Testimony of

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Mr. Chairman, Mr. Davis, and members of the Committee, thank you for inviting me to testify today to provide my views on the authority of the President to influence the decisions of his subordinates in the Executive Branch. It is an honor to appear before you.

I am testifying today in a personal capacity based on my interest and background in administrative and constitutional law. I am currently engaged in private law practice in Washington, D.C. I have previously served as General Counsel of the U.S. Department of Agriculture, General Counsel of the Office of Management and Budget, and Associate Counsel to the President. Until recently, I served part-time as Vice Chairman of the Privacy and Civil Liberties Oversight Board. My experience in government regulatory issues was also developed as a student at Harvard University's John F. Kennedy School of Government and as a law clerk on the U.S. Court of Appeals for the D.C. Circuit.

My views here are focused only on the general issue of presidential authority to influence and direct the regulatory actions and decisions of the Executive Branch, including the EPA Administrator, under Article II of the Constitution. I have no particular position regarding the propriety or correctness of EPA's revised ozone standards. Moreover, my view that the President is – and should be – in control of the Executive Branch is in no way intended to derogate or diminish Congress' power to set policy by legislation and to oversee the Executive's execution of the laws.

Specifically, I do not believe that the President's command of a unitary Executive Branch provides any *carte blanche* to disobey or disregard statutory mandates that are constitutionally enacted by Congress. Rather, the unitary Executive means that it must be the President, not some (relatively) faceless subordinate, narrow agency or obscure technical committee, who is responsible to the public to take care that the laws are

well and faithfully executed. In short, the unitary Executive concept (1) promotes more effective rulemaking by bringing a broader perspective to bear on important regulatory decisions and (2) enhances democratic accountability for regulatory decision-making by pinning responsibility on the President to answer to the public for the important regulatory actions taken by his or her Administration.

It is my understanding that the Committee is interested in the question of whether the President has unduly intervened in the process whereby EPA has set revised national ambient air quality standards for ozone under the Clean Air Act. I believe the Committee's concern in this regard is based on the fact that policy judgments expressed by the President played a role in the final standards established by EPA; and, that EPA exercised its regulatory discretion in a manner that did not wholly acquiesce in the recommendations provided to the agency by the Clean Air Scientific Advisory Committee (CASAC).

I further understand that, in the Clean Air Act, Congress authorized EPA to exercise some residual policy-making discretion in setting national ambient air quality standards that are requisite to protect public health with an adequate margin of safety as well as to protect public welfare as required under the statute.

While the Supreme Court has held that Congress did not authorize EPA to consider the costs (and thus the relative benefits) to the public of setting Clean Air Act standards at any particular level, neither Congress nor the Supreme Court has directed EPA to adopt CASAC's technical recommendations without exercising any further judgment. Significantly, Congress can always, if it chooses, adopt the CASAC recommendations directly into law. It may do so even now, of course, and thereby supersede the policy judgments of the Executive.

I am not in a position to opine or comment on what the parameters for the exercise of that further judgment are or should be, but I will assume that any involvement by the President and/or the Office of Management and Budget (OMB) would have taken place within those parameters – and thus within the range of discretion Congress intended EPA to exercise, and which the Supreme Court has approved.

Setting standards requisite to protect public health and welfare is inherently a policy exercise because Congress and the courts acknowledge that government regulations cannot, and need not, achieve

"zero risk." Accordingly, to achieve legally acceptable risk (i.e., protecting a sufficient percentage of the public from a sufficient degree of risk) policy makers are obligated to consider the science, and then make complex *policy* judgments – not technical judgments – that deal with myriad uncertainties and weighting dilemmas, including gaps in scientific and medical analysis and data, differential impacts on different population groups, and the fact that society is dynamic so that the consequences of taking certain actions are not entirely reliable or predictable. The Supreme Court has substantially constrained Executive Branch policy discretion, but not eliminated it, by ruling that Congress prohibited policy makers from considering the relative costs and benefits of any particular national ambient air quality standard.

In any event, policy makers must apply their best judgment to the administrative record before them. The law requires EPA to adequately explain, justify and defend the national ambient air quality standards it adopts. And, the agency's decisions and explanations are subject to scrutiny, comment and challenge under the Administrative Procedure Act (or the analogous provisions of the Clean Air Act itself).

A regulatory decision that has been dictated by factors other than those prescribed by Congress, or by material considerations that are not disclosed in the public record, would be subject to judicial invalidation. I distinguish, however, between the propriety of the factors to be considered, on the one hand, and the judgments made based on those factors. **Unless Congress sets the specific pollution standards in law itself (which it may certainly choose to do if it wishes to remove Executive discretion), or Congress establishes specific formulae or other fixed methodologies for setting pollution levels, then the Executive Branches decision-making process is necessarily judgmental, not merely mechanical.**

I believe that the President is fully entitled to express his policy judgments to the EPA Administrator, and to expect his subordinate to carry out the presidential judgment of what the law requires and permits. (I note that the President would not be permitted under current law, in my opinion, to compel EPA to set particular Clean Air Act standards based on a cost-benefit analysis. Whether this constraint makes sense or not, the Supreme Court has plainly said that Congress did not authorize public costs and relative benefits to be considered as a factor in setting national ambient air quality standards.)

