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Statement of

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Committee on the Judiciary

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Hearing on the Regulatory Improvement Act of 2007

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Madam Chairman and Members of the Subcommittee:

Thank you for the invitation to testify at this Hearing on the Regulatory Improvement Act of 2007**.** I first would like to applaud the Subcommittee's leadership, especially Chairman Sanchez and ranking member Cannon, for their commitment to the issues we will discuss today, and specifically for inviting commentary on the need for a reauthorized and well funded Administrative Conference. For many people, matters of administrative law and process are not the most exciting, but the truth is, nothing is more important than ensuring that our government agencies make effective, efficient, and accountable policy decisions.

I am a Professor of Law at Harvard Law School. I am an expert on administrative law and have written numerous articles on the regulatory and administrative process. I co-author a leading casebook in administrative law, now in its third edition, and I teach

legislation and regulation, administrative law, and advanced administrative law. I am a past Chair of the Executive Committee on Administrative Law for the American Association of Law Schools (AALS) and I have served as and Executive Officer of two subcommittees of the Administrative Law Section of the American Bar Association. I recently concluded an empirical study of judicial review of agency rules, which I will discuss briefly today. The study covers over ten years of challenges to federal agency rules in the United States Courts of Appeals. My co-investigator on that study, Joseph Doherty, Director of the Empirical Research Group at the University of California, Los Angeles Law School, could not be here today, but he will be happy to answer any follow-up questions you might have.

I will briefly describe the results of this study in my testimony today, but more broadly, I will focus on two points: (1) the need for research and study of the administrative process to help Congress engage in meaningful reform; and (2) the benefits to be gained by funding an independent agency like the Administrative Conference of the United States (ACUS) to produce and sponsor such research.

I. The Need for Empirical Research on the Administrative Process

Congressional law reform efforts aimed at making the administrative process more effective, efficient and fair would benefit greatly from research into administrative law and process. The need for empirical data is striking. Many scholars have conducted empirical studies of the judiciary and Congress but there is a relative lack of empirical research on the administrative state. Why does this matter? There are many misconceptions about the administrative process that could lead Congress down the wrong path to reform. Without empirical data, Congress could waste precious time and resources on matters that are not real problems, while ignoring aspects of the administrative process that genuinely require legislative attention.

Given the importance and power of federal agencies, it is surprising how little we know about them. I will focus my remarks on rulemaking, but the scope of the research needed on the administrative state is much broader, and includes every aspect of agency policymaking as well as adjudication.

Agencies promulgate thousands of rules each year; these rules have the force and effect of law, and many of them, as the members of this subcommittee know, have very significant social and economic impacts. The agencies that produce a high volume of rules include the Department of Transportation, the Environmental Protection Agency, the Department of Homeland Security, and Health and Human Services. Federal agencies affect virtually every corner of the U.S. economy and every aspect of social life. They regulate the financial markets, telecommunications and consumer products; they set environmental, health and safety standards; and they establish rules governing immigration, homeland security as well as law and order. Yet our empirical knowledge of the efficiency, effectiveness, and fairness of the agency rulemaking processes remains very limited.

Although scholars, agency officials, judges and members of Congress often call for reform of administrative procedures, the truth is that we lack even the most basic knowledge about how well federal agencies are performing their assigned tasks. For example, we simply do not know whether agency rules are effective; indeed, we have no agreed upon measure for assessing "effectiveness." We do not know whether executive oversight mechanisms like cost-benefit analysis improve rules. We do not even know the extent to which agency rules are fully implemented—most of the analytic requirements Congress and the President imposes on agencies occur *ex ante*, on the front end of the rulemaking process, with very little attention paid to implementation *ex post*. We do not know how long, on average, and across agencies, the rulemaking process takes. Nor do we know how often rules are challenged in court, whether those rules generally survive judicial review, and if they do not, why courts invalidate them.

There are many myths about the administrative process that survive unchallenged for years, and that can lead congressional reform efforts astray. For example, it was long asserted that eighty per cent of EPA rules are challenged in court. This statistic was relied upon by academics, legislators, and journalists, quoted by successive administrators of EPA, and cited before congressional committees as truth. Yet the statistic had no empirical basis—it was made up. A recent empirical study found that no more than thirty-five per cent of the EPA's rules are challenged. What if Congress had reacted to that statistic by altering the EPA's rulemaking process to limit agency discretion, or by adding more procedural steps? This might have hampered or slowed rules unnecessarily. The point is that only with good data can Congress choose wisely where to invest its resources.

