Hearing before the
U.S. Senate Committee on Homeland Security and Government Affairs

Subcommittee on Efficiency and Effectiveness
of Federal Programs and the Federal Workforce

"A MORE EFFICIENT AND EFFECTIVE GOVERNMENT:
IMPROVING THE REGULATORY FRAMEWORK"

March 11, 2014

Statement of Amb. C. Boyden Gray

I am grateful for the opportunity to testify before the Subcommittee on these crucial issues. Regulatory reform has been a major issue throughout my career: in the Reagan and Bush Administrations, where we developed the landmark executive order on regulatory reform; and then in the private sector and as chairman of the ABA's Administrative Law Section; and most recently as U.S. Ambassador to the European Union, where I saw firsthand the importance of regulatory reform in the international context. Today, these issues are more important than ever, as we experience unprecedented growth in the scope and burden of the administrative state.

My testimony today focuses primarily on two issues: the much-needed reforms proposed in the Regulatory Accountability Act and other legislation; and the need to streamline the process for federal regulatory permits.

But it is also important to keep in mind not just *procedural* reforms, but also *substantive* reforms: agencies wield vast powers only because Congress has delegated them such vast powers. To truly reform the administrative state, Congress must undertake serious reforms of the underlying statutes themselves, to limit the delegations of power to the agencies.

I. The Regulatory Accountability Act (S. 1029) and Other Reforms

Since 1981, oversight of the administrative state, including the analysis of regulations' costs and benefits, has been governed primarily by executive orders: first by President Reagan's E.O. 12291, and then by President Clinton's E.O. 12866, which is still in force under President Obama. These orders have done much to improve the quality and efficiency of federal regulation, but they are not perfect. The Regulatory Accountability Act (S. 1029), which I have supported before Congress many times,[1] would substantially improve upon those executive orders in at least two ways:

First, the Act would *codify* regulatory oversight and cost-benefit analysis. It is good that Administrations have voluntarily undertaken such coordination and analysis in executive orders, but this cannot remain a matter of White House discretion. Congress needs to commit these crucial matters to federal *statutes.* And because cost-benefit analysis would become a statutory requirement for agencies, that analysis would thus be subject to judicial review, which helps to ensure that the agencies undertake such analysis rigorously and in good faith.

Second, and even more importantly, the Act would extend regulatory review and cost-benefit analysis to the so-called "independent" agencies, which have always been exempted from the White House's executive orders on regulatory review. In the Reagan Administration, we exempted "independent" agencies from the original executive orders not because we thought such White House oversight was unlawful, but rather because we thought it was politically infeasible at that time. But the times have changed dramatically: after three decades of OIRA oversight, there is no substantial opposition to subjecting "independent" agencies'

[1] I attach and incorporate my prior statements. Specifically, I testified in support of the Act before the House Judiciary Committee in October 2011 (**Attachment 1**). I testified again in support of the Act, and other regulatory reforms in September 2012 (**Attachment 2**). In July 2013, I wrote a letter for the record in a House Judiciary Committee subcommittee hearing on the Regulatory Accountability Act (**Attachment 3**). And in September 2013, I testified before a House Judiciary Committee subcommittee in support of the Act (**Attachment 4**).

regulations to OIRA review, except among hardliners who oppose any meaningful brakes on regulation *per se*.[2] Congress already imposes cost-benefit analysis requirements on some independent agencies, in very limited ways.[3] Congress is long overdue to impose such a fundamental obligation on *all* agencies, be they "independent" or "executive."

Arbitrarily exempting independent agencies from the oversight of regulatory review and cost-benefit analysis also undermines current efforts to achieve transatlantic regulatory reform and cooperation.[4] Financial services are a major component of transatlantic

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[2] In 2011, a coalition of law professors opposed the Regulatory Accountability Act, arguing that the Act's "additional hurdles" would make it more difficult for agencies to create new regulations. Their concerns about over-regulating the regulators is quite ironic: they ought to consider that perhaps the private sector feels similarly about the agencies' regulations.

[3] Congress requires the Commodity Futures Trading Commission to consider the costs and benefits of its regulations. 7 U.S.C. § 19(a). Congress similarly requires the Securities and Exchange Commission to examine certain regulations' effects on "efficiency, competition, and capital formation," which 15 U.S.C. §§ 78c(f), 78w(a)(2), 80a-2(c); *see also Chamber of Commerce v. SEC*, 412 F.3d 133, 144 (D.C. Cir. 2005) ("uncertainty may limit what the Commission can do, but it does not excuse the Commission from its statutory obligation to do what it can to apprise itself—and hence the public and the Congress—of the economic consequences of a proposed regulation before it decides whether to adopt the measure") (citing 15 U.S.C. § 80a-2(c)).

[4] A recent Atlantic Council report notes:

> Because of the decentralized nature of this regulatory governance, there can be considerable variation between US agencies on substantive issues. For example, US regulatory agencies such as the CFTC and SEC have occasionally differed as to the extraterritorial effect of various provisions of the Dodd-Frank Act (DFA), even where their rules govern similar or economically identical transactions. Furthermore, independent agencies can and do break with executive agencies like the US Trade Representative—and even the US Treasury Department—on international regulatory policy. This domestic 'divergence' can, in turn, create challenges with regards to promoting a unified 'US position' across a variety of different sectors.

Atlantic Council, *The Danger of Divergence: Transatlantic Financial Reform & the G20 Agenda* (Dec. 2013), *at* http://www.atlanticcouncil.org/images/publications/Danger_of_Divergence_Transatlantic_Financial_Reform_1-22.pdf; *see also* Raymond J. Ahearn, Congressional Research Service, *Transatlantic Regulatory Cooperation: Background and Analysis* (Aug. 24, 2009) ("Congress might play an important and pivotal role in transatlantic regulatory cooperation. Through authorization and appropriations of many different independent regulatory agencies, Congress is in a position to facilitate or impede progress in this undertaking."), *at* http://www.fas.org/sgp/crs/row/RL34717.pdf.

trade, and thus their exclusion from transatlantic regulatory reform and cooperation would undermine the viability of the entire free-trade effort.

The Regulatory Accountability Act is a crucially important reform, but it is not the only welcome reform before Congress. In my 2012 testimony, I also supported several other bills, including the REINS Act (now S. 15). The REINS Act would help to restore Congress's constitutional responsibility as the nation's sole repository of legislative power. As Congress delegates ever more authority to regulators—a point that I will return to at the end of my statement—bills such as the REINS Act become ever more important. Congress must re-accept responsibility for the administrative state's burdens on American people and businesses.

II. The Federal Permitting Improvement Act (S. 1397)

There's an old joke: *In Britain, everything is permitted except that which is forbidden; in Germany, everything which is not permitted is forbidden; and in Russia, everything is forbidden, even that which is permitted.* It's a funny joke, until you begin to consider the sad state of federal permits here in the United States.

Federal statutes that establish permit requirements place immense power and responsibility in the hands of bureaucrats. The public must trust them to act in the public interest, protecting us from true dangers while not unduly stifling free enterprise and economic growth. Unfortunately, the last several years have shown us how regulators can effectively shut down projects not just by rejecting permits, but also by simply failing to process permit applications expeditiously and in good faith.

We all know the highest-profile examples, such as the Keystone XL pipeline, the Cape Wind offshore wind farm, and the government's own Yucca Mountain nuclear waste repository. In these cases and others, various regulators—and outside groups, leveraging the permit process and opportunities for litigation—managed to delay the projects by years, if not

permanently. But even more worrisome is the fact that there are myriad other examples, ones that do not earn equivalent public notice, but which are also very important to the nation's economic future, especially with respect to energy development.

The Federal Permitting Improvement Act (S. 1397) would go a long way to mitigate many of these problems. By placing OMB at the head of the new "Federal Infrastructure Permitting Improvement Council," and then by designating one specific agency as the "lead agency" for each type of multi-permit project, it would help to coordinate scattered agencies and set deadlines for the various approvals needed for a given project. (I note that the Energy Policy Act of 2005 established a similar "lead agency" role for the Federal Energy Regulatory Commission, with respect to federal approvals needed for natural gas pipelines liquefied natural gas import/export projects.[5])

And this comes at a crucially important moment in our nation's history, as we chart our energy future. The nation's vast natural gas reserves, unlocked by modern advances in hydraulic fracturing and horizontal drilling, are coming available at the very moment when we need them the most: to help supply clean electricity; to provide clean fuel for cars and trucks; and to allow the United States to Europe and other allies break free from their dependence upon Russian gas. But to fully utilize our new gas reserves, we will need to substantially increase our natural gas pipeline infrastructure, in order to move gas from the wells to the markets. According to a 2011 study by ICF International, in the next twenty-plus years America will need 1,400 miles of new gas transmission pipelines each year (*i.e.*, 43 billion cubic feet for day in new capacity).[6] Similarly, the Edison Electric Institute recently reported

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[5] 15 U.S.C. 717n(b)(1).

[6] ICF International, *North American Midstream Infrastructure Through 2035—A Secure Energy Future* 68 (June 28, 2011), *at* http://www.ingaa.org/File.aspx?id=14900. And that is in addition to roughly 17,000 miles of new "lateral" and "gathering" lines annually. *Id.*

that its members plan to spend over $50 billion on electric transmission line projects by 2023.[7] And of course those projects will create thousands of jobs, which is precisely why both the AFL-CIO and the U.S. Chamber of Commerce support this commonsense legislation. But for these projects to happen, the nation desperately needs an infrastructure permitting process that is transparent, efficient, and reliable. The point is not to rubber-stamp all projects, but rather to make sure that needed projects are not exposed to procedural abuse by either regulators or by special interests who exploit the current permitting frameworks' inefficiencies and opacity.

