Written Statement of Noel J. Francisco
Partner, Jones Day

Before

The Committee on the Judiciary
Subcommittee on Courts, Commercial and Administrative Law
House of Representatives

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"Formal Rulemaking and Judicial Review: Protecting Jobs and the Economy with Greater Regulatory Transparency and Accountability"

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Mr. Chairman, Ranking Member, and Members of the Subcommittee:

My name is Noel John Francisco. I am a partner at the law firm of Jones Day, where I chair the firm's Government Regulation practice. I served as Associate Counsel to President George W. Bush from 2001 to 2003, and as Deputy Assistant Attorney General in the Department of Justice's Office of Legal Counsel from 2003 to 2005. It is an honor to appear before you to discuss the important issue of ensuring effective judicial review of agency action.

Every student of high school civics understands the basic contours of our system of separated powers: The Legislative Branch makes the law. The Executive Branch enforces the law. And the Judicial Branch interprets the law. But consider how this often plays out in the modern administrative state: Congress passes a broad and open-ended law, leaving it to an Executive Branch administrative agency to "fill in the gaps" through administrative regulation. The agency then promulgates regulations interpreting and implementing that open-ended law. And when the issue gets to the judiciary, the courts, as a general matter, defer to Congress's decision to delegate to the agency the policy-making functions in the first place, *see Mistretta v. United States*, 488 U.S. 361, 372-74 (1989), and defer to the agency's interpretation and implementation of the law that Congress passed, *see Mayo Foundation for Medical Education and Research v. United States*, 131 S. Ct. 704, 714-16 (2011). As a result, we often see the administrative agencies making, interpreting, *and* enforcing the law.

To a large extent, this is necessary to the proper functioning of the modern administrative state. In complex regulatory regimes, Congress cannot anticipate every problem that might arise. Nor can courts fill in the policy gaps that Congress leaves open. As a result, it is necessary that Congress be able to delegate a certain amount of its policy-making function to administrative agencies, particularly on matters that involve agency expertise. And it is equally necessary for courts to accord a certain amount of deference to the agencies' exercise of that delegated power. But at the same time, there *must* be some kind of judicial check. For otherwise, we risk unduly concentrating all three powers of government in the Executive Branch alone.

This, in a nutshell, is the dilemma of administrative law: how to balance the dual needs for judicial deference to, and judicial oversight of, the political branches of our government. At first blush, this might appear to be a dry topic best left to judges and academics. But in truth, it goes to the heart of our system of separated powers. If we strike the wrong balance—if we allow excessive and unchecked delegation to administrative agencies—we risk transforming our system of government into something it was never meant to be. It is, therefore, both necessary and appropriate for Congress in general—and this Subcommittee in particular—to continually review the balance that we have struck and, where necessary, recalibrate and adjust that balance.

With that basic background in mind, I would like to focus on three areas of administrative law where, in my view, recalibration and readjustment may be warranted: (1) formal versus informal rulemaking; (2) judicial deference to agency interpretations of law; and (3) judicial enforceability of statutes designed to ensure that agencies engage in reliable rulemaking that considers the burdens of regulation. In each of these cases, the pendulum has swung far in the direction of increased agency power.

1. Formal Versus Informal Rulemaking. Today, informal rulemaking has become the norm. Congress passes a general law. The President, through an administrative agency, implements that law through informal rulemaking procedures, pursuant to which it notifies the public of the proposed regulation and allows for a period of written public comment. The agency then finalizes the rule. And the judiciary upholds it unless it is "arbitrary and capricious." *See* The Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A). This regulatory scheme thus gives the judiciary a limited role in policing the power of the regulatory agencies.

Consider, however, the formal rulemaking alternative, which provides a more rigorous and transparent administrative process followed by increased, yet still deferential, judicial review. Under the formal rulemaking process, the agency holds an open hearing on its proposed regulation, during which interested parties may not only submit their views in writing, but may also testify and question witnesses. After the agency finalizes the rule, the judiciary reviews it to ensure the agency's factual conclusions are supported by "substantial evidence." APA § 706(2)(E). This is hardly an intrusive standard of review, as courts must uphold the regulation if the agency's decision is supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Yet formal rulemaking is rarely, if ever, used.

