Chapter 2

Rulemaking

Most descriptions of rulemaking procedure begin with the publication of a notice of proposed rulemaking and end with the publication of the final rule. In reality, however, the rulemaking process really begins when an agency considers whether to propose a rule, and it may not end until there has been judicial review of the promulgated rule. This chapter explains each of the steps of the rulemaking process in chronological order. It covers the initiation of rulemaking, writing the rule, advocacy by interested parties, the notice and comment period, and judicial review.

Take Note

Most agencies are engaged in informal rulemaking, which, as the last chapter discussed, involves giving notice, inviting written comments, and justifying the rule in a statement of basis and purpose. 5 U.S.C.A. § 553. The rulemaking process, however, is more complex than reference to section 553 would suggest. First, there has been judicial interpretation of section 553, which has imposed additional procedural obligations on agencies. Second, an agency may have to utilize procedures imposed by sources other than the APA. The agency’s mandate may impose additional procedures, such as a required oral hearing or the opportunity to cross-examine persons submitting information. In addition, statutes like the National Environmental Policy Act (NEPA), the Paperwork Reduction Act, and the Regulatory Flexibility Act may impose additional procedures if the rule will have certain effects. Third, the agency may wish to take advantage of certain mechanisms for developing rules, which entail special procedures. For example, an agency may desire to develop a rule through consensus-building among interested parties. A procedure for this exists called “regulatory negotiation.” Or an agency may want to obtain the advice of outside persons before proposing a rule. If an agency utilizes an advisory committee, for example, it must comply with the Federal Advisory Committee Act (FACA), which regulates the formation and operation of such committees. 5 U.S.C. App. II. Fourth, executive branch agencies must comply with executive orders issued by the President, such as E.O. 12,866, which required agencies to prepare a “regulatory impact analysis” for any significant regulatory action. In order to comply with E.O. 12,866, an agency must submit its impact statement for approval to the Office of Information and Regulatory Affairs (OIRA), an office in the White House, which has the function of monitoring the agency’s compliance with the executive order.
Finally, the rulemaking process is impacted by the nature of the internal procedures, incentives, and management methods used by an agency. See Thomas O. McGarity, Some Thoughts On Deossifying The Rulemaking Process, 41 Duke L.J. 1385 (1992) (describing the complications of the rulemaking).

The following text, problems, and secondary materials will introduce you to some of the complexity of the rulemaking process. Although this complexity makes the rulemaking process more difficult to understand, the complexity is unavoidable for those who practice administrative law. Indeed, it is what makes rulemaking a particularly interesting area of administrative law in which to practice.

A. Rulemaking Initiation

A number of events can prompt an agency to propose a rule. The agency may act pursuant to a statutory command, in response to staff recommendations, as a result of a rulemaking petition from an interested person, or from political pressure from the legislative or the executive branches. This section considers how an agency initiates the rulemaking process and how members of the public can influence an agency’s rulemaking agenda.

1. Sources of Proposed Regulations

Often a statutory mandate requires an agency to adopt rules to protect safety (such as the Occupational Safety and Health Act and the National Highway Traffic Safety Act) or to adopt rules in the public interest, convenience, and necessity (such as the Federal Communications Act). These broad requirements provide substantial discretion to agencies to determine what activity, if any activity, needs to be regulated.

The question then becomes what influences the agency in the exercise of that discretion? There are both bottom-up and top-down approaches. From the bottom up, rules often begin with a staff recommendation. Staff recommendations can arise in several ways. First, staff members may suggest that a rule is necessary when they identify problems that the agency should address. In a health and safety agency, for example, regulatory proposals may be based on new scientific research, regulatory developments in other countries, or recommendations by private standard-setting organizations. In addition, the agency’s enforcement efforts will produce information that can be used to determine how well existing regulations are being met and what aspects of the regulations are not working or are unrealistic. Finally, the agency might have a formal system of priority setting that identifies potential rulemaking subjects and ranks them according to their importance. This process would identify candidates for rulemaking on an on-going basis.

The public can also become a bottom up source for proposed regulations by lobbying an agency and/or filing rulemaking petitions. The APA provides that “[e]ach agency shall
give an interested person the right to petition for issuance, amendment, or repeal of a rule.” 5 U.S.C.A. § 553(e).

Probably the most common top-down approach is legislation requiring specific regulations, often by a particular time or upon the occurrence of certain events. For example, the Clean Air Act Amendments of 1990 created the acid deposition control program to attack the problem of acid rain. Part of that law required EPA to “promulgate, not later than 18 months after November 15, 1990, a system for issuing, recording, and tracking [the] allowances [that authorize emissions of acid rain precursors], which shall specify all necessary procedures and requirements for an orderly and competitive functioning of the allowance system.” 42 U.S.C.A. § 7615b(d). See Jacob E. Gersen & Anne Joseph O’Connell, Deadlines in Administrative Law, 156 U. Pa. L. Rev. 923 (2008).

Congress also has other tools it can use to cause an agency to propose a rule. An agency may do so in order to avoid a critical legislative investigation prompted by complaints from statutory beneficiaries. Most administrators wish to avoid answering hostile questions before the television cameras in a congressional hearing concerning the failure to respond to a problem considered important by a legislative committee. As further motivation to act, Congress can threaten to reduce the agency’s budget or to attach an appropriations amendment that limits future agency action. Richard J. Pierce & Sidney A. Shapiro, Political & Judicial Review of Agency Action, 59 Tex. L. Rev. 1175, 1198 (1981).

The reverse is also true. Congress can block agency efforts to start or continue a rulemaking by legislation, often using an appropriations rider, which prohibits spending money on such an effort. See Neal E. Devins, Regulation of Government Through Limitations Riders, 1987 Duke L.J. 457; Sandy Zellmer, Sacrificing Legislative Integrity at the Altar of Appropriations Riders, 21 Harv. Envtl. L. Rev. 457 (1997). Congress can also rely on the non-legislative methods, mentioned earlier, to encourage an agency not to pursue a particular regulation or to change the content of that regulation.

Likewise, the White House can prompt an agency to start a regulation or influence it not to do so. The Clinton White House was notable for the President’s hands on approach to instruct agencies to propose a regulation. See Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2290 (2001). In the George W. Bush administration, the Office of Management and Budget (OMB), a White House office, issued a series of “prompt letters” recommending that agencies undertake a particular rulemaking process. See John D. Graham, Saving Lives Through Administrative Law and Economics, 157 U. Pa. L. Rev. 395, 461 (2008). This practice has been continued in the Obama administration. See OIRA Prompt Letters, available at http://www.reginfo.gov/public/jsp/EO/promptLetters.jsp. The White House also seeks to stall regulatory efforts or to affect the content of proposed regulations, as we will take up later in this chapter.

Acting indirectly through legislators or executive officials, lobbyists representing a segment of the “public” can generate political heat that triggers the top-down approach. The involvement of the White House and Congress is to be expected as agencies operate
in a political environment and are subject to oversight by elected officials. In fact, this is a hallmark of all regulatory agencies, whether they are national, state or local. Industry and business groups, as well as public interest and environmental groups, do both types of lobbying. Regulators must cope with the political environments in which they find themselves, and political influence is a way for lawyers (by contacting elected officials) to achieve the client’s objectives, whether it is to promote or stymie regulation or to affect its content. For this reason, “administrative law is ‘legal civics,’ no more, no less.” Ernest Gellhorn & Glen O. Robinson, Perspectives on Administrative Law, 75 Colum. L. Rev. 771, 798 (1975) (attributing the phrase "legal civics" to professor Frank C. Newman).

Once an agency decides to initiate a rule, it must publish that information in the semi-annual Regulatory Agenda. See Executive Order 12866, 58 Fed. Reg. 51735 (1993) (presidential order requiring the Regulatory Agenda). The agenda appears twice a year and contains a description of the regulatory initiatives that an agency intends to take during the next six months, as well as a status report on previously described initiatives. The White House makes the agenda available to the public on the Internet: http://www.reginfo.gov/public/do/eAgendaMain.

Food for Thought

EPA, OSHA, and other health and safety regulators have been criticized for relying on ad hoc staff recommendations for proposed rules instead of employing a priority-setting process that ranks different regulatory proposals, particularly concerning environmental, health, and safety risks, by their significance. E.g., Stephen Breyer, Breaking the Vicious Circle: Toward Effective Risk Regulation 1–29 (1993); Sidney A. Shapiro & Thomas O. McGarity, Reorienting OSHA: Regulatory Alternatives and Legislative Reform, 6 Yale J. on Reg. 1, 15–18 (1989). Agencies have been slow to adopt priority setting, in part because regulatory problems are difficult to rank. Administrators often have limited information about such problems, and for that reason, it is difficult to know which risks are the most significant. Moreover, administrators are reluctant for political reasons to admit that some problem is less important than other problems. Regulatory beneficiaries will dislike an agency’s decision to ignore their problem, and legislators who represent such persons are likely to make this displeasure known to the agency. Shapiro & McGarity, supra, at 18–20. Can you think of other reasons why an agency would be reluctant to adopt a priority setting process?
2. Lobbying

**Hypo 2-1: Lobbying the Agency**

The following problem is based on EPA's regulation of pesticides manufactured by biotechnology. Agricultural researchers using biotechnology have the potential to create biodegradable microbial pesticides derivable from bacteria, viruses, and fungi that can synthesize toxins poisonous to specific insects. Biotechnology can also be used to transfer a pesticide-producing gene into a plant to improve its natural defense mechanism.

Before new “pesticides” can be sold, the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) requires that the manufacturer obtain a “registration” or a license from EPA. FIFRA defines the term “pesticide” very broadly to include any substance “intended for preventing, destroying, repelling, or mitigating any pest,” or “intended for use as a plant regulator, defoliant, or desiccant.” To register a pesticide product, a manufacturer must demonstrate, among other requirements, that the pesticide will “perform its intended function without unreasonable adverse effects on the environment.” To support the registration, a manufacturer must generally conduct field tests and experiments. For this purpose, FIFRA authorizes EPA to issue an “Experimental Use Permit (EUP).” As you might imagine, obtaining one of these permits can be expensive and time consuming.

EPA has promulgated a rule that exempts small-scale (10 acres or less) field tests of chemical pesticides from this requirement. The agency has refused to broaden the rule to exempt from the EUP requirements small-scale field tests of pesticides produced by biotechnology, because not enough is known about the environmental hazards of such products.

(a) Imagine that you work for a law firm that represents a biotech company. The company foresees that it will wish to engage in a number of small-scale tests of bio-engineered pesticides, and it believes that the stringent requirements for EUPs, however appropriate in the beginning of biotechnology, are no longer necessary or called for. Armed with studies showing no environmental injuries and only one uncontrolled environmental release (with no untoward effects) out of hundreds of field tests, the company asks your firm to get EPA to amend its rule. What should your firm do?

(b) Assume that someone in EPA told someone in the National Wildlife Federation (NWF) what that law firm was doing. You work as one of NWF’s lawyers. What would you advise the organization to do?
Hypo Materials

INITIATING AGENCY ACTION: COMMENTS OF PATRICIA BAILEY


The first thing to do is to think about what you’re trying to do. Agency actions are taken pursuant to statutes and regulations or congressional oversight indictments. And in that respect, they are making legal decisions. But that is the only respect in which you can call a lot of these decisions legal. While regulations and statutes are at the foundation of agency action, decisions that are being made are what government should do, not really so much what the government is compelled to do by the statute. And so you have to remember, I think, when you go forward to do battle with the government agency, that an agency is not a courtroom. . . .

These people are making policy decisions. . . .

Getting the agency to act in a certain way requires certain policy advocacy skills. And in no particular order, I would say that those skills are an ability to understand the agency’s problem, to have a fairly firm grip on the legislative process, the ability to deal with the political environment that the agency finds itself in, and an understanding of basic policy analysis tools that most all agencies use. The final skill would be, of course, to know when none of these other skills would work, and to know what to do then.

Let me elaborate a little bit. Let’s say that you are dealing with an agency where a decision is going to be made and a proposal has already been made about it. I think that there is no need to come whining to the agency that some policy or decision that they make is going to harm your client or harm consumers or do harm to someone. Because almost any decision that an agency makes is going to harm someone. Allegation without more does not surprise them and does not cause them to change course.

You have to know what the agency’s mission is, what its purpose is, what its causes are. And that may enable you to argue that whatever action it is that they are proposing to take will damage their own interests. This is often a good tactic to take, because, hopefully, you can get them to see that whatever it is you want them to do is in their own best interests, based on your understanding of what they have been told to do and what they are trying to do. And at the same time, don’t ever try to conceal your own self-interest, because your reasons from the outside are inherently suspect.

If you understand an agency’s position, you may discover that what is primary for the agency is really secondary or even unimportant to you. But what may be crucial to you is only secondary for the agency. If you can look at it that way, you may be able to get
something that is very important to you eliminated or added, whatever your interest is, in a way that will enable the agency to deal with the problem without compromising its own case. A 100% win is not attainable. It is probably a waste of money to pursue, and unwise in the end.

Now, regardless of how serious and significant the issue may be, the decision reached will be based largely on the material generated at the staff level by the staff. To be most effective, input of data and arguments from outsiders must be made at that level. It will make less and less of an impact as a matter for decision moves up the chain.

I cannot tell you the number of people I know who want to come in and talk to the Secretary of Commerce about a matter that somebody has said in the regulatory agenda he’s going to make a decision on this week. The problem, however, is that it is too late, it is just too late to do that.

You have to educate yourselves about the agency’s normal procedures. And all government agencies have the same kind of modus operandi. They have these lengthy in-depth analyses by the stack, but somewhere—and you should find out where—somebody is responsible for making an overall synthesis of these arguments so that it tells a story that makes sense to somebody. And then there’s going to be a summary at the top for the people at the highest levels of the decision chain. So you should prepare your papers in the same format.

Understand that once the papers leave the staff unit, the decisions made in that unit will not be reversed. The lawyers are not going to reverse anything that the economists have written. And that’s true all across this spectrum. In the end, the arguments of the unit may be rejected, but they’re not going to be reversed by anyone. So you have to get in on the ground floor. You cannot risk missing out at that level.

I would say, partly because of the foregoing, do not gratuitously insult the staff of an agency. What will happen is that most likely the agency will close ranks against you, freeze you out. That is going to be true even if you have a pretty good case or an argument. I have seen it happen a lot. I call it the “New York lawyers’ syndrome.” It is sort of, you know, “These people are really not very bright. They’re not very something.” They have an animosity toward my client, born surely of their ignorance. And it could as well be called “the Chicago’s economist syndrome” or “the cumulus single-minded public advocate approach.” There is a way not to deal with these things. In court you can go in and make light of somebody else’s argument. But to try that in an agency; you’re on your way out.

Now I would say, try to understand the political environment that the agency is involved in. Don’t talk about unelected bureaucrats with arbitrary unchecked power; that is not how it seems to them. With OMB (The Office of Management and Budget) on one shoulder and the White House on another and congressional oversight investigative appropriations committees, agency constituents—whomever they may be—labor, agriculture, business, and the media. [T]he media is always there, disclosing things, commenting on
things, criticizing them and subjecting them to ridicule. It doesn't seem to [the agencies] like they have unchecked power. So you should keep in mind when you're urging an agency to take a certain kind of action how it is going to appear to the significant others that surround that agency. Because that is the way that agency will be looking at it.

I would also say that if your views are an anathema to some of those people that you are trying to persuade, if you represent Exxon and you're trying to deal with the EPA on oil spill regulation or something, what you might try to do is to form a coalition and get someone else to make your argument. . . .

It is helpful if you know the rudiments of policy analysis—cost/benefit analysis, risk assessment, knowledge of market forces and all that stuff. All agencies talk a lot about that now. And actually these are useful tools. . . .

INITIATING AGENCY ACTION: COMMENTS OF CORNISH HITCHCOCK


[I have] six observations and rules of thumb on how to influence agencies. . . .

The first one is, knock on every door. What that means is look for various supporters when people might be interested in whatever form. People in Congress might be interested to the extent that they are willing to introduce legislation. People at the agencies may be interested in the subject matter. People in the news media may be interested if it is a good story. Whatever door may be open, try it.

The second rule of thumb is look for allies. That is important for several reasons. One is political. The more friends you have, the more people you have saying, “This is a good idea,” the more likely you are to achieve the goals. The second reason that this rule is important, particularly if you represent groups like ours, is that it provides a way to get empirical data to bolster your case. . . .

The third rule of thumb is read the newspapers. Now why do you do that? The reason is because it is important in terms of learning what signals the administration, the agency, and political higher-ups are sending. What are they looking for? What is the policy? How does your particular proposal comport with the overall regulatory policy? How does it fit in? What are the signals that are being sent? What are the things that the agency, the staff is going to be asked when they come forward with the recommendation?

The fourth rule of thumb (which is sort of related to the last rule of thumb) is know your audience. This operates at several levels. . . . It also deals with something that lawyers seem to have trouble getting the knack of, and I think it reflects on legal training, which
tries to teach you how to be a litigator but not necessarily how to influence agencies or Congress. One thing you have to know is that in the agencies, the Bureau of Economics gets the economic issue, the General Counsel’s office looks at the legal issue, things get farmed out, and you have to make sure that the comments are structured so that they will be considered by professionals with different backgrounds, not all of whom respond to legal points. . . .

The other principle in terms of knowing your audience involves comments in rulemakings, that is, sounding the themes that the Secretary or the Administrator or the administration generally is interested in sounding. As your policy proposal works its way into the system, you can put in arguments that this will achieve the following three goals in the state of the union message or whatever else you want to use as your jumping off point. And that needs to be reflected in your writing.

You also need to keep in mind a broader audience: Congress, the press, the public at large. You get calls from the Hill or from the news media. What are you people doing? What are you saying? If you have a ten or twenty page statement with all of the material in there, readily understandable, you are going to accomplish a lot.

The point I made a moment ago about lawyer-training is that a lot of time lawyers think of doing comments pretty much as if they were writing a brief to a court. However, it is a different exercise. Agency practice is much more like congressional practice. Your focus really has to be to persuade the agency, whoever may be reading it, why the world would be a better place if your proposal is enacted. And that is a different exercise than trying to persuade an appellate court that case A is really distinguishable from case B, or that the court is compelled to rule in your favor on the basis of case C. That is what litigation is about.

Point number five is read the rules. You need to know to what extent you can talk to the staff. When do the ex parte rules drop like an iron curtain across your ability to communicate and provide additional information? What are the chances for expediting it? . . .

And finally a point on style in terms of writing comments. I have expressed it in the outline this way: If you can't think of something nice to say, say it anyway. What that means is there will be times when there is a proposal that comes from an agency that you think is truly dreadful; there is the temptation to say it is truly dreadful. And that may be good if you're talking to the news media who want to understand whether something is good or bad—nuanced distinctions don't always get into the coverage.

Points for Discussion

a. Who Should You Contact?

Who at EPA should you contact on behalf of your client? Should you contact the Administrator or someone else in the administrator's office? With whom in EPA should
you speak? Do you want to talk to the agency's lawyers? Or should you contact biologists or other scientists who would have knowledge about the safety of biodegradable microbial pesticides? Should you speak to the scientists yourself or should you have scientists in the company speak to EPA scientists? If the latter, what would you do as the company's lawyer to prepare the scientists for such a meeting?

In thinking about the answer, you should take a look at the EPA’s organization chart and click on the Office of Administrator. See [http://www2.epa.gov/aboutepa/epa-organizational-structure](http://www2.epa.gov/aboutepa/epa-organizational-structure). Who in the Office might be advisable to contact? Or should you contact someone in one of the lower EPA Offices, which are also listed as part of the overall organization chart. One of the choices is the Office of Chemical Safety and Pollution Prevention. If you click on the name, it will carry you to the Office’s website, which allows you to then click on “Organization chart.” See [http://www2.epa.gov/aboutepa/organization-chart-office-chemical-safety-and-pollution-prevention-ocspp](http://www2.epa.gov/aboutepa/organization-chart-office-chemical-safety-and-pollution-prevention-ocspp). Which of the offices appear to be the one that might be responsible for proposing the rule that the biotech company seeks?

b. Preparing for the Meeting

How should you prepare for such a meeting or how should you prepare company scientists? What lessons can you take from Patricia Bailey and Cornish Hitchcock about the nature of the arguments you or they should employ?

c. Lawyers and Politics

As we mentioned, and as the excerpts also relate, a lawyer’s advocacy role is not limited to talking with agency personnel; advocates will reach out to elected officials and seek their assistance. Tom Susman, a former chair of the Administrative Law and Regulatory Practice Section of the American Bar Association, has noted that such political contacts have become an important aspect of agency practice:

Politics defines relationships among people—and among institutions—especially governmental institutions. Politics is thus irrelevant, or peripheral, only in the most focused, structured, and formalized proceeding—like a hearing room without a jury. . . .