Among the things we do not know and ought to know are these: how well rules are implemented and whether they achieve their goals; whether agencies are issuing rules faster than they used to; whether agencies are getting better at rulemaking in the sense that their rules avoid or survive legal challenge; whether there is a difference in performance between executive and independent agencies in terms of the quality or speed of their rulemaking processes; whether agencies are doing a superior job of analyzing scientific data; whether there is a wide variation in rulemaking processes across agencies and whether there are successful approaches that could be adopted more broadly; whether cost-benefit analysis and other ex ante analytic requirements improve the efficiency or effectiveness of rules; and whether there are institutional obstacles to effective agency priority-setting and resource allocation.

II. Results of Freeman and Doherty Empirical Study: Judicial Review of Rulemaking

Purpose of the Study

This study grew out of conversations with staff from the Congressional Research Service during the 109th Congress about this subcommittee's interest in empirical work on the administrative process.[1] The goal of the study is to investigate what happens to legislative rules upon judicial review, including the rate at which they are invalidated in whole or part; the reasons why they are invalidated in whole or part; and any trends in the cases that might be attributable to differences in (1) the agencies generating the rules; (2) the litigants challenging them; or (3) the composition of the judicial panels hearing the cases. While this study is only a beginning, we expect it to yield useful data on the judicial treatment of rules.

Summary

Our data shows that the clear majority (58%) of challenged legislative rules are upheld in their entirety; that nearly 80% are upheld either in whole or part; and that only 11% are invalidated in their entirety.[2] These results are generally consistent over time, across agencies, and unaffected by the composition of the judicial panels reviewing the rules. Using conservative estimates from other studies of the number of "major" or "economically significant" legislative rules promulgated annually,[3] we can estimate that a very small percentage of rules are challenged each year (2.6%), and that a tiny percentage are invalidated in whole (0.3%) or in part (1.1%).

[1] In its earlier Oversight Report, this Subcommittee identified issues that require further study, including (1) public participation in the rulemaking process; (2) Congressional review of rules; (3) Presidential review of agency rulemaking; (4) judicial review of agency rulemaking, (5) the agency adjudicatory process; (6) and the utility of regulatory analysis and accountability requirements; and (7) the role of science in the regulatory process.

[2] Put another way, the data show that 42% of challenged rules are invalidated in whole or part.

[3] These estimates are based on studies of rulemaking by Stephen Croley, Professor of Law, University of Michigan, using totals of rulemakings compiled by RISC and OIRA pursuant to Executive Order 12866, and by GAO pursuant to the Congressional Review Act. Because these agencies collect data about rules using different criteria, there are discrepancies in their totals (e.g., OIRA double counts proposed and final rules so its numbers are likely inflated; GAO counts rules from independent agencies which could inflate its totals compared to OIRA which does not). Taking into consideration the risk of over-counting and under-counting as a function of how a "rule" is defined by each agency, Croley estimated that between 1000-1500 substantive or significant or "core" rules are promulgated each year by federal agencies. We chose the lower number of that range for our calculations above, but even if we halved Croley's estimate to be even more conservative, or used the 500-700 range of "major" rules subject to OMB review annually, the percentage of rules invalidated each year would be extremely small.

Description of Study and Methodology

We acquired data on administrative agency appeals from the Administrative Office of the Courts (AOC) that concluded during the period 1994-2004.[4] The data consists of 3,075 cases, which AOC culled from an initial database of 10,000 cases involving administrative agency appeals from all federal circuit courts over the eleven year time period. AOC culled the 3,075 cases using the following rules: The cases included administrative agency appeals that were terminated in the federal courts of appeal. The cases excluded Board of Immigration Appeals cases and consolidated appeals. A further reduction limited the dataset to include cases that were terminated on the merits and in which an opinion was published. The AOC provided us with certain information about each case, including docket number, names of appellant(s) and respondent(s), the final date of the case and the administrative agency involved. Our research involved (1) determining which of the 3,075 cases were rulemaking cases (the "threshold" decision), and (2) collecting information about each rulemaking challenge.