The bill balances all of these competing concerns by both streamlining the process and coordinating multi-agency reviews, and also ensuring that all stakeholders, including affected communities, are brought into the process as early as possible, to bring their concerns to the forefront of the process at the outset.[8] Moreover, the bill would finally set a sensible deadline for judicial review of all covered federal permitting decisions. Many statutes already provide such deadlines—FERC's approval of natural gas pipeline, for example, must be appealed no later than sixty days after FERC issues its final decision.[9] But where no such deadline currently is prescribed, a project's opponents may be bound only by the general *six-year* statute of limitations for lawsuits challenging federal actions.[10] Such projects cannot simply rely on the hope that a federal court will shorten that deadline, after the fact, through "laches" and other equitable doctrines. Federally approved projects need the certainty that this bill's 180-day statute of limitations would provide. And that 180-day window is extremely generous

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7 Edison Electric Institute, *Transmission Projects: At A Glance*, at iii (Mar. 2013), *available at* http://www.eei.org/issuesandpolicy/transmission/Documents/Trans_Project_lowres.pdf.

8 *See* Section 3(c)(2)(i) (requiring the new Federal Infrastructure Permitting Council to promulgate "best practices" on "early stakeholder engagement, including fully considering and, as appropriate, incorporating recommendations provided in public comments on any proposed covered project").

9 15 U.S.C. § 717r(b).

10 28 U.S.C. § 2401(a).

to those who wish to appeal the agencies' action in good faith, and not merely to use the old six-year statute of limitations to cast a cloud of uncertainty over projects that regulators have reviewed and approved.

In sum, I strongly support this bill. Let me also offer a few suggestions for further improvement:

The bill binds *federal* agencies administering federal laws.[11] But many federal permits are administered by *state* authorities, under the Clean Water Act, the Clean Air Act, the Coastal Zone Management Act, and other laws. Those "cooperative federalism" laws offer some of the best opportunities for project opponents (including the regulators themselves) to delay or block projects[12]; thus, I hope the Senate will consider including those state agencies, administering federal laws, in this new framework.[13]

And for that same reason, this bill might not be interpreted as covering the Keystone XL pipeline and other international oil pipelines. International oil pipelines are

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[11] *See* Section 2(1), defining "agency" in accordance with 5 U.S.C. § 551: "each authority of the Government of the United States." Elsewhere, the Act defines "authorization" to include all approvals "under Federal law, whether administered by a Federal or State agency," *see id.* § 2(3), but the Act places binding obligations only on "agencies"—*i.e.*, federal agencies. Similarly, the Act's provision for a "permitting timetable" directs the "lead" federal agency to consult with the "State in which the project is located," but it ultimately provides permitting deadlines only for "each participating agency"—*i.e.*, only federal agencies. *See* Section 4(c)(2)(A).

[12] *See, e.g.*, *Islander East Pipeline Co. v. Ct. Dep't of Envtl. Protection*, 525 F.3d 141 (2d Cir. 2008) (state agency successfully rejected a pipeline's Clean Water Act application, six years after the project first applied for its permit, and two years after the Second Circuit reversed the agency's original denial); *AES Sparrows Point LNG, LLC v. Smith*, 527 F.3d 120 (4th Cir. 2008) (county unsuccessfully attempted to block LNG project by purporting to amend the State's program administering the Clean Water Act). *See generally, e.g.*, John Darby *et al.*, *The Role of FERC and the States in Approving and Siting Interstate Natural Gas Facilities and LNG Terminals After the Energy Policy Act of 2005—Consultation, Preemption and Cooperative Federalism*, 6 Tex. J. Oil Gas & Energy L. 335 (2011); Jacob Dweck *et al.*, *Liquefied Natural Gas (LNG) Litigation After the Energy Policy Act of 2005: State Powers in LNG Terminal Siting*, 27 Energy L.J. 473 (2006).

[13] Moreover, many important interstate projects are blocked by state regulators administering *state* laws, even after Congress's Energy Policy Act of 2005 was enacted to take jurisdiction away from state regulators delaying or denying necessary permits. *See Piedmont Envtl. Council v. FERC*, 558 F. 3d 304 (4th Cir. 2009).

governed not by statutes administered by agencies, but by executive orders asserting inherent presidential power in the absence of statutes.[14] Although the President delegates much of this inherent authority to the Secretary of State,[15] at least one federal court has held that this exercise of non-statutory presidential power still is not "agency" action (and therefore not subject to review under the Administrative Procedure Act).[16] For Keystone XL, this problem would be solved by other pending bills that would expressly approve the Keystone XL pipeline by an Act of Congress[17] (or, in the previous Congress, by bills reassigning the President's permitting authority to the Federal Energy Regulatory Commission[18]). But out of an abundance of caution, the Federal Permitting Improvement Act should expressly and unambiguously include "Presidential Permits" in its coverage.

Second, this bill's $25 million threshold[19] would leave many federal permit applicants unprotected. While I understand that such a threshold makes life easier for regulators, it has the perverse effect of exposing to regulatory abuse the companies *most vulnerable* to the burdens of cost and delay—small businesses.

And it would do so at a moment when small businesses face unprecedented permitting burdens. As many have discussed (including in recent Supreme Court arguments), the EPA now interprets Title II of the Clean Air Act as imposing pre-construction "PSD"[20] permit requirements for all companies emitting more than just 100 or 250 tons of greenhouse

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14 *See*, *e.g.*, Paul W. Parfomak *et al.*, Congressional Research Service, *Keystone XL Pipeline Project: Key Issues*, at Appx. A (Dec. 2, 2013).

15 Exec. Order 13337 (Apr. 30, 2004); Exec. Order 11423 (Aug. 16, 1968).

16 *The Sisseton–Wahpeton Oyate v. Dep't of State*, 659 F. Supp. 2d 1071, 1080-82 (C.D. S.D. 2009).

17 S. 17; S. 582.

18 H.R. 3548 (112th Cong.).

19 *See* Section 2(5)(A)(ii).

20 That is, "prevention of significant deterioration."

gases per year. By EPA's own estimate, this covers *82,000* sources per year (as opposed to the 280 sources that needed PSD permits before greenhouse gas emissions were regulated).[21] As EPA itself explains, these "commercial and residential sources—the great majority of which are small businesses—would each incur, on average, almost $60,000 in PSD permitting expenses."[22] For now, EPA says that it will exclude small businesses by unilaterally exercising sole discretion to "tailor" its rule to cover only larger emitters. But EPA and the Justice Department refuse to guarantee that small businesses will permanently receive these initial protections—in fact, Solicitor General Verrilli conceded at oral argument that EPA "might" ultimately impose its requirements on all businesses that emit more than 100 or 250 tons of greenhouse gases per year.[23] Given the EPA's expansive view of its own authority, and the burdens that EPA could place on small businesses through the state regulators administering the federal PSD program,[24] the Federal Permitting Improvement Act's protections should be extended to smaller businesses.

Finally, Congress must keep in mind that the mere setting of deadlines for agency action cannot guarantee that the regulators will be forced to administer the permit process in good faith. We saw this in the case of Keystone XL: Congress set a deadline for the

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[21] 75 Fed. Reg. 31514, 31556 (June 3, 2010).

[22] *Id.*

[23] *See* Oral Arg. Tr., *Util. Air. Regulatory Group v. EPA*, Nos. 12-1146 *et al.*, at 86 (Kagan: "Are you essentially looking for the number that captures the same class of emitters?" Verrilli: "I think—I don't know that it will be the same, but I think it'll be—but I think the—the class will be a lot smaller than the class under EPA's current understanding of what it means to emit 250 tons per year"); *see also id.* at 56 (Alito: "I thought EPA said, well, we're going to work toward [the statutory thresholds]." Verrilli: "No, this is—this is to try to get to the statutory threshold . . . he agency has discretion in deciding what constitutes the potential to emit 250 tons per year.").

[24] I was counsel to several States in the *Utility Air Regulatory Group v. EPA* case, filing *amicus* briefs at the certiorari and merits stages, highlighting the burdens that EPA' program would place on state permitting authorities.

President to decide the permit application, and when the deadline came, the President simply denied the permit, asserting that the years of reviews leading up to that point were insufficient for him to make a decision. Simply put, regulators facing deadlines can threaten to simply veto projects, forcing the applicants either to file new applications (as Keystone XL did) or to acquiesce to time extensions. So long as regulators enjoy those powers, it will remain incumbent upon Congress to actively monitor regulators' conduct, and to hold them accountable.

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Let me close with one last, crucial point. Procedural reforms are important, but so are *substantive* reforms. As the Supreme Court said, "an agency literally has no power to act . . . unless and until Congress confers power upon it."[25] By the same token, an agency is capable of irrationally or abusively thwarting permit applicants only because Congress has given them such power.

Thus, the true root of the problem is not procedural, but substantive: Congress delegates far too much power to agencies. Procedural reforms can go a long way toward mitigating the problems of agency abuse, but those problems will be truly cured only when Congress amends the agencies' statutes, to truly limit the powers delegated to the agencies.

Congress has done this before. In 1987, Congress repealed the Powerplant and Fuel Use Act of 1978's prohibition against power companies using natural gas to generate electricity. It can do so again—it *must* do so again, beginning with the open-ended delegations of power, in the Clean Air Act and other federal statutes, which empower regulators to use permit requirements to block crucially important projects.

Similarly, while it is important for the White House to direct agencies to

[25] *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

undertake "look-back" reviews to reconsider the ongoing costs and benefits of existing regulations,[26] it is even more important for *Congress* to retrospectively review the costs and benefits of the agencies' cumulative body of regulations. Congress's review is necessary to ensure that "independent" agencies are fully subjected to retrospective review.[27] But even more importantly, Congress's own review is necessary to ensure that *all* agencies' costs and benefits are reviewed rigorously in good faith.