In my view, this balance—where nearly all agency rulemaking is subject only to "arbitrary and capricious" review—warrants reconsideration. Under formal rulemaking, agencies *still* have broad leeway to implement Congress's mandates, and courts *still* defer to agencies' judgments. But formal rulemaking provides a greater level of transparency and accountability and closer judicial oversight. It is therefore worth considering whether (a) formal rulemaking should be used more, or (b) the "substantial evidence" standard should be extended to informal rulemaking proceedings.

2. Judicial Deference to Agency Interpretations of Law. Another area in which the scale has tipped far in the direction of deference is the standards courts apply when reviewing agency interpretations of law. In 1944, the Supreme Court acknowledged the common-sense principle that the level of deference a court should accord to an agency interpretation is proportional to the

interpretation's persuasiveness, as demonstrated by the agency's thoroughness, level of expertise, formality, and consistency. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944). Since then, however, the Supreme Court has progressively increased the level of deference accorded to agencies and also expanded the circumstances in which such deference is warranted.

Under the most common rule, articulated by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-44 (1984), courts may ask whether the statute at issue is ambiguous and, if so, whether the agency's interpretation reflects a "permissible" interpretation of the law. Even more deferential than *Chevron*, however, is the standard established in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945), and *Auer v. Robbins*, 519 U.S. 452, 461 (1997), which holds that an agency's interpretation of its own regulation is "controlling . . . unless it is plainly erroneous or inconsistent with the regulation." *Seminole Rock*, 325 U.S. at 414. Similarly, the Court held in *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 103 (1983) ("*BGE*"), that a reviewing court must be "at its most deferential" when reviewing an agency's scientific conclusions. *Skidmore*, in contrast, is now considered the *lowest* level of deference applicable to agency interpretations of law, rather than the standard rule it was intended to be.

Again, judicial deference is both important and appropriate. The question, however, is whether the balance has tilted too far in favor of unchecked agency discretion.

In light of this, it merits considering whether administrative law has struck the right balance between judicial deference and oversight and how the applicable standards could be clarified. For example, Congress might consider: (a) clarifying that *Skidmore* deference applies where an agency fails to adhere rigorously to its own procedures or those required by the APA; (b) clarifying the standard courts should apply when determining whether a regulation is "permissible" under *Chevron*'s second step; or (c) streamlining the applicable levels of deference, such that *Skidmore* applies unless Congress has explicitly delegated lawmaking authority, in which case *Chevron* applies. There are, undoubtedly, other possibilities. It is, moreover, entirely appropriate for Congress to undertake this assessment. After all, the varying deference doctrines are, at bottom, rules of interpretation—mechanisms by which courts assess what *Congress* intended when passing a law. It is therefore appropriate for Congress to provide the judiciary with guidance on how, going forward, courts should discern this legislative intent.

3. Judicial Enforceability of Certain Statutes. Finally, Congress has, from time to time, enacted specific statutes aimed at ensuring that agencies engage in more rigorous and transparent analysis before promulgating burdensome regulations. For example, the Information Quality Act ("IQA"), Pub. L. No. 106-554, § 515 (2001), seeks to ensure that the information on which agencies rely meets standards of reliability. Likewise, the Regulatory Flexibility Act ("RFA"), 5 U.S.C. §§ 601 *et seq.*, aims to ensure that agencies consider the economic impact of regulation on small businesses. These targeted statutory regimes are thus intended to ensure that, in specified areas, agencies engage in the rigorous analysis that the public expects before the government imposes potentially burdensome and costly regulations. The problem, however, is that while these statutes serve the most salutary of purposes, their effectiveness is limited. As construed by the courts, the ability of parties to enforce the IQA is very limited. And the RFA's terms accord agencies wide discretion to determine when and how it applies. These too, therefore, are areas where recalibration and readjustment may be warranted.