We randomly assigned one-third of the cases (1,025) to one of three research assistants to read and code. Using the docket numbers and other information in the AOC file, they were able to locate published opinions in 3,071 (99.9%) of the cases. In most of the cases (88%) a single docket number was associated with a single opinion. One-half of the remainder (6%) consisted of two docket numbers consolidated into a single opinion, and opinions that consolidated three or more individual dockets comprised the balance. This process reduced the total number of cases to 2,871. We trained our research team to code cases following detailed written instructions developed through a pilot study conducted in 2005-2006. All data collection was preceded by an analysis of the case in order to answer two threshold questions: whether the case involved a challenge to a notice and comment (legislative) rule; and whether the court reached the merits of the case. Ten percent (n=282) of the cases reviewed crossed the threshold and were analyzed in-depth. These rulemaking cases were coded for information on procedural history, enabling statute(s), the parties to the case, the judges, the basis or bases for the challenge, the outcome and the remedy.

Preliminary Results

Rules from thirty agencies were challenged during the eleven-year period under study. Challenges against two agencies constituted a majority of the cases: the EPA (102) and the FCC (88). There were ninety-two others. Of the others, only the Federal Energy Regulatory Commission (9), the Internal Revenue Service (23), the Federal Aviation Administration (7) and the Department of Transportation (12) had more than four challenges during the period under study.

[4] The database includes cases that were docketed from 1991-2003 and decided between November 1994 and 2004. We thank Pragati Patrick of the AOC and Curtis Copeland of CRS for assistance in obtaining the database. We also thank Mort Rosenberg for helpful consultation. We presented a preliminary version of the results from our pilot study at a forum convened by the Congressional Research Service in September, 2006. For feedback on those results, we are grateful to Peter Strauss, Jeff Lubbers and Randy May.

We allocated case outcomes among five categories, ranging from complete invalidation of the rule to upholding the rule in its entirety, with intermediate categories for rules that are partially invalidated and partially upheld, and for remand. We found that, *on average, 58% of all rules are upheld in their entirety* (Table 1). This varied somewhat among agencies. EPA rules were upheld entirely in 46% of cases, FCC rules were upheld entirely in 57% of cases, and all other agency rules were upheld entirely in 72% of cases. Twenty per cent of rules were completely invalidated (9% were remanded), and another 22% were invalidated in part (16% were remanded).

Rules were typically challenged on four grounds: the rule violates the Constitution (14%); the agency made an error of law (74%); the rule was arbitrary or capricious (62%); or the agency committed a procedural error under the Administrative Procedure Act (11%) (Table 2). FCC rules were challenged most often on arbitrary or capricious grounds (74%), as were EPA rules (68%); other agencies were challenged on this basis 46% of the time. The most common challenge, regardless of agency, was on the basis of interpretation of law: this challenge arose in 80% of EPA cases, 70% of FCC cases and 72% of cases involving other agencies.

Some challenges varied by agency. The FCC was much more likely to be challenged on constitutional grounds (27%) compared to the EPA (3%) or other agencies (14%). EPA rules were more likely to face challenges on APA procedural grounds (15%) than rules from the FCC (9%) or other agencies (8%).

The distribution of challenges to the rules is reflected in the pattern of invalidations, though the rate of invalidation is lower than the rate of challenges. Three per cent of FCC cases were invalidated in whole or part on constitutional grounds (Table 3). Sixteen percent of all challenged rules were invalidated in whole or part on arbitrary or capricious grounds, and a smaller proportion (3%) of rules were invalidated on grounds that the agency rulemaking process violated the APA. When EPA rules are invalidated, whether in whole or part, the most frequent reason cited is that the agency made an error of law (37%); the second most common reason is that the rule is arbitrary or capricious (18%) (Table 3). Likewise, when FCC rules are invalidated, the most frequent reason is error of law (24%), and the second is arbitrary or capricious (19%).

We might expect that the partisan composition of the three-judge panel would influence outcomes of appeals of agency rules. This does not appear to be true. Panels with three Republican-appointed judges were as likely as panels with two or one Republican-appointed judges to uphold rules outright (54%, 57% and 55%, respectively) (Table 7). The panels with three Democratic-appointed judges appear more likely to uphold rules (76%), but the number of cases is too small to arrive at any statistically valid conclusions. In addition, there does not appear to be a systematic partisan effect with regard to the particular agency whose rules are in question. EPA rules are the least likely to be upheld, independent of the panel's makeup.

Appeal outcomes are not correlated with the type of petitioner. Corporate petitioners are no more likely to succeed at invalidating rules than are environmental or other types of petitioners (Table 8). There are slight differences in the percentage of rules that are upheld in their entirety (63% of corporate petitions vs. 52% of environmental petitions) but these differences are not statistically significant.