We don't trust corporations to audit their own financial statements; we require them to undergo independent audits by outside accountants. By the same token, an agency's own assessment of its regulations' costs and benefits is much less useful than an assessment conducted by an independent auditor, such as the Government Accountability Office or the Congressional Budget Office—*especially* when agencies consistently skew their own cost-benefit analysis, as former OIRA Administrator Susan Dudley has demonstrated.[28] To rely on agencies to police their own cost-benefit analysis is to ignore James Madison's warning in *Federalist No. 10*: "No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity."

To conduct such review, and to systematically correct Congress's over-delegation of power to agencies, requires the work of more than just this agency. Congress should consider establishing a joint committee specifically tasked with solving these problems, which are among the most pressing issues of our time.

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[26] *See, e.g.*, Exec. Order 13563 (Jan. 18, 2011); OIRA Memorandum for the Heads of Executive Departments and Agencies, "Final Plans for Retrospective Analysis of Existing Rules" (June 14, 2011), *at* http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-25.pdf.

[27] The White House's retrospective-review order did not require independent agencies to participate; rather, the White House asked independent agencies to *volunteer* to undertake retrospective review. *See* Exec. Order 13579 (July 11, 2011).

[28] Susan E. Dudley, *Perpetuating Puffery: An Analysis of the Composition of OMB's Reported Benefits of Regulation*, 47 Bus. Econ. 165 (2012).

Thank you, again, for the opportunity to testify. I welcome your questions.

Addendum 1

Statement of Amb. C. Boyden Gray

Oct. 25, 2011

Hearing Before the House Judiciary Committee:

"H.R. 3010: The Regulatory Accountability Act of 2011"

Hearing before the
U.S. House of Representatives
Committee on the Judiciary

H.R. 3010: THE "REGULATORY ACCOUNTABILITY ACT OF 2011"

October 25, 2011

Statement of Amb. C. Boyden Gray

I am pleased to have been asked to testify before the Committee on the "Regulatory Accountability Act of 2011." I have previously testified before this committee on matters of administrative law, including the reauthorization of the Administrative Conference of the United States (ACUS).

At the ACUS hearing seven years ago, I testified that "the U.S. administrative law system, I believe, is the best in the world. It is the most transparent, the fairest and the most economically productive." I still believe that. But as I went on to say at that hearing, our administrative law system has retained its prized status only because of the government's commitment to maintaining and improving the system over time.

"The Administrative Procedure Act," I said then, "is unrecognizable in the sense of its original language. It has been largely rewritten, not in derogation of congressional intent, but to flesh out what the words mean." Or, to adapt Justice Holmes's famous words, the life of administrative law has been both logic and experience.

The bill before this committee, the "Regulatory Accountability Act of 2011," is a welcome next step in the continued improvement of administrative law. The Act applies the lessons of both logic and experience to solve some of the stark problems raised by the regulatory state's sudden, exponential new growth. On matters of public finance, energy and the environment, telecommunications, and health care, regulatory agencies are taking broadly worded statutory grants of power and applying them in ways that threaten to undermine America's competitive standing in the world, and American liberty at home.

Against that backdrop, the Act has many provisions that I welcome, including new formal-hearing requirements for major rules and high-impact rules, and an ongoing duty to revisit previously promulgated major rules and high-impact rules. But I would like to focus my testimony today on two subjects: First, and most importantly, the Act codifies cost-benefit requirements that have governed the Executive agencies for three decades, but which have not governed "independent" agencies, such as the Commodities Futures Trading Commission (CFTC). And second, the Act prudently reinforces the courts' important oversight role through judicial review.

Cost-Benefit Analysis and the Independent Agencies

Since President Reagan signed Executive Order 12291, and continuing through its successors, including Executive Order 12866, the President has required Executive agencies to subject newly proposed regulations to cost-benefit analysis, under the guidance of the Office of Information and Regulatory Affairs (OIRA).

That centralized review has substantially improved the regulatory process, promoting efficiency while simultaneously ensuring democratic accountability.

Those Executive Orders did not reach the "independent" agencies, however; instead, the Orders exempted those agencies from their coverage. But as those "independent" agencies—the CFTC, NLRB, and Federal Reserve, for example—have come to exert exponentially greater weight on the economy, their exemption has become utterly untenable.

Regardless of the extent to which "independent" agencies are subject to presidential control, Congress *clearly* controls them through its legislative power, and it may subject those agencies to procedural requirements—such as cost-benefit analysis and the opportunity for formal on-the-record hearings—and other forms of Administration oversight and judicial review.

And that is what the Committee proposes to do here. By incorporating the provisions of the Regulatory Accountability Act of 2011 into the overarching structure of the Administrative Procedure Act—which does *not* exempt independent agencies—Congress will commit the independent agencies to OIRA guidance and oversight, including the discipline of cost-benefit analysis and alternatives analysis.

To illustrate the critical importance of this improved oversight, let me offer three recent examples of "independent" agency regulatory efforts that would be improved by OIRA oversight, cost-benefit analysis, and alternatives analysis.

1. Financial Regulation

The Dodd-Frank Wall Street Reform and Consumer Protection Act, passed just last year, created an astonishing plethora of rulemaking requirements by a variety of agencies. According to the Davis Polk law firm's widely read legislative analysis, Dodd-Frank will require at least two hundred and forty-three rulemakings. The vast majority of those rules will be issued by "independent" agencies: the CFTC, SEC, and Federal Reserve, and the newly created Financial Stability Oversight Council and Consumer Financial Protection Bureau.

So far, the result has not been encouraging; in fact, it is cause for serious concern. The CFTC's Inspector General issued a report on April 15, 2011, detailing the flaws that have pervaded the CFTC's proposal of derivatives rules. Most significantly, the IG found that the CFTC's cost-benefit analysis for the new rules was directed not by economists, but by lawyers: "it is clear that the Commission staff viewed [cost-benefit analysis] to constitute a legal issue more than an economic one, and the views of the Office of General Counsel therefore trumped those expressed by the Office of Chief Economist." The Regulatory Accountability Act, by contrast, would commit economic analysis to the economists. Better still, where the CFTC treated cost-benefit analysis as a "caboose," the Regulatory Accountability Act places it firmly near the front of the procedural train, in the required notice of proposed rulemaking.

The Federal Reserve's own regulatory work under Dodd-Frank raises similar red flags. Last month, JP Morgan Chase's CEO, Jamie Dimon, publicly

questioned Fed Chairman Bernanke whether the myriad Dodd-Frank regulatory initiatives would together do more harm than good. Chairman Bernanke answered, "nobody's looked at it in all detail," and that only after imposing these onerous new regulations would they "figure out where the cost exceeds the benefit and … make the appropriate adjustments." Chairman Bernanke's reasoning puts the cart before the horse—or, to borrow the CFTC's terms, the caboose before the locomotive. Regulators should ascertain the costs and benefits of their regulations *before* deciding whether to impose those regulations on American people and industry, as the Regulatory Accountability Act's proposed framework recognizes.

Even more worrisome, in those same comments Chairman Bernanke disclaimed even the Fed's ability to calculate whether the cumulative effect of new regulations would have a positive or negative impact on credit: "You know, it's just too complicated. We don't really have quantitative tools to do that."

Those are unsatisfactory answers, especially when the apparent cost of new regulations—in terms of both compliance and substantive effect—may be so great. No one argues that cost-benefit questions can always be resolved to the nearest dollar, but in all cases the rigor of cost-benefit review must at least ascertain generally whether regulations do more harm than good. This is particularly important in cases of landmark regulatory reform, which overturns many long-settled arrangements and imposes new burdens on people and businesses. Our independent regulatory agencies can and must do better, and the reforms proposed in this Act will help to ensure that they do.

2. Telecommunications Policy

As the Nation's dependence upon communications technology and the Internet increases, so does the FCC's role in the Nation's economy. Most significantly, a majority of FCC commissioners have committed to establishing "net neutrality" rules governing current and future Internet infrastructure, culminating with the promulgation of net neutrality rules in December 2010. That policy is surrounded by uncertainty, both with respect to whether the policy is lawful (in light of the D.C. Circuit's decision last year in *Comcast v. FCC*), and with respect to whether those rules are justified as a matter of policy. While I would not currently offer conclusions on either of those points, I will note that the Commissioners are deeply divided on the question of whether the net neutrality policy's costs outweigh its benefits. The FCC's majority asserts that "the costs associated with these open Internet rules are likely small," but the dissenting commissioners urge that the policy will result in "less investment," "less innovation," "increased business costs," "increased prices for consumers," and "jobs lost." These are precisely the questions that should be—and, under the proposed Act, would be—resolved through rigorous cost-benefit analysis undertaken under OIRA oversight.

3. Energy and Environmental Policy

Let me end with one more brief example. The Nation's energy and environmental policies implicate not just one agency, but many. Spreading responsibility for these issues across many agencies is an invitation for substantial inefficiency, perhaps even cases of agencies working at cross-purposes. And so

inter-agency coordination is critically important. While the agencies with greatest influence over U.S. energy policy probably are the Department of Energy and the Environmental Protection Agency (EPA), three other important regulatory bodies—the Federal Energy Regulatory Commission (FERC), the Nuclear Regulatory Commission (NRC), and (because of its derivatives jurisdiction) the CFTC—are "independent" agencies, and thus exempt from the current OIRA review process. Going forward, the FERC's jurisdiction over natural gas pipelines will help to shape the Nation's development of newly abundant natural gas supplies; the NRC, meanwhile, largely controls the future of our electric power supply through its regulation of nuclear power generators, and the proposed Yucca Mountain site. The proposed Act would help to ensure that those agencies' rules promote the public interest in a coordinated procedure that includes the Energy Department and EPA.