If the EPA Administrator does not agree with the President, he or she may resign or be replaced, but there are no grounds to complain that the President's position is undue "interference." **It is the President's responsibility, not just his right, to ensure that Executive Branch regulatory decisions – to the extent Congress has left the Executive with some discretion – reflect the President's own policy judgments. That way, the public can hold the President accountable for important regulatory judgments, or alternatively, look to Congress for stronger, smarter or more specific laws.**

Accordingly, the EPA Administrator in the case at hand was well advised to consider and defer to the policy judgments of the President.

I will make a number of further brief points in support of this view, and be happy to respond to any questions you may have.

The Constitution empowered the President to command the Executive Branch.

Article II of the Constitution vests the executive power of the United States in the President. It does not vest executive power in any other authority, and it authorizes only the President to appoint the principal officers of the United States (with the advice and consent of the Senate), and authorizes inferior officers to be appointed by the President, or by agency heads or the courts (without the advice or consent of the Senate). The Constitution specifically empowers the President to require the head of any Executive department to provide his or her opinion on any subject relevant to the duties of the President or of that agency head.

The reasons why the Constitution established a powerful President are well known. In short, the Framers were acutely conscious of the debilitating weaknesses that resulted from "executive by committee" during the Revolutionary War, and under the Articles of Confederation.

Alexander Hamilton, of course, was the leading proponent of both the Constitution and the strong presidency it established. It is impossible to surpass the wisdom or compelling quality of the arguments Hamilton advanced for the Constitution's strong President in his *Federalist Paper* essays.

In Federalist 76, Alexander Hamilton addressed the benefits of a unitary executive to direct the federal government of the United States. He

stated: ". . . one man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices, than a body of men of equal or perhaps even of superior discernment. The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation."

In Federalist 70, Hamilton specified that "unity" was one of the key ingredients of the Executive. He explained that "[t]his unity may be destroyed in two ways: either by vesting the power in two or more magistrates of equal dignity and authority; or by vesting it ostensibly in one man, subject, in whole or in part, to the control and co-operation of others, in the capacity of counsellors to him."

He clearly understood that putting one person in charge of the Executive Branch would promote democratic accountability. Hamilton argued that "one of the weightiest objections to a plurality in the Executive . . . is that it tends to conceal faults and destroy responsibility . . . . It is evident from these considerations, that the plurality of the Executive tends to deprive the people of the two greatest securities they can have for the faithful exercise of any delegated power, first, the restraints of public opinion, which lose their efficacy, as well on account of the division of the censure attendant on bad measures among a number, as on account of the uncertainty on whom it ought to fall; and, second, the opportunity of discovery with facility and clearness the misconduct . . . ."

In other words, the Constitution adopted a unitary Executive in order that the people would know exactly whom to credit, or whom to blame, if the laws were not faithfully and effectively discharged. If responsibility is diffused, then the ability of the public to influence and choose their government is diluted.

Presidents of both parties have asserted the right to oversee and direct the actions and decisions of regulatory agencies.

<u>Presidential Involvement in Environmental Rulemaking in the Carter Administration</u>

Former Chief Judge Patricia Wald, who served as Assistant Attorney General for Legislative Affairs in the Carter Administration, and was subsequently appointed to the U.S. Court of Appeals for the D.C. Circuit by President Jimmy Carter, strongly supported the power and responsibility of a President to direct his or her subordinates in the Executive Branch. In 1981,

she authored the leading opinion on presidential control over rulemaking, *Sierra Club v. Costle.* Judge Wald was joined in that opinion by then Judge, now Justice, Ruth Bader Ginsburg.

In a context not dissimilar from the current ozone regulation of interest to this Committee, *Sierra Club* concerned EPA rules restricting sulfur and particulate matter emitted by new power plants. Judge Wald addressed arguments advanced by environmental plaintiffs who claimed that President Carter improperly interfered in the EPA rulemaking in order to impose weaker pollution controls than the technical staff at EPA desired. She categorically rejected this criticism of President Carter's decisive role.