There is no apparent trend in either upholding or invalidating rules. Some year-to-year variation exists, but these differences are statistically insignificant (Table 9). The percentage of cases in which rules have been upheld in their entirety did not drop below 50% during the eleven-year period under study, and was within the 50-60% range for eight of the eleven years included in the study.

Implications

Our study suggests that the rulemaking process is not in crisis. Agencies are not seeing their rules invalidated at alarming rates, nor are there any disturbing patterns in terms of the alleged "bias" of partisan judicial panels. Nor are we seeing skewed results in terms of the likelihood of success of particular litigants. In the past, some scholars have suggested that one or another agency was having great difficulty defending its rules upon judicial review—one study stated that EPA rules were entirely or mostly upheld only 33% of the time. Our study challenges that picture as inaccurate. Still, there remains a significant percentage of rules that are invalidated in whole or in part, which suggests the need for additional study of why such rules, or aspects of them, fail.

III. The Need for the Administrative Conference of the United States

Over the last dozen years, since ACUS has been defunct, empirical study of the administrative state has occurred only in fits and starts: a few academics have undertaken to do empirical studies (though not in a coordinated way); the CRS has sought to elicit research on behalf of Congress (though this has been mostly ad hoc); the American Bar Association's Administrative Law Section has made some reform proposals; and admirably, Professor Neil Kerwin created the Center for the Study of Rulemaking at American University. Yet none of these organizations or initiatives can replace the Administrative Conference, with its mandate from Congress to study agencies and agency process in a comprehensive and systematic way.

I should make clear that it is unrealistic to expect universities to sponsor systematic research about the administrative state. First, it is an expensive prospect that not all universities are in a position to fund. The study I reported to you today was generously funded by the Deans of Harvard Law School and the UCLA School of Law, and it has cost thousands of dollars so far. Second, empirical work on agency processes is not the kind of research that tends to earns law professors tenure in major law schools, so it is a dangerous thing to undertake in terms of one's future career prospects. And finally, even if a handful of academics are willing to pursue empirical study of the administrative process, there is an absence of any coordinating body at the moment that can make good use of the results, and direct further inquiries.

Both Justice Scalia and Justice Breyer have testified in enthusiastic support of ACUS, which reflects the respect this agency garnered over the years across the ideological spectrum. As Justice Scalia has said, and as Curtis Copeland has emphasized today, there is no realistic substitute for ACUS. The agencies themselves cannot be expected to take a long-term critical view of their own processes, nor are they equipped to consider broader, sometimes government-wide reforms. OMB is not an appropriate neutral body for the study of agency process, especially since the impact of OMB oversight is something that itself requires empirical study.[5] Congressional staffs have neither the time nor the expertise to work on the more technical reform proposals that a body like ACUS might generate; indeed, ACUS could be a valuable resource for them. And outside organizations like the American Bar Association—no matter how meritorious their proposals—do not have the clout to convince agencies to adopt significant reforms. Agencies treat inquiries and reform suggestions from such bodies with suspicion, and tend to react to them defensively. By contrast, ACUS was always viewed as a government insider that could often get agencies to adopt changes voluntarily. It was respected as a nonpartisan expert agency with a balanced membership drawn from academia, the judiciary, and high level private sector and government practice. ACUS was also a valuable asset and source of information for Congress—ACUS worked with congressional committees and committee staffs in the early stages of legislative development.

Moreover, at past funding levels, and at funding levels likely to be considered by this Subcommittee, ACUS is a bargain. Its key strength is in bringing together people of great distinction from both the public and private sectors—to think carefully and systematically about sensible good government reform. As Justice Scalia has only half-jokingly pointed out, many of these people charge very high billable rates; Congress gets their help for free. If it is re-authorized and appropriately funded, ACUS can provide an invaluable service to Congress.