Judicial Review

Let me note one other salutary feature of the Act: it strengthens judicial review of agency actions on questions of regulatory interpretation, factual issues, and cost-benefit analysis, at least in cases where the agency's own process fails to satisfy the Act's heightened requirements. Judicial review of agency action requires a delicate balance—the applicable standards of review are deferential, but those standards must be firmly enforced. The Act strikes that balance well.

And the courts are clearly able to maintain that balance of deference and critical scrutiny, as the D.C. Circuit demonstrated most recently deciding the case of *Business Roundtable v. SEC.* There, the court struck down the SEC's "proxy

access rule" upon narrow but firm review of the SEC's failure to satisfy an SEC-specific statute requiring the agency to consider costs and benefits. As the court explained in that case:

> We agree with the petitioners and hold the Commission acted arbitrarily and capriciously for having failed once again . . . adequately to assess the economic effects of a new rule. Here the Commission inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters.

The SEC's failings in that case exemplify some of the regulatory failings that the Regulatory Accountability Act would work to prevent; the court's analysis exemplifies the well-tailored solution that courts would provide under the Act.

I would stress, however, that Congress must not dilute those generally applicable standards of judicial review by enacting separate statutes that tighten the scope of judicial review and thus effectively immunize certain agency decisions. The best recent example of this troubling trend is the Dodd-Frank Act, which prohibits the Supreme Court and other federal courts from considering, among other things, whether the Treasury Secretary's "resolution determination" (*i.e.*, forced liquidation) of a financial company was lawful; instead, the courts may only review whether his factual determinations and analysis was reasonable.

After I criticized Dodd-Frank's troubling features in a *Washington Post* op-ed last December, the Treasury Department's General Counsel replied in a letter to the editor, asserting that Dodd-Frank "explicitly provides for judicial review" of such draconian agency determinations, but neglecting to admit that judicial review

would be strictly limited in terms of both scope and time, thus nullifying the protections that judicial review ordinarily provides.

Congress should not insulate those types of agency actions from judicial review. The Regulatory Accountability Act is a welcome sign that this Committee values the courts' oversight role, and I hope that it signals Congress's continued commitment going forward.

* * *

The White House recently claimed that "the annual cost of regulations has not increased during the Obama administration"; that the last two years of President Bush's administration "imposed far higher regulatory costs than did the Obama administration in its first two years"; and that "there has been no increase in rulemaking in [the Obama] administration." Those are very broad—and, to put it gently, counterintuitive—claims. Only by requiring the federal agencies to calculate the costs and benefits of their regulations, and then subjecting those projections to the scrutiny of public comment, can we know with greater certainty whether new regulatory initiatives, especially landmark initiatives affecting economic growth and energy infrastructure development, do more good than harm.

Again, I am grateful for the opportunity to testify in favor of the Regulatory Accountability Act of 2011. It draws on, and improves upon, the foundation laid in the Administrative Procedure Act and the Executive Orders on regulatory review.

<u>Addendum 2</u>

Statement of Amb. C. Boyden Gray

Sept. 20, 2012

Hearing Before the House Judiciary Committee:

"Regulation Nation: The Obama Administration's Regulatory Expansion vs. Jobs and Economic Recovery"

Hearing before the
U.S. House of Representatives
Committee on the Judiciary

"REGULATION NATION: THE OBAMA ADMINISTRATION'S REGULATORY EXPANSION VS. JOBS AND ECONOMIC RECOVERY"

September 20, 2012

Statement of Amb. C. Boyden Gray

I am pleased to have been asked to testify before the Committee on the question of the current regulatory burden on the national economy. This is the single most pressing domestic policy matter of the day, and I am honored to contribute to the discussion.

As it is so often said, "history never repeats itself, but it rhymes." This seems to be one of those moments. Thirty years after President Reagan campaigned in large part on a platform of regulatory reform, and successfully reformed much of the administrative state, we find ourselves largely back where we began. Regulatory agencies once again rival the tax code and monetary policy in their ability to retard economic growth. And they are doing so at the worst possible opportunity—when we need economic growth more than ever.

Fortunately, while we have encountered these problems before, we also know from experience the best remedies: require regulatory agencies to subject their rules to the rigors of meaningful cost-benefit analysis; erect administrative law procedures that are transparent, predictable, and reliable; maximize the fruits of market-based solutions; and craft substantive statutes that give clear direction to—and place clear limits upon—the agencies that will administer them.

The solution is not just to "roll back some regulations, and call me in the morning," as President Obama glibly mischaracterized in his speech to the Democratic Party's convention earlier this month. Rather, the question is how we can best structure the administrative state to make its regulations both effective and efficient. It is not a question of deregulation; it is a question of *smart* regulation.

I. The Costs of Regulation and of Regulatory Uncertainty

I am a lawyer, not an economist, and so I defer largely to the economic analysis offered by my esteemed co-panelist, Professor John Taylor of Stanford and the Hoover Institution. That said, even a lawyer can recognize the basic facts of regulatory burden on the economy.

First, the Obama Administration's regulations impose immense costs on the economy. By their own estimate, their regulations have cost up to $32.1 billion—but that figure covers just forty-five so-called "major rules" issued in 2009, 2010, and 2011.[1] Of course, we should view the Administration's self-serving estimates of regulatory costs and benefits with a skeptical eye: as Susan Dudley, former Administrator of the White House Office of Information and Regulatory Affairs ("OIRA") and now Director of George Washington University's Regulatory Studies Center, noted recently in *Business Economics*,

> Agencies have strong incentives to demonstrate through analysis that their desired regulations will result in benefits that exceed costs. . . . A better baseball analogy might note that, as the regulatory game is now structured, OIRA is the umpire—the sole judge of the balls and strikes pitched by the agencies. When the umpire boasts with such

[1] See OIRA, "Draft 2012 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities," at p. 19 (Mar. 2012), *at* http://www.whitehouse.gov/sites/default/files/omb/oira/draft_2012_cost_benefit_report.pdf.

> enthusiasm about his team's score, one has to wonder who will ensure that the game is played fairly.[2]

In sharp contrast to the Administration's own estimate, the American Action Forum (led by Douglas Holtz-Eakin, former chief economist of the President's Council of Economic Advisers and director of the Congressional Budget Office) estimates that this Administration's regulatory burden on the economy exceeds $450 billion.[3]

Second, regulators impose costs not just through the regulations that they directly impose, but also through the problem of regulatory uncertainty. While some assert that regulatory uncertainty is a "canard,"[4] a team of Stanford and Chicago economists recently demonstrated the impact of policy uncertainty, analyzing data that "foreshadows drops in private investment of 16 percent within 3 quarters, industrial production drops of 4 percent after 16 months, and aggregate employment reductions of 2.3 million within two years"—findings that "reinforce concerns that policy-related uncertainty played a role in the slow growth and fitful recovery of recent years[.]"[5]

Of course, the problem is not "regulatory uncertainty" in the abstract. Uncertainty beats certainty when the certainty in question is a massively costly regulation

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2 Susan E. Dudley, "Perpetuating Puffery: An Analysis of the Composition of OMB's Reported Benefits of Regulation," *Business Economics* 47:3, at p. 175 (2012)

3 *See* "President's Regulatory Record in the Courts" (Aug. 21, 2012), *at* http://americanactionforum.org/topic/president's-regulatory-record-courts.

4 *See*, *e.g.*, Jonathan Cohn, "The GOP's Uncertainty Canard" (Oct. 4, 2011), *at* http://www.tnr.com/blog/jonathan-cohn/95748/republican-regulation-uncertainty-business-data-cantor-mishel-bartlett.

5 Scott R. Baker, Nicholas Bloom, and Steven J. Davis, "Measuring Economic Policy Uncertainty" (June 4, 2012), *at* http://faculty.chicagobooth.edu/steven.davis/pdf/PolicyUncertainty.pdf.

with no benefits. Rather, the problem is costly, inefficient regulation, and the possibility of still more costly, inefficient regulation.

II. Regulatory Reform's Record

As I noted at the outset of this testimony, our present problems are challenging but not wholly unprecedented. The present economic malaise deservedly draws comparisons to the malaise of the 1970s, when heavy regulation combined with other headwinds to prevent economic growth. To the credit of economist Alfred Kahn, lawyer Stephen Breyer, and others, the Carter Administration and Congress began to wake up to those problems in the late 1970s. But Ronald Reagan truly understood the challenge, and he campaigned vigorously in 1980 on a platform of regulatory reform. Once elected, he put his mandate into effect by commissioning a serious reform effort.

I was privileged to participate in that process, which culminated with the landmark Executive Order 12291, creating the Office of Information and Regulatory Affairs and requiring executive branch agencies to subject regulations to meaningful cost-benefit analysis under OIRA's direction, among other things. President Reagan's Republican successors, Presidents George H.W. Bush and George W. Bush, continued to support and expand upon those reforms. And even Reagan's Democratic successor, President Clinton, largely maintained those reforms in Executive Order 12866.

To be clear, the Reagan reforms were not perfect. Most significantly, E.O. 12291 limited its requirements to *executive* agencies (the Environmental Protection Agency, Labor Department, and so on) but did not touch the so-called "independent" agencies—the Securities and Exchange Commission, National Labor Relations Board, and others. Even though the President has constitutional authority to impose such rules on the independent

agencies, the Reagan Administration stayed its own hand. It was a prudential decision: at that time, independent agencies' regulatory impact was much less than it is today.