Joseph Goulden, in The Superlawyers, saw this as the dark side of Washington law practice and characterized the exercise of the lawyer’s art of influencing government decisionmaking a violation of the public interest. Goulden sold a lot of books but missed the point. Our system of checks and balances—which includes in Washington many cross-checks and counter-balances—works on many levels, in many ways.


In Cornelius M. Kerwin & Scott R. Furlong, Rulemaking: How Government Agencies Write Law and Make Policy (4th ed. 2010), the authors explain why rulemaking inevitably involves lobbying and politics:
Rulemaking refines, and in some instances defines, the mission of every government agency. In so doing, it provides direction and content for budgeting, program implementation, procurement, personnel management, dispute resolution, and other important governmental activities. Rules provide specific, authoritative statements of the obligations the government has assumed and the benefits it must provide. It is to rules, not statutes or other containers of law, that we turn most often for an understanding of what is expected of us and what we can expect from government. As a result, intense political activity surrounds the contemporary rulemaking process and effective political action in America is no longer possible without serious attention to rulemaking.

Id. at xi. How does the authors’ claim help explain Tom Susman’s assertion that “politics touches . . . most aspects of Washington lawyering”?

Should lobbying be a normal and expected, even desirable, part of public law practice, or are such activities nothing more than influence peddling? Do you think state or local administrative law practice is different?

Food for Thought

The level of lobbying concerning important rules has expanded into sophisticated public relations campaigns, among other tactics, which seek to delegitimize an agency’s efforts in public opinion. Professor McGarity explains:

A substantial body of administrative law scholarship stands for the proposition that policymaking in administrative agencies is not confined to the formal structures of administrative law as envisioned by the drafters of the Administrative Procedure Act. This Article suggests that in this era of deep divisions over the proper role of government in society, high-stakes rulemaking has become a “blood sport” in which regulated industries, and occasionally beneficiary groups, are willing to spend millions of dollars to shape public opinion and influence powerful political actors to exert political pressure on agencies.

Thomas O. McGarity, Administrative Law As Blood Sport: Policy Erosion in a Highly Partisan Age, 61 Duke L.J. 1671, 1671 (2012). McGarity notes that former SEC Commissioner Arthur Levitt referred in 2010 to federal regulation as a “‘a kind of blood sport’” in which the regulated industries attempt “‘to make the particular agency” promulgating an unwelcome regulation “‘look stupid or inept or venal.’” Id. at 1681.

The significance of such efforts, McGarity explains, is that it removes decision-making to more political arenas, in which agency actions can be stopped or modified without the more deliberative and evidentiary processes that are used in administrative law to arrive at an appropriate decision.

If Professor McGarity’s diagnosis is correct that rulemaking is becoming more “political” and less “legal,” is this result a good or bad thing for the country? Why?
3. Petitions for Rulemaking

As indicated earlier, one of the ways the public can initiate rulemaking is through a petition for rulemaking. One should not think of this as an alternative to lobbying, however. Rather, filing such a petition may be part of a total lobbying strategy.

As noted earlier, the APA provides that “[e]ach agency shall give an interested person the right to petition for issuance, amendment, or repeal of a rule.” 5 U.S.C.A. § 553(e). The APA does not require any further procedures concerning a rulemaking petition, but an agency’s own mandate might do so. The Toxic Substances Control Act (TSCA), for example, requires that EPA make a decision concerning a petition within 90 days. If EPA grants the petition, it must promptly commence rulemaking, and if EPA denies the petition, it must publish the reasons in the Federal Register. 15 U.S.C.A. § 2620. Agencies can voluntarily adopt procedural rules for the filing and processing of petitions, although most agencies have not done so. Nevertheless, you must ascertain whether there are any applicable rules, or else your petition may not qualify for consideration.

The Administrative Conference of the United States (ACUS) recommended that agencies adopt basic procedures for the receipt, consideration, and prompt disposition of petitions for rulemaking, including procedures for publicizing the address for filing petitions and what should be included in their contents, the maintenance of a public petition file, and a commitment to prompt notice of a petition’s disposition. Recommendation No. 86–6, “Petitions for Rulemaking,” 1 C.F.R. § 305.86–6.

The APA also mandates that “[p]rompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding” and “the notice shall be accompanied by a brief statement of the grounds for denial.” Id. § 555(e). Under section 555, an agency cannot ignore a petition for rulemaking since it must give “prompt notice . . . of the denial” and accompany the notice with “a brief statement of the grounds for the denial.” Thus, filing a petition is a way to force some action out of the agency if it is otherwise reluctant.

If the agency grants the petition and proceeds to rulemaking, no issue for judicial review arises, but if the agency does not respond to the petition within a reasonable time, or if the agency rejects the petition, the petitioner can seek judicial review under the APA.

a. Agency Inaction

Section 551(13) of the APA defines “agency action” to include “failure to act,” and this definition of agency action applies to the judicial review chapter of the APA. 5 U.S.C.A. § 701(b)(2). Moreover, section 706, which addresses the scope of judicial review of agency
action, specifically provides that “[t]he reviewing court shall compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C.A. § 706(1).

As you will see later in this course, when courts review agency action, the court usually has an agency decision to review, and the court can assess whether that decision meets various legal criteria. When, however, the very problem is the absence of an agency decision, it is much harder for courts to review what the agency has (not) done. Usually the agency’s reason or excuse for not making a decision is that, in light of existing responsibilities and priorities, a decision on whether to begin the petitioned for rulemaking has not yet been made. In other words, the agency asserts that because of limited resources and other commitments, it simply cannot make an informed decision yet whether to begin a rulemaking. What is a court to do? It could order the agency to change its relative priorities and to make a decision on the rulemaking within a prescribed period. The difficulty with this solution is that the court is in no position to assess the relative priorities of all the things the agency does. Perhaps the agency’s explanation is in good faith.

**Hypo 2-2: Agency Delay**

In the prior Hypo, the law firm undertook to lobby EPA to change its rule. Let us suppose that at some point the firm filed a petition for rulemaking with EPA to amend its EUP rule to allow small-scale field tests without having to obtain an EUP. Imagine now that two years have passed, and EPA has not responded to the petition. When asked informally, EPA has answered orally and in writing that the petition is pending, but that matters of higher priority—the large backlog of existing pesticides that FIFRA requires EPA to screen for safety—have precluded the agency from determining whether rulemaking is justified for amending the EUP regulation.

How do you assess the likelihood of success of bringing a lawsuit under the APA to force EPA to engage in the rulemaking or at least to respond to your petition?
Hypo Materials

Telecommunications Research & Action Center v. Federal Communications Commission

750 F.2d 70 (D.C.Cir.1984).

Harry T. Edwards, Circuit Judge:

[The Telecommunications Research & Action Center (TRAC) sought judicial review of the FCC's failure to decide whether the American Telephone and Telegraph Company should reimburse ratepayers for certain allegedly unlawful overcharges. These overcharges allegedly occurred in 1978, and TRAC filed a petition with the FCC in 1979 indicating its belief that the overcharges had occurred and seeking FCC enforcement. The FCC issued a Notice of Inquiry seeking public comment on the issue, preliminary to deciding whether or not to take action. Thereafter, over the almost next five years, the FCC took no action.]

Representative Timothy Wirth, Chairman of the Subcommittee on Telecommunications, Consumer Protection and Finance of the House Committee on Energy and Commerce, has twice written to the FCC to inquire about the unexplained delay in agency action. In 1981, FCC officials responded that they expected a staff recommendation that fall. However, no such recommendation was produced. In the spring of 1984, agency officials modified their response and estimated that a staff recommendation would be issued that summer. The agency failed on this commitment, too. Now, in the face of this court action, the Commission has recently indicated that it plans to resolve the matter on or before November 30, 1984.

[Given the clear legislative preference for review of final action, we must be circumspect in exercising jurisdiction over interlocutory petitions. Postponing review until relevant agency proceedings have been concluded “permits an administrative agency to develop a factual record, to apply its expertise to that record, and to avoid piecemeal appeals.” . . .

Claims of unreasonable agency delay clearly fall into that narrow class of interlocutory appeals from agency action over which we appropriately should exercise our jurisdiction. It is obvious that the benefits of agency expertise and creation of a record will not be realized if the agency never takes action. Agency delay claims also meet [the] criteria for our interlocutory intervention—not only is there an outright violation of 5 U.S.C.A. § 555(b)'s mandate that agencies decide matters in a reasonable time, there also is no need for the court to consider the merits of the issue before the agency. Finally and most significantly, Congress has instructed statutory review courts to compel agency action that has been unreasonably delayed. 5 U.S.C.A. § 706(1).

In the context of a claim of unreasonable delay, the first stage of judicial inquiry is to consider whether the agency's delay is so egregious as to warrant mandamus. Although this court has decided several cases involving claims of unreasonable delay, we have not
articulated a single test for when the writ should issue. On reading these cases together, however, one can discern the hexagonal contours of a standard. Although the standard is hardly ironclad, and sometimes suffers from vagueness, it nevertheless provides useful guidance in assessing claims of agency delay: (1) the time agencies take to make decisions must be governed by a “rule of reason”; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not “find any impropriety lurking behind agency lassitude in order to hold that agency action is ‘unreasonably delayed.’”

Because, in the instant case, the FCC has assured us that it is moving expeditiously on both overcharge claims, we need not test the delay here against the above standard to determine if it is egregious enough to warrant mandamus. But in light of the Commission’s failure to meet its self-declared prior deadlines for these proceedings, we believe these delays are serious enough for us to retain jurisdiction over this case until final agency disposition.

In [an earlier case] we announced that: the entire ratemaking procedure in the 1934 Communications Act revolves around a “rule of reason”. . . . It assumes that rates will be finally decided within a reasonable time encompassing months, occasionally a year or two, but not several years or a decade. . . . Complex regulation must still be credible regulation; the delay at issue here threatens the FCC’s credibility. . . . Many of the same considerations that impel judicial protection of the right to a “speedy trial” in criminal cases or implementation of civil decrees with all deliberate speed are not inapposite in agency deliberations. Those situations generally involve protection of constitutional rights, but delay in the resolution of administrative proceedings can also deprive regulated entities, their competitors or the public of rights and economic opportunities without the due process the Constitution requires. In that case we found a four year delay to be unreasonable. In the instant case, the FCC has delayed almost five years on the rate of return inquiry. . . . Even the agency recognizes, at least with regard to the rate of return delay, that “an unfortunately long time has elapsed since [this] matter first appeared.” Whether or not these delays would justify mandamus, we believe they clearly warrant retaining jurisdiction. . . .

As the case indicates, courts are reluctant to engage in any review when an agency has not issued a final decision. In some circumstances, courts may not even engage in review. This subject is treated in Chapter Five.
Points for Discussion

a. Congressional History

Why do you suppose the court included the history of congressional interest in the issue? How do you think that history affects the court's judgment?

b. Potential Remedies

If the court agreed there was unreasonable delay, what sort of remedy should it use? What is the purpose of the court deciding to retain jurisdiction in TRAC?

c. Congressionally Imposed Deadlines

In TRAC, the court notes that “where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason. . . .” Does this mean that when Congress has established a definitive timetable for agency action, the court must enforce the statutory deadline? Or should the court consider all of the factors in deciding how to proceed? The circuit courts are split over this issue. Compare In re United Mine Workers of Am. Int'l Union, 190 F.3d 545, 551 (D.C. Cir. 1999) (“Our conclusion that the Secretary has violated the deadline set forth in the Mine Act does not end the analysis. . . . [W]e must continue our analysis of the remaining TRAC factors to determine whether mandamus is appropriate in this case.”) with Forest Guardians v. Babbitt, 174 F.3d 1178, 1190–91 (10th Cir. 1999) (“when an entity governed by the APA fails to comply with a statutorily imposed absolute deadline, it has unlawfully withheld agency action and courts, upon proper application, must compel the agency to act”). Is there any reason why a court should not enforce a specific statutory deadline?

Why are the courts reluctant to enforce statutory deadlines? Should courts give an agency more time after it has missed a statutory deadline? Other than statutory deadlines, what other mechanisms might Congress use to ensure that agencies adopt regulations in an expeditious manner? Is the only alternative leaving it up to courts to determine what is unreasonable delay? Consider the following recommendation:

Congress should require OSHA to set rulemaking deadlines and then should make those deadlines judicially enforceable. This would permit the Agency to set realistic deadlines, while still holding the Agency accountable. Congress could further assure accountability by providing that Agency-set deadlines could be extended only for good cause and only for congressionally determined intervals. Finally, Congress should provide for judicial review of Agency-set deadlines to prevent OSHA from setting unreasonably long deadlines.

Shapiro & McGarity, supra, at 53–57. Would this recommendation make courts less reluctant to enforce rulemaking deadlines? Or would judges still defer to administrators who claimed that the press of business made it impossible to meet a preset deadline?
If the likelihood of success of a lawsuit is minimal, are there good reasons to bring the suit anyway? Would it be ethical conduct?

**Take Note**

The issue of agency inaction can also arise once a rulemaking has begun but the agency does not conclude it. For example, the Eleventh Circuit in *UMW v. Department of Labor, 358 F.3d 40, 44 (D.C. Cir. 2004)*, overruled a decision by the Mine Safety Health Administration (MSHA) not to finish a rule that had been developed in the Clinton Administration, holding that the agency had failed to offer an adequate explanation for its decision to abandon the rulemaking. This issue also arises in adjudications when complaints have been made to an agency and it has failed to institute the adjudication, or where the adjudication has begun but the agency takes a long time to render a decision. Thus, how courts address the issue of delay in these additional contexts may be relevant to judicial review of agency inaction on petitions for rulemaking.

Note that TRAC is decided by the United States Court of Appeals for the D.C. Circuit. Among courts of appeals, the D.C. Circuit has traditionally been recognized as having relative expertise in administrative law, because it hears so many administrative law cases. There are two principal reasons why so many cases are brought there. First, several statutes require persons seeking judicial review of agency action to bring suit in the District of Columbia. The justification for this requirement is that if only one court will hear cases under that statute, there will not be a possibility of a split among the circuits, which would create confusion as to the agency’s mandate in different parts of the country. Second, even when laws do not require that suits be brought in the District of Columbia, plaintiffs know that they can bring suit there, because it is the principal place of business for the agency.

**b. Denial of a Petition**

Once an agency has denied a petition for rulemaking, one of the obstacles to judicial review is eliminated. The agency has made a decision that can be reviewed. And now there is a new legal issue: is the denial lawful? Answering this question depends upon what laws are applicable and on what basis the agency denied the petition. For example, if the agency denies the petition because, conceding the facts in the petition, the agency does not have the legal authority to adopt the rule requested, the issue is purely legal—does the agency have the authority or not? On the other hand, if the agency denies the petition because its view of the facts is different from the petitioners’ view, then the issue is factual, or perhaps
judgmental. A common basis for denial of a petition could be that the issue is simply not important enough, given the agency’s resources and priorities, to justify rulemaking at this time. Courts are likely to respond differently to these different kinds of justifications.

### Hypo 2-3: Agency Denial of a Petition

Imagine that EPA, badgered by your law firm, has finally responded to your requests and petition for rulemaking to amend the EUP rule; it has denied the petition. It rejects the petition on the following grounds. The current rule requiring individual permits for biological pesticide small-scale field tests has worked well. The lack of injuries and uncontrolled releases are evidence of the current system’s effectiveness. Whatever economic efficiencies might be achieved by exempting small-scale field tests from the EUP requirements would be relatively minor, and the cost to EPA of determining whether such an exemption would adequately protect against uncontrolled releases or injuries would be substantial. Moreover, at the current time (and for the foreseeable future), EPA lacks the resources to undertake such a rulemaking, in light of the resources it is using to assess the safety and effectiveness of the backlog of currently permitted pesticides.

What is the likelihood of getting a court to overturn this decision?

### Hypo Materials

**Arkansas Power & Light Co. v. Interstate Commerce Commission**

725 F.2d 716 (D.C.Cir.1984).

**Harry T. Edwards, Circuit Judge:**

[Arkansas P & L and other coal burning utilities petitioned the ICC to institute rulemaking to collect certain data to implement its responsibilities for approving the rates railroads may charge to so-called “captive” shippers. At the time of the case, the ICC regulated the rates that railroads could charge for the interstate shipment of goods and commodities. The ICC rejected the petition for rulemaking.]

Addressing rulemaking, the ICC observed at the outset that Congress had not evinced any intent to require a rulemaking proceeding. . . . In addition, the ICC observed that annual carrier-by-carrier or commodity-by-commodity elasticity studies—used to determine whether a carrier could improve its profitability on a given route by altering its pricing
structure—would be inconsistent with the design of the . . . Act to minimize the need for regulatory control. Rules and guidelines for gathering and applying a nationwide data base would also be difficult to develop, and the amount of information necessary to develop an avoidable loss data base would be “enormous and enormously difficult to gather.” Along with these negative ramifications of a rulemaking proceeding, the agency considered the positive aspects of case-by-case evolution of standards to apply in implementing the [Act]. It concluded,

making this assessment in individual cases is more productive and efficient than a rulemaking because it will avoid applying a massive reporting burden on carriers which are efficient. . . .

[W]e affirm the Commission’s decision not to engage in rulemaking. . . .

Initially, it is not unreasonable for the ICC to conclude that development of a nation-wide data base is unnecessarily cumbersome—because it would require numerous railroads, operating both efficiently and inefficiently, to produce data that might never be used—and to conclude that case-by-case evolution of standards is most productive and efficient. . . . Finally, the ICC indicates that it will follow adequate procedures in the individual adjudications to enable petitioners, through discovery and otherwise, to obtain the kind of data they seek through rulemaking. Thus, the ICC has explained why rulemaking would be unnecessarily burdensome and how individual adjudications can and will accomplish the same result. Taking the ICC at its word, we perceive no necessity for rulemaking. . . .

Second. As a general proposition, this court will compel an agency to institute rulemaking proceedings only in extremely rare instances. The law in this Circuit makes clear that the scope of review under the Administrative Procedure Act (“APA”) of an agency decision to deny a rulemaking petition is very narrow. Such review is limited to ensuring that the agency has adequately explained the facts and policy concerns it relied on, and that the facts have some basis in the record. Given this very narrow standard of review, there is absolutely no basis on this record to compel rulemaking.

Massachusetts v. Environmental Protection Agency


Justice Stevens delivered the opinion of the Court.

On October 20, 1999, a group of 19 private organizations filed a rulemaking petition asking EPA to regulate “greenhouse gas emissions from new motor vehicles under § 202 of the Clean Air Act.” . . . Fifteen months after the petition’s submission, EPA requested public comment on “all the issues raised in [the] petition,” adding a “particular” request for comments on “any scientific, technical, legal, economic or other aspect of these issues that may be relevant to EPA’s consideration of this petition.” EPA received more than 50,000
On September 8, 2003, EPA entered an order denying the rulemaking petition. The agency gave two reasons for its decision: (1) that contrary to the opinions of its former general counsels, the Clean Air Act does not authorize EPA to issue mandatory regulations to address global climate change, and (2) that even if the agency had the authority to set greenhouse gas emission standards, it would be unwise to do so at this time.

The scope of our review of the merits of the statutory issues is narrow. As we have repeated time and again, an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities. That discretion is at its height when the agency decides not to bring an enforcement action. Therefore, in Heckler v. Chaney, 470 U.S. 821 (1985), we held that an agency’s refusal to initiate enforcement proceedings is not ordinarily subject to judicial review. Some debate remains, however, as to the rigor with which we review an agency’s denial of a petition for rulemaking.