IV. An Agenda for a re-authorized and funded ACUS

While I would not characterize the administrative state as being in crisis, it is operating with a sixty year old manual—the Administrative Procedure Act—which is in need of reform. The APA's rudimentary procedures have been supplemented over time by executive orders, ad hoc statutory requirements and judicial decisions. Agencies now face enormous procedural burdens that should be rationalized and made more efficient. Agencies must also respond to a world that has changed significantly since the APA was passed, a world characterized by technology that could enhance public participation in the administrative process, but that could also overwhelm it. Administrative procedures

[5] OMB/OIRA cannot perform the functions of ACUS because it represents the interests and policy imperatives of the White House. OMB cannot be expected to take a more independent view of agency performance. Moreover, OIRA is charged with overseeing rulemaking, and in particular with enforcing executive orders requiring cost-benefit analysis. Yet this encompasses only part of what federal agencies do. OMB does not oversee agency adjudication, agency grants and contracts, and other important agency actions. OMB is not equipped to engage in programmatic research and reform of the administrative state. It lacks the mandate, the personnel, and the credibility with agencies that ACUS has historically enjoyed.

must also be developed to manage novel forms of public-private partnership, and extensive outsourcing that did not exist when the APA was passed.

Other witnesses on today's panel have offered examples of what ACUS might have helped Congress to do (or avoid) had it been in existence over the last 12 years and I have no doubt that during this time ACUS would have performed a very useful service. I am in full agreement with Mr. Copeland's suggestion, for example, that ACUS could have helped to generate a more balanced and informed discussion of the implications of E.O. 13422, which has attracted a great deal of attention and generated controversy among administrative law scholars and members of Congress. The other panelists have also suggested issues that ACUS might focus on in the future, including electronic rulemaking and public participation, congressional review, informal policymaking through consent decrees, the role of science in rulemaking and a host of other issues. I agree with these as well. I wish only to underscore that I believe ACUS could be the incubator for the next generation of administrative law research and I would suggest two areas in particular that in my view would benefit from careful study.

One of the issues that a re-authorized and funded ACUS should focus on is government outsourcing. Private entities increasingly perform what we traditionally view as government functions, including some functions associated with the military, prisons, and national security. Questions about the effectiveness and efficiency of outsourcing have arisen in the context of the response to hurricane Katrina and the war in Iraq. The trouble is that such contracts can escape effective oversight. Private providers have contractual obligations vis-à-vis the government, but their actions typically fall outside of administrative law protections, process and regulation. How, if at all, should we conceive of these actors in administrative law? Is there a need for administrative law reform to address the issues raised by contracting out? This is a topic of considerable relevance at the moment, and it will only become more important over time.

The second area where ACUS could direct much needed research is the reconciliation of the principles of administrative law with the imperatives of national security. Like other agencies, the various agencies within the Department of Homeland Security (DHS) undertake administrative processes and promulgate rules. However, unlike the other agencies, the DHS has not, perhaps understandably, been subject to commensurate scrutiny or cost-benefit analysis. How are the administrative law principles of transparency and accountability, fairness and effectiveness, to be reconciled with national security interests? Is the APA the appropriate framework for dealing with contemporary matters of national security? These are not easy questions to answer but ACUS could provide a forum for their consideration. These are among the next generation of issues that ACUS might profitably explore.

Finally, a relatively small financial investment in ACUS could lead to significant cost savings down the road by directing Congress to high priority issues that are most in need of reform, and directing Congress away from taking costly steps that may be unnecessary. This concludes my remarks. I would be happy to respond to any questions that you might have.

Appendix

Judicial Review of Agency Rules: An Empirical Analysis

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TABLES

Table 1. Appeal outcome by agency type.

Outcome	Agency			
	EPA	**FCC**	**Other**	**Total**
Invalidated	14%	9%	11%	11%
Invalidated & Remanded	13%	9%	5%	9%
Invalidated in part, Upheld in part, & Remanded	22%	17%	9%	16%
Invalidated in part, Upheld in part, no Remand	6%	8%	3%	6%
Upheld	46%	57%	72%	58%
N	102	88	92	282
Column totals may not equal 100% due to rounding				

Table 2. Basis for challenging the rule

		Rule not within agency's authority		Rule fails substantive review			Court unable to review	Agency failed to follow relevant procedural requirements		
Agency	**N**	**Constitutional**	**Interp. of Law**	**A/C**	**SE**	**Other SOR**	**Insuff. Info**	**Notice Insufficient**	**APA**	**Other Statutory rulemaking requirements**
EPA	102	3%	80%	68%	7%	1%	1%	18%	15%	12%
FCC	88	27%	70%	74%	6%	3%	1%	10%	9%	11%
Other	92	14%	72%	46%	14%	1%	0%	18%	8%	8%
Total	282	14%	74%	62%	9%	2%	1%	16%	11%	10%

Table 3. Reasons for invalidating the rule

(Includes both complete and partial invalidations)