The results were overwhelming, as seen in the economic growth that followed. But aside from the well-known statistical evidence, my favorite illustration of the success of Reagan's regulatory reforms is a personal anecdote. A couple of years after President Reagan promulgated his reforms, when the economy was in recovery, I encountered the wife of the C.E.O. of one of the Big Three U.S. auto companies. She said her husband attributed the recovery to the regulatory reform program—not just because of the revision of old regulations but because of the signal that new regulations would be efficient and transparent enough to enable the companies to focus less on Washington and more on cars and consumers.

III. Regulatory Reform Recedes

Unfortunately, in politics few victories are truly permanent, and regulatory reform is no exception. In recent years, the benefits of past reforms have been eroded by a number of developments.

First, and as I just noted, the so-called "independent" agencies have come to impose a much greater burden on the economy. The Securities and Exchange Commission, National Labor Relations Board, and other longstanding agencies wield immensely more power than they once did. Once-sleepy agencies such as the Commodity Futures Trading Commission were given vast new powers by the Dodd-Frank Act and other new laws. And Dodd-Frank created another new independent agency, the Bureau of Consumer Financial Protection ("CFPB"), which threatens economic costs of its own. While the Obama Administration has made much of the fact that it nominally asked independent agencies to

review the costs and benefits of their regulations, the executive branch has not taken serious steps to actually align the costs and benefits of independent agencies' regulations. Moreover, Congress is increasingly unwilling to oversee those agencies, as demonstrated by the Dodd-Frank provisions preventing Congress even from reviewing the budget of the self-funded CFPB.

Second, the executive branch's control of cost-benefit analysis increasingly lacks credibility, as Professor Dudley's aforementioned article demonstrates. The Administration's self-serving claims that its regulatory benefits far exceed the costs of unprecedented environmental regulations should be met with serious suspicion. One notorious case study is the Administration's proposed valuation methodology for power plants' "cooling water intake" facilities. To establish the value of fish harmed by those facilities, the EPA conducted a survey asking respondents how much they would be "willing to pay" to save certain species of fish. Of course such a study is wildly hypothetical, even ridiculous—few citizens are ever presented with a real-life situation in which they would pay real money to save real fish. And so the results, garnered from well-meaning respondents, were predictably skewed in favor of high values. That flimsy methodology might next be used to support costly regulations on the nation's energy producers.

Furthermore, too much of the current Administration's regulations are driven not by transparent notice-and-comment rulemakings, but through backroom deals. Perhaps the most notorious example of this is the Administration's "bailout" of the auto industry. Seizing upon the industry's 2008-2009 crisis, the White House and EPA coerced auto companies into agreeing to accept overwhelmingly burdensome greenhouse gas regulations before a single word of the proposal was ever drafted—a disturbing incident recounted

forcefully in the House Oversight and Government Reform Committee's new report.[6] To the extent that the Administration forced this deal upon private industry, it was a serious abuse of power; to the extent that some inside the industry welcomed the arrangement, to the detriment of other auto companies and the economy at large, it was a textbook case of the "crony capitalism," backroom deals, and logrolling inherent in a regulatory process that lacks true transparency. As regulations proliferate, so do the opportunities for secret deals.

IV. Regulatory Reforms To Solve Our Modern Problems

Given those and other problems, the basic solutions clearly present themselves. Regulatory cost-benefit analysis requirements must be extended to independent agencies. And the framework for such review can no longer be designed and executed exclusively by the executive branch, without outside oversight.

In the last two years, Congress has seen many legislative reforms incorporating these solutions. In fact, the bills considered and passed by this Committee, described below, constitute a comprehensive set of reforms that would solve many or all of the problems at hand.

First, the Regulatory Accountability Act (H.R. 3010) takes the cost-benefit analysis currently required of agencies pursuant to executive orders and applies it to *all* agencies, executive and "independent" alike, as a matter of federal statutory law. By requiring agencies to analyze costs and benefits on the record, it gives the public an opportunity to comment upon the estimates of those costs and benefits, ultimately improving the final calculations by increasing the amount and quality of information in the

6 "A Dismissal of Safety, Choice, and Cost: The Obama Administration's New Auto Regulations" (Aug. 10, 2012), *at* http://oversight.house.gov/wp-content/uploads/2012/08/CAFE-Report-8-10-12-FINAL.pdf

administrative record. Furthermore, the Act would generally require agencies to choose the lowest-cost rulemaking alternative that meets the objectives of the underlying substantive statute—it would not supersede the requirements of, *e.g.*, the Clean Air Act, but rather it would simply require regulators to select the regulatory framework that achieves those requirements at the lowest possible cost. And the Act preserves agency discretion to choose a higher-cost alternative if necessary to protect the public health, safety, and welfare, so long as the additional benefits justify the additional cost.

The Regulatory Accountability Act would also require agencies to consider market-based alternatives to command-and-control rulemaking. This is a particularly laudable proposal. During my time in the Reagan and Bush Administrations, some of the government's greatest legislative successes promoted market-based solutions. The Clean Air Act, for example, fostered a system of emissions trading that allowed the free market to solve some of the most vexing regulatory challenges presented by air pollution. (That genuine cap-and-trade system stands in marked contrast to the phony "market-based" cap-and-tax solution promoted more recently by climate-change activists.) Unfortunately, recent legislation has trended in the other direction—for example, much of the regulatory mandates imposed by Dodd-Frank, to end the problem of "Too Big To Fail" banks, are counterproductive and destined to fail, whereas simple capital requirements would allow the market to solve the problem itself. The Regulatory Accountability Act will help to correct this trend, by restoring market-based solutions to a central place in regulatory policymaking.

By requiring — not merely inviting — the White House to impose cost-benefit analysis requirements on "independent" agencies, and then subjecting that review to deferential-yet-meaningful judicial review, the Act would ensure that the President and

OIRA will take responsibility for independent agencies, with the further oversight provided by judicial review of the agency's eventual output.

The Regulatory Flexibility Improvements Act (H.R. 527) targets the problems that regulatory agencies currently create for small businesses. By requiring agencies to account for the total impact of regulations—their cumulative direct and indirect impacts—and by requiring the agencies to open the door to small businesses to advise on the real-world effects of regulation, the Act would create a process to prevent regulators from placing heavy regulations on the nation's job creators without first exercising due care and prudence. True to its name, this bill improves the existing Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act, to finally achieve those laws' original aims.

The "REINS" Act (H.R. 10) would restore Congress's constitutional responsibility as the nation's sole repository of legislative power, by requiring Congress to vote for major regulations before they go into effect. For the past century, Congress has delegated more and more power to regulators, raising serious constitutional concerns. Even if such delegations will not be remedied in the courts under the old "Nondelegation Doctrine," they *certainly* can be remedied by Congress itself. The REINS Act is a laudable attempt by Congress to prevent itself from abdicating its constitutional responsibilities, refocusing accountability on legislators who—unlike federal bureaucrats—are directly accountable to the People.

The Regulatory Freeze for Jobs Act (H.R. 4078, Title I) recognizes that the current economic malaise calls for immediate action. To that end, the Act would freeze regulations costing more than $100 million until the unemployment rate finally reaches 6

percent. The Act, which includes exceptions necessary to protect national security and public health, safety, and welfare, would create the "breathing room" necessary to repair the economic injuries exacerbated by over-burdensome regulations. We need to grow the economy, not the *Federal Register*.

The Sunshine for Regulatory Decrees and Settlements Act (H.R. 4078, Title III) would help to solve the longstanding collusion between activist groups and sympathetic regulators, which use sham ("sue and settle") litigation and resultant "consent decrees" to constrict or prevent true transparency in the regulatory process. By requiring greater public notice, tougher judicial scrutiny, a more open judicial process, and (in the Attorney General's office) direct accountability at the highest levels of the Executive Branch, this Act would ensure that "public interest" litigation truly promotes, not impairs, the public interest.

Finally, the "RAPID" Act (H.R. 4078, Title V) recognizes that the burdens of regulation are not limited to the rulemaking process. Countless federal statutes require companies to apply for permits before undertaking job-creating projects. And too often, regulators, aided by activist groups, now seem to think that the goal of the permitting process is not to get safe, sound projects approved, but to block projects for political, ideological, or even fundraising reasons. The RAPID Act would streamline the permitting process, directing agencies to work together in a single, coherent process that promotes efficiency and accountability, including meaningful deadlines for the completion of administrative reviews and for the filing of suits challenging permit approvals.

Some have argued that those legislative reforms are too heavy-handed, placing too much power in the hands of federal judges to micromanage regulatory or economic decisions better left to experts. I disagree. These reforms do not prescribe any

substantive outcomes; they do not nullify substantive statutes governing finance or the environment; rather, they merely erect procedures that will require the White House and agencies to seriously consider costs, benefits, and alternatives. This is a light burden and, given the burdens that agencies place on persons and businesses, an entirely proportionate one.

The best example of how these reforms would work in practice is the D.C. Circuit's recent decision in *Business Roundtable v. SEC*,[7] an appeal of the S.E.C.'s "proxy access rule." A federal statute required the S.E.C. to consider the costs and benefits of that rule. When the proxy access rule was appealed in the D.C. Circuit, the court did not try to undertake its own economic analysis, or even micromanage the agency's own substantive review; rather, the court reviewed only whether the S.E.C. had sufficiently considered the evidence in the record before the agency, and whether the agency had meaningfully considered and replied to affected parties' arguments. Because the agency clearly had failed to satisfy those minimal requirements, the court vacated the rule and remanded the matter to the agency—it gave the agency another bite at the apple. The court did not prohibit the S.E.C. from reaching the same substantive outcome; it simply required the agency to satisfy the applicable procedural requirements.