EPA concluded in its denial of the petition for rulemaking that it lacked authority under 42 U.S.C. § 7521(a)(1) to regulate new vehicle emissions because carbon dioxide is not an “air pollutant” as that term is defined in § 7602. In the alternative, it concluded that even if it possessed authority, it would decline to do so because regulation would conflict with other administration priorities. As discussed earlier, the Clean Air Act expressly permits review of such an action. We therefore “may reverse any such action found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”

On the merits, the first question is whether § 202(a)(1) of the Clean Air Act authorizes EPA to regulate greenhouse gas emissions from new motor vehicles in the event that it forms a “judgment” that such emissions contribute to climate change. We have little trouble concluding that it does.

The alternative basis for EPA’s decision—that even if it does have statutory authority to regulate greenhouse gases, it would be unwise to do so at this time—rests on reasoning divorced from the statutory text. While the statute does condition the exercise of EPA’s authority on its formation of a “judgment,” 42 U.S.C. § 7521(a)(1), that judgment must relate to whether an air pollutant “cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare.” Put another way, the use of
the word “judgment” is not a roving license to ignore the statutory text. It is but a direction to exercise discretion within defined statutory limits.

If EPA makes a finding of endangerment, the Clean Air Act requires the agency to regulate emissions of the deleterious pollutant from new motor vehicles. Ibid. (stating that “[EPA] shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class of new motor vehicles”). EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies. But once EPA has responded to a petition for rulemaking, its reasons for action or inaction must conform to the authorizing statute. Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do. To the extent that this constrains agency discretion to pursue other priorities of the Administrator or the President, this is the congressional design.

EPA has refused to comply with this clear statutory command. Instead, it has offered a laundry list of reasons not to regulate. . . . Although we have neither the expertise nor the authority to evaluate these policy judgments, it is evident they have nothing to do with whether greenhouse gas emissions contribute to climate change. Still less do they amount to a reasoned justification for declining to form a scientific judgment. . . .

In short, EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change. Its action was therefore “arbitrary, capricious, . . . or otherwise not in accordance with law.” We need not and do not reach the question whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA’s actions in the event that it makes such a finding. We hold only that EPA must ground its reasons for action or inaction in the statute.

[The] case is remanded for further proceedings consistent with this opinion.

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Points for Discussion

a. Review of Refusal to Initiate Enforcement Proceedings

As noted in Massachusetts v. EPA, the Supreme Court has found that an agency’s refusal to initiate enforcement proceedings ordinarily is not subject to judicial review. See Heckler v. Chaney, 470 U.S. 821, (1985), which you will study in Chapter 5. In light of this decision, it was unclear whether a decision to reject a petition (i.e., not to engage in rulemaking) was likewise not normally subject to judicial review, although the D.C. Circuit had held that this type of decision was subject to judicial review. We will consider the difference between the two situations in Chapter 5.
b. The Remedy

What do you think of the remedy imposed by the Court in *Massachusetts v. EPA*? Why did the Court not order EPA to undertake a rulemaking to regulate greenhouse gas emissions from new motor vehicles? After all, at the end of that rulemaking, the agency (at least in theory) could decide that such emissions do not endanger the environment; that is, they do not cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. In *American Horse Protection Association, Inc. v. Lyng*, 812 F.2d 1 (D.C.Cir.1987), the court also found that the agency’s explanation for not instituting a rulemaking was arbitrary and capricious—not a product of reasoned decisionmaking—and it gave this explanation for not ordering a rulemaking.

The Association seeks an order directing the Secretary to institute rulemaking proceedings. Our cases make clear, however, that such a remedy is appropriate “only in the rarest and most compelling circumstances.” [In another case, we] merely remanded to the agency to inquire into whether changed circumstances called for amendment of the earlier rule, leaving it to the agency to choose the form of inquiry. This remedy is particularly appropriate when the agency has failed to provide an adequate explanation of its denial.

Take Note

We will return to the “arbitrary, capricious, and abuse of discretion” standard of review later in this chapter. See 5 U.S.C.A. § 706(2)(D). You will find that this standard is a basis for review of agency action under a number of different circumstances, in particular of agency rulemaking. Among other obligations, an agency is obligated under this standard of review to “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). How did EPA run afoul of this requirement?

Food for Thought

In *Massachusetts v. EPA*, the agency requested public comment on the petition for rulemaking and received more than 50,000 comments, while in *Arkansas Power and Light*, the agency rejected the rulemaking petition without seeking any public comment. Likewise, EPA did not seek comments in Problem 2–3. How might this affect the level of judicial deference the agency’s decision receives? In *Williams Natural Gas Co. v. FERC*, 872 F.2d 438 (D.C.Cir.1989), which involved a decision not to promulgate a final rule by the Federal Energy Regulatory Commission, the court noted that there is a distinction between:
an agency’s refusal to undertake a rulemaking (reviewable, if at all, under an exceedingly narrow standard), and its decision to terminate a docket after a substantial record has been compiled. In the present case, [t]he agency has issued a lengthy [Notice of Proposed Rulemaking (NOPR)] expressing its tentative conclusions that a change in the regulation is warranted, and it has received numerous comments on the issue from interested parties. Under these circumstances, a court will have a sufficient evidentiary base for determining whether the Commission’s ultimate decision was arbitrary and capricious or in contravention of the statute.

Why might a judge be more reluctant to overturn the denial of a petition when there is no rulemaking record?

B. APA Rulemaking Procedures

1. The Exceptions

Before we turn in detail to the APA procedures applicable to rulemaking, we want to address the exceptions to these requirements. The first step for an agency lawyer is to determine whether the procedures apply at all, and an important step for any lawyer thinking about challenging a rule adopted without notice and comment is to determine whether notice and comment were required.

a. General Exceptions

As mentioned in Chapter 1, section 553 of the APA is the section governing rulemaking. It contains the “notice and comment” procedures applicable to “informal rulemaking,” and it directs persons to sections 556 and 557 if “formal rulemaking” is triggered. Section 553 does not apply to certain kinds of rules: rules involving military or foreign affairs functions and rules involving agency management or personnel, or involving public property, loans, grants, benefits, or contracts. 5 U.S.C.A. § 553(a).

Although some rules may be exempt from section 553, they are not exempt from section 552. While section 552 is often referred to as the Freedom of Information Act (FOIA), which is dealt with in Chapter 8, it contains a general requirement that “substantive rules of general applicability adopted as authorized by law” and “each amendment, revision, or repeal of the foregoing” be published in the Federal Register “for the guidance of the public.” If an agency fails to publish the rule in the Federal Register, section 552 provides that, unless persons have actual notice of the rule, they may not be adversely affected by it.
The idea that military and foreign affairs matters should not be subject to notice and comment rulemaking is readily understandable, although the scope of the exception may be broader than necessary. See generally ACUS, Recommendation 73–5, Elimination of the “Military or Foreign Affairs Function” Exemption from APA Rulemaking Requirements. And not involving the public in rules relating only to an agency’s internal management or personnel likewise seems efficient. The APA, however, also exempts all rules involving public property. This includes rules concerning public lands (i.e., Forest Service, Bureau of Land Management, and National Park Service regulations), loans (i.e., rules about student loans, small business loans, and housing loans), grants, benefits (i.e., Social Security, Medicare, Medicaid, welfare rules), and contracts (i.e., procurement regulations and regulations governing government sales, such as Bonneville Power Administration electricity sales). Why these functions should be exempt from the APA’s procedural requirements is less clear, but the origins of the APA suggest why it happened.

Recall that the explosion of new regulatory programs and agencies during the New Deal, largely in response to the Great Depression, was the motivating force behind the APA. The American Bar Association, representing the businesses affected by the new regulations and agencies, was concerned about government acting on private persons (including businesses) by restricting their ability to do what they wanted. Thus, the focus of the APA and its procedures was from the perspective of the private person who is restricted from doing what he or she wishes. The exceptions from the rulemaking procedures reflect this focus, because when government regulates its own property, or makes grants, loans, or benefits available to persons, or enters into contracts with persons, it is not restricting or imposing its will on the liberty of private persons.

Subsequent history has undermined this focus of the APA, although it has not entirely eliminated it. More recently, the APA has been viewed not only as a source of protection from government action, but also a source of protection for statutory rights. Thus, a Consumer Product Safety Commission rule not only imposes burdens on the regulated businesses, but it also creates protections for consumers. The CPSC, by not fulfilling its legal requirements or by regulating inappropriately, can harm either or both groups, and therefore the APA, and other procedural laws, should protect both groups. See Richard B. Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1669 (1975). The idea that the APA should also protect beneficiary groups undermines the public property, grants, loans, benefits, and contracts exception in section 553. Some commentators and the Administrative Conference of the United States have called for the elimination of the exemption. See ACUS, Recommendation 69–8, Elimination of Certain Exemptions from the APA Rulemaking Requirements; Arthur E. Bonfield, Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts, 118 U. Pa. L. Rev. 540 (1970).
Chapter 2  Rulemaking

Take Note

Responsive to, or reflective of, the changed attitudes, many agencies by regulation have voluntarily waived these exceptions and subjected themselves to section 553’s requirements. For example, the Department of Health and Human Services (then Health, Education, and Welfare) waived the exemption in 1971, see 36 Fed. Reg. 2532 (1971), as did the Department of Agriculture (USDA), see 36 Fed. Reg. 13804 (1971). In 2013, however, USDA revoked its 1971 Policy Statement, indicating that it would no longer voluntarily follow the public participation requirements of the APA relating to public property, loans, grants, benefits, or contracts. When it proposed the revised policy, USDA noted, “When USDA issued the Statement of Policy implementing the 1969 ACUS recommendation, USDA anticipated that “[t]he advantages of implementing the [ACUS] recommendation . . . will outweigh any disadvantages such as increased costs or delays.” USDA has since determined that this is not the case, finding that, in many cases, using the APA’s notice-and-comment procedures necessarily delays the implementation of a program without providing a corresponding benefit.” 78 Fed. Reg. 33045 (2013).

Once an agency voluntarily agrees to comply with the notice and comment rulemaking procedures, it must comply with section 553(b)–(c) until it revokes the previous commitment. See Morton v. Ruiz, 415 U.S. 199 (1974). Congress by statute has also eliminated the exemption for some agencies and programs. For example, the Department of Energy Organization Act eliminated the exemption for that Department and its subdivisions, see 42 U.S.C.A. § 7191(b)(3). Thus, the applicability of the APA’s section 553 may turn on laws outside of the APA itself.

b. Exceptions from Notice and Comment

In addition to the above exemptions from all of section 553, section 553 also contains specific exemptions from the notice and comment requirements for (1) rules of agency organization, procedure, or practice, (2) interpretive rules, (3) general statements of policy, and (4) other rules for which notice and public procedure are impracticable, unnecessary, or contrary to the public interest. This last exception, unlike the previous three, requires the agency to find good cause for invoking this exception and to publish that finding and the reasons therefor with the rule. Each of these exceptions has its own body of law defining the exception, but as a general matter it has been said that exemptions are “narrowly construed and only reluctantly countenanced.” American Federation of Government Employees v. Block, 655 F.2d 1153 (D.C.Cir.1981).

Take Note

For reasons that hopefully will become clearer later, we will put off the “law” concerning interpretive rules and statements of policy until Chapter 4. We will deal with the other exceptions now.
As you read, the “good cause” exception requires an agency to find that notice and public procedure are “impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. § 553(b)(B). The APA’s legislative history offers the following definition of the key terms:

“Impracticable” means a situation in which the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rule-making proceedings. “Unnecessary” means unnecessary so far as the public is concerned, as would be the case if a minor or merely technical amendment in which the public is not particularly interested were involved. “Public interest” supplements the terms “impracticable” or “unnecessary”; it requires that public rulemaking procedures shall not prevent an agency from operating and that, on the other hand, lack of public interest in rulemaking warrants an agency to dispense with public procedure.

Administrative Procedure Act: Legislative History, S. Doc. No. 248 (1946), at 200. “In practice, agencies often apply the ‘impracticable’ ground together with the ‘contrary to public interest’ ground, the two being closely related. Ordinarily, situations potentially covered by these two prongs of the good-cause exemption are those in which advance notice would defeat the agency’s regulatory objective; immediate action is necessary to reduce or avoid health hazards or other imminent harm to persons or property; or inaction will lead to serious dislocation in government programs or the marketplace.” Jeffrey S. Lubbers, A Guide To Federal Agency Rulemaking 95 (5th ed. 2012).

Hypo 2-4: Exceptions from Notice and Comment

Imagine that the Administrator of EPA was called up to the House Agriculture Committee to explain why EPA was deliberately imposing higher food costs on consumers by requiring unnecessary and burdensome paperwork on biotech companies with respect to their pesticides as opposed to chemical companies and their pesticides. When asked, the Administrator was unable to estimate when, if ever, the agency would be able to address the rulemaking requested by the biotech companies. By the end of the hearing, the Administrator, to avoid worse problems, had agreed to address the biotech company’s rulemaking request in an expedited fashion. Back at EPA, the Administrator wants to be rid of this problem. It is not important enough to consume her time or that of other persons at the agency. She directs that the matter be disposed of as quickly as possible.

The program office, on the basis of the materials submitted by the biotech company, remains reluctant to exempt small-scale field tests of biologically engineered pesticides from the EUP requirement altogether, but it believes that EPA could substantially decrease the regulatory burdens for permitting such tests. The application procedure currently required by regulation requires the permit applicant to submit an elaborate application form (together with a $4500 fee) to EPA, which then is reviewed by
EPA, and EPA makes an initial decision within four months, usually imposing specific conditions. In place of this system, the program office suggests adopting a regulation specific to small-scale field tests of biologically engineered pesticides that would include a number of generic conditions to ensure safety. Then, the permit application would merely identify the applicant and the pesticide to be tested, and the applicant would certify that it would follow the regulatory conditions. This application would be deemed granted seven days after receipt unless EPA specifically took action to require an individually tailored permit.

The Assistant Administrator asks the General Counsel whether this regulation could be adopted immediately, without prior notice and comment, under one or more of the APA exceptions to the requirement of notice-and-comment procedures. As an attorney in EPA’s General Counsel’s office, what do you advise?

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Hypo Materials

**American Hospital Assn. v. Bowen**

834 F.2d 1037 (D.C.Cir.1987).

Wald, Chief Judge:

[In 1982, Congress amended the Medicare system to create a method for cost control administered by Peer Review Organizations (PROs), private organizations of doctors that would monitor “some or all of the professional activities” of the providers of Medicare services in their areas. In passing the 1982 amendments, Congress painted with a broad brush, leaving the Department of Health and Human Services (HHS) to fill in many important details of the workings of peer review. The principal function of a PRO is to review for conformance with the substantive standards of the Medicare Act the professional activities of physicians, hospitals, and other providers of health care. The standard of review is whether the services and items provided by the doctor or hospital “are or were reasonable and medically necessary,” and thus whether these activities satisfy the standards for federal government reimbursement under Medicare. HHS promulgated a number of regulations after notice and comment to implement the PRO system. In addition to these regulations, HHS issued, without notice or comment, a series of directives and transmittals governing the PRO program. These transmittals contain a wide variety of instructions, guidelines and procedures covering aspects of the PRO program.]

On October 10, 1984, complaining of . . . “the small and incomplete selection of regulations” HHS had published implementing the PRO program and the large number of procedures set forth in documents not published as regulations, AHA filed with HHS
A petition for rulemaking. In it, AHA requested HHS to promulgate a complete set of regulations governing all aspects of the PRO program. AHA sent another letter on January 8, 1985, requesting a date for HHS’ response. No response to this letter was ever received.

On January 29, 1985, the American Hospital Association (AHA) brought suit against HHS in the District Court for the District of Columbia. Its complaint argued that HHS had circumvented the notice and comment requirements of § 553 of the APA, and asked that the court declare the transmittals and directives invalid for failure to comply with § 553.

The distinctive purpose of § 553’s [exemption] for “rules of agency organization, procedure or practice” is to ensure “that agencies retain latitude in organizing their internal operations.” A useful articulation of the exemption’s critical feature is that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which parties present themselves or their viewpoints to the agency.

Over time, our circuit in applying the § 553 exemption for procedural rules has gradually shifted focus from asking whether a given procedure has a “substantial impact” on parties to inquiring more broadly whether the agency action also encodes a substantive value judgment or puts a stamp of approval or disapproval on a given type of behavior. The gradual move away from looking solely into the substantiality of the impact reflects a candid recognition that even unambiguously procedural measures affect parties to some degree.

While the range of cases applying this exemption may appear idiosyncratic, a few recent decisions of this and other circuits illustrate the scope and limits of the procedural exemption. In Neighborhood TV Co., Inc. v. FCC, we held that a FCC decision to freeze applications for television licenses on some frequencies affected an applicant’s interest “only incidentally,” and thus was procedural. In Guardian Federal Savings & Loan Association, we held that a directive specifying that requisite audits be performed by nonagency accountants was exempt as a procedural measure. And in United States Department of Labor v. Kast Metals Corp., the Fifth Circuit held that the agency’s rules governing the selection of employers for workplace safety investigations was a procedural rule. By contrast, we have struck down as nonprocedural an agency rule foreclosing home health agencies from the right to deal with the Secretary of HHS in order to gain reimbursement for Medicare, and we have held that a parole board’s selection of parole eligibility guidelines had the intent and effect of changing substantive outcomes.

[One of the contested directives is PRO Manual IM85–2]. A broadbrush description of IM85–2 is that it maps out an enforcement strategy for the PROs with whom HHS contracts. As the district court observed, the statutes and preexisting regulations that deal with PRO review are relatively sketchy, and thus IM85–2 makes a significant contribution towards describing the daily functions of PROs. It requires, for instance, that the PRO review at least 5% of all hospital admissions, selected at random. Where a “significant pattern”
of unnecessary admissions appears in a particular subcategory of medicine, the PRO is instructed to step up its review to 100% of hospital admissions in the area.

... The requirements set forth in the transmittal are classic procedural rules, exempt under that distinctive prong of § 553. The bulk of the regulations in the transmittal set forth an enforcement plan for HHS’s agents in monitoring the quality of and necessity for various operations. They essentially establish a frequency and focus of PRO review, urging its enforcement agents to concentrate their limited resources on particular areas where HHS evidently believes PRO attention will prove most fruitful.

As we have previously observed, enforcement plans developed by agencies to direct their enforcement activity warrant considerable deference.

The Fifth Circuit’s decision in United States Department of Labor v. Kast Metals Corp., 744 F.2d 1145 (5th Cir.1984), is particularly instructive with regard to this manual. In Kast Metals, the court of appeals held that the Occupational Safety and Health Administration (“OSHA”) had validly developed a calculus to target employers for inspection, despite the fact that this calculus had been adopted without notice and comment rulemaking. The court reasoned that OSHA’s inspection plan, known as CPL 2.25B, fell far short of the sort of investigative activity likely to have the intent or effect of substantially altering party behavior. “The creation and use of CPL 2.25B to select employers for inspection did not of itself constitute investigation; rather, the plan sets forth procedural steps to guide the agency in exercise of its statutory authority to conduct investigations.” In classifying OSHA’s rule as procedural under § 553, the Fifth Circuit wrote, “[t]he Secretary used CPL 2.25B to concentrate OSHA’s inspection resources in industries with the highest potential for safety and health violations. ... The plan is procedural on its face.” Like OSHA rule CPL 2.25B, HHS Manual IM85–2 operates to concentrate agency inspection resources in areas (here, medical procedures) with the highest potential for statutory violations (here, violations of Medicare’s reimbursement standards), and like CPL 2.25B, HHS’ manual is procedural on its face. ...

The manual imposes no new burdens on hospitals that warrant notice and comment review. This is not a case in which HHS has urged its reviewing agents to utilize a different standard of review in specified medical areas; rather, it asks only that they examine a greater share of operations in given medical areas. Were HHS to have inserted a new standard of review governing PRO scrutiny of a given procedure, or to have inserted a presumption of invalidity when reviewing certain operations, its measures would surely require notice and comment, as well as close scrutiny to insure that it was consistent with the agency’s statutory mandate. But that is not this case.

At worst, Manual IM85–2 burdens hospitals by (1) making it more likely that their transgressions from Medicare’s standards will go unnoticed and (2) imposing on them the incidental inconveniences of complying with an enforcement scheme. The former concern is patently illegitimate: Congress’ very purpose in instituting peer review was to crack down on reimbursements for medical activity not covered by Medicare. As for the
second burden, case law clearly establishes that such derivative burdens hardly dictate notice and comment review. Accordingly, we hold that PRO Manual IM85–2 is a procedural rule exempt from § 553’s notice and comment requirements. . . .