In sum, in the modern administrative state, courts must accord deference to the discretion of agencies if they are to fulfill their congressionally delegated task of interpreting and enforcing laws enacted by Congress. But in order to ensure that our basic system of government is preserved, Congress must, at the same time, ensure effective judicial oversight of agency discretion. In recent years, the balance has tipped decisively in favor of agency discretion. I therefore believe that some form of legislative recalibration should be considered.

I elaborate on these issues in more detail in the discussion below.

A. Formal Versus Informal Rulemaking

The APA provides for two types of procedures for promulgating substantive rules: formal procedures and informal ones. Both allow for significant judicial deference to an agency's ultimate conclusion. The formal procedures, however, provide greater transparency into the agency's decision-making process by requiring on-the-record hearings during which witnesses testify and may be cross-examined, as well as a higher (though still deferential) standard for judicial review. In contrast, in informal proceedings, the agency's rationale and analysis is often difficult to discern, and regulations are subject to a lower standard of review. In modern administrative law, however, formal rulemaking has all but disappeared. In my view, this is an instance where Congress should consider whether the pendulum has swung too far in favor of agency discretion.

1. Formal Versus Informal Rulemaking. There are two primary differences between formal and informal rulemaking, one procedural, and the other relating to the standard for judicial review.

First, as a procedural matter, formal rulemaking is more rigorous and transparent than informal rulemaking. The formal rulemaking procedures, which are governed by APA §§ 556 and 557, require an open hearing where interested parties can testify and can cross-examine adverse witnesses. Formal rulemaking is often called "rulemaking on a record" because these trial-type proceedings provide much more opportunity for the agency to develop a formal record before issuing a final rule. In contrast, informal rulemaking, also called "notice-and-comment" rulemaking, does not require an agency to hold oral hearings, nor do agencies typically do so. Instead, an agency must give written notice of "either the terms or substance of the proposed rule or a description of the subjects and issues involved," APA § 553(b)(3); allow "interested persons an opportunity to participate" in the rulemaking through submission of written comments, APA § 553(c); and, when an agency issues a final rule, include "a concise general statement of . . . basis and purpose," *id.* Thus, formal rulemaking allows interested parties to have greater input into the rulemaking process.

Second, and relatedly, informal rules are subject to a more deferential standard of review than formal rules. Under APA § 706(2)(A), courts may set aside informal rules only if they are "arbitrary and capricious." This standard requires that the agency engage in "reasoned decision-making," *Professional Drivers Council v. Bureau of Motor Carrier Safety*, 706 F.2d 1216, 1220 (D.C. Cir. 1983), and courts must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment," though the court "is not empowered to substitute its judgment for that of the agency," *Citizens to Preserve Overton*

Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). As the Supreme Court has explained, "[n]ormally an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

In contrast, for rules adopted through formal procedures, the APA provides an additional layer of review. In addition to "arbitrary and capricious" review under APA § 706(2)(A), courts must also examine the evidentiary basis for formal rules to ensure that they are supported by "substantial evidence." APA § 706(2)(E). This "substantial evidence" standard is also deferential—though less so than the "arbitrary and capricious" standard—and requires a court to ask whether the agency's decision is supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co.*, 305 U.S. at 229. This standard thus allows a court to look at the whole record and assess whether there is evidentiary support for the conclusions drawn by the agency. Consequently, formal rules are more likely to be supported by the evidentiary record than informal ones, since agencies know that a formal rule that lacks evidentiary support will be more vulnerable to legal attack.

In light of these differences, and the apparent benefits of the formal rulemaking process, one might expect to see a fair number of rules promulgated pursuant to the formal procedures. That, however, is most certainly not the case. The formal procedures only apply when the agency's authorizing statute explicitly requires them, *see United States v. Florida East Coast Railway Co.*, 410 U.S. 224 (1973), which is quite rare. Consequently, virtually all agency rulemakings today take place through informal "notice-and-comment" rulemaking.