Some have argued that these statutes would make regulators' work too difficult. Last autumn, when this committee convened a hearing on the Regulatory Accountability Act (H.R. 3010), a group of law professors wrote that "the procedural and analytical requirements added by" the Act "would be enormously burdensome."[8] I could

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[7] 647 F.3d 1144 (D.C. Cir. 2011).

[8] *See* https://www.law.upenn.edu/blogs/regblog/Letter%20to%20House%20Judiciary%20Committee%20on%20HR%203010.pdf

not myself devise a better parody of the myopic, regulator-centric view of the regulatory state. Administrative agencies place enormous burdens on American companies every day; those burdens, not procedural requirements placed on bureaucrats, are the problem that cries out for immediate alleviation.

And again, reforms of the kind reflected in *Business Roundtable v. SEC* do not impose unreasonable burdens on either regulators or the courts. Indeed, the caseload of the D.C. Circuit, which is the principal reviewing court, appears to be declining, not growing.[9] And within that shrinking caseload, the court's regulatory docket is declining even faster.[10]

* * *

In closing, let me note that the Reagan Administration's successes are not the only examples worth considering. In the 1990s and early 2000s, the "sick man of Europe" was Germany—perhaps a difficult fact to recall, considering that Germany is today the engine of European economic growth and the continent's best hope for economic stability. Germany saved itself first and foremost through regulatory reform in 2003-2005, especially with respect to labor law restrictions, and the reforms worked very quickly to turn Germany's recovery around.

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[9] *See*, *e.g.*, "Judicial Business of the United States Courts," 2011 Annual Report of the Director of the Administrative Office of the U.S. Courts, at p. 59 (http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf).

[10] *See*, *e.g.*, Hon. Douglas H. Ginsburg, *Remarks Upon Receiving the Lifetime Service Award of the Georgetown Federalist Society Chapter*, 10 GEO. J. L. & PUB. POL'Y 1, 2 (2012) ("The number of cases filed in the D.C. Circuit has declined more or less continuously over the last twenty-five years. More surprising, the number of administrative law cases filed in our court also has declined over that period, again consistently, and the percentage of administrative law cases on our docket is lower now than it has been in all but two of the last twenty-five years.").

Germany's resurgence has shaped much of the modern political-economic debate, not just on questions of European bailouts but also on the issue of the proposed U.S.-E.U. free trade agreement—a treaty that could dramatically reduce transatlantic over-regulatory friction.

But amidst all of that, we must not neglect the lessons relevant to the issues before this committee today. Germany's Chancellor Merkel is urging Europe to recognize that structural reform is needed to rescue the continent from economic disaster. We should heed her warnings as well, and begin by reforming the structure of the administrative state.

Addendum 3

Letter & Statement of Amb. C. Boyden Gray

July 17, 2013

Hearing Before the House Judiciary Committee,
Subcommittee on Regulatory Reform, Commercial and Antitrust Law:

"H.R. 2122: The Regulatory Accountability Act of 2012"

C. BOYDEN GRAY
1627 I STREET NW, SUITE 950
WASHINGTON, DC 20006

July 17, 2013

Hon. Spencer T. Bachus, III, *Chairman*
Subcommittee on Regulatory Reform & Antitrust Law
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Hon. Stephen Cohen, *Ranking Member*
Subcommittee on Regulatory Reform & Antitrust Law
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Re: H.R. 2122 — The Regulatory Accountability Act of 2013

Dear Chairman Bachus and Ranking Member Cohen,

I am pleased for this opportunity to support the Regulatory Accountability Act of 2013, H.R. 2122. As I explain in the enclosed statement, I twice testified before the full Judiciary Committee in support of the previous version of this Act. The reforms set forth in the bill, including the extension of cost-benefit review to "independent" agencies, is just as important today as it was in the last Congress.

In my career, I have been fortunate to observe the regulatory state from a variety of vantage points: in the Executive Branch, as White House Counsel and on President Reagan's original task force on regulatory reform; as Ambassador to the European Union, where regulatory friction between the United States and Europe was (and is) a critically important issue; as a private lawyer counseling clients who must bear the regulatory burdens imposed by federal agencies; and in my own civic work and public advocacy.

In all of those capacities, I have witnessed time and time again the harms that overburdensome regulation threatens to the free market, to economic growth, and to principles of good government. Regulation promotes the public interest when its benefits outweigh its costs, and to that end the Regulatory Accountability Act would protect the public interest.

Sincerely,

C. Boyden Gray

cc: Hon. Bob Goodlatte, Chairman, House Committee on the Judiciary
Hon. John Conyers, Jr., Ranking Member, House Committee on the Judiciary

Statement of C. Boyden Gray:

The Regulatory Accountability Act of 2013 (H.R. 2122)

July 16, 2013

In the last Congress, I twice testified before the full Judiciary Committee in support of the Regulatory Accountability Act of 2011. In October 2011, I testified in support of the Regulatory Accountability Act specifically. In September 2012, I returned to testify in support of the full suite of regulatory-reform bills that the Committee had passed, including the Regulatory Accountability Act and the REINS Act.

I enclose my prepared statements from those hearings, for inclusion in the record for last week's hearing on H.R. 2122, the Regulatory Accountability Act of 2013.[1] I stand by the specific points that I raised in those hearings, and I reiterate my support for the Act in general. As I said in 2011, "[b]y incorporating the provisions of the Regulatory Accountability Act . . . into the overarching structure of the Administrative Procedure Act—which does *not* exempt independent agencies—Congress will commit the independent agencies to OIRA guidance and oversight, including the discipline of cost-benefit analysis and alternatives analysis." Furthermore, I continue to support the Act's effort to "strengthen[ ] judicial review of agency actions on questions of regulatory interpretation, factual issues, and cost-benefit analysis, at least in cases where the agency's own process fails to satisfy the Act's heightened requirements." The Act strikes the "delicate balance" of setting standards that are not burdensome, yet ensuring that those standards will be firmly enforced, and it will improve rulemaking at all agencies, "executive" and "independent" alike, as my prior statements explain.

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[1] My statements also remain available on the Committee's web site, at http://judiciary.house.gov/hearings/pdf/Gray%2010252011.pdf and http://judiciary.house.gov/hearings/Hearings 2012/Gray 09202012.pdf.

In the intervening months since the last hearing, we have witnessed only more evidence of the need to bring "independent" agencies into the framework for accountability and oversight established by Executive Orders 12291 and 12866. Let me offer two examples.

1. Consumer Financial Protection Bureau's Auto Loan "Bulletin"

The Dodd-Frank Act established the Consumer Financial Protection Bureau (CFPB), a new regulatory agency enjoying an unprecedented combination of independence and insulation from the executive, legislative, and judicial branches and an effectively open-ended statutory mandate. My constitutional objections to the CFPB's establishment are a matter of public record,[2] but the CFPB's execution of its broad powers raises substantial questions regarding cost-benefit analysis.

Dodd-Frank's Section 1022(b)(2) nominally requires the CFPB to conduct cost-benefit review of its rulemakings. But because the statute does not require the CFPB's analysis to be vetted by the experts at the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (*i.e.*, the experts that vet other agencies' regulations under Executive Order 12866), it inherently lacks the accountability added by outside review of its work by both OIRA and other stakeholder agencies, which the OIRA-review process currently requires for other agencies' rulemakings.[3]

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[2] *See*, *e.g.*, C. Boyden Gray & John Shu, *The Dodd-Frank Wall Street Reform & Consumer Protection Act of 2010: Is It Constitutional?*, ENGAGE: THE JOURNAL OF THE FEDERALIST SOCIETY'S PRACTICE GROUPS, vol. 11, no. 3 (2010), *available at* http://www.fed-soc.org/doclib/20101209_BoydenShuDoddFrankWP.pdf; C. Boyden Gray & Jim R. Purcell, *Why Dodd-Frank Is Unconstitutional*, WALL ST. J. (June 22, 2012).

[3] *See* Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838 (2013). Unfortunately, even OIRA's work can shows signs of pro-regulatory bias, including the inflation of a proposed rule's estimated costs. *See*, *e.g.*, Susan E. Dudley, *Perpetuating Puffery: An Analysis of the Composition of OMB's Reported Benefits of Regulation*, 47 BUS. ECON. 165 (2012). And agencies have found tactics to "insulate" themselves from OIRA's review. *See* Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755 (2013).

But even more worrisome is the fact that that statute limits the cost-benefit requirement to CFPB's *rulemakings*, thus allowing the CFPB to evade the rigors of cost-benefit review by imposing regulatory requirements and policies through "guidance" or other informal proceedings instead of actual rulemakings. For example, in March 2013 the CFPB announced a new policy of regulating auto loans. This was a controversial development, given that Dodd-Frank expressly limits the CFPB's jurisdiction over aspects of such loans,[4] but it was all the more controversial because it imposed this policy through a "bulletin" rather than through an actual rulemaking.[5]

The Regulatory Accountability Act doubly protects against these kinds of agency maneuvers. First, by reaching independent agencies, the Act would prevent the CFPB and other independent agencies from conducting such proceedings outside the scope of OIRA oversight. Second, the Act's Section 4 takes care to expressly reach not just rulemakings but also "guidance."

2. GAO's Study Of Agencies' Flawed Cost-Benefit Analyses

In December 2012, the Government Accountability Office (GAO) issued a study of several agencies' rulemakings promulgated pursuant to the Dodd-Frank Act.[6] The GAO's findings were troubling: independent agencies' evaluation of regulations' costs and benefits often omitted key elements of the OMB's best practices for regulatory review, and often did not seriously attempt either to fully quantify costs and benefits or to candidly discuss the strengths and weaknesses of their "qualitative" analyses.[7]

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[4] Dodd-Frank Act § 1029.