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**Air Transport Association of America v. Department of Transportation**

900 F.2d 369 (D.C.Cir. 1990).

**HARRY T. EDWARDS, Circuit Judge:**

The issue in this case is whether respondent governmental agencies (collectively “Federal Aviation Administration” or “FAA”) were obliged to engage in notice and comment procedures before promulgating a body of regulations (“Penalty Rules” or “Rules”) governing the adjudication of administrative civil penalty actions. . . . The FAA maintains that it was justified in dispensing with notice and comment under the “rules of agency organization, procedure, or practice,” and “good cause” exceptions to section 553.

We grant the petition for review. It is well established that the exemption under section 553(b)(A), for “rules of agency organization, procedure, or practice,” does not apply to agency action that “substantially alter[s] the rights or interests of regulated” parties. American Hosp. Ass’n v. Bowen. The Penalty Rules fall outside the scope of the exception because they substantially affect civil penalty defendants’ “right to avail [themselves] of an administrative adjudication.” Moreover, because we find that the time constraints of the enabling statute did not impose an insurmountable obstacle to complying with the applicable notice and comment requirements of the APA, we also reject the FAA’s reliance on the “good cause” exception under section 553(b)(B). Consequently, we hold that the Penalty Rules are invalid and that the FAA may not initiate new prosecutions until it has complied with the procedural requirements of the APA.

In December of 1987, Congress enacted a series of amendments to the Federal Aviation Act relating to civil penalties. Among other things, these amendments raised to $10,000 the maximum penalty for a single violation of aviation safety standards and established a “demonstration program” authorizing the FAA to prosecute and adjudicate administrative penalty actions involving less than $50,000. . . .

Approximately nine months after enactment of [these amendments], the FAA promulgated the Penalty Rules. Effective immediately upon their issuance, the Penalty Rules established a schedule of civil penalties, including fines of up to $10,000 for violations of the safety standards of the Federal Aviation Act and related regulations. The Penalty Rules also established a comprehensive adjudicatory scheme providing for formal notice, settlement procedures, discovery, an adversary hearing before an ALJ and an administrative appeal. In explaining why it dispensed with prepromulgation notice and comment,
the FAA emphasized the procedural character of the Penalty Rules. The FAA did respond to post promulgation comments but declined to make any amendments to the Rules. . . .

Section 553's notice and comment requirements are essential to the scheme of administrative governance established by the APA. These procedures reflect Congress' "judgment that . . . informed administrative decisionmaking require[s] that agency decisions be made only after affording interested persons" an opportunity to communicate their views to the agency. Equally important, by mandating "openness, explanation, and participatory democracy" in the rulemaking process, these procedures assure the legitimacy of administrative norms. For these reasons, we have consistently afforded a narrow cast to the exceptions to section 553, permitting an agency to forgo notice and comment only when the subject matter or the circumstances of the rulemaking divest the public of any legitimate stake in influencing the outcome. In the instant case, because the Penalty Rules substantially affected civil penalty defendants' right to avail themselves of an administrative adjudication, we cannot accept the FAA's contention that the Rules could be promulgated without notice and comment.

The FAA argues that the Penalty Rules are exempt as "rules of agency organization, procedure, or practice" because they establish "procedures" for adjudicating civil penalty actions. According to the FAA, it would have been obliged to permit public participation in the rulemaking process only if the Penalty Rules affected aviators' "substantive" obligations under the Federal Aviation Act. We find this analysis unpersuasive.

Our cases construing section 553(b)(A) have long emphasized that a rule does not fall within the scope of the exception merely because it is capable of bearing the label "procedural." . . .

Rather than focus on whether a particular rule is "procedural" or "substantive," [our] decisions employ a functional analysis. Section 553(b)(A) has been described as essentially a "housekeeping" measure, "[t]he distinctive purpose of . . . [which] is to ensure 'that agencies retain latitude in organizing their internal operations,'" Where nominally "procedural" rules "encode[ ] a substantive value judgment" or "substantially alter the rights or interests of regulated" parties, however, the rules must be preceded by notice and comment.

The Penalty Rules fall outside the scope of section 553(b)(A) because they substantially affect a civil penalty defendant's right to an administrative adjudication. Under both the due process clause and the APA, a party has a right to notice and a hearing before being forced to pay a monetary penalty. Congress expressly directed the FAA to incorporate these rights into its civil penalty program. In implementing this mandate, the FAA made discretionary—indeed, in many cases, highly contentious—choices concerning what process civil penalty defendants are due. Each one of these choices "encode[d] a substantive value judgment," on the appropriate balance between a defendant's rights to adjudicatory procedures and the agency's interest in efficient prosecution. The FAA was no less obliged to engage in notice and comment before taking action affecting these adjudicatory rights than it would have been had it taken action affecting aviators' "substantive" obligations under the Federal Aviation Act.
The cases cited by the FAA do not suggest a contrary conclusion. The FAA puts its primary emphasis on *American Hospital Association*. . . . Nothing in *American Hospital Association* detracts from the principle that the public does have a legitimate interest in participating in agency decisions affecting statutory and constitutional rights “to avail oneself of an administrative adjudication.”

Also inapposite are various decisions in which we have applied section 553(b)(A) to rules that regulate such matters as the timing of applications for benefits or the timing of the agency’s processing of such applications. The rules at issue in these cases did affect “the manner in which the parties present themselves or their viewpoints to the agency,” but they did not affect any component of a party’s statutory or constitutional right to avail himself of an administrative adjudication. They were all cases, in short, in which “the need for public participation” in the rulemaking process was “too small to warrant it.” The Penalty Rules, in contrast, affect the entire range of adjudicatory rights guaranteed by the due process clause, the APA and section 1475(d)(1)—matters far too important to be withdrawn from public deliberation. . . .

The dissent . . . contends that we have “obliterated” the distinction between substance and procedure. But, as the case law clearly illustrates, there is no such “distinction” to obliterate for purposes of section 553(b)(A). The dissent refuses to come to terms with the precedent characterizing this exception to notice and comment rulemaking as a mere “housekeeping” measure applicable to rules “‘organizing [agencies’] internal operations.’” The dissent’s infusion of a rigid “procedure”—“substance” distinction is not only inconsistent with our precedent but is also inconsistent with the statutory text. Section 553(b)(A) does not exempt “rules of procedure” per se, but rather “rules of agency organization, procedure, or practice.” The dissent’s exclusive focus on the word “procedure” thus violates the well established principle of construction “that ‘words grouped in a list should be given related meaning.’”

In sum, the FAA’s contention that it did not affect the “substantive” obligations of aviators under the Federal Aviation Act is irrelevant. “The characterizations ‘substantive’ and ‘procedural’—no more here than elsewhere in the law—do not guide inexorably to the right result, nor do they really advance the inquiry very far.” In using the terms “rules of agency organization, procedure, or practice,” Congress intended to distinguish not between rules affecting different classes of rights—“substantive” and “procedural”—but rather to distinguish between rules affecting different subject matters—“the rights or interests of regulated” parties and agencies’ “‘internal operations.’” Because the Penalty Rules substantially affect civil penalty defendants’ “right to avail [themselves] of an administrative adjudication,” members of the aviation community had a legitimate interest in participating in the rulemaking process.

We also disagree that the two-year duration of section 1475’s demonstration program furnished the FAA with “good cause” to dispense with notice and comment procedures. Like the other exceptions, the good cause exception is to “be narrowly construed and only reluctantly countenanced.” In particular, we have explained that statutory time limits do not ordinarily excuse compliance with the APA’s procedural requirements. . . .
the reasoning of two of our sister circuits, we held that the statutory deadline did not constitute good cause to forgo notice and comment absent “‘any express indication’” by Congress to this effect.

. . . Congress did not express an intention to relieve the FAA of the legal obligation to engage in notice and comment procedures before promulgation of the Penalty Rules. Indeed, section 1475 did not even set a formal deadline for implementation of the agency’s authority to assess civil penalties. It is true that the two-year duration of the “demonstration program,” along with the associated eighteen-month reporting deadline, encouraged the FAA to act with reasonable dispatch. But we believe that the FAA, using expedited notice and comment procedures if necessary, could have realized this objective short of disregarding its obligations under the APA.

Finally, the FAA is foreclosed from relying on the good cause exception by its own delay in promulgating the Penalty Rules. The agency waited almost nine months before taking action to implement its authority under section 1475. At oral argument, counsel for the FAA conceded that the delay was largely a product of the agency’s decision to attend to other obligations. We are hardly in a position to second guess the FAA’s choices in determining institutional priorities. But insofar as the FAA’s own failure to act materially contributed to its perceived deadline pressure, the agency cannot now invoke the need for expeditious action as “good cause” to avoid the obligations of section 553(b).

Finally, we reject the FAA’s contention that its response to comments after promulgation of the Penalty Rules cured any noncompliance with section 553. Section 553 provides “that notice and an opportunity for comment are to precede rule-making.” We strictly enforce this requirement because we recognize that an agency is not likely to be receptive to suggested changes once the agency “put[s] its credibility on the line in the form of ‘final’ rules. People naturally tend to be more close-minded and defensive once they have made a ‘final’ determination.”

SILBERMAN, CIRCUIT JUDGE, dissenting:

I [believe] the rules fall, by ample measure, within the “procedural” exemption of section 553(b)(A), which exempts from notice and comment “rules of agency organization, procedure, or practice.” To be sure, the rules in this case could as well be described as rules of “practice” (covering the practice of the parties and attorneys before the FAA) and also in some respects rules of “agency organization” (dealing with the interrelationship between the administrative law judges and the Administrator). I use the term “procedure” here to cover all three concepts.

Lines between substance and procedure in various areas of the law are difficult to draw and therefore often perplex scholars and judges. But Congress, when it passed the Administrative Procedure Act, made that difference critical, and we are therefore obliged to implement a viable distinction between “procedural” rules and those that are substantive. . . .
If we assume a spectrum of rules running from the most substantive to the most procedural, I would describe the former as those that regulate “primary conduct,” . . . and the latter are those furthest away from primary conduct. In other words, if a given regulation purports to direct, control, or condition the behavior of those institutions or individuals subject to regulation by the authorizing statute it is not procedural, it is substantive. At the other end of the spectrum are those rules, such as the ones before us in this case, which deal with enforcement or adjudication of claims of violations of the substantive norm but which do not purport to affect the substantive norm. These kinds of rules are, in my view, clearly procedural.

Rules are no less procedural because they are thought to be important or affect outcomes. Congress did not state, when it passed the APA, that all but insignificant rules must be put out for notice and comment. . . .

Admittedly, not all our cases fit precisely along the continuum I described above. When an agency, rather than publishing rules which define a substantive norm to which regulated groups must conform or which flesh out enforcement procedures to effectuate such compliance, instead adopts rules dealing with the award of benefits, a slightly different but similar analysis is used to distinguish substantive from procedural rules. Sometimes the Government’s prospective award of benefits is actually designed, in part, to affect primary conduct—such as the standards used to determine whether to renew a broadcast license or the criteria employed to determine eligibility for unemployment insurance. But typically, benefits are bestowed in accordance with preexisting qualifications or status. In those circumstances, it cannot be said that the rules seek to condition primary conduct. We still think of such rules as substantive because defining eligibility for a benefit program is the very essence of the program. It is in this context that we said that substantive rules are those that affect the “rights and interests of parties.” . . .

Of course, procedure impacts on outcomes and thus can virtually always be described as affecting substance, but to pursue that line of analysis results in the obliteration of the distinction that Congress demanded. We avoided that snare only recently in American Hosp. Ass’n v. Bowen, where we held, over a strong dissent in many respects redolent of the majority opinion here, that HHS rules that set forth the enforcement priorities for peer review organizations (acting as agents to ensure medically reasonable and necessary hospital health care), as well as some adjudicatory procedures similar to those contained in the rules before us, did not have to be published for comment. . . .

It might be thought that there is something vaguely underhanded about an agency publishing important rules without an opportunity for those affected to comment. And lawyers and judges tend to prefer, on the margin, added procedure. But . . . we have been admonished somewhat dramatically by Vermont Yankee to not add more procedure to the APA than Congress required. I am afraid the majority opinion by obliterating the distinction between substance and procedure in section 553 does just that.
Harry T. Edwards, Circuit Judge:

In July 1988, appellant JEM Broadcasting Company, Inc. (“JEM”) submitted a license application for a new FM station in Bella Vista, Arkansas. The Federal Communications Commission (“FCC” or “Commission”) accepted JEM’s application for filing, but determined upon further review that JEM had provided inconsistent geographic coordinates for its proposed transmitter site. Unable to resolve the inconsistency from the application papers, the FCC, acting pursuant to its “hard look” processing rules, dismissed JEM’s application without providing JEM an opportunity to correct its error.

[In 1985, in anticipation of a flood of new FM license applications, the FCC adopted its so-called “hard look” regulations, designed to weed out incomplete applications.] The “hard look” rules established a fixed filing period—known as a “window”—for all applications requesting use of a particular channel. Applications filed within the window period would be evaluated for “substantial completeness”; those meeting this standard would be accepted for tender. . . .

Applications that did not include the prescribed information by the close of the window were considered “unacceptable for tender” and were returned without opportunity for filing a curative amendment. Moreover, if any data were incorrect or inconsistent, and the [sic] “the critical data [could not] be derived or the inconsistency resolved within the confines of the application and with a high degree of confidence,” the application was deemed unacceptable for tender and would be dismissed with no opportunity to cure the defect. . . . JEM’s application met this latter fate.

. . . JEM contends that the so-called “hard look” rules cannot be applied against it because the rules were promulgated without notice and comment in violation of the Administrative Procedure. . . .

The APA provides that “rules of agency organization, procedure, or practice” are exempt from the general notice and comment requirements of section 553. Although in applying this provision we have struggled with the distinction between “substantive” and “procedural” rules, we find the instant application to be straightforward. Our oft-cited formulation holds that the “critical feature” of the procedural exception “is that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency.” “Of course, procedure impacts on outcomes and thus can virtually always be described as affecting substance, but to pursue that line of analysis results in the obliteration of the distinction that Congress demanded.” Air Transport Ass’n of Am. v. Department of Transp. (Silberman, J., dissenting). The issue, therefore, “is one of degree,” and our task is to identify
which substantive effects are “sufficiently grave so that notice and comment are needed to safeguard the policies underlying the APA.”

In this case, JEM challenges so much of the “hard look” rules as deprives license applicants of the opportunity to correct errors or defects in their filings and submit the applications nunc pro tunc. JEM cannot deny, of course, that the Commission always has required applications to be complete in all critical respects by some date or suffer dismissal; and the Commission argues that its new rules simply “shift[ed] to the beginning of the process some of the application checks previously made later in the process.” Although we do not think the instant rule change can be dismissed quite so glibly—after all, the previous regime gave applicants notice of errors and a window for redress—we conclude that a license applicant’s right to a free shot at amending its application is not so significant as to have required the FCC to conduct notice and comment rulemaking, particularly in light of the Commission’s weighty efficiency interests. The APA’s procedural exception embraces cases, such as this one, in which the interests “promoted by public participation in rulemaking are outweighed by the countervailing considerations of effectiveness, efficiency, expedition and reduction in expense.”

. . . The critical fact here, however, is that the “hard look” rules did not change the substantive standards by which the FCC evaluates license applications, e.g., financial qualifications, proposed programming, and transmitter location. This fact is fatal to JEM’s claim.

We think the “hard look” rules fall comfortably within the realm of the “procedural” as we have defined it in other cases. . . .

Finally, seizing on another aspect of our law in this area, JEM argues that we cannot find the instant rule to be procedural because it encodes the substantive value judgment that applications containing minor errors should be sacrificed to promote efficient application processing. We have indeed held that the procedural exception to notice and comment “does not apply where the agency ‘encodes a substantive value judgment.’” However, JEM’s attempt to force the “hard look” rules into this rubric is unavailing. JEM’s reasoning threatens to swallow the procedural exception to notice and comment, for agency housekeeping rules often embody a judgment about what mechanics and processes are most efficient. In *Air Transport Association of America v. Department of Transportation*, a divided panel of this court held that the Department of Transportation’s adoption of a comprehensive scheme for adjudicating civil penalty actions required notice and comment, in part because the rules encoded a substantive value judgment “on the appropriate balance between a defendant’s rights to adjudicatory procedures and the agency’s interest in efficient prosecution.” [Because after the Supreme Court remanded that case with a suggestion that it was moot, we vacated that judgment,] *Air Transport* is no longer binding precedent, [and] we recognize that our opinion there extended the “value judgment” rationale further than any other case of this circuit of which we are aware; and to the extent that it suggests a different result here, we disavow its reasoning.
Points for Discussion

a. The Edwards Opinions

Judge Edwards authored both *Air Transport Association* and *JEM Broadcasting Company*. In the first case, he used the following test concerning whether an agency can claim a rule is procedural for purposes of being except from section 553 rulemaking: “Rather than focus on whether a particular rule is ‘procedural’ or ‘substantive,’ [our] decisions employ a functional analysis. . . . ‘Where nominally “procedural’ rules ‘encode[ ] a substantive value judgment’ or ‘substantially alter the rights or interests of regulated’ parties, however, the rules must be preceded by notice and comment.’” In the second case, he applied the following analysis: “Our oft-cited formulation holds that the ‘critical feature’ of the procedural exception ‘is that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency.’ . . . [O]ur task is to identify which substantive effects are ‘sufficiently grave so that notice and comment are needed to safeguard the policies underlying the APA.’”

Professor Hickman observes, “The substantial impact and value judgment tests are both frustratingly vague. There is some debate over the extent to which the two tests overlap in practice. Hence, the goal of the courts sometimes is merely to keep the procedural rule exception from swallowing the notice-and-comment rule.” Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury’s (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 N. Dame L. Rev. 1727, 1775–76 (2007). We are confident that you will agree with the first sentence. What does Professor Hickman mean when she says that the goal of the courts is to keep the procedural rule exception from swallowing the notice-and-comment rule? How does *JEM Broadcasting Company* seek to accomplish this goal?

b. Remedy

If EPA adopted a rule without notice and comment, and a court found that no exception applied, what might be the proper remedy? Should requiring after-the-fact comment suffice? Would it make a difference if some biotech companies were already running small-scale field tests pursuant to the new procedures?

c. Good Cause Exception

A relatively common justification for using the good cause exception is that the agency is under a statutory deadline to adopt a rule. Why should courts be skeptical of statutory deadlines for rulemaking as grounds for avoiding notice and comment, assuming that the deadline is so short as to make meaningful notice and comment impossible? What do you suppose Congress intended in such a circumstance? Should courts do other than give effect to congressional will?

What if the statutory deadline provided enough time for notice and comment, but the agency through oversight or lack of planning waits until the last moment and then
claims “good cause” for avoiding notice and comment? The agency certainly should not be rewarded for its failure to provide enough time, but should “teaching the agency a lesson” be done at the expense of meeting the statutory deadline? Courts have routinely held rules invalid under these circumstances.

Another relatively common justification for invoking the good cause exception is that the agency is responding to an emergency. If there was an emergency justifying an exception from prior notice and comment, the APA does not require later notice and comment, nor does it limit the time the rule may remain in effect. The Model State Administrative Procedure Act, which generally requires notice-and-comment rulemaking as well, has a parallel “unnecessary, impracticable, or contrary to the public interest” exception. MSAPA § 3–108. It, however, provides a mechanism whereby the agency may be required to undertake a notice and comment rulemaking proceeding with respect to the rule within two years of the promulgation of the rule. MSAPA § 3–108(c). If the new rulemaking proceeding requirement is triggered, the rule adopted without notice and comment goes out of effect in 180 days. Id. The Endangered Species Act has a similar provision, allowing for listing of a threatened or endangered species without notice and comment in an emergency, but limiting the effect of that listing for 240 days, presumably enough time to undertake a rulemaking proceeding. 16 U.S.C.A. § 1533(b)(7).

d. Interim Final Rules

Sometimes an agency adopts a rule without notice and comment, invoking one of the “good cause” exceptions, but invites the public to make comments on the rule, saying that the agency will consider them and, if appropriate, make changes in the rule. This is usually called an “interim final rule.” In a few situations, Congress has authorized the use of interim final rules. See, e.g., 42 U.S.C.A. § 1395hh (authorizing the use of interim-final regulations for some aspects of the Social Security program).