		Rule not within agency's authority		Rule fails substantive review			Court unable to review	Agency failed to follow relevant procedural requirements		
Agency	**N**	**Constitutional**	**Interp. of Law**	**A/C**	**SE**	**Other SOR**	**Insuff. Info**	**Notice Insufficient**	**APA**	**Other Statutory rulemaking requirements**
EPA	102	0%	37%	18%	1%	0%	12%	6%	6%	3%
FCC	88	3%	24%	19%	0%	1%	5%	3%	2%	0%
Other	92	1%	13%	10%	3%	0%	5%	3%	1%	2%
Total	282	1%	25%	16%	1%	0%	7%	4%	3%	2%

Table 4. Chevron Step 1 and Step 2 analyses* and outcomes by agency

		Overturn		Uphold	
Agency	**N**	**Chevron Step 1**	**Chevron Step 2**	**Chevron Step 1**	**Chevron Step 2**
EPA	102	28%	6%	16%	51%
FCC	88	15%	8%	22%	41%
Other	92	8%	5%	17%	39%
Total	282	17%	6%	18%	44%

*Categories not mutually exclusive due to multiple Chevron analyses in individual rule challenges.

Table 5. Reasons for upholding the rule

		Rule within agency's authority		Rule survives substantive review			Court able to review	Agency followed relevant procedural requirements		
Agency	**N**	**Constitutional**	**Interp. of Law**	**A/C**	**SE**	**Other SOR**	**Suff. Info**	**Notice was Sufficient**	**APA**	**Other statutory rulemaking requirements**
EPA	102	3%	49%	39%	3%	1%	3%	11%	9%	6%
FCC	88	15%	49%	54%	5%	3%	4%	4%	6%	11%
Other	92	9%	47%	32%	9%	1%	1%	11%	5%	4%
Total	282	9%	48%	41%	6%	2%	2%	9%	7%	7%

Table 6. Outcome of challenge by basis for challenge

Basis For Challenge

	Rule not within agency's authority		Rule fails substantive review			Court unable to review	Agency failed to follow relevant procedural requirements		
Outcome of Challenge	**Constitutional**	**Interp. of Law**	**A/C**	**SE**	**Other SOR**	**Insuff. Info**	**Notice was insufficient**	**APA**	**Other statutory rulemaking requirements**
Invalidated	5%	11%	7%	8%	0%	0%	11%	13%	7%
Invalidated & Remanded	3%	8%	7%	0%	0%	50%	9%	7%	0%
Invalidated in part, Upheld in part, & Remanded	13%	20%	24%	36%	0%	0%	32%	20%	24%
Invalidated in part, Upheld in part, no Remand	15%	7%	7%	4%	0%	50%	9%	0%	7%
Upheld	65%	54%	55%	52%	100%	0%	39%	60%	62%
N	40	210	176	25	5	2	44	30	29

Table 7. Percentage of cases where rules upheld in entirety, by agency and partisan composition of 3-judge panel					
Agency	**Partisan composition of 3-judge panel**				
	3R 0D	**2R 1D**	**1R 2D**	**0R 3D**	**Total**
EPA	38%	51%	37%	67%	46%
FCC	47%	51%	65%	80%	57%
Other	84%	69%	67%	100%	72%
Total	54%	57%	55%	76%	58%
N	46	117	94	17	282
F	3.86	1.72	3.92	0.65	6.80
Prob>F	.03	.18	.02	.54	.00

Table 8. Appeal outcome by petitioner type.				
	Petitioner Type			
Outcome	**Other**	**Corp**	**Enviro**	**Non-Profit**
Invalidated	13%	9%	12%	20%
Invalidated & Remanded	6%	10%	10%	20%
Invalidated in part, Upheld in part, & Remanded	17%	12%	24%	13%
Invalidated in part, Upheld in part, no Remand	7%	6%	2%	0%
Upheld	56%	63%	52%	47%
N	109	116	42	15
Chi-square=11.23, DF=12, p=.51				
Column totals may not equal 100% due to rounding				

Table 9. Percentage of cases that are upheld in entirety, by year of final date.		
Final Date	**% Upheld Outright**	**Number of Cases**
1994	56%	9
1995	65%	26
1996	70%	30
1997	56%	27
1998	69%	29
1999	56%	18
2000	55%	31
2001	52%	31
2002	52%	31
2003	50%	24
2004	54%	26
Total	58%	282