[5] CFPB Bulletin 2013-02 (Mar. 21, 2013), *available at* http://files.consumerfinance.gov/f/201303_cfpb_march_-Auto-Finance-Bulletin.pdf.

[6] *Dodd-Frank Act: Agencies' Efforts to Analyze and Coordinate Their Rules*, GAO-13-101 (2012), *available at* http://www.gao.gov/assets/660/650947.pdf.

[7] *See*, *e.g.*, *id.* at 18-19.

This is not the first time that the GAO has found independent agencies' analyses lacking,[8] and it follows the prominent criticisms published by the Inspectors General of the Securities and Exchange Commission and the Commodity Futures Trading Commission.[9] I fully expect that the independent agencies will continue to have such problems, and that reports detailing them will continue to issue, until Congress finally subjects independent agencies to truly meaningful oversight by OIRA and the courts.

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Again, these examples reiterate and reconfirm the points I made in the Judiciary Committee's previous hearings; thus, I enclose my previous statements in support of the Regulatory Accountability Act, for inclusion in the record.

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[8] GAO, *Dodd-Frank Regulations: Implementation Could Benefit From Additional Analyses and Coordination*, GAO-12-151 (2011), *available at* http://www.gao.gov/assets/590/586210.pdf.

[9] CFTC, Office of the Inspector General, *A Review Of Cost-Benefit Analyses Performed by the Commodity Futures Trading Commission in Connection with Rulemakings Undertaken Pursuant to the Dodd-Frank Act* (June 13, 2011), *available at* http://www.cftc.gov/ucm/groups/public/@aboutcftc/documents/file/oig_investigation_061311.pdf; SEC, Office of the Inspector General, Report of Review of Economic Analyses Conducted by the Securities and Exchange Commission in Connection With Dodd-Frank Act Rulemakings (June 13, 2011), *available at* http://www.sec-oig.gov/Reports/AuditsInspections/2011/Report_6_13_11.pdf.

Addendum 4

Statement of Amb. C. Boyden Gray

Sept. 30, 2013

Hearing Before the House Judiciary Committee,
Subcommittee on Regulatory Reform, Commercial and Antitrust Law:

**"The Office of Information and Regulatory Affairs:
Federal Regulations and Regulatory Reform"**

Hearing before the
U.S. House of Representatives
Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the Committee on the Judiciary

"THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS: FEDERAL REGULATIONS AND REGULATORY REFORM"

September 30, 2013

Statement of Amb. C. Boyden Gray

I am honored to have been invited to testify before the Judiciary Committee's Subcommittee on Regulatory Reform, Commercial and Antitrust Law on the subject of the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB).

The focus of my remarks today will be the regulatory reforms that can be accomplished by subjecting proposed regulations to the oversight of OIRA—perhaps the most powerful office in the administrative apparatus of our Government, but one of its best-kept secrets.

I. REGULATORY ACCOUNTABILITY ACT

In the last Congress, I twice testified before the full Judiciary Committee in support of the Regulatory Accountability Act of 2011.[1] As I said in 2011, "[b]y incorporating the provisions of the Regulatory Accountability Act . . . into the overarching structure of the Administrative Procedure Act— which does *not* exempt independent agencies—Congress will commit the independent agencies to OIRA guidance and oversight, including the discipline of cost-benefit analysis and alternatives analysis." This remains, to my mind, one of our administrative law system's most critical needs.

[1] My statements remain available on the Committee's web site, at http://judiciary.house.gov/hearings/pdf/Gray%2010252011.pdf and http://judiciary.house.gov/hearings/Hearings 2012/Gray 09202012.pdf.

A. OIRA OVERSIGHT OF INDEPENDENT AGENCIES

Before examining cost-benefit analysis in particular, I will spend a moment on the virtues of OIRA oversight in general. As federal agencies proliferate and the regulatory burden on the American public and American industry grows, it becomes increasingly important that the myriad cooks stirring the regulatory soup be subject to meaningful oversight. As Sally Katzen observed after her time as OIRA Administrator under President Clinton, "the problems that plague our nation do not fit neatly into one agency"; "nor are they likely to be solved by one regulatory action."[2] Subjecting independent agencies to OIRA oversight would therefore result in "better coordinated and coherent regulatory actions, and ultimately better decisionmaking."[3] The need to bring independent agencies into the fold grows more urgent as Congress delegates more and more power to them. The Securities and Exchange Commission, National Labor Relations Board, and other longstanding agencies wield immensely more power than they once did. And the Dodd-Frank Act granted vast new powers to existing independent agencies such as the Commodity Futures Trading Commission, and created another new independent agency, the Consumer Financial Protection Bureau ("CFPB"), with unprecedented power and unprecedented independence from all three branches of government. Exempting independent agencies from OIRA oversight is sometimes justified by the argument that, whereas executive agencies are the President's, independent agencies are Congress's. The premise is no longer true if it ever was: Congress is increasingly unwilling to oversee those agencies, as demonstrated by the Dodd-Frank provisions preventing Congress even from reviewing the budget of the self-funded CFPB.

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[2] Sally Katzen, *OIRA at Thirty: Reflections and Recommendations*, 63 ADMIN. L. REV. 103, 108, 111 (2011) (emphasis omitted).

[3] *Id.* at 110.

As a general matter, Congress and the courts can only react to administrative rules after they have already been promulgated; meaningful oversight of the administrative state must start in the executive branch. Indeed, beginning with my experience as counsel to Vice President Bush, I have observed that centralized review of administrative agencies is most effective when the Office of the Vice President takes an active role in its supervision. I have seen ambitious regulatory reform succeed with vice presidential leadership, and I have seen inter-agency efforts fail for want of centralized leadership. Whether or not the Vice President takes an active role in regulatory matters, however, it is now more important than ever that OIRA be granted the authority it needs to direct and supervise a coherent administrative policy across all federal agencies—not just those whose heads serve at the pleasure of the President.

It is well accepted that the President's constitutional duty to faithfully execute the laws gives him authority to subject independent agencies to OIRA review.[4] But this is an area in which congressional cooperation, rather than unilateral executive action, is preferable for purposes of inter-branch comity. While the Obama Administration has made much of the fact that it nominally asked independent agencies to review the costs and benefits of their regulations, the executive branch has not taken serious steps to actually align the costs and benefits of independent agencies' regulations. And OIRA does not discuss proposed independent agency rules with the public as it does with respect to executive agencies.

B. COST-BENEFIT ANALYSIS

One of the greatest virtues of the Regulatory Accountability Act is that it would subject independent agencies to the requirement that they establish that the costs imposed by their

[4] *See* VIVIAN S. CHU & DANIEL T. SHEDD, PRESIDENTIAL REVIEW OF INDEPENDENT REGULATORY COMMISSION RULEMAKING: LEGAL ISSUES (Sept. 10, 2012), at 12-15, *available at* http://www.fas.org/sgp/crs/misc/R42720.pdf.

rules are justified by the benefits they accrue.

Cost-benefit analysis is sometimes unfairly disparaged as tool of conservatives, and as designed to "promote a deregulatory agenda under the cover of scientific objectivity."[5] Both claims are false.

1. IDEOLOGICALLY NEUTRAL

The detractors of cost-benefit analysis tend to oppose it for its results, not its method. For example, there are those who criticize economic analysis because it "has never been the environmentalist's friend."[6] But economic analysis viewed in the abstract is ideologically neutral. When it is used correctly, cost-benefit analysis promotes regulations that are good for society by deterring regulations (from any political quarter) that would elevate the interests of a few above the good of the whole.[7]

Conservatives are by no means the only advocates of cost-benefit analysis.

Sally Katzen opposed codification of cost-benefit analysis while in office,[8] but she had a change of heart after she left OIRA. In 2011, she wrote that "requirements for economic analysis and centralized review should be extended to the Independent Regulatory

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[5] FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 9 (2004); *see also Daniel A. Farber, Rethinking the Role of Cost-benefit Analysis*, 76 U. CHI. L. REV. 1355, 1366 (2009) (arguing that cost-benefit analysis is motivated by "political bias against regulation") (reviewing ACKERMAN & HEINZERLING, *supra*); Jonathan D. Guynn, *The Political Economy of Financial Rulemaking After* Business Roundtable, 99 VA. L. REV. 641, 644 (2013) (citing arguments that cost-benefit analysis is "designed to further a deregulatory agenda by creating regulatory gridlock, imposing an impossible burden of proof on the regulators or making it prohibitively expensive for agencies to issue regulations.").

[6] Lisa Heinzerling, *Lisa Heinzerling Responds to Richard Revesz on Cost-Benefit Analysis*, GRIST (May 15, 2008), http://grist.org/article/cost-benefit-environmentalism-an-oxymoron/

[7] Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165, 225-26 (1999) ("[W]e argue that CBA, properly understood, is consistent with every political theory that holds that the government should care about the overall well-being of its citizens.").

[8] Katzen, *supra* note 2, at 108.

Commissions (IRCs—those multi-headed agencies, such as the Securities and Exchange Commission, the Federal Communications Commission, the Federal Trade Commission, etc., whose members do not serve at the pleasure of the President and can be removed only for cause."[9] Citing reports by OMB and Resources for the Future, Katzen observed that "IRCs do not typically engage in the rigorous economic analysis that has come to be expected (and generally accepted) for executive branch agencies. In light of the wave of financial regulations triggered by the Dodd-Frank Act, Katzen called extending cost-benefit analysis to independent agencies "a no-brainer."[10] I agree.