If Congress has not authorized interim rules, should courts be less strict in policing the “good cause” exception when agencies use this process? Some courts have not been. See, e.g., Natural Resources Defense Council, Inc. v. United States EPA, 683 F.2d 752 (3d Cir.1982); American Fed. of Gov’t Employees v. Block, 655 F.2d 1153 (D.C.Cir.1981). Why not? The Administrative Conference of the United States issued a recommendation that whenever agencies adopt rules without notice and comment (other than when the agency finds notice and comment “unnecessary”), they simultaneously ask for comments on the rule and respond to the comments received. If agencies do respond to these adverse comments and ratify or modify the rule as appropriate, the Administrative Conference recommends that courts consider the initial failure to provide notice and comment, even if in error, to be harmless error. Recommendation 95–4, 60 Fed. Reg. 43108 (1995).

e. Direct Final Rules

Although some rules are noncontroversial, an agency may hesitate to invoke the good cause exemption on this basis, even though it is unlikely to receive any comments
Chapter 2  Rulemaking

in response to a rulemaking notice. The Environmental Protection Agency (EPA) invented the concept of “direct-final rulemaking” to address this situation. To use this procedure, an agency publishes a final rule in the Federal Register with a statement that the rule will become effective on a particular date unless an adverse comment is received before that date. If an adverse comment is received, the agency withdraws the rule, and it then publishes it as a proposed rule under notice and comment procedures.


Should there be some limit on an agency’s use of direct final rules? Or is it enough protection for the public that if any one file an adverse comment the agency will use notice and comment rulemaking?

f.  GAO Study

In 2012, the Government Accountability Office (GAO) completed a study for Congress estimating the number of final rules for which agencies did not publish a notice of proposed rulemaking (NPRM). GAO estimated that agencies did not publish a notice of proposed rulemaking (NPRM) for about 35 percent of significant rules and about 44 percent of non-significant actions rules published during 2003–2010. A significant rule is a significant regulation action that is likely to result in a rule that may have an annual impact on the economy of $100 million or more or is significant for other reasons. You will find out more about this designation later in the chapter. When agencies did not publish a NPRM, they relied on the “good cause” exception for about 77 percent of significant rules and 61 percent of non-significant rules. The GAO study also found that agencies published about 15 percent of significant rules and about 4 percent of non-significant rules as interim rules. U.S. General Accountability Office, Federal Rulemaking: Agencies Could Take Additional Steps To Respond To Public Comments 2 (2012).

Are you surprised by the frequency with which agencies attempt to avoid notice and comment rulemaking? Even if this procedure is not required, agencies are still free voluntarily to use it. Why do you suppose agencies are not tempted to do so? Put another way, why is it that the burdens of notice-and-comment rulemaking appear to agencies to outweigh the benefits? You may wish to return to this question after you learn more about these burdens in subsequent sections of this chapter.
2. Formal, Informal, or Hybrid Rulemaking

As you read in Chapter 1, there are three types of rulemaking procedures: informal, formal, and hybrid. The APA itself only recognizes the first two; hybrid rulemaking is what we call it when Congress has imposed additional procedures, or substituted different procedures, beyond those required by the APA. Probably most rules are made by informal rulemaking. These rules are only subject to the notice-and-comment procedures required by section 553 and must be accompanied by a statement of basis and purpose when they are promulgated. 5 U.S.C.A. § 553. Congress has required the use of “formal” rulemaking in a few circumstances. In these circumstances, agencies must follow the procedures specified in sections 556–57, which essentially require a trial-type proceeding, to promulgate a rule. Finally, Congress has required many agencies to use “hybrid” rulemaking in a number of situations. The nature of the additional or substitute procedures required differs from statute to statute, but they are more burdensome to the agency than those required for informal rulemaking, while less burdensome than the procedures required in formal rulemaking.

Take Note

Because formal rulemaking is so rare, and because its procedures are virtually indistinguishable from the procedures for formal adjudication, discussed in Chapter 3, those procedures will be discussed there. We will deal with hybrid rulemaking after we consider basic APA informal rulemaking.

In a trilogy of cases in the 1970s, the Supreme Court clarified three key issues concerning rulemaking procedures. In United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742 (1972), the Court interpreted when section 553 triggers the requirement of formal rulemaking. United States v. Florida East Coast Railway Co., 410 U.S. 224 (1973), reiterated that decision and clarified when a “hearing” requirement triggers the need for a trial-type proceeding in a rulemaking, even if formal rulemaking is not required. Finally, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978), considered whether the courts can impose hybrid rulemaking procedures on an agency.

United States v. Allegheny-Ludlum Steel Corp.


REHNQUIST, JUSTICE:

[The Interstate Commerce Commission (ICC), which has been abolished, once regulated various aspects of railroad transportation including the rates that railroads could charge. Disappointed with a rule promulgated by the ICC using informal rulemaking, some
shippers, including Allegheny Ludlum Steel Corporation, sought judicial review. They argued, among other contentions, that the Esch Act, quoted below, required the ICC to hold a hearing before promulgating any rule, which the agency did not do.

. . . Appellees claim that the Commission's procedure here departed from the provisions of 5 U.S.C. §§ 556 and 557 of the Act. Those sections, however, govern a rulemaking proceeding only when 5 U.S.C. § 553 so requires. The latter section, dealing generally with rulemaking, makes applicable the provisions of §§ 556 and 557 only “when rules are required by statute to be made on the record after opportunity for an agency hearing. . . .” The Esch Act, authorizing the Commission “after hearing, on a complaint or upon its own initiative without complaint, (to) establish reasonable rules, regulations, and practices with respect to car service . . .,” does not require that such rules “be made on the record.” 5 U.S.C. § 553. That distinction is determinative for this case. “A good deal of significance lies in the fact that some statutes do expressly require determinations on the record.” Sections 556 and 557 need be applied only where the agency statute, in addition to providing a hearing, prescribes explicitly that it be “on the record.” We do not suggest that only the precise words “on the record” in the applicable statute will suffice to make §§ 556 and 557 applicable to rulemaking proceedings, but we do hold that the language of the Esch Car Service Act is insufficient to invoke these sections. . . .

United States v. Florida East Coast Railway Co.


REHNQUIST, JUSTICE:

Appellees, two railroad companies, . . . challenged the order of the Commission on both substantive and procedural grounds. The District Court held that the language of § 1(14)(a)\(^1\) of the Interstate Commerce Act, required the Commission in a proceeding such as this to act in accordance with the Administrative Procedure Act, 5 U.S.C. § 556(d), and that the Commission’s determination to receive submissions from the appellees only in written form was a violation of that section because the respondents were “prejudiced” by that determination within the meaning of that section.

Following our decision last Term in United States v. Allegheny-Ludlum Steel Corp., we noted probable jurisdiction, and requested the parties to brief the question of whether

\(^1\) Section 1(14)(a) provides: “The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this chapter, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices.” . . .
the Commission’s proceeding was governed by 5 U.S.C. § 553, or by §§ 556 and 557, of the Administrative Procedure Act. We here decide that the Commission’s proceeding was governed only by § 553 of that Act, and that appellees received the “hearing” required by § 1(14)(a) of the Interstate Commerce Act.

II. Applicability of Administrative Procedure Act

In United States v. Allegheny-Ludlum Steel Corp., we held that the language of § 1(14)(a) of the Interstate Commerce Act authorizing the Commission to act “after hearing” was not the equivalent of a requirement that a rule be made “on the record after opportunity for an agency hearing” as the latter term is used in § 553(c) of the Administrative Procedure Act.

Both of the district courts that reviewed this order of the Commission concluded that its proceedings were governed by the stricter requirements of §§ 556 and 557 of the Administrative Procedure Act, rather than by the provisions of § 553 alone. The conclusion of the District Court for the Middle District of Florida, which we here review, was based on the assumption that the language in § 1(14)(a) of the Interstate Commerce Act requiring rulemaking under that section to be done “after hearing” was the equivalent of a statutory requirement that the rule “be made on the record after opportunity for an agency hearing.” Such an assumption is inconsistent with our decision in Allegheny-Ludlum.

III. “Hearing” Requirement of § 1(14)(a) of the Interstate Commerce Act

Inextricably intertwined with the hearing requirement of the Administrative Procedure Act in this case is the meaning to be given to the language “after hearing” in § 1(14)(a) of the Interstate Commerce Act. Appellees, both here and in the court below, contend that the Commission procedure here fell short of that mandated by the “hearing” requirement of § 1(14)(a), even though it may have satisfied § 553 of the Administrative Procedure Act. The Administrative Procedure Act states that none of its provisions “limit or repeal additional requirements imposed by statute or otherwise recognized by law.” 5 U.S.C. § 559. Thus, even though the Commission was not required to comply with §§ 556 and 557 of that Act, it was required to accord the “hearing” specified in § 1(14)(a) of the Interstate Commerce Act.

The term “hearing” in its legal context undoubtedly has a host of meanings. Its meaning undoubtedly will vary, depending on whether it is used in the context of a rulemaking-type proceeding or in the context of a proceeding devoted to the adjudication of particular disputed facts. It is by no means apparent what the drafters of the Esch Car Service Act of 1917, which became the first part of § 1(14)(a) of the Interstate Commerce Act, meant by the term. What is apparent, though, is that the term was used in granting authority to the Commission to make rules and regulations of a prospective nature.

Here, the incentive payments proposed by the Commission in its tentative order, and later adopted in its final order, were applicable across the board to all of the common carriers
by railroad subject to the Interstate Commerce Act. No effort was made to single out any particular railroad for special consideration based on its own peculiar circumstances. . . . Though the Commission obviously relied on factual inferences as a basis for its order, . . . the factual inferences were used in the formulation of a basically legislative-type judgment, for prospective application only, rather than in adjudicating a particular set of disputed facts. [Accordingly, the Court held that here the word “hearing” in the Interstate Commerce Act did “not necessarily embrace either the right to present evidence orally and to cross-examine opposing witnesses, or the right to present oral argument to the agency’s decisionmaker.”]

### Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.


**REHNQUIST, JUSTICE:**

[The Natural Resources Defense Council (NRDC) challenged a rule promulgated by the Atomic Energy Commission (AEC). The NRDC contended that the absence of discovery or cross-examination denied it a meaningful opportunity to participate in the rulemaking proceedings. The District of Columbia Circuit Court of Appeals remanded the rule to the AEC. According to the Supreme Court, the “ineluctable mandate” of the circuit court’s decision was that “the procedures followed during the hearings were inadequate.” The Court stated that “[a]gencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them.” Thus, “[a]bsent constitutional constraints or extremely compelling circumstances,” administrative agencies “‘should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.’” The Court cited several “compelling” reasons for its holding:]

In the first place, if courts continually review agency proceedings to determine whether the agency employed procedures which were, in the court’s opinion, perfectly tailored to reach what the court perceives to be the “best” or “correct” result, judicial review would be totally unpredictable. And the agencies, operating under this vague injunction to employ the “best” procedures and facing the threat of reversal if they did not, would undoubtedly adopt full adjudicatory procedures in every instance. Not only would this totally disrupt the statutory scheme, through which Congress enacted “a formula upon which opposing social and political forces have come to rest,” but all the inherent advantages of informal rulemaking would be totally lost.
Secondly, it is obvious that the court in these cases reviewed the agency’s choice of procedures on the basis of the record actually produced at the hearing, and not on the basis of the information available to the agency when it made the decision to structure the proceedings in a certain way. This sort of Monday morning quarterbacking not only encourages but almost compels the agency to conduct all rulemaking proceedings with the full panoply of procedural devices normally associated only with adjudicatory hearings.

Finally, and perhaps most importantly, this sort of review fundamentally misconceives the nature of the standard for judicial review of an agency rule. The court below uncritically assumed that additional procedures will automatically result in a more adequate record because it will give interested parties more of an opportunity to participate in and contribute to the proceedings. But informal rulemaking need not be based solely on the transcript of a hearing held before an agency. Indeed, the agency need not even hold a formal hearing. Thus, the adequacy of the “record” in this type of proceeding is not correlated directly to the type of procedural devices employed, but rather turns on whether the agency has followed the statutory mandate of the Administrative Procedure Act or other relevant statutes. If the agency is compelled to support the rule which it ultimately adopts with the type of record produced only after a full adjudicatory hearing, it simply will have no choice but to conduct a full adjudicatory hearing prior to promulgating every rule. In sum, this sort of unwarranted judicial examination of perceived procedural shortcomings of a rulemaking proceeding can do nothing but seriously interfere with that process prescribed by Congress.

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**Take Note**

The hostility against formal rulemaking reflected in *Allegheny-Ludlum* and *Florida East Coast Railway* turns on the trial-like procedure involved in formal rulemaking (as well as in formal adjudication). Vermont Yankee similarly reflects skepticism about trial-like procedures in informal rulemaking. Why is it that the Court discounts the value of trial-like procedures for determining facts in rulemakings when, as we will see, it continues to recognize the value of those procedures in adjudications?

Professor Kenneth Culp Davis’s answer is that adjudication and rulemaking involve different types of facts and that adjudicatory procedures are unnecessary to resolve factual disputes that typically come up in rulemaking. Kenneth Culp Davis, *An Approach To The Problems of Evidence*, 55 Harv. L. Rev. 364, 402–416 (1942). Professors Richard Pierce and Davis explain:

> All government actions necessarily are based on a large number of findings or assumptions concerning many facts. The factual underpinnings of government actions frequently are disputed. The nature of the disputed facts vary widely, however. A determination that an individual committed a crime must be based on findings of historical fact unique to an individual. A legislative decision to subsidize a particular type of housing is based at least implicitly, and usually
explicitly, on factual determinations that the type of housing to be subsidized is particularly valuable to society and that it would not be available in sufficient quantity in the absence of a subsidy. Similarly, the Court based its landmark decision in Brown v. Board of Education, 347 U.S. 483 (1954), on factual determinations concerning the effects of educational segregation on members of racial minorities.

. . . Courts refer to [facts concerning the individual] as adjudicative facts, which usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case.

Facts related to an individual are intrinsically the kinds of facts that should not be resolved to the individual’s detriment without giving the individual an opportunity to be heard with respect to those facts. An individual knows more about the facts concerning herself and her activities than anyone else is likely to know. Thus, an individual is uniquely well-positioned to rebut or explain evidence that bears upon an adjudicative fact concerning her past conduct.

The second type of fact—illustrated by the Court’s decision in Brown and the hypothetical legislative decision to subsidize a particular type of housing—is a legislative fact. Legislative facts do not describe the individual who is uniquely affected by the government action or that individual’s past conduct. Rather, legislative facts are the general facts that help a government institution decide questions of law, policy, and discretion. An individual adversely affected by a government action is not uniquely well-positioned to contribute to the resolution of a dispute with respect to a legislative fact. The Constitution permits the institutions of government to resolve disputed legislative facts by relying on sources other than the individuals who are affected by resolution of those facts. The most useful sources of data for resolution of disputes concerning legislative facts often are contained in the published literature of the social or natural science disciplines relevant to the legislative fact at issue.


Besides theoretical reasons for hostility towards formal rulemaking, the Court was aware of egregious examples where formal rulemaking had taken time and resources wholly out of proportion to any value gained from the procedures. The most famous case involved the Food and Drug Administration’s nine-year formal rulemaking proceeding to determine the percentage of weight in peanut butter that must come from peanuts. See Robert W. Hamilton, Rulemaking on a Record by the Food and Drug Administration, 50 Tex. L. Rev. 1132, 1150 (1972).
3. Informal Rulemaking Requirements

a. Notice

The APA requires that a “general notice of proposed rulemaking shall be published in the Federal Register.” 5 U.S.C.A. § 553(b). These notices are variously abbreviated as NPRMs or NOPRs. Although a Federal Register notice is not required if persons subject to the rule “are named or either personally served or otherwise have actual notice [of the rulemaking] in accordance with law,” id., agencies seldom, if ever, rely on actual notice. Moreover, publication in the Federal Register is “constructive” notice of a rule and is legally sufficient even if an affected or interested party is unaware of the notice. One responsibility of regulatory lawyers in places like trade associations, interest groups, corporations, or lawyers with ongoing clients, is to look at the Federal Register each day to determine if an agency has proposed a rule, or issued some other notice, about which their client or organization should be aware. Publications such as loose-leaf reporter services and trade publications also follow the Federal Register and include stories about proposed rulemakings, and often include the actual notices as well, concerning issues of interest to their readers. Many lawyers, however, simply access the Federal Register on-line at the website of the Government Printing Office: http://www.gpo.gov.

The NPRM must include the “time, place, and nature” of the public proceedings. Id. § 553(b)(1). Providing the time, place, and nature of the proceedings enables interested persons to participate in those proceedings by indicating the type of rule involved, the time during which the agency will receive written comments, and instructions concerning where to file the comments. An agency must also indicate the legal authority under which the rule is proposed and “either the terms or substance of the proposed rule or a description of the subjects and issues involved.” Id. Agencies, however, normally publish much more than what the APA requires. Virtually all agencies today publish the actual text of the proposed rule. Moreover, agencies also publish something known as a “preamble” to the actual rule text, which, in addition to what is required by the APA, gives a background to the rulemaking and describes what the rule is intended to do. Partially, this is a result of statutes that have added additional requirements to what the APA requires agencies to provide. Partially, this is a reaction by agencies to minimize the possibility that a court will decide that the agency’s notice was insufficient.

Prior to Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978), which held that courts could not impose additional rulemaking procedures on agencies, a number of courts had enforced the notice requirement of section 553, not according to its terms, but according to the purposes perceived to be behind that requirement. For example, the legislative history of the APA stated that notice must be “sufficient to fairly apprise interested persons of the issues involved, so that they may present responsive data or argument.” Legislative History of the Administrative Procedure Act, S. Doc. No. 248, 79th Cong., 2d Sess. 200 (1946). Giving effect to this idea, rather than the text of section 553, a number of courts, for example, required that agencies must
identify in the NPRM the data and methodology of any scientific evidence on which they relied. *Portland Cement Association v. Ruckelshaus*, 486 F.2d 375 (D.C.Cir.1973), *cert. denied* 417 U.S. 921 (1974), is often cited as the source of this trend. EPA had promulgated a final rule which adopted new source performance standards for Portland cement plants based on test results that had not been made available for public comment. The court found a “critical defect in the decision-making process . . . in the initial inability of petitioners to obtain—in timely fashion—the test results and procedures used . . . ,” because “[i]t is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, [in] critical degree, is known only to the agency.” See also *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240 (2d Cir.1977). When an agency fails to make the necessary disclosures, a court will remand a final rule to an agency for a new notice and comment period.

Despite *Vermont Yankee*, this body of case law is still given effect. See, e.g., *Lloyd Noland Hospital & Clinic v. Heckler*, 762 F.2d 1561 (11th Cir.1985). A common “hybrid” requirement added by Congress is for agencies to include different types of background data (or summaries or notices thereof) in the NPRM. See, e.g., 42 U.S.C. § 7191(b)(1) (Department of Energy NPRMs must include “a statement of the research, analysis, and other available information in support of, the need for, and the probable effect of, any proposed rule. . . .”); 42 U.S.C.A. § 7607(d)(3) (proposed rules under the Clean Air Act must include “a summary of the factual data on which the proposed rule is based; the methodology used in obtaining the data and in analyzing the data; and the major legal interpretations and policy considerations underlying the proposed rule.”).

The adequacy of the notice in a proposed rule is a common procedural challenge to a rule. Whenever the agency adopts as a final rule text that is different from what was in the proposed rule, someone may complain that the NPRM did not provide adequate notice. Obviously, where the change is minor this complaint is unavailing. Moreover, an agency may have flagged an issue in its preamble as something that might change in the course of the rulemaking, so that persons would be fairly on notice of a particular change. It is not uncommon, either because the agency merely changes its mind or because of some information that arises in the course of the rulemaking, for the agency to decide that the final rule should differ in a material fashion from the proposed rule, even where the agency has not specifically flagged the issue.