2. Recalibrating the Balance. Although informal rulemaking procedures give agencies a means by which they can issue rules quickly and efficiently, it should go without saying that enacting rules quickly is often far less important than striking the right policy balance. Indeed, while there are surely some areas where expeditious agency action is paramount, I would expect that for the great majority of rules, striking the right policy balance is more important that reaching a quick result. Thus, administrative efficiency cannot, in my view, justify the virtual extinction of the formal rulemaking process. The balance between formal and informal rulemaking is therefore an area where a recalibration is warranted.

There are, of course, numerous ways in which the balance could be adjusted. One possibility would be a renewed emphasis on formal rulemaking procedures by Congress. This would serve to enhance both public participation in the rulemaking process and judicial oversight through "substantial evidence" review. Another possibility would be to expand the "substantial evidence" standard of review to informal rulemakings. This would preserve the more streamlined "notice and comment" structure but, by increasing the level of judicial oversight, incentivize agencies to engage in more rigorous analysis in order to ensure that their regulations survive increased judicial scrutiny. Or some combination of these approaches could be considered. But regardless of how the balance is struck, the important point is that Congress should be vigilant to ensure that the regulatory process is both rigorous and transparent, so that

agency determinations receive the level of scrutiny commensurate with the administrative agencies' responsibility to Congress and the public.

B. Judicial Deference to Agency Interpretations of Law

When an agency interprets a law that the agency is charged with administering, courts normally defer to the agency's interpretation. Currently, courts employ different standards of deference to agency interpretations, depending on the type of interpretation under review—what some scholars have referred to as a "continuum of deference."[1] Over time, however, the balance between deference and judicial oversight has tended strongly toward deference and away from rigorous judicial review. This shift toward ever-increasing deference weakens the primary check on agency discretion. This too, then, is an area where Congress should consider whether current administrative law standards have struck the proper balance between agency discretion and judicial oversight.

1. Standards of Deference. In *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the Supreme Court established the common-sense principle that agency interpretations of law "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Id.* at 140. The level of deference a court should show to an agency interpretation, the *Skidmore* court explained, "depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id. Skidmore* thus called for a sliding-scale approach to deference, whereby the level of respect a court accorded to an agency interpretation was proportional to the interpretation's persuasiveness.

Since *Skidmore*, however, the Supreme Court has recognized several categories of agency interpretation to which it has accorded heightened deference—deference that, unlike *Skidmore* deference, does, in fact, give agency interpretations the "power to control." *Id.* The most well-known of these categories is the two-step analysis first developed in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-44 (1984). This so-called "*Chevron* deference" applies whenever an agency interprets its statutory delegation of lawmaking authority. *United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001). Under *Chevron*, a court first determines "whether Congress has directly spoken to the precise question at issue." *Id.* at 843. Next, if "the statute is silent or ambiguous with respect to the specific issue," courts ask whether the agency's interpretation of the ambiguous statute is "permissible." *Id.* If so, the court is to defer to the agency's determination. *Id.*

Even more deferential than *Chevron* is the standard established in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) and *Auer v. Robbins*, 519 U.S. 452, 461 (1997), which applies when a court is reviewing an agency's interpretation of one of its own regulations. When applying *Auer* deference, an agency's interpretation of its own properly issued regulation is "controlling . . . unless it is plainly erroneous or inconsistent with the regulation." *Seminole Rock*, 325 U.S. at 414. One commentator has described this doctrine as providing that

[1] William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 Geo. L.J. 1083 (2008).

"whenever an agency applies a regulation—whether to seek a civil penalty through an enforcement proceeding, to adjudicate a claim for federal benefits, or even to determine the means of calculating a prisoner's incarceration—the governing regulation means what the agency says it means unless the reviewing court can conclude that the agency is 'plainly wrong,'" thereby "mak[ing] it easier for the agency simply to issue vague regulations and then put off difficult policy questions until the relatively less demanding implementation stage."[2]