And Cass Sunstein, who headed OIRA during President Obama's first term and authored *The Cost Benefit State: The Future of Regulatory Protection*, published by the American Bar Association, wrote that "us[ing] cost-benefit analysis in a highly disciplined way" to "ensur[e] that high costs are justified by high benefits—is especially important in a period of economic difficulty."[11]

This is not a new idea. Judge Patricia Wald, former Chief Judge of the D.C. Circuit, appointed by President Carter, wrote in 1983 that "[e]ven when the governing statute says nothing specific about economic principles, the agency may rely heavily on economic analysis to meet more general statutory criteria, such as determining that rates are 'just and reasonable.' "[12]

Given the bipartisanship support its practitioner's have voiced for cost-benefit analysis, it should come as no surprise that it "has become a mainstream tool used by Presidents of both

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[9] *Id.* at 109.

[10] *Id.* at 110.

[11] Cass R. Sunstein, *Humanizing Cost-Benefit Analysis*, Euro. 2 J. OF RISK REG. 3 (2011).

[12] Patricia M. Wald, *Judicial Review of Economic Analysis*, 1 YALE J. ON REG. 43, 43 (1983).

parties and members of Congress on both sides of the aisle."[13]

2. FACILITATION OF JUDICAL REVIEW

Requiring agencies to subject their regulations to cost-benefit analysis also allows for meaningful judicial review of agency action. Without substituting its policy judgment for that of the agency, a court can ensure that the agency employed its expertise to craft a regulation that will do more good than harm.

Perhaps the best example of judicial review of administrative cost-benefit analysis is *Business Roundtable v. S.E.C.*, the very case that sparked some of the loudest complaints that cost-benefit analysis is a partisan device. That case involved an appeal of the S.E.C.'s "proxy access rule." A federal statute required the S.E.C. to consider the costs and benefits of that rule. When the proxy access rule was appealed in the D.C. Circuit, the court did not try to undertake its own economic analysis, or even micromanage the agency's own substantive review; rather, the court reviewed only whether the S.E.C. had sufficiently considered the evidence in the record before the agency, and whether the agency had meaningfully considered and replied to affected parties' arguments about the costs of the rule. The agency clearly had failed to satisfy those minimal requirements. As the court held, the agency had "inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters."[14] But rather than dictating an outcome, the court vacated the rule and remanded the matter to the agency—it gave the agency another bite at the apple. The court did

[13] Guynn, *supra* note 5, at 644-45.

[14] *Business Roundtable v. SEC*, 647 F.3d 1144, 1148-49 (D.C. Cir. 2011).

not prohibit the S.E.C. from reaching the same substantive outcome; it simply required the agency to satisfy the applicable procedural requirements.

This is precisely what the reviewing court is supposed to do when confronted with an agency's statutorily required cost-benefit analysis. In the words of Judge Wald,

> Where a governing statute requires the agency to conduct an economic analysis as a basis for action, . . . the court must insist that it be done and that it include whatever components Congress specified. Little or no deference is due the agency in such threshold scrutiny. . . . The court must assure itself that the statutorily mandated decision . . . has been made and that the agency's reasoning was rational and supported by evidence. An agency cannot immunize arbitrary or capricious substantive decisions by dressing them up in the Emperor's clothes of economic jargon.[15]

Business Roundtable demonstrates that judicial review of cost-benefit analysis promotes a rulemaking process driven by expertise and not mere politics. There is no good reason why independent agencies, which are responsible for some of the costliest rules in the Federal Register, should be exempt from this process.

3. PROBLEMATIC IMPLEMENTATION OF COST-BENEFIT ANALYSIS

None of this is to suggest that simply requiring agencies to perform cost-benefit analysis of their rules is a fail-proof solution for the problems of regulatory mismanagement. Like any form of analysis, cost-benefit analysis may reflect the value judgments of the regulator. Congress, and this body in particular, must therefore be vigilant in regulating the regulators.

[15] Wald, *supra* note 12, at 50.

This vigilance is especially needful in the current Administration, which, by its own estimate, has imposed up to $51.5 million in regulatory costs between 2009 and 2012, considering only the 58 so-called "major rules" issued during that time period.[16] And that self-serving estimate should be viewed skeptically: As former OIRA Administrator Susan Dudley has observed,

> Agencies have strong incentives to demonstrate through analysis that their desired regulations will result in benefits that exceed costs. . . . [A]s the regulatory game is now structured, OIRA is the umpire—the sole judge of the balls and strikes pitched by the agencies. When the umpire boasts with such enthusiasm about his team's score, one has to wonder who will ensure that the game is played fairly.[17]

In sharp contrast to the Administration's own estimate, the American Action Forum (led by Douglas Holtz-Eakin, former chief economist of the President's Council of Economic Advisers and director of the Congressional Budget Office) estimates that this Administration's regulatory burden on the economy exceeds $518 billion.

The Administration's estimate of the benefits of its regulations is just as problematic as its estimate of costs. Take, for example, the Administration's estimate of the "social cost of carbon"—a figure that is critical to the cost-benefit analyses for an increasing number of greenhouse gas emissions-related regulations.[18] According to former OIRA Administrator Cass Sunstein, the social cost of carbon (now $36 per ton), which was the product of an interagency

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[16] *See* OIRA, 2013 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act," at 19, at http://www.whitehouse.gov/sites/default/files/omb/inforeg/2013_cb/draft_2013_cost_benefit_report.pdf.

[17] Susan E. Dudley, *Perpetuating Puffery: An Analysis of the Composition of OMB's Reported Benefits of Regulation*, BUS. ECON. 47:3, at 175 (2012).

[18] Cass R. Sunstein, Working Paper: *The Real World of Cost-Benefit Analysis: Thirty-Six Questions (and Almost as Many Answers)*, HARV. L. SCHOOL PUB. L. & LEGAL THEORY WORKING PAPER SERIES, Paper No. 13-11 (May 15, 2013) (Social cost of carbon "values are used to establish the benefits of regulatory efforts to reduce greenhouse gas emissions, and they have played a significant role in many rulemakings."), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2199112 (citing Light-Duty Vehicle Greenhouse Gas Emission Standards, 75 Fed. Reg. 25,324, 25,520–524 (May 7, 2010) (to be codified at 49 C.F.R. pts. 531, 533, 536, 537, 538); Energy Conservation Standards for Residential Refrigerators, Refrigerator-Freezers, and Freezers, 76 Fed. Reg. 57,516, 57,559–57,561 (Sept. 15, 2011) (to be codified at 10 C.F.R. pt. 430)).

working group, is "binding until [it is] changed" by "some kind of formal process." Until that time, says Sunstein, "[a]gencies and departments (including OIRA and others within the Executive Office of the President) may not reject such documents, in whole or in part, in the context of particular rules."[19] But those estimates have never been the subject of a stand-alone notice and comment procedure. And the estimated cost declared by the committee is particularly problematic because the risk it attributes to carbon emissions (and therefore the benefit of their reduction) is global in scope, whereas the cost of regulation is necessarily borne only by entities within the United States. Thus, EPA justifies regulations that impose enormous costs on U.S. industry by reference to benefits that are shared the world over. This is in tension with an OMB Circular stating the commonsense proposition that "[a]nalyses should focus on benefits and costs accruing to the citizens of the United States in determining net present value. Where programs or projects have effects outside the United States, these effects should be reported separately."[20] My point here is not to propose a solution but to guard against complacent acceptance of cost-benefit analysis by administrative agencies.

II. REGULATORY FLEXIBILITY ACT

Under the current Regulatory Flexibility Act, each of three "covered agencies"[21] must convene a review panel to assess the impact on small businesses of ill-defined economically "significant" proposed rules.[22] The Regulatory Flexibility Improvements Act (H.R. 2542) would give primary responsibility for this assessment to the Chief Counsel for Advocacy of the

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[19] *Id.* at 4.

[20] OMB Circular A-94 (revised), *available at* http://www.whitehouse.gov/omb/circulars_a094.

[21] The "covered agencies" are EPA, CFPB, and OSHA. 5 U.S.C. § 609(d).

[22] *Id.* § 509(a).

Small Business Administration,[23] and would require the interagency panel that receives the Chief Counsel's report to include an OIRA employee.[24] The Act would also allow OIRA, not just the originating agency—to decide what rules are covered.[25] Finally, the Act would require executive agencies to submit to OIRA (and to Congress) their periodic reviews of small business impacts of their existing rules.[26] Including OIRA in the process in these ways would promote consistency and reduce bias in the assessment of regulatory impacts on small businesses—a matter of vital importance to the economy.

III. SUNSHINE FOR REGULATORY DECREES AND SETTLEMENTS ACT

Although the primary subject of my remarks has been OIRA, I would be remiss if I did not address the Sunshine for Regulatory Decrees and Settlements Act (H.R. 1493). This legislation would help to solve the longstanding collusion between activist groups and sympathetic regulators, which use sham ("sue-and-settle") litigation to achieve through "consent decrees" administrative rules that cannot be obtained through the ordinary regulatory process. Relegating administrative rulemaking to backroom deals between administrators and particular interested parties undermines the transparency, public participation, and agency expertise that are the hallmarks of our administrative law system. By requiring greater public notice, tougher judicial scrutiny, a more open judicial process, and (in the Attorney General's office) direct accountability at the highest levels of the Executive Branch, this Act would ensure that "public interest" litigation truly promotes, not impairs, the public interest.

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[23] H.R. 2542, sec. 6, amending 5 U.S.C. § 609(b).

[24] *Id.*, amending 5 U.S.C. § 609(d).

[25] *Id.*, amending 5 U.S.C. § 609(e).

[26] *Id.*, sec. 7, amending 5 U.S.C. § 610.