Echoing Hamilton, Judge Wald eloquently affirmed the President's power over a unitary Executive Branch. Her opinion explains:

> "The executive power under our Constitution, after all, is not shared it rests exclusively with the President. The idea of a 'plural executive,' or a President with a council of state, was considered and rejected by the Constitutional Convention. Instead the Founders chose to risk the potential for tyranny inherent in **placing power in one person, in order to gain the advantages of accountability fixed on a single source**. . . . In the particular case of EPA, Presidential authority is clear since it has never been considered an 'independent agency,' but always part of the Executive Branch. **The authority of the President to control and supervise executive policymaking is derived from the Constitution**; the desirability of such control is demonstrable from the practical realities of administrative rulemaking. . . . Our form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive. **Single mission agencies do not always have the answers to complex regulatory problems.** An overworked administrator exposed on a 24-hour basis to a dedicated but zealous staff needs to know the arguments and ideas of policymakers in other agencies as well as in the White House."

Indeed, **Judge Wald opined that preserving the President's flexibility to direct his or her subordinates was so important that it was not legally required for the Executive Branch to publicly disclose the details of White House and presidential contacts.** Where the President is directly involved, Judge Wald admonished courts to "tread with

extraordinary caution" in mandating disclosure of relevant Executive Branch communications.

To be sure, Judge Wald was appropriately sensitive to the legal requirement that agencies justify their rules on the basis of the relevant administrative record. She did not believe, however, that Presidential influence behind the scenes undermined the agency's decision-making process. Judge Wald wrote:

> "[A]ny rule issued here with or without White House assistance must have the requisite factual support in the rulemaking record, and under this particular statute [the Clean Air Act] the Administrator may not base the rule in whole or in part on any 'information or data' which is not in the record, no matter the source. The courts will monitor all this, but they need not be omniscient to perform their role effectively. Of course, **it is always possible that undisclosed Presidential prodding may direct an outcome that is factually based on the record, but different from the outcome that would have obtained in the absence of Presidential involvement.** In such a case, it would be true that that the political process did affect the outcome in a way the courts could not police. **But we do no believe that Congress intended that the courts convert informal rulemaking into a rarefied technocratic process, unaffected by political considerations or the presence of Presidential power.** In sum, we find that the existence of intra-Executive Branch meetings during the post-comment period, and the failure to docket one such meeting involving the President, violated neither the procedures mandated by the Clean Air Act nor due process."

In 2002, Judge Wald wrote an academic reflection on her decision in *Sierra Club* in the Georgetown Law Journal. In the article, she rehearsed the circumstances the court reviewed in 1981, and recalled that the pollution control level EPA ultimately adopted in 1979 was very controversial. She noted that "the agency staff had proposed a figure less than half a large" as the one eventually selected by the Administrator. She explained that the relatively lenient standard adopted by the Carter Administration was challenged by environmental groups on the grounds that it "resulted from political pressure placed on EPA from a variety of sources, including pressure exerted by the President in a meeting that was never made part of the agency's rulemaking docket."

Judge Wald characterized her opinion as supporting the proposition that so long as the rule had the requisite factual support in the record, the fact that the political process had affected the outcome was, on balance, acceptable – indeed, desirable.

Judge Wald's law review article stated that **"the President has constitutionally derived power to control and supervise executive policymaking. The [*Sierra Club*] court found such power to be desirable, noting that the President's direction can give a valuable, national perspective to decisions made by a single-mission agency."**

Moreover, she also pointed out that *Sierra Club* explicitly preserved the President's flexibility in directing his or her subordinates:

> "[t]he D.C. Circuit's opinion in Sierra Club protects . . . sensitive presidential information [i.e., "the President's interaction with agency decisionmakers"] by making it legally irrelevant. Under Sierra Club, a presidential directive to an agency engaged in rulemaking will not add anything to the validity of the agency's final rule (which must be otherwise justified by the rulemaking record), but neither will it detract from the validity of the rule (assuming the rule is so justified). By decoupling the legal validity of the rule from any presidential action that may have led to it, **the D.C. Circuit not only protected the President's flexibility to give direction to executive agencies**, **but also removed any reason why parties challenging the rule would have a valid need to know about the President's actions.** The principle of Sierra Club therefore plays an important role in guarding the confidentiality of the President's activities."

<u>Presidential Involvement in Environmental Rulemaking in the Clinton Administration</u>

President Bill Clinton, further codified and solidified the process and desirability of presidential control over Executive Branch rulemaking. **In 1993, President Clinton issued Executive Order 12866 to ensure that agency regulations are consistent with "the President's priorities, and the principles set forth in this Executive Order."** The Order noted that, in the event of a conflict between regulatory agencies and the Office of Management and Budget, the President or Vice President would review the matter and "notify the affected agency . . . of the President's decision." President Clinton's Order generally tracked the regulatory review principles previously articulated in President Reagan's Executive Order 12291;

however, President Clinton actually extended presidential oversight and control over rulemaking in a number of regards, including application of the regulatory planning process to independent agencies.