The courts have struggled concerning to what extent an agency can change a final rule without the necessity of giving new notice and holding a second comment period. On the one hand, a rule that obligates agencies to give new notice each time that they make a change in a proposed rule would discourage agencies from making any changes. This result would defeat the purpose of the comment period which is to educate the agency concerning what constitutes an appropriate rule. On the other hand, if agencies can change a rule in fundamental ways without giving new notice, interested persons are denied a fair opportunity to influence the nature of the final rule.
To protect the interest of parties in commenting on proposed rules, the courts have consistently held that the notice of proposed rulemaking must “fairly apprise interested persons” of the issues in the rulemaking. United Steelworkers v. Marshall, 647 F.2d 1189, 1221 (D.C.Cir.1980). Interested persons are fairly apprised if the final rule is a “logical outgrowth” of the rulemaking proceeding. United Steelworkers of America, 647 F.2d at 1191; Taylor Diving & Salvage Co. v. United States Dept. of Labor, 599 F.2d 622, 626 (5th Cir.1979); BASF Wyandotte Corp. v. Costle, 598 F.2d 637, 642 (1st Cir.1979), cert. denied 444 U.S. 1096 (1980); CSX Transportation Inc. v. Surface Transportation Board, 584 F.3d 1076, 1079–1083 (D.C. Cir. 2009).

Hypo 2-5: Lack of Notice

The National School Lunch Program (NLSP) is a federally assisted meal program that provided low-cost or free lunches to more than 31 million children in 100,000 public and non-profit private schools and residential child care institutions each school day in 2011. At the federal level, the Food and Nutrition Service, which is located in the Department of Agriculture (USDA) administers the NLSP. At the State level, the NLSP is usually administered by State education agencies, which operate the program through agreements with local school food authorities. As a condition of receiving federal money, state authorities must abide by the conditions set by the Food and Nutrition Service, which establishes such conditions using rulemaking.

In the Healthy, Hunger-Free Kids Act of 2010, Pub. L. 111–296, 124 Stat. 3183, Congress required USDA to update the NSLP’s meal pattern and nutrition standards based on the latest Dietary Guidelines for Americans. As mandated in section 301 of the National Nutrition Monitoring and Related Research Act of 1990, 7 U.S.C.A 5341, the Dietary Guidelines for Americans is reviewed, updated, and published every 5 years in a joint effort between the Department of Health and Human Services (HHS) and USDA.

Assume that in order to come into compliance with the congressional directive USDA has proposed a rule that would require schools to serve lunches that comply with the latest dietary guidelines. Specifically, USDA proposed that lunches must meet the following conditions:

(a) A limit on the percent of calories from total fat to 30 percent based on the actual number of calories offered;
(b) A limit on the percent of calories from saturated fat to less than 10 percent based on the actual number of calories offered;
(c) A reduction of the levels of sodium and cholesterol; and
(d) An increase in dietary fiber.
During the comment period, USDA received a comment from the Vegetarian Energy Group Institute (VEGI) which advocated that schools should be required to serve a minimum of five vegetarian meals per month. VEGI made two arguments for its position. First, it noted that the standards proposed by USDA were based on the assumption that individuals comply with the latest guidelines for other meals. VEGI presented survey evidence that indicated many families, however, do not comply with the guidelines at home. For this reason, it argued that more restrictive standards were necessary if the health of children was to be protected. Second, VEGI argued that having vegetarian lunches would serve an educational function because it would acquaint students about the possibility of vegetarian diets.

Assume that USDA accepted the argument put forward by VEGI and required that schools serve a minimum of five vegetarian lunches a month. A vegetarian lunch was defined as food that does not include any type of meat, fish, or eggs.

If you are a lawyer for:

(a) the National Association of Beef Producers, which opposes the change because it will reduce the amount of meat that schools will be able to serve, what arguments would you make that USDA has not complied with the requirements of section 553? How would you rate the Association's chances of convincing a court to remand the rule?

(b) USDA, what arguments would you make that USDA has complied with the requirements of section 553?

Hypo Materials

CHAPTER 13, SCHOOL LUNCH PROGRAMS, 42 U.S.C.A.

§ 1751. Congressional Declaration of Policy

It is declared to be the policy of Congress, as a measure of national security, to safeguard the health and well-being of the Nation's children and to encourage the domestic consumption of nutritious agricultural commodities and other food, by assisting the States, through grants-in-aid and other means, in providing an adequate supply of foods and other facilities for the establishment, maintenance, operation, and expansion of nonprofit school lunch programs. . . .

§ 1756. Payments to States

(a) (1) Funds appropriated to carry out section 1753 of this title during any fiscal year shall be available for payment to the States for disbursement by State educational agencies in accordance with such agreements, not inconsistent.
with the provisions of this chapter, as may be entered into by the Secretary and such State educational agencies for the purpose of assisting schools within the States in obtaining agricultural commodities and other foods for consumption by children in furtherance of the school lunch program authorized under this chapter. . . .

§ 1757 State Disbursement to Schools; Purpose; Child and Children Defined; Food Costs; Limitation

Funds paid to any State during any fiscal year pursuant to section 1753 of this title shall be disbursed by the State educational agency, in accordance with such agreements approved by the Secretary as may be entered into by such State agency and the schools in the State, to those schools in the State which the State educational agency, taking into account need and attendance, determines are eligible to participate in the school lunch program. . . .

§ 1758. Program Requirements

(a) Nutritional standards; medical and special dietary needs of individual students; whole milk as beverage; diminution of food waste; acceptance of offered foods.

(1) Lunches served by schools participating in the school lunch program under this chapter shall meet minimum nutritional requirements prescribed by the Secretary on the basis of tested nutritional research; . . .

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DEPARTMENT OF AGRICULTURE,
PROPOSED RULE NATIONAL SCHOOL LUNCH PROGRAM
AND SCHOOL BREAKFAST PROGRAM:
NUTRITION OBJECTIVES FOR SCHOOL MEALS


SUMMARY: This rule proposes to amend the regulations outlining the nutrition standards for the National School Lunch Program. It is part of an integrated, comprehensive plan for promoting the health of children. Specifically, this proposal would update the current nutrition standards to incorporate the Dietary Guidelines for Americans, which reflect medical and scientific consensus on proper nutrition as a vital element in disease prevention and long-term health promotion. . . .
Background

Nutrition Standards in the School Meal Programs

The primary purpose of the National School Lunch Program (NSLP), as originally stated by Congress in 1946 in section 2 of the National School Lunch Act (NSLA), is “to safeguard the health and well-being of the Nation’s children. . . .”

An array of scientific data now augments our knowledge by documenting that excesses in consumption are a major concern because of their relationship to the incidence of chronic disease. The typical diet in the United States is high in fat, saturated fat and sodium and low in complex carbohydrates and fiber. The meal requirements for the NSLP have not kept pace with the growing consensus of the need to modify eating habits. Given the importance of school meals to the nation’s children, especially needy children, the Department is committed to meeting its health responsibilities by updating the nutrition standards for school meals to ensure that children have access to a healthful diet as well as an adequate one. To accomplish this task, the Department is proposing to have school meals conform to the latest Dietary Guidelines for Americans (hereinafter referred to as the Dietary Guidelines) as well as provide proper levels of nutrients and calories. . . .

School Meals’ Lack of Compliance With Current Dietary Guidelines

The current Dietary Guidelines recommend that people eat a variety of foods; maintain a healthy weight; choose a diet with plenty of vegetables, fruits, and grain products; and use sugar and sodium in moderation. The Dietary Guidelines also recommend diets low in fat, saturated fat, and cholesterol so that over time, fat comprises 30 per cent or less of caloric intake, and saturated fat less than 10 per cent of total calories, for persons two years of age and older.

However, information available to the Department consistently shows that children’s diets, including meals served in schools, do not conform to the recommendations of the Dietary Guidelines. . . .

Proposed Regulatory Changes

Expanding and Updating Nutrition Requirements

The Department’s mission continues to be to carry out the declared policy of Congress to “safeguard the health and well-being of the Nation’s children.” In order to meet this goal, school meals must change to reflect the scientific consensus that is articulated in the Dietary Guidelines. Therefore, the Department believes that current nutrition standards must be expanded to incorporate the Dietary Guidelines in the NSLP and SBP regulations and is proposing to amend §§ 210.10 and 220.8 to require that school meals meet the applicable recommendations of the Dietary Guidelines including the quantified standards established for fat and saturated fat. Proposed regulations would also require schools to make an effort to reduce sodium and cholesterol, increase dietary fiber and serve a variety of foods. . . .
Accordingly, 7 CFR parts 210 and 220 are proposed to be amended, as follows:

PART 210—NATIONAL SCHOOL LUNCH PROGRAM

8. A new section 210.10 is added to read as follows:

§ 210.10 Nutrition standards for lunches and menu planning systems

(a) Nutrition standards for reimbursable lunches. School food authorities shall ensure that participating schools provide nutritious and well-balanced meals to children based on the nutrition standards provided in this section. . . . For the purposes of this section, the nutrition standards are:

(1) Provision of one-third of the Recommended Dietary Allowances (RDA) of protein, calcium, iron, vitamin A and vitamin C to the applicable age groups in accordance with the Minimum Nutrient Levels for School Lunches in paragraph (e)(4)(i) of this section;

(2) Provision of the lunchtime energy allowances for children based on the four age groups provided for in the Minimum Nutrient Levels for School Lunches in paragraph (e)(4) of this section;

(3) The applicable Dietary Guidelines for Americans which are:
   (i) Eat a variety of foods;
   (ii) Limit total fat to 30 percent of calories;
   (iii) Limit saturated fat to less than 10 percent of calories;
   (iv) Choose a diet low in cholesterol;
   (v) Choose a diet with plenty of vegetables, fruits, and grain products; and
   (vi) Use salt and sodium in moderation; and

(4) The following measures of compliance with the Dietary Guidelines for Americans:
   (i) A limit on the percent of calories from total fat to 30 percent based on the actual number of calories offered;
   (ii) A limit on the percent of calories from saturated fat to less than 10 percent based on the actual number of calories offered;
   (iii) A reduction of the levels of sodium and cholesterol; and
   (iv) An increase in the level of dietary fiber.
Chocolate Manufacturers Association v. Block

755 F.2d 1098 (4th Cir.1985).

SPROUSE, Circuit Judge:

Chocolate Manufacturers Association (CMA) appeals from the decision of the district court denying it relief from a rule promulgated by the Food and Nutrition Service (FNS) of the United States Department of Agriculture (USDA or Department). CMA protests that part of the rule that prohibits the use of chocolate flavored milk in the federally funded Special Supplemental Food Program for Women, Infants and Children (WIC Program). Holding that the Department’s proposed rulemaking did not provide adequate notice that the elimination of flavored milk would be considered in the rulemaking procedure, we reverse.

. . . The WIC Program was established by Congress in 1972 to assist pregnant, postpartum, and breastfeeding women, infants and young children from families with inadequate income whose physical and mental health is in danger because of inadequate nutrition or health care. Under the program, the Department designs food packages reflecting the different nutritional needs of women, infants, and children and provides cash grants to state or local agencies, which distribute cash or vouchers to qualifying individuals in accordance with Departmental regulations as to the type and quantity of food.

[T]he Department in November 1979 published for comment the proposed rule at issue in this case. Along with the proposed rule, the Department published a preamble discussing the general purpose of the rule and acknowledging the congressional directive that the Department design food packages containing the requisite nutritional value and appropriate levels of fat, sugar, and salt. Discussing the issue of sugar at length, it noted, for example, that continued inclusion of high sugar cereals may be “contrary to nutrition education principles and may lead to unsound eating practices.” It also noted that high sugar foods are more expensive than foods with lower sugar content, and that allowing them would be “inconsistent with the goal of teaching participants economical food buying patterns.”

The rule proposed a maximum sugar content specifically for authorized cereals. The preamble also contained a discussion of the sugar content in juice, but the Department did not propose to reduce the allowable amount of sugar in juice because of technical problems involved in any reduction. Neither the rule nor the preamble discussed sugar in relation to flavoring in milk. Under the proposed rule, the food packages for women and children without special dietary needs included milk that could be “flavored or unflavored.”

The notice allowed sixty days for comment and specifically invited comment on the entire scope of the proposed rules: “The public is invited to submit written comments in favor of or in objection to the proposed regulations or to make recommendations for alternatives not considered in the proposed regulations.” Over 1,000 comments were received from state and local agencies, congressional offices, interest groups, and WIC Program
participants and others. Seventy-eight commenters, mostly local WIC administrators, recommended that the agency delete flavored milk from the list of approved supplemental foods.

In promulgating the final rule, the Department, responding to these public comments, deleted flavored milk from the list, explaining:

In the previous regulations, women and children were allowed to receive flavored or unflavored milk. No change in this provision was proposed by the Department. However, 78 commenters requested the deletion of flavored milk from the food packages since flavored milk has a higher sugar content than unflavored milk. They indicated that providing flavored milk contradicts nutrition education and the Department’s proposal to limit sugar in the food packages. Furthermore, flavored milk is more expensive than unflavored milk. The Department agrees with these concerns. . . .

Therefore, to reinforce nutrition education, for consistency with the Department’s philosophy about sugar in the food packages, and to maintain food package costs at economic levels, the Department is deleting flavored milk from the food packages for women and children. Although the deletion of flavored milk was not proposed, the comments and the Department’s policy on sugar validate this change. . . .

On this appeal, CMA contends first that the Department did not provide notice that the disallowance of flavored milk would be considered, and second that the Department gave no reasoned justification for changing its position about the nutritional value of chocolate in the food distributed under its authority. The Department responds to the first contention by arguing that its notice advised the public of its general concern about high sugar content in the proposed food packages and that this should have alerted potentially interested commenters that it would consider eliminating any food with high sugar content. It also argues in effect that the inclusion of flavored milk in the proposed rule carried with it the implication that both inclusion and exclusion would be considered in the rulemaking process. Because we agree with CMA that the Department provided inadequate notice and, therefore, that it must reopen the comment period on the rule, we do not reach the issue of the reasonable justification for its change of position.

The requirement of notice and a fair opportunity to be heard is basic to administrative law. Our single chore is to determine if the Department’s notice provided interested persons, including CMA, with that opportunity. We must decide whether inclusion of flavored milk in the allowable food packages under the proposed rule should have alerted interested persons that the Department might reverse its position and exclude flavored milk if adverse comments recommended its deletion from the program.

Section 4 of the Administrative Procedure Act (APA) requires that the notice in the Federal Register of a proposed rulemaking contain “either the terms or substance of the proposed rule or a description of the subjects and issues involved.” The purpose of the notice-and-comment procedure is both “to allow the agency to benefit from the experience and input of the parties who file comments . . . and to see to it that the agency maintains
a flexible and open-minded attitude towards its own rules.” The notice-and-comment procedure encourages public participation in the administrative process and educates the agency, thereby helping to ensure informed agency decisionmaking.

The Department’s published notice here consisted of the proposed rule and a preamble discussing the negative effect of high sugar content in general and specifically in relation to some foods such as cereals and juices, but it did not mention high sugar content in flavored milk. The proposed rule eliminated certain foods with high sugar content but specifically authorized flavored milk as part of the permissible diet. In a discussion characterized by pointed identification of foods with high sugar content, flavored milk was conspicuous by its exclusion. If after comments the agency had adopted without change the proposed rule as its final rule, there could have been no possible objection to the adequacy of notice. The public was fully notified as to what the Department considered to be a healthy and adequate diet for its target group. The final rule, however, dramatically altered the proposed rule, changing for the first time the milk content of the diet by deleting flavored milk. The agency concedes that the elimination of flavored milk by the final rule is a complete reversal from its treatment in the proposed rule, but it explains that the reversal was caused by the comments received from 78 interested parties—primarily professional administrators of the WIC Program.

This presents then not the simple question of whether the notice of a proposed rule adequately informs the public of its intent, but rather the question of how to judge the adequacy of the notice when the proposal it describes is replaced by a final rule which reaches a conclusion exactly opposite to that proposed, on the basis of comments received from parties representing only a single view of a controversy. In reviewing the propriety of such agency action, we are not constrained by the same degree of deference we afford most agency determinations. “Though our review of an agency’s final decision is relatively narrow, we must be strict in reviewing an agency’s compliance with procedural rules.” “The question of adequacy of notice where a proposed rule is changed after comment . . . requires careful consideration on a case-by-case basis.”

There is no question that an agency may promulgate a final rule that differs in some particulars from its proposal. Otherwise the agency “can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary.” An agency, however, does not have carte blanche to establish a rule contrary to its original proposal simply because it receives suggestions to alter it during the comment period. An interested party must have been alerted by the notice to the possibility of the changes eventually adopted from the comments. Although an agency, in its notice of proposed rulemaking, need not identify precisely every potential regulatory change, the notice must be sufficiently descriptive to provide interested parties with a fair opportunity to comment and to participate in the rulemaking. . . .

The test devised by the First Circuit for determining adequacy of notice of a change in a proposed rule occurring after comments appears to us to be sound: notice is adequate if the changes in the original plan “are in character with the original scheme,” and the final
rule is a “logical outgrowth” of the notice and comments already given. Other circuits also have adopted some form of the “logical outgrowth” test. Stated differently, if the final rule materially alters the issues involved in the rulemaking or, if the final rule “substantially departs from the terms or substance of the proposed rule,” the notice is inadequate.

There can be no doubt that the final rule in the instant case was the “outgrowth” of the original rule proposed by the agency, but the question of whether the change in it was in character with the original scheme and whether it was a “logical outgrowth” is not easy to answer. In resolving this difficult issue, we recognize that, although helpful, verbal formulations are not omnipotent talismans, and we agree that in the final analysis each case “must turn on how well the notice that the agency gave serves the policies underlying the notice requirement.” Under either view, we do not feel that CMA was fairly treated or that the administrative rulemaking process was well served by the drastic alteration of the rule without an opportunity for CMA to be heard.

It is apparent that for many years the Department of Agriculture has permitted the use of chocolate in some form in the food distribution programs that it administers. . . . Chocolate flavored milk has been a permissible part of the WIC Program diet since its inception and there have been no proposals for its removal until the present controversy. . . .

The published preamble to the proposed rule consisted of twelve pages in the Federal Register discussing in detail factors that would be considered in making the final rule. Two pages were devoted to a general discussion of nutrients, including protein, iron, calcium, vitamin A, vitamin C, folic acid, zinc, and fiber, and the dangers of overconsumption of sugar, fat, and salt. The preamble discussed some foods containing these ingredients and foods posing specific problems. It did not discuss flavored milk.

In the next eight pages of the preamble, the nutrition content of food packages was discussed—under the general headings of “cereal” and “juice” for infants; and “eggs,” “milk,” “cheese,” “peanut butter and mature dried beans and peas,” “juice,” “additional foods,” “cereals,” “iron,” “sugar,” “whole grain cereals,” “highly fortified cereals,” and “artificial flavors and colors” for women and children. The only reference to milk concerned the correct quantity to be provided to children, i.e., 24 quarts per month instead of 28 quarts. Although there was considerable discussion of the sugar content of juice and cereal, there was none concerning flavored milk. Likewise, there was considerable discussion of artificial flavor and color in cereal but none concerning flavored milk. The only reference to flavored milk was in the two-page discussion of the individual food packages, which noted that the proposed rule would permit the milk to be flavored or unflavored. The proposed rule which followed the preamble expressly noted that flavored or unflavored milk was permitted in the individual food packages for women and children without special dietary needs.

At the time the proposed rulemaking was published, neither CMA nor the public in general could have had any indication from the history of either the WIC Program or any other food distribution programs that flavored milk was not part of the acceptable diet for women and children without special dietary needs. The discussion in the preamble to the
proposed rule was very detailed and identified specific foods which the agency was examining for excess sugar. This specificity, together with total silence concerning any suggestion of eliminating flavored milk, strongly indicated that flavored milk was not at issue. The proposed rule positively and unqualifiedly approved the continued use of flavored milk. Under the specific circumstances of this case, it cannot be said that the ultimate changes in the proposed rule were in character with the original scheme or a logical outgrowth of the notice. We can well accept that, in general, an approval of a practice in a proposed rule may properly alert interested parties that the practice may be disapproved in the final rule in the event of adverse comments. The total effect of the history of the use of flavored milk, the preamble discussion, and the proposed rule, however, could have led interested persons only to conclude that a change in flavored milk would not be considered. Although ultimately their comments may well have been futile, CMA and other interested persons at least should have had the opportunity to make them. We believe that there was insufficient notice that the deletion of flavored milk from the WIC Program would be considered if adverse comments were received, and, therefore, that affected parties did not receive a fair opportunity to contribute to the administrative rulemaking process. That process was ill-served by the misleading or inadequate notice concerning the permissibility of chocolate flavored milk in the WIC Program and “does not serve the policy underlying the notice requirement.”

