



THE GEORGE
WASHINGTON
UNIVERSITY
WASHINGTON DC

The APA at 65

Regulatory Policy Commentary

March 1, 2011

by Susan E. Dudley, Director

[The George Washington University Regulatory Studies Center](#)

The [House Judiciary Committee](#)'s [Subcommittee on Courts, Commercial and Administrative Law](#) held [hearings](#) Monday on the [Administrative Procedure Act](#), which will turn 65 in June. The most striking aspect of the hearing was that all witnesses agreed on the need for amendments to the Act to align the procedures by which regulations are developed with the technology and policy issues of concern in the 21st century.

The APA emerged in 1946 as a result of concerns about the growing “fourth branch” of government. It reflected a compromise between a respect for the separation of powers implicit in the Constitution and the perceived need for bureaucratic expertise in developing administrative laws. Arguably one of the most important pieces of legislation ever enacted, the APA has remained largely unchanged for 65 years, despite significant transformation in the organization and scope of government regulatory agencies.

The 1970s in particular brought a dramatic shift in regulation. On the one hand, we saw a [decline in the traditional economic regulation](#) that was at issue when the APA was enacted, which controlled private sector prices, entry, and exit. Scholars at the time persuasively showed that economic regulation tended to keep prices higher than necessary, to the benefit of regulated industries, and at the expense of consumers. This led to the bipartisan movement to [deregulate](#) such industries as airlines and trucking, and abolish regulatory agencies such as the Civil Aeronautics Board and the Interstate Commerce Commission.

On the other hand, a new form of “social” regulation aimed at addressing environmental, health, and safety concerns, was emerging, administered by newly formed agencies, such as EPA, OSHA, NHTSA and the CPSC. Concerns over the burden of these new regulations led President Carter to expand on procedures – begun by Presidents Nixon and Ford – for analyzing the impact of new regulations and minimizing their burdens.

Though Congress has since passed legislation (such as the Regulatory Flexibility Act and Unfunded Mandates Reform Act) aimed at ensuring cost-effective regulatory outcomes, these efforts have been driven largely by the executive branch. Every modern president has continued and expanded the procedural and analytical requirements that began in the 1970s.

Despite these requirements for regulatory impact analysis, the growth in new regulations continues, and with it concerns that we have reached a point of diminishing returns. The

executive and legislative requirements for analysis of new regulations appear to have been inadequate to counter the powerful motivations in favor of regulation. Politicians and policy officials face strong incentives to “do something,” and passing legislation and issuing regulations demonstrate action. Requirements to evaluate the outcomes of those actions (the benefits, costs, and unintended consequences) tend to take a back seat.

So, the Subcommittee’s interest in regulatory reform is welcome. There is abundant scholarship on this subject, including the recommendations made over the years by the [Administrative Conference of the United States](#), which recently reconvened. Unlike the scholarship regarding the traditional forms of regulation in the 1970s, the policy literature today does not uniformly support deregulation but rather examines the incentives provided by different forms of regulation and the resulting benefits and costs to society.

Witnesses agreed that Congress might consider procedural reforms to engage the public more effectively on agencies’ justifications for new regulations, and to improve judicial review. Applied to the most significant regulations, these process changes could improve the empirical accuracy of factual determinations and the rigor and transparency of agencies’ supporting analysis.

Witnesses were unanimous in recommending that Congress improve upon the decisional criteria by which regulatory alternatives are evaluated by codifying the decision requirements currently embodied in [executive orders](#) issued by Presidents Clinton and Obama. The main advantages of creating a statutory obligation for meeting these regulatory impact analysis standards would be to apply them to independent agencies, and make compliance with them judicially reviewable. Congress will also need to decide whether these cross-cutting decisional criteria would supersede or be subordinate to the decision criteria expressed in individual statutes.

Monday’s hearing may be the beginning of constructive dialogue on procedural and decisional reforms that could improve how the U.S. government develops and evaluates regulatory policy.