Indeed, I believe it is clear that President Clinton directly participated in the approval of the 1997 ozone standard which was the precursor to the standard of interest to the Committee today. Just as is the case with the current ozone rule, and as was the case with President Carter's sulfur and particulate matter rules, EPA ultimately chose a pollution standard that was more lenient than the one favored by agency staff and recommended by the CASAC committee of scientific advisers.

Given President Clinton's activist role in the federal regulatory process, it is no surprise that his White House and OMB advisers provided robust and unapologetic intellectual support for a powerful presidential influence over rulemaking.

In a 2007 Michigan Law Review article, President Clinton's regulatory czar at OMB, Sally Katzen, wrote that she "served as the Administrator of OIRA during the Clinton Administration [and is] unabashedly a proponent of centralized review of rule-making." Interestingly, she made a point of singling out both the career and political appointees at EPA has having particularly intense enthusiasm for the agency's mission and faith in regulatory solutions.

Likewise, another alumnus of President Clinton's OMB, Professor Peter Swire, wrote his 1985 law school note in the Yale Law Journal in "suppor[t of] a greater presidential role in regulation." He expressed the view that "[t]he President, elected nationally, charged with executing all federal laws, and accountable for the sum total of executive action, has a unique potential to balance and coordinate agency action."

The current Dean of the Harvard Law School, Elena Kagan, served President Clinton as both a White House lawyer and domestic policy adviser. She has acknowledged that regulatory activity in the Clinton Administration became **"more and more an extension of the President's own policy and political agenda,"** that President Clinton **"greatly enhanced presidential supervision of agency action,"** and that President Clinton "**personally appropriated significant regulatory action through communicative strategies that presented regulations and other agency work product, to both the public and other governmental actors, as his own**."

Dean Kagan wrote the following in her 2001 article in the Harvard Law Review:

> **"[P]residential control of administration, in critical respects, expanded dramatically during the Clinton years, making the regulatory activity of the executive branch agencies more and more an extension of the President's own policy and political agenda.**
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> "At the front end of the regulatory process, Clinton regularly issued formal directives to the heads of executive agencies to set the terms of administrative action and prevent deviation from his proposed course. And at the back end of the process (which could not but affect prior stages as well), **Clinton personally appropriated significant regulatory action through communicative strategies that presented regulations and other agency work product, to both the public and other governmental actors, as his own, in a way new to the annals of administrative process.**
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> "By the close of the Clinton Presidency, a distinctive form of administration and administrative control -call it "presidential administration" -had emerged, at the least augmenting, and in significant respects subordinating, other modes of bureaucratic governance. Triggered mainly by the re-emergence of divided government and built on the foundation of President Reagan's regulatory review process, **President Clinton's articulation and use of directive authority over regulatory agencies, as well as his assertion of personal ownership over regulatory product, pervaded crucial areas of administration.** Of course, presidential control did not show itself in all, or even all important, regulation; no President (or his executive office staff) could, and presumably none would wish to, supervise so broad a swath of regulatory activity. And of course, presidential control co-existed and competed with other forms of influence and control over administration, exerted by other actors within and outside the government. **At times, indeed, presidential administration surely seemed to Clinton and his staff, as it surely also had to their pioneering predecessors, more an aspiration than an achievement. Still, these officials put in place a set of mechanisms and practices, likely to survive into the future,**

> **that greatly enhanced presidential supervision of agency action, thus changing the very nature of administration (and, perhaps too, of the Presidency).”**

Dean Kagan did not merely chronicle the expansion of presidential power over the federal regulatory process during the Clinton Administration – she affirmatively supported the merits of increased direct presidential authority over Executive Branch agencies.

This development, she wrote (sounding positively Hamiltonian):

> **“satisfies legal requirements** and promotes the values of administrative accountability and effectiveness. . . . Presidential administration in this form a**dvances political accountability** by subjecting the bureaucracy to the control mechanism most open to public examination and most responsive to public opinion. And presidential administration **furthers regulatory effectiveness** by providing not only the centralization necessary to achieve a range of technocratic goals but also the dynamic charge so largely missing today from both the administrative sphere and the surrounding political system.”

It makes sense, as a matter of public policy, to acknowledge and respect the President’s ultimate dominion over the Executive Branch.

In sum, both the effectiveness and accountability of agency rulemaking is promoted by respecting presidential control over the regulatory process. This proposition was most effectively articulated by Alexander Hamilton in the *Federalist Papers*, embodied in the Constitution, and embraced wholeheartedly by Presidents of both parties.

If federal regulations do not serve the public well – either because they are too restrictive or too permissive, or simply not well designed – the President (and Congress, of course) should take the blame. If the regulations are reasonable and accomplish the public’s goals efficiently, then the President (and Congress) should receive the credit. Technical advisers are essential to the rulemaking process, but the buck has to stop with the person who answers to the people, the President.

Thank you for considering my views.