expansive

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[2] 410 U.S. 224 (1973).

[3] *See* 5 U.S.C. §§ 556-557.

[44] *See generally* Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO STATE L.J. 237 (2014).

[5] 5 U.S.C. § 553(c).

[6] 435 U.S. 519 (1978).

judge-made procedural requirements in the context of notice-and-comment rulemaking has had the unanticipated effect of pushing agencies to rely more heavily on the issuance of informal agency guidance, which is subject to no particularized APA procedural requirements. Directive suggestions and interpretations issued by agencies via policy guidance are subject to significantly less transparency and accountability than regulations promulgated under the constraints of APA section 553.

More Detailed Judicial Review and Agency Procedural Requirements

In addition to judicial overreach in interpretation of the regulatory procedural requirements in sections 553, 556, and 557 of the APA, courts have also imposed arguably extratextual requirements on the judicial review standards for agency action in section 706 of the APA. For example, section 706(2)(C) of the APA requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[7] Full stop. There is no textual indication that courts are to provide deference to agency interpretations or follow the two-step approach that courts have created through the *Chevron* framework.[8] The most obvious plain reading of the textual review requirement of section 706(2)(C) is to embody a de novo review for questions of law, not deference to agency's own interpretations of the law that is to constrain them.

Agency transparency and accountability would be improved if courts provided closer review of the legal constraints that apply to agency action. Where Congress has applied statutory rules of the road to agencies, courts should hold agencies accountable to following those requirements. In addition, Congress itself could step in by imposing greater direct review of agency action through information requests, appropriations restrictions if Congress concludes that an agency is acting outside of statutory legal constraints.

In addition to taking steps over the years to narrow *Chevron* deference, the U.S. Supreme Court also recently acknowledged that lower courts at times do not give adequate care to review of whether agencies are reaching correct legal interpretations of their own regulations. Although the Court attempted to toughen the judicial review approach to agency interpretations of regulations in *Kisor v. Wilkie*, the Court to date has declined to directly reverse its decisions in either *Auer v. Robbins* or *Chevron* supporting deference to agency legal determinations.[9]

That said, Congress could take action by updating or amending the APA to clarify that a de novo review standard should apply to questions of law if Congress concludes that

[7] 5 U.S.C. § 706(2)(C).

[8] *See, e.g.*, Michigan v. EPA, 576 U.S. 743, 760-64 (2015) (Thomas, J., concurring) (analyzing the legality of the Supreme Court's interpretation in *Chevron v. NRDC*, 467 U.S. 837 (1984).

[9] *See Kisor v. Wilkie*, 139 S. Ct. 2400 (2019); *Auer v. Robbins*, 519 U.S. 452 (1997); *Chevron*, 467 U.S. at 837.

standard is appropriate. Such a standard certainly would help ensure that executive action is subject to greater legal review.

Narrower Delegations

One area where courts arguably have imposed tougher standards on agency action than the original APA text required is in application of the "arbitrary" and "capricious" review standard for agency policy determinations.[10] Prior to the late twentieth century, courts were more deferential to agency policy determinations within areas of policy discretion authorized by statute.[11]

One factor motivating this heightened review may be a greater awareness in recent years that statutes delegate authority to agencies subject to very broad discretionary standards, which agencies are using to impose heavy requirements on regulated entities subject to little accountability or review.[12] Litigants have taken notice and filed challenges in the U.S. Supreme Court asking it to reinvigorate delegation limitations under Article I, Section 1 of the Constitution, which vests all "legislative power" in Congress. The Court to date has declined to require Congress to legislate more specific standards for agency action than the requirement that Congress merely provide an "intelligible principle" for the agency to follow.[13] But numerous statutes like the Federal Trade Commission Act have been in effect for much of the past century. Agency accountability and transparency would be significantly strengthened if Congress were to update or reenact these broad organic agency statutes to address twenty-first century technology and practice. If Congress wanted to do so contingent on the benefit of the institutional expertise of longtime agency officials, then it could request that agencies provide necessary reports or recommended policy changes and subsequently amend or adopt those recommendations via the legislative process as Congress sees fit. From the time of the very first Congress when Congress relied heavily on Treasury Secretary Alexander Hamilton's expertise and statutory recommendations, Congress made necessary policy determinations subject to the interests of the people and families that it represents, but with the benefit of informed executive expertise.[14]

Statutory Requirements for Transparency in Agency Guidance Documents

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[10] *See generally* 5 U.S.C. § 706(2)(A).

[11] *See generally Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (applying hard look review and suggesting that agencies must provide special explanation for policy changes even where such changes are brought about by an electoral change in presidential administration).

[12] *See, e.g.*, *Dept. of Transp. v. Ass'n of Amer. R.R.*, 575 U.S. 43, 66-91 (2015) (Thomas, J., concurring).

[1313] *See, e.g.*, *Gundy v. United States*, 139 S. Ct. 2116 (2019).

[14] *See generally* Jennifer L. Mascott, *Early Customs Laws and Delegation*, 87 GEO. WASH. L. REV. 1388 (2019).

In addition to updating the APA, Congress should consider the statutory adoption of several executive orders issued during the Trump Administration to improve agency accountability and transparency. The Biden Administration has rescinded several of the earlier executive orders, but Congress could codify them as permanent requirements moving forward. Several of the most relevant executive orders include the Trump orders titled "Promoting the Rule of Law Through Improved Agency Guidance," "Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication," and "Protecting Americans From Overcriminalization Through Regulatory Reform."

Agency Adjudication

Finally, if Congress decides to revisit the textual statutory standards for transparency and accountability in rulemaking, then Congress should also consider revisiting accountability in agency adjudication.[15] Agencies exercise vast power to conduct their investigations, bring charges, and impose heavy penalties and sanctions on regulated parties. Congress should consider imposing more uniform standards limiting the instances in which agencies can both investigate and bring charges against regulated entities and then adjudicate the outcome of those own charges.[16] The entire American system was built on the Madisonian model of separated powers to instill accountability and protect liberty. The exercise of investigative, policymaking, and adjudicative responsibilities within a single administrative entity on matters involving liberty and property should receive congressional review.

[15] *See generally* Constitutionally Conforming Agency Adjudication, 2 LOYOLA JOURNAL OF REGULATORY COMPLIANCE 22 (2017) (online).

[16] *See generally* Comment of the Administrative Law Clinic, Antonin Scalia Law School, *Request for Information Regarding Bureau Rules of Practice for Adjudication Proceedings*, Docket No. CFPB-2018-0002.