The judgment of the district court is therefore reversed, and the case is remanded to the administrative agency with instructions to reopen the comment period and thereby afford interested parties a fair opportunity to comment on the proposed changes in the rule.

Points for Discussion

a. Logical Outgrowth Test

To make the logical outgrowth test more concrete, the Seventh Circuit articulated the following principles to determine the adequacy of a NPRM:

... The adequacy of notice in any case must be determined by a close examination of the facts of the particular proceeding which produced a challenged rule. However, without reciting in detail the facts of other cases, we note that courts have upheld final rules which differed from proposals in the following significant respects: outright reversal of the agency’s initial position; elimination of compliance options contained in an NPR; collapsing, or further subdividing, distinct categories of regulated entities established in a proposed rule; exempting certain entities from the coverage of final rules; or altering the method of calculating or measuring a quantity relevant to a party’s obligations under the rule.

On the other hand, a rule will be invalidated if no notice was given of an issue addressed by the final rules. Moreover, courts have held on numerous occasions
that notice is inadequate where an issue was only addressed in the most general terms in the initial proposal, or where a final rule changes a pre-existing agency practice which was only mentioned in an NPR in order to place unrelated changes in the overall regulatory scheme into their proper context.

The crucial issue, then, is whether parties affected by a final rule were put on notice that “their interests [were] ‘at stake’”; in other words, the relevant inquiry is whether or not potential commentators would have known that an issue in which they were interested was “on the table” and was to be addressed by a final rule. From this perspective it is irrelevant whether the proposal contained in the NPR was favorable to a particular party’s interests; the obligation to comment is not limited to those adversely affected by a proposal. “[A]pproval of a practice in a proposed rule may properly alert interested parties that the practice may be disapproved in the final rule in the event of adverse comments.”


In determining whether an agency has given sufficient notice, should it matter whether the party claiming lack of notice is familiar with the issues involved in the rulemaking? In other words, should a court take into account whether the person or entity claiming lack of notice was a sophisticated corporation that closely follows regulatory activity at an agency or a member of the public who does not do so? See *Alto Dairy v. Veneman*, 336 F.3d 560 (7th Cir. 2003) (observing that although the agency’s notice would be “gobbledygook to an outsider, insiders such as the plaintiffs would realize that the focus of the proceeding would be on their eligibility” to be grouped with other milk producers for purposes of eligibility for minimum price levels for milk).

b. Sufficiency of Notice

If some parties comment on an issue, is this sufficient evidence that the original notice was adequate to provide interested parties with a fair opportunity to comment on that issue? Compare *United Steelworkers of America, AFL-CIO-CLC v. Schuylkill Metals Corp.*, 828 F.2d 314, 318 (5th Cir.1987) (rejecting claim that the notice was not adequate to raise an issue because other parties had commented on the issue) with *American Federation of Labor and Congress of Industrial Organizations v. Donovan*, 757 F.2d 330 (D.C.Cir.1985) (existence of comments on an issue is evidence of the adequacy of the original notice, but the adequacy of the notice cannot be established based on such comments alone). Why might courts be reluctant to accept the existence of comments as adequate proof of the adequacy of the original notice?

c. Logical Growth Test

Two critics of *Chocolate Manufacturers* observe: “Applying the logical outgrowth test without reference to the comments responding to the original notice dramatically restricts the ability of agencies to make changes between notice and rule without providing a second notice and conducting an additional period of comment. This transforms the logical
outgrowth test from a requirement that agencies stay within the bounds of the notice and the comments received to a requirement that agencies predict, in the initial notice, all of the possible directions in which the comments may lead.” Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 Geo. Wash. L. Rev. 856 (2007). Is it fair to force litigants to read all of the comments in order to have notice of a potential change in a proposed rule?

d. Effect of a Successful Notice Challenge

If the National Association of Beef Producers wins its lawsuit, USDA will have to undertake another round of notice and comment rulemaking, assuming that it still wants to promulgate new nutritional guidelines. Have the beef producers won a Pyrrhic victory? How likely is it that USDA will adopt the same rule that was struck down? What do the beef producers gain if USDA adopts an identical rule?

e. Advice to Agency Attorneys

One administrative law expert has offered the following advice to agency attorneys who are responsible for drafting a notice of proposed rulemaking that is adequate to sustain changes in a proposed rule:

> Although specific proposals are valuable in focusing comment, they may ultimately place the agency at a disadvantage, in that the proposal’s very specificity might limit the options available in the final rule. On the other hand, although a generally worded proposal may well avoid some of the restrictions of a too-specific proposal, an agency must be careful that such a proposal is not so general that it affords inadequate notice of particular issues in the proceeding. . . .

One way an agency can both set forth specific proposals in an NRPM and retain flexibility in fashioning the final rule is to include in the NPRM several alternatives that are under considerations. . . .

A related approach would be for the agency, in addition to its specific proposal, to pose a series of questions going beyond the terms of the proposal on which it seeks comment.

Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking* 265–66 (5th ed. 2012). If you were the attorney for USDA who wrote the notice for the new nutrition guidelines, how could you employ these techniques? Is there any disadvantage to using them?

b. Opportunity for Comment

As the previous materials make clear, the purpose of the NPRM is to enable interested persons to comment on the proposed rule. Accordingly, section 553(c) requires agencies to provide interested persons an opportunity to comment “through submission of written data, views, or arguments.” There is no requirement for an oral presentation or hearing. Moreover, the APA does not mandate any specific time period for this opportunity. It does have a require-
ment that final rules must be published 30 days prior to their effective date, id. § 553(d), which is sometimes misinterpreted as mandating a 30 day comment period. Again, this is an area that Congress has often chosen to add “hybrid” requirements, specifying a minimum time period for comments in some statutes. The Safe Drinking Water Act, for example, requires a minimum 60 day comment period for certain rules. 42 U.S.C.A. § 300g–1(b)(2)(B). Even without a requirement of this type, most agencies will provide for 60 or more days for complex or controversial rules, and they will often extend the time for comments if requested to do so. An agency will announce a time extension in the Federal Register.

Take Note Box

Many federal agencies now have an electronic rulemaking docket, which is a website that permits interested persons to learn about pending rulemaking proceedings, to file their comments electronically, and to see the comments filed by other persons or entities. These dockets can be accessed from a government-wide search engine found at www.regulations.gov. If you type in the name of an agency—e.g. EPA—you will see all of the rules currently open for comment. There is also a button on which you can click that will take you to the rulemaking docket. There you will find all of the supporting documents that the agency has on file and all of the comments that have been filed to date. We encourage you to go to the website and try it out. Congress authorized and encouraged the use of electronic dockets in the E-Government Act of 2002, Pub. L. 107–347, 206, 207. See Beth Simone Noveck, The Electronic Revolution in Rulemaking, 53 Emory L.J. 433 (2004).

A question that arises in informal rulemaking is what constraints exist with respect to communications between interested parties and an agency. Are there restrictions as to whether or when written or oral communications can take place?

In formal rulemaking the APA places specific prohibition on ex parte communications—that is, communications made to decisionmakers in the agency outside of the prescribed (and public) procedures. See 5 U.S.C.A. § 557(d). Section 553, by comparison, does not prohibit such contacts in informal rulemaking. Congress can, and sometime does, prohibit or limit such contacts in an agency’s mandate. Moreover, an agency can adopt prohibitions or limitations on its own. For example, the Federal Trade Commission (FTC) at one time prohibited all ex parte contacts between Commissioners and outside persons or staff assistants during a rulemaking. 42 Fed. Reg. 43973–74 (1977). In 1980, Congress established statutory ex parte limitations applicable to certain FTC rulemakings. 15 U.S.C.A. § 57(a)–(j).

Besides these restrictions, the due process clause has been interpreted as prohibiting ex parte contacts when rulemaking involves “conflicting claims to a valuable privilege.” Sangamon Valley Television Corporation v. United States, 269 F.2d 221 (D.C.Cir. 1959). The case involved a rule promulgated by the Federal Communications Commission
Chapter 2  Rulemaking

One of the FCC’s functions is to allocate the radio spectrum to different uses, such as radio, television, cellular telephones, and other uses. The FCC rule determined that a VHF channel, used by a television station in Springfield, Illinois, should be transferred to St. Louis, and two UHF channels, used by St. Louis stations, should be transferred to Springfield. The VHF channel was more valuable because it reached more viewers with better reception. While the rule was under consideration, representatives of a St. Louis UHF station that was interested in having a new VHF channel assigned to St. Louis, and representatives of two Springfield business interests, which were interested in retaining the VHF channel, made ex parte presentations to various FCC commissioners with respect to the merits of the rulemaking proceeding.

The court held that such contacts were not permissible and offered this brief explanation:

The Commissioner and the intervenor contend that because the proceeding now on review was “rule-making,” ex parte attempts to influence the Commissioners did not invalidate it. The Department of Justice disagrees. On behalf of the United States, the Department urges that whatever the proceeding may be called it involved not only allocation of TV channels among communities but also resolution of conflicting claims to a valuable privilege, and that basic fairness requires such a proceeding to be carried out in the open. We agree with the Department of Justice. Accordingly, private approaches to members of the Commission vitiated its action and the proceeding must be reopened.

269 F.2d at 224.

Food for Thought
What are “ex parte” contacts? See 5 USC § 551(14). Why does the APA explicitly ban oral or written communications, not on the public record, in formal rulemaking? Earlier, it was pointed out that section 553 of the APA requires formal rulemaking when an agency’s statutory mandate requires that a rule is “to be determined on the record after opportunity for an agency hearing.” 5 USC § 553(c). How does this relate to the ban on ex parte comments in formal rulemaking?

Food for Thought
Hypo 2-6: Ex Parte Communications

In the previous problem, the Department of Agriculture had proposed a rule to update the nutrition standards for school lunches and, last we heard, on the basis of the comments received, it seem disposed to adopt the arguments of VEGI to require at least five vegetarian meals a month. Imagine that the National Association of Beef Producers (NABP) learns that USDA is in the process of trying to write a preamble justifying this decision, and it wants to engage in a concerted effort to try to demonstrate to the Secretary of Agriculture that such a requirement would impose additional costs while actually harming students’ health. Students will discard the vegetables and not eat lunch at all, probably substituting snacks and candy instead of a nutritious, filling, and tasty meat main course. NABP contacts senators and congresspersons from Iowa, Kansas, Texas, and Florida to tell them about USDA’s expected action. In addition, NABP contacts the Office of Management and Budget, in the Executive Office of the President, to present its case that USDA is about to make a terrible mistake. Finally, NABP writes and phones the Secretary of Agriculture, asking for an appointment to speak to him about the depressed state of cattle prices and the school lunch program. The Secretary has already had calls from Capitol Hill “requesting” him to come visit with a group of members of Congress from cattle states. His secretary has given him a message that the President’s domestic policy adviser has asked him to prepare a briefing for the President on the School Lunch regulations.

Assume you are a lawyer with the General Counsel’s office in the Department of Agriculture. The Secretary wants to know what he can and cannot do in response to this onslaught. As someone who answers to the President, who must deal with Congress every day, and who is supposed to look out for the interests of agricultural interests (as well as run the school lunch program), he would like to meet with these people and hear them out, but he does not want to do anything illegal or anything that would jeopardize whatever rule USDA adopts.
Chapter 2  Rulemaking

Hypo Materials

Home Box Office v. Federal Communications Commission

567 F.2d 9 (D.C.Cir.1977).

Per Curiam:

[In the early days of cable television, the FCC strictly regulated what cable programmers could provide, for fear that cable would destroy the broadcast TV industry, to the ultimate detriment of the public interest. In this rulemaking, the FCC had proposed to loosen those restrictions somewhat. After the comment period, however, the FCC met with many of the interested parties, trying to negotiate an outcome acceptable to all. After the rule was adopted, however, it was challenged by a number of the parties. One of the issues was the ex parte communications the FCC had engaged in.]

. . . It is apparently uncontested that a number of participants before the Commission sought out individual commissioners or Commission employees for the purpose of discussing ex parte and in confidence the merits of the rules under review here. In fact, the Commission itself solicited such communications in its notices of proposed rulemaking. . . . In an attempt to clarify the facts this court sua sponte ordered the Commission to provide “a list of all of the ex parte presentations, together with the details of each, made to it, or to any of its members or representatives, during the rulemaking proceedings.” In response to this order the Commission filed a document over 60 pages long which revealed, albeit imprecisely, widespread ex parte communications involving virtually every party before this court. . . .

Unfortunately, the document filed with this court does not allow an assessment of what was said to the Commission by the various persons who engaged in ex parte contacts. To give a flavor of the effect of these contacts, however, we think it useful to quote at length from the brief of amicus Geller:

[Ex parte] presentations have in fact been made at crucial stages of the proceeding. Thus, in early 1974, then-Chairman Burch sought to complete action in this proceeding. Because the Commission was “leaning” in its deliberations towards relaxing the existing rules “with ‘wildcard’ rights for ‘blockbuster’ movies,” American Broadcasting Company’s representatives contacted “key members of Congress,” who in turn successfully pressured the Commission not to take such action. Further, in the final crucial decisional period, the tentative course to be taken by the Commission would leak after each non-public meeting, and industry representatives would rush to make ex parte presentations to the Commissioners and staff. . . .
It is important to note that many contacts occurred in the crucial period between the close of oral argument on October 25, 1974 and the adoption of the First Report and Order on March 20, 1975, when the rulemaking record should have been closed while the Commission was deciding what rules to promulgate. The information submitted to this court by the Commission indicates that during this period broadcast interests met some 18 times with Commission personnel, cable interests some nine times, motion picture and sports interests five times each, and “public interest” intervenors not at all.

Although it is impossible to draw any firm conclusions about the effect of ex parte presentations upon the ultimate shape of the pay cable rules, the evidence is certainly consistent with often-voiced claims of undue industry influence over Commission proceedings, and we are particularly concerned that the final shaping of the rules we are reviewing here may have been by compromise among the contending industry forces, rather than by exercise of the independent discretion in the public interest the Communications Act vests in individual commissioners. Our concern is heightened by the submission of the Commission’s Broadcast Bureau to this court which states that in December 1974 broadcast representatives “described the kind of pay cable regulation that, in their view, broadcasters ‘could live with.’” If actual positions were not revealed in public comments, as this statement would suggest, and, further, if the Commission relied on these apparently more candid private discussions in framing the final pay cable rules, then the elaborate public discussion in these dockets has been reduced to a sham.

Even the possibility that there is here one administrative record for the public and this court and another for the Commission and those “in the know” is intolerable. Whatever the law may have been in the past, there can now be no doubt that implicit in the decision to treat the promulgation of rules as a “final” event in an ongoing process of administration is an assumption that an act of reasoned judgment has occurred, an assumption which further contemplates the existence of a body of material documents, comments, transcripts, and statements in various forms declaring agency expertise or policy with reference to which such judgment was exercised. Against this material, “the full administrative record that was before (an agency official) at the time he made his decision,” it is the obligation of this court to test the actions of the Commission for arbitrariness or inconsistency with delegated authority. Yet here agency secrecy stands between us and fulfillment of our obligation. . . .

The failure of the public record in this proceeding to disclose all the information made available to the Commission is not the only inadequacy we find here. Even if the Commission had disclosed to this court the substance of what was said to it ex parte, it would still be difficult to judge the truth of what the Commission asserted it knew about the television industry because we would not have the benefit of an adversarial discussion among the parties. The importance of such discussion to the proper functioning of the agency decisionmaking and judicial review processes is evident in our cases. We have insisted, for example, that information in agency files or consultants’ reports which the agency has identified as relevant to the proceeding be disclosed to the parties for adversarial
comment. Similarly, we have required agencies to set out their thinking in notices of
proposed rulemaking. This requirement not only allows adversarial critique of the agency
but is perhaps one of the few ways that the public may be apprised of what the agency thinks
it knows in its capacity as a repository of expert opinion. From a functional standpoint,
we see no difference between assertions of fact and expert opinion tendered by the public,
as here, and that generated internally in an agency: each may be biased, inaccurate, or
incomplete—failings which adversary comment may illuminate. . . .

From what has been said above, it should be clear that information gathered ex
parte from the public which becomes relevant to a rulemaking will have to be disclosed at
some time. On the other hand, we recognize that informal contacts between agencies and
the public are the “bread and butter” of the process of administration and are completely
appropriate so long as they do not frustrate judicial review or raise serious questions of
fairness. Reconciliation of these considerations in a manner which will reduce procedural
uncertainty leads us to conclude that communications which are received prior to issuance
of a formal notice of rulemaking do not, in general, have to be put in a public file. Of
course, if the information contained in such a communication forms the basis for agency
action, then, under well established principles, that information must be disclosed to the
public in some form. Once a notice of proposed rulemaking has been issued, however,
any agency official or employee who is or may reasonably be expected to be involved in
the decisional process of the rulemaking proceeding, should “refus[e] to discuss matters
relating to the disposition of a [rulemaking proceeding] with any interested private party,
or an attorney or agent for any such party, prior to the [agency’s] decision * * *.” If ex
parte contacts nonetheless occur, we think that any written document or a summary of
any oral communication must be placed in the public file established for each rulemaking
docket immediately after the communication is received so that interested parties may
comment thereon.
Sierra Club v. Costle


WALD, Circuit Judge:

This case involved EPA's adoption of a rule pursuant to the 1977 Amendments to the Clean Air Act to govern emissions from coal burning power plants. During the pendency of the rulemaking, EPA was the subject of ex parte contacts by interested parties, legislators, and the President’s staff.

V. The 1.2 Lbs./MBTU Emission Ceiling

[The Environmental Defense Fund (EDF)] challenges this part of the final regulation on procedural grounds, contending that although there may be evidence supporting the 1.2 lbs./MBtu standard, EPA should have and would have adopted a stricter standard if it had not engaged in post-comment period irregularities and succumbed to political pressures. . . .

B. EDF’s Procedural Attack

EDF alleges that as a result of an “ex parte blitz” by coal industry advocates conducted after the close of the comment period, EPA backed away from adopting the .55 lbs./MBtu limit, and instead adopted the higher 1.2 lbs./MBtu restriction. . . . “Scores” of pro-industry “ex parte” comments were received by EPA in the post-comment period, states EDF, and various meetings with coal industry advocates including Senator Robert Byrd of West Virginia took place during that period. These communications, EDF asserts, were unlawful and prejudicial to its position.

In order for this court to assess these claims, we must identify the particular actions and incidents which gave rise to EDF’s complaints. Aside from a passing reference to a telephone call from an EPA official to the Chief Executive Officer of the National Coal Association, EDF’s procedural objections stem from either (1) comments filed after the close of the official comment period, or (2) meetings between EPA officials and various government and private parties interested in the outcome of the final rule, all of which took place after the close of the comment period.

1. Late Comments

The comment period for the [regulation] began on September 19, 1978, and closed on January 15, 1979. After January 15, EPA received almost 300 written submissions on the proposed rule from a broad range of interests. EPA accepted these comments and entered them all on its administrative docket. EPA did not, however, officially reopen the comment period, nor did it notify the public through the Federal Register or by other means that it had received and was entering the “late” comments. . . .
2. **Meetings**

EDF objects to nine different meetings. . .

EDF believes that the communications just outlined, when taken as a whole, were so extensive and had such a serious impact on the NSPS rulemaking, that they violated EDF’s rights to due process in the proceeding, and that these “ex parte” contacts were procedural errors of such magnitude that this court must reverse. EDF does not specify which particular features in each of the above-enumerated communications violated due process or constituted errors under the statute; indeed, EDF nowhere lists the communications in a form designed to clarify why any particular communication was unlawful. Instead, EDF labels all post-comment communications with EPA from whatever source and in whatever form as “ex parte,” and claims that “this court has repeatedly stated that ex parte contacts of substance violate due process.”

