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

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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

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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]

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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.