Similarly, in *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 103 (1983), the Supreme Court adopted a yet more deferential standard governing agency judgments on scientific matters. Called "super deference" by some,[3] the Court held that a reviewing court must be "at its most deferential" when reviewing agency interpretations that involve judgments "within its area of special expertise, at the frontiers of science." *BGE*, 462 U.S. at 103. Finally, some courts have held that courts should defer to an agency's determination of whether it has regulatory jurisdiction in the first place. *See, e.g., United Transp. Union v. Surface Transp. Bd.*, 183 F.3d 606, 612-13 (7th Cir. 1999).[4]

As these developments show, since *Skidmore*, courts have become increasingly deferential to agency interpretations of law. Comparing *Skidmore* with *Chevron*, for example, reveals the greater degree to which courts defer to agency interpretations under the *Chevron* analysis. Under *Skidmore*, the level of deference given to an agency's interpretation is proportional to the persuasiveness of the agency's interpretation. Courts thus consider the agency's interpretive process in light of the text under consideration. Under *Chevron*, however, agencies may get *Chevron* deference even when the agency's interpretation has been inconsistent over time, *see National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 981 (2005), the agency's interpretation was made significantly after enactment of the statute, *see Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 740 (1996), or the interpretation was prompted by litigation, *see id.* at 741. The question for the court under *Chevron* is not whether the agency's interpretation is the best, or even the most sensible, reading of the statute, but whether it is a "permissible" one. To be sure, this does not eliminate judicial review; courts can and do invalidate regulations under *Chevron*. *See, e.g., AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388-92 (1999). Compared to *Skidmore*, however, *Chevron* does significantly constrain such review.

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[2] *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 615-16 (1996). For example, regulations direct that payments for health services covered by Medicare must be "reasonable," defining "reasonable" to include those costs that are "necessary and proper" or "appropriate and helpful," and leaving further elaboration to other agency pronouncements. 42 C.F.R. § 413.9(a), (b)(2). Likewise, regulations under HIPAA governing notice to an individual of a breach of private health information require notice if the risk of harm to the individual is "significant," leaving clarification of the situations where notice is required to further agency action. 45 C.F.R. § 164.402(1)(i).

[3] *See* Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 Mich. L. Rev. 733 (2011).

[4] One commentator has noted that "[t]o accord such power to agencies would be to allow them to be judges in their own cause, in which they are of course susceptible to bias." Cass R. Sunstein, *Law and Administration after* Chevron, 90 Colum. L. Rev. 2071, 2099 (1990); *see also* Nathan Alexander Sales & Jonathan H. Adler, *The Rest is Silence:* Chevron *Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. Ill. L. Rev. 1497, 1518 (describing different approaches taken by the federal courts of appeals).

Auer and *BGE* deference, moreover, go even further. Indeed, *Auer* potentially allows an agency to insulate its interpretation from judicial review by interpreting an ambiguous statute with its own ambiguous regulation and then interpreting the ambiguous regulation. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting); *Christensen v. Harris Cnty.*, 529 U.S. 576, 587-88 (2000).[5] Likewise, some commentators have noted that the highly deferential *BGE* standard "incentivizes agencies to cloak their true reasoning behind an unassailable mantle of science."[6]

To be sure, some level of deference serves important purposes. For example, agency decisions often involve technical and complex issues that require the balancing of competing priorities and which courts are not equipped to handle appropriately. In such circumstances, where agencies promulgate rules through transparent and rigorous administrative processes, it is necessary and appropriate to defer to their resolution of these issues. Nonetheless, effective judicial review of agency action is also essential to the proper functioning of the modern administrative state, since it ensures that Congress has the ultimate say on important matters of public policy. This, in turn, creates greater legitimacy in the administrative process by ensuring that agencies operate within the bounds of the discretion accorded them by Congress.[7]

In addition, as a practical matter, effective judicial review should increase the quality of agency action. For example, the prospect of judicial review should encourage agencies to be more attentive to policy limits imposed by Congress, thus increasing the democratic legitimacy of the regulations. Likewise, judicial review encourages thoroughness and rigor in the decision-making process, making it more likely that the regulations will in fact solve the problems at which they are aimed without creating new and/or unintended ones. If agencies are aware that unsupported conclusions will face skepticism in the courts, they will be more likely to spend the time and resources necessary to ensure that their conclusions are well-founded. Excessive deference, on the other hand, diminishes an agency's incentives to adhere closely to its statutory mandate and engage in a thorough decision-making process.

Consequently, it is important to constantly assess whether administrative law doctrine reflects the proper balance between agency discretion and judicial review.

2. Recalibrating the Balance. Because the pendulum has swung far in favor of agency deference, now may be an appropriate time for Congress to consider whether it should increase, to some extent, the role of the courts in this process. As in other areas, there are numerous ways to accomplish this goal.

One possibility that some commentators have suggested would be to streamline the applicable standards of deference. Under this approach, *Chevron* deference would apply only where Congress has explicitly delegated lawmaking authority, rather than a general authority to

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[5] *See* Manning, *supra* note 2, at 615-17.

[6] Meazell, *supra* note 3, at 763-64.

[7] *See* Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 Duke L.J. 522, 525.

implement and interpret a statute. In other cases, *Skidmore* deference would apply, as it is not clear that additional standards, such as those articulated in *Auer* and *BGE*, are necessary.[8]

Another possibility is to limit *Chevron* deference to agency decisions made in strict compliance with an agency's own internal administrative processes and those required by the APA. Absent strict adherence to administrative procedure, *Skidmore* deference applies. This approach reflects the view that rigorous and transparent adherence to administrative processes serves to enhance the democratic legitimacy of regulations, and absent such adherence to procedures, closer judicial scrutiny is warranted.

Finally, with respect to *Chevron* deference itself, Congress might consider clarifying the standard of review. Currently, the "permissible" standard applied under *Chevron*'s second step is open-ended and vague. Congress could attempt to specify factors a court should consider when determining if a regulation does, in fact, reflect a "permissible" interpretation of a statute.

These are just a few possibilities, some of which may be more workable and/or effective than others. But the basic issue that warrants legislative attention is the need to ensure a proper level of judicial oversight of agency discretion. Otherwise, we risk having both Congress and the courts effectively excluded from the regulatory process.

C. Enhancing Current Statutory Controls on Agency Action

Congress has, from time to time, enacted targeted statutes aimed at ensuring that agency regulations are promulgated through more rigorous and transparent procedures. Two good examples of this are the Information Quality Act and the Regulatory Flexibility Act. The problem, however, is that the effectiveness of these statutes is limited. The IQA lacks sufficient mechanisms to allow judicial enforcement. And the RFA accords agencies wide latitude to determine whether and to what extent it applies. The benefits of such statutes, therefore, could be enhanced by creating better avenues of enforcement.

1. Information Quality Act. The Information Quality Act, also called the Data Quality Act, is designed to ensure the reliability of the information agencies use to develop regulations. It requires the Office of Management and Budget ("OMB") to issue guidelines that "provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies." 44 U.S.C. § 3516 note (a). The OMB guidelines direct agencies to ensure that the quality of the information on which they rely is at a level "appropriate to the nature and timeliness of the information to be disseminated." *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies*, Republication, 67 Fed. Reg. 8452, 8458 (Feb. 22, 2002). They require that agencies both adopt appropriate standards of quality for the types of information the agency disseminates and put in place a review process to ensure the quality of the information before it is disseminated. *Id.* at 8458-59. And, for agencies involved in disseminating "influential scientific, financial, or statistical information," the guidelines call for a "high degree of transparency" about the

[8] *See* Eskridge & Baer, *supra* note 1, at 1183-89; Manning, *supra* note 2, at 686-90.

agency's data and methods to facilitate the reproduction of the information by third parties. *Id.* at 8460.

The guidelines provide for an administrative review process through which a party can challenge the quality of an agency's information, and affected parties can appeal an unsuccessful challenge within the agency. *Id.* at 8459. The IQA, however, does not provide any mechanism of judicial review of an agency's determination, and courts thus far have held that the IQA does not create a private right of action. *See, e.g., Salt Inst. v. Leavitt*, 440 F.3d 156, 159 (4th Cir. 2006).

2. Regulatory Flexibility Act. The Regulatory Flexibility Act seeks to protect small businesses from some of the burdens of federal regulation by requiring agencies to engage in procedures designed to measure the impact on small businesses when an agency proposes a new rule. When an agency first proposes a new rule, the RFA requires it to publish in the Federal Register an "initial regulatory flexibility analysis" that includes the agency's reasoning for the proposed rule, its goals, the types and number of entities that will be affected, and a description of anticipated costs of compliance. 5 U.S.C. § 603(b). The agency must also identify any preexisting rules that might conflict or overlap with the proposed rule and any less burdensome alternatives to the proposed rule that would achieve the agency's objective. *Id.* If the agency issues a final rule, it must then include a "final regulatory flexibility analysis" which explains the need for and objectives of the rule, summarizes and evaluates the issues raised during the public comment period, lists the changes made as a result of the comments, and contains a statement as to why the agency rejected alternative proposals. 5 U.S.C. § 604(a).

An agency may avoid these requirements, however, by certifying that the regulation will not have a "significant economic impact on a substantial number of small entities." 5 U.S.C. § 605(b). The RFA, moreover, does not define when a regulation has had a "significant economic impact on a substantial number of small entities," and instead leaves to agencies the task of determining when their regulations trigger the requirements of the RFA. President Bush's Executive Order 13272 of August 2002 sought to address this issue by requiring agencies to develop procedures for determining whether a regulation has a "significant economic impact on a substantial number of small entities." Exec. Order No. 13272, Proper Consideration of Small Entities in Agency Rulemaking, 67 Fed. Reg. 53461 (Aug. 16, 2002). Still, however, Executive Order 13272 did not provide for a uniform definition or set of procedures for determining when a rule triggers the RFA's requirements, and to date no such uniform procedures exist.

3. Recalibrating the Balance. Both the IQA and RFA are salutary attempts to constrain the discretion afforded agencies to ensure that they engage in reliable rulemaking that is conscious of the burdens inflicted by regulation. Unfortunately, however, the effectiveness of each is constrained by the limitations on the ability to enforce their mandates. Here again, therefore, is another area where Congress should consider whether to strengthen these statutes to ensure that agencies work within the context of the priorities Congress has set for them.

As with the other areas discussed above, there are many different ways to effectuate this reform. For example, Congress could consider incorporating the IQA and/or the RFA into the APA itself, such that a failure to adhere to the requirements of these statutes constitutes a violation of the APA. Another possibility for the IQA would be to provide for a private right of

action and judicial review of challenges to data quality under the IQA. With respect to the RFA, Congress could expand the universe of regulations to which the RFA's procedures apply. After all, there is no obvious reason why the more rigorous analysis required by the RFA should apply only where large numbers of small businesses are affected. Or Congress could adopt a uniform procedure for determining when a rule has a "significant economic impact on a substantial number of small entities."

In short, the IQA and RFA recognize and attempt to remedy specific shortcomings of the regulatory process, but are constrained in their effectiveness by limited means of enforcement. This too, then, is an area where Congress should consider mechanisms for ensuring that the goals of these statutes are, in fact, attained.

D. Conclusion

In the modern administrative state, courts must necessarily defer to the discretion of administrative agencies if agencies are to fulfill their congressionally delegated task of interpreting and enforcing laws enacted by Congress. But effective judicial oversight is equally necessary to ensure that this discretion does not become a license to fundamentally transform our system of separated powers. To this end, administrative law must strike a delicate balance between congressional delegation, agency discretion, and judicial review. Given the importance of this mission, we must be vigilant in reviewing existing legal regimes and, where necessary, recalibrating the balance. As I have explained, in several areas, the balance has tipped far in favor of agency discretion. It is therefore appropriate to consider whether reforms are needed to increase judicial oversight of the regulatory process while, at the same time, ensuring that Congress and the Executive Branch have the tools necessary to confront and resolve the problems of the day. In my view, those two goals are not inconsistent with, but rather are and should be, mutually reinforcing of one another.

This concludes my prepared written statement. I would be happy to answer any questions you may have.