At the outset, we decline to begin our task of reviewing EPA’s procedures by labeling all post-comment communications with the agency as “ex parte.” Such an approach essentially begs the question whether these particular communications in an informal rulemaking proceeding were unlawful. Instead of beginning with a conclusion that these communications were “ex parte,” we must evaluate the various communications in terms of their timing, source, mode, content, and the extent of their disclosure on the docket, in order to discover whether any of them violated the procedural requirements of the Clean Air Act, or of due process.

**C. Standard for Judicial Review of EPA Procedures**

This court’s scope of review is delimited by the special procedural provisions of the Clean Air Act, which declare that we may reverse the Administrator’s decision for procedural error only if (i) his failure to observe procedural requirements was arbitrary and capricious, (ii) an objection was raised during the comment period, or the grounds for such objection arose only after the comment period and the objection is “of central relevance to the outcome of the rule,” and (iii) “the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.” The essential message of so rigorous a standard is that Congress was concerned that EPA’s rulemaking not be casually overturned for procedural reasons, and we of course must respect that judgment.

Our authority to reverse informal administrative rulemaking for procedural reasons is also informed by *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.* In its unanimous opinion, the Supreme Court unambiguously cautioned this court against imposing its own notions of proper procedures upon an administrative agency entrusted with substantive functions by Congress. . .

**D. Statutory Provisions Concerning Procedure**

The 1977 Amendments required the agency to establish a “rulemaking docket” for each proposed rule which would form the basis of the record for judicial review. [Section 307
of the Act requires the docket to contain, inter alia, (1) “notice of the proposed rulemaking . . . accompanied by a statement of its basis and purpose,” and a specification of the public comment period; (2) “all written comments and documentary information on the proposed rule received from any person . . . during the comment period; (3) the transcript of public hearings, if any; and (4) all documents . . . which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking . . .”; (3) drafts of proposed rules submitted for interagency review, and all documents accompanying them and responding to them; and (4) the promulgated rule and the various accompanying agency documents which explain and justify it.

In contrast to other recent statutes, there is no mention of any restrictions upon “ex parte” contacts. However, the statute apparently did envision that participants would normally submit comments, documentary material, and oral presentations during a prescribed comment period. Only two provisions in the statute touch upon the post-comment period, one of which, as noted immediately supra, states that “(a)ll documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability.” But since all the post-comment period written submissions which EDF complains of were in fact entered upon the docket, EDF cannot complain that this provision has been violated.

Since this court can reverse an agency on procedural grounds only if it finds a failure to observe procedures “required by law,” we must first decide whether the procedures followed by EPA between January 15 and June 1, 1979 were unlawful. Only if we so find would we then face the second issue whether the unlawful errors were “of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.” We now hold that EPA’s procedures during the post-comment period were lawful, and therefore do not face the issue whether any alleged errors were of “central relevance” to the outcome.

E. Validity of EPA’s Procedures During the Post-Comment Period

The post-comment period communications about which EDF complains vary widely in their content and mode; some are written documents or letters, others are oral conversations and briefings, while still others are meetings where alleged political arm-twisting took place. For analytical purposes we have grouped the communications into categories and shall discuss each of them separately. As a general matter, however, we note at the outset that nothing in the statute prohibits EPA from admitting all post-comment communications into the record; nothing expressly requires it, either. Most likely the drafters envisioned promulgation of a rule soon after the close of the public comment period, and did not envision a months-long hiatus where continued outside communications with the agency would continue unabated. We must therefore attempt to glean the law for this case by inference from the procedural framework provided in the statute.
1. Written Comments Submitted During Post-Comment Period

Although no express authority to admit post-comment documents exists, the statute does provide that: All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability.

This provision, in contrast to others in the same subparagraph, is not limited to the comment period. Apparently it allows EPA not only to put documents into the record after the comment period is over, but also to define which documents are “of central relevance” so as to require that they be placed in the docket. The principal purpose of the drafters was to define in advance, for the benefit of reviewing courts, the record upon which EPA would rely in defending the rule it finally adopted; it was not their purpose to guarantee that every piece of paper or phone call related to the rule which was received by EPA during the post-comment period be included in the docket. EPA thus has authority to place post-comment documents into the docket, but it need not do so in all instances.

Such a reading of the statute accords well with the realities of Washington administrative policymaking, where rumors, leaks, and overreactions by concerned groups abound, particularly as the time for promulgation draws near. In a proceeding such as this, one of vital concern to so many interests, industry, environmental groups, as well as Congress and the Administration it would be unrealistic to think there would not naturally be attempts on all sides to stay in contact with EPA right up to the moment the final rule is promulgated. The drafters of the 1977 Amendments were practical people, well versed in such activity, and we decline now to infer from their silence that they intended to prohibit the lodging of documents with the agency at any time prior to promulgation. Common sense, after all, must play a part in our interpretation of these statutory procedures.

EPA of course could have extended, or reopened, the comment period after January 15 in order formally to accommodate the flood of new documents; it has done so in other cases. But under the circumstances of this case, we do not find that it was necessary for EPA to reopen the formal comment period. In the first place, the comment period lasted over four months, and although the length of the comment period was not specified in the 1977 Amendments, the statute did put a premium on speedy decisionmaking by setting a one year deadline from the Amendments’ enactment to the rules’ promulgation.

If, however, documents of central importance upon which EPA intended to rely had been entered on the docket too late for any meaningful public comment prior to promulgation, then both the structure and spirit of section 307 would have been violated. The Congressional drafters, after all, intended to provide “thorough and careful procedural safeguards . . . (to) insure an effective opportunity for public participation in the rulemaking process.”

The case before us, however, does not present an instance where documents vital to EPA’s support for its rule were submitted so late as to preclude any effective public comment,
[and] EDF itself has failed to show us any particular document or documents to which it lacked an opportunity to respond, and which also were vital to EPA's support for the rule.

2. Meetings Held With Individuals Outside EPA

The statute does not explicitly treat the issue of post-comment period meetings with individuals outside EPA. Oral face-to-face discussions are not prohibited anywhere, anytime, in the Act. The absence of such prohibition may have arisen from the nature of the informal rulemaking procedures Congress had in mind. Where agency action resembles judicial action, where it involves formal rulemaking, adjudication, or quasi-adjudication among “conflicting private claims to a valuable privilege,” the insulation of the decision-maker from ex parte contacts is justified by basic notions of due process to the parties involved. But where agency action involves informal rulemaking of a policymaking sort, the concept of ex parte contacts is of more questionable utility.

Under our system of government, the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public from whom their ultimate authority derives, and upon whom their commands must fall. As judges we are insulated from these pressures because of the nature of the judicial process in which we participate; but we must refrain from the easy temptation to look askance at all face-to-face lobbying efforts, regardless of the forum in which they occur, merely because we see them as inappropriate in the judicial context. Furthermore, the importance to effective regulation of continuing contact with a regulated industry, other affected groups, and the public cannot be underestimated. Informal contacts may enable the agency to win needed support for its program, reduce future enforcement requirements by helping those regulated to anticipate and shape their plans for the future, and spur the provision of information which the agency needs. The possibility of course exists that in permitting ex parte communications with rulemakers we create the danger of “one administrative record for the public and this court and another for the Commission.” Under the Clean Air Act procedures, however, “(t)he promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket. . . .” Thus EPA must justify its rulemaking solely on the basis of the record it compiles and makes public.

Regardless of this court’s views on the need to restrict all post-comment contacts in the informal rulemaking context, however, it is clear to us that Congress has decided not to do so in the statute which controls this case. . . .

Lacking a statutory basis for its position, EDF would have us extend our decision in *Home Box Office, Inc. v. FCC* to cover all meetings with individuals outside EPA during the post-comment period. Later decisions of this court, however, have declined to apply *Home Box Office* to informal rulemaking of the general policymaking sort involved here, and there is no precedent for applying it to the procedures found in the Clean Air Act Amendments of 1977.
It still can be argued, however, that if oral communications are to be freely permitted after the close of the comment period, then at least some adequate summary of them must be made in order to preserve the integrity of the rulemaking docket, which under the statute must be the sole repository of material upon which EPA intends to rely. The statute does not require the docketing of all post-comment period conversations and meetings, but we believe that a fair inference can be drawn that in some instances such docketing may be needed in order to give practical effect to section 307’s requirement that all documents “of central relevance to the rulemaking” shall be placed in the docket as soon as possible after their availability. This is so because unless oral communications of central relevance to the rulemaking are also docketed in some fashion or other, information central to the justification of the rule could be obtained without ever appearing on the docket, simply by communicating it by voice rather than by pen, thereby frustrating the command of section 307 that the final rule not be “based (in part or whole) on any information or data which has not been placed in the docket. . . .”

EDF is understandably wary of a rule which permits the agency to decide for itself when oral communications are of such central relevance that a docket entry for them is required. Yet the statute itself vests EPA with discretion to decide whether “documents” are of central relevance and therefore must be placed in the docket; surely EPA can be given no less discretion in docketing oral communications, concerning which the statute has no explicit requirements whatsoever. Furthermore, this court has already recognized that the relative significance of various communications to the outcome of the rule is a factor in determining whether their disclosure is required. A judicially imposed blanket requirement that all post-comment period oral communications be docketed would, on the other hand, contravene our limited powers of review, would stifle desirable experimentation in the area by Congress and the agencies, and is unnecessary for achieving the goal of an established, procedure-defined docket, viz., to enable reviewing courts to fully evaluate the stated justification given by the agency for its final rule.

Turning to the particular oral communications in this case, we find that only two of the nine contested meetings were undocketed by EPA. The agency has maintained that, as to the May 1 meeting where Senate staff people were briefed on EPA’s analysis concerning the impact of alternative emissions ceilings upon coal reserves, its failure to place a summary of the briefing in the docket was an oversight. We find no evidence that this oversight was anything but an honest inadvertence; furthermore, a briefing of this sort by EPA which simply provides background information about an upcoming rule is not the type of oral communication which would require a docket entry under the statute.

The other undocketed meeting occurred at the White House and involved the President and his White House staff. . . .

(a) Intra-Executive Branch Meetings

We have already held that a blanket prohibition against meetings during the post-comment period with individuals outside EPA is unwarranted, and this perforce applies
to meetings with White House officials. We have not yet addressed, however, the issue whether such oral communications with White House staff, or the President himself, must be docketed on the rulemaking record, and we now turn to that issue. The facts, as noted earlier, present us with a single undocketed meeting held on April 30, 1979, at 10:00 a.m., attended by the President, White House staff, other high ranking members of the Executive Branch, as well as EPA officials, and which concerned the issues and options presented by the rulemaking.

We note initially that section 307 makes specific provision for including in the rulemaking docket the “written comments” of other executive agencies along with accompanying documents on any proposed draft rules circulated in advance of the rulemaking proceeding. . . . This specific requirement does not mention informal meetings or conversations concerning the rule . . . , nor does it refer to oral comments of any sort. Yet it is hard to believe Congress was unaware that intra-executive meetings and oral comments would occur throughout the rulemaking process. We assume, therefore, that unless expressly forbidden by Congress, such intra-executive contacts may take place, both during and after the public comment period; the only real issue is whether they must be noted and summarized in the docket.

The court recognizes the basic need of the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy. He and his White House advisers surely must be briefed fully and frequently about rules in the making, and their contributions to policymaking considered. The executive power under our Constitution, after all, is not shared it rests exclusively with the President. . . .

We recognize, however, that there may be instances where the docketing of conversations between the President or his staff and other Executive Branch officers or rulemakers may be necessary to ensure due process. This may be true, for example, where such conversations directly concern the outcome of adjudications or quasi-adjudicatory proceedings; there is no inherent executive power to control the rights of individuals in such settings. Docketing may also be necessary in some circumstances where a statute like this one specifically requires that essential “information or data” upon which a rule is based be docketed. But in the absence of any further Congressional requirements, we hold that it was not unlawful in this case for EPA not to docket a face-to-face policy session involving the President and EPA officials during the post-comment period, since EPA makes no effort to base the rule on any “information or data” arising from that meeting. Where the President himself is directly involved in oral communications with Executive Branch officials, Article II considerations combined with the strictures of Vermont Yankee require that courts tread with extraordinary caution in mandating disclosure beyond that already required by statute.

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

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**Points for Discussion**

a. **Change of Mind**

The D.C. Circuit’s attitude toward *ex parte* communications seems to have changed between *Home Box Office* and *Sierra Club*. Can you think of any reason for the switch, such as an intervening Supreme Court case? *Home Box Office* itself seems to have been a fragile opinion; one of the three judges on the panel concurred specially to disagree with the majority’s *ex parte* analysis, and in less than a year a different panel of the D.C. Circuit refused to apply *Home Box Office’s* *ex parte* analysis to another FCC case. Although that panel technically held that it would not apply *Home Box Office’s* analysis to activity occurring before the decision was rendered, the full opinion of the panel clearly indicated its belief that *Home Box Office’s* *strict* *ex parte* rules were inappropriate in ordinary notice-and-comment rulemaking. See *Action for Children’s Television v. Federal Communications Commission*, 564 F.2d 458 (D.C.Cir.1977). Even if *Home Box Office* is not “good law,” can you think of any reasons why agencies might wish to follow it anyway?

b. **Clean Air Act Requirements**

Note that Sierra Club did not involve a challenge to EPA’s procedures under Section 553 of the APA or under the APA at all, but rather involved a challenge under the Clean Air Act’s own procedural requirements applicable to rulemaking. These requirements are much more specific than the comparable requirements of the APA. Is this a basis for distinction from the APA? See *Board of Regents v. Environmental Protection Agency*, 86 F.3d 1214, 1222 (D.C.Cir.1996) (distinguishing *Sierra Club* on the ground that, unlike the Clean Air Act, § 553 of the APA does not contain language requiring an agency to place all documents of “central relevance” to the rulemaking “proceeding” in the rulemaking docket).
In *Home Box Office* it seemed that an important part of the offense to the court was the fact that the information provided to the Commission had not been subjected to comment by opposing parties. In *Sierra Club*, the court specifically determined that EDF had adequate opportunity to respond to all the important new information provided EPA after the close of the comment period. Courts do continue to police agencies' use of information either received or generated by the agency and not made available for public comment. See, e.g., *Ober v. United States Environmental Protection Agency*, 84 F.3d 304 (9th Cir.1996) (overturning EPA's approval of a state's Clean Air Act state implementation plan because EPA had invited and received over 300 pages of information from the state after the close of the public comment period, when EPA relied on that information to approve the state plan) and *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392 (9th Cir.1995) (finding an APA violation when the FWS relied on a United States Geological Survey draft study in order to justify a rule listing Bruneau Hot Springs Snail as an endangered species without making that draft available to the public). But see *Solite Corp. v. United States Environmental Protection Agency*, 952 F.2d 473 (D.C.Cir.1991) (an agency may use supplementary data, unavailable during the notice and comment period, that expands on and confirms information contained in the proposed rulemaking and addresses alleged deficiencies in the pre-existing data, so long as no prejudice is shown); *Rybachek v. United States Environmental Protection Agency*, 904 F.2d 1276 (9th Cir.1990) (permissible for EPA to rely on over 6000 pages of material added to record after the close of the comment period because material was EPA's response to comments).

Another issue in *Sierra Club* was whether members of Congress had unlawfully pressured EPA to adopt the rules that it did. No statute imposes any particular limitation on congressional “pressure,” but an earlier D.C. Circuit case, *D.C. Federation of Civic Associations v. Volpe*, 459 F.2d 1231 (D.C.Cir.1971), had found improper pressure. The court in *Sierra Club* distinguished the previous case as follows:

In *D.C. Federation* the Secretary of Transportation, pursuant to applicable federal statutes, made certain safety and environmental findings in designating a proposed bridge as part of the interstate highway system. Civic associations sought to have these determinations set aside for their failure to meet certain statutory standards, and because of possible tainting by reason of improper Congressional influence. Such influence chiefly included public statements by the Chairman of the House Subcommittee on the District of Columbia, Representative Natcher, indicating in no uncertain terms that money earmarked for the construction of the District of Columbia's subway system would be withheld unless the Secretary approved the bridge. [A] majority did agree on the controlling principle of law: “that the decision (of the Secretary) would be invalid if based in whole or in part on the pressures emanating from Representative Natcher.” . . . The court
remanded simply so that the Secretary could make this decision strictly and solely on the basis of considerations made relevant by Congress in the applicable statute.

*D.C. Federation* thus requires that two conditions be met before an administrative rulemaking may be overturned simply on the grounds of Congressional pressure. First, the content of the pressure upon the Secretary is designed to force him to decide upon factors not made relevant by Congress in the applicable statute. Representative Natcher’s threats were of precisely that character, since deciding to approve the bridge in order to free the “hostage” mass transit appropriation was not among the decisionmaking factors Congress had in mind when it enacted the highway approval provisions of Title 23 of the United States Code. Second, the Secretary’s determination must be affected by those extraneous considerations.

In the case before us, there is no persuasive evidence that either criterion is satisfied. Senator Byrd requested a meeting in order to express “strongly” his already well-known views that the SO 2 standards’ impact on coal reserves was a matter of concern to him. EPA initiated a second responsive meeting to report its reaction to the reserve data submitted by the NCA. In neither meeting is there any allegation that EPA made any commitments to Senator Byrd. The meetings did underscore Senator Byrd’s deep concerns for EPA, but there is no evidence he attempted actively to use “extraneous” pressures to further his position. Americans rightly expect their elected representatives to voice their grievances and preferences concerning the administration of our laws. We believe it entirely proper for Congressional representatives vigorously to represent the interests of their constituents before administrative agencies engaged in informal, general policy rulemaking, so long as individual Congressmen do not frustrate the intent of Congress as a whole as expressed in statute, nor undermine applicable rules of procedure. Where Congressmen keep their comments focused on the substance of the proposed rule, and we have no substantial evidence to cause us to believe Senator Byrd did not do so here, administrative agencies are expected to balance Congressional pressure with the pressures emanating from all other sources. To hold otherwise would deprive the agencies of legitimate sources of information and call into question the validity of nearly every controversial rulemaking.

Although EPA did not violate the restrictions announced in *D.C. Federation*, not all government officials are as careful. See *Earth Island Institute v. Hogarth*, 484 F.3d 1123, 1134–35 (9th Cir. 2007) (affirming the district court’s finding that “both Mexico and the United States Department of State . . . engaged in a persistent effort to influence both the process and the ultimate finding, and that high ranking-officials [sic] in the Department of Commerce were willing to heed these influences notwithstanding the scientific evidence to the contrary.”).

c. **Statement of Basis and Purpose**

After receiving comments from interested persons, Section 553(c) requires agencies “after consideration of the relevant matter presented, . . . [to] incorporate in the rules adopted a concise general statement of their basis and purpose.” This preamble to the final
rule was intended “to enable the public to obtain a general idea of the purpose of, and a statement of the basis and justification for, the rules,” rather than “an elaborate analysis of rules or of the detailed considerations upon which they are based.” Legislative History of the Administrative Procedure Act, supra, at 225.

As in the case of notice, however, this original practice has changed notably. Today, the preamble to a complicated or controversial rule can easily exceed 100 pages of the double-columned, small type Federal Register. As noted earlier, there are two reasons for this development.

In part, extensive preambles are the result of statutes that require agencies to do more in their final preambles. See, e.g., 42 U.S.C.A. § 7191(d) (DOE must accompany rule with “an explanation responding to the major comments, criticisms, and alternatives offered during the comment period”); 42 U.S.C.A. § 7607(d)(6) (EPA under Clean Air Act must include in statement of basis and purpose “an explanation of the reasons for any major changes in the promulgated rule from the proposed rule” and “a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period”). See also 40 CFR § 1503.4 (agencies in their final Environmental Impact Statements must respond to comments submitted during the comment period).

The more detailed and expansive statements of basis and purpose are also the result of court decisions that either set aside or remanded to the agency rules that the courts found inadequately justified. As we will see later, the agency’s contemporaneous explanation for its action, supported by information in the rulemaking record, is the basis upon which courts review the substantive rationality of the rule. To skimp on the statement of basis and purpose, therefore, effectively limits the ability of the agency later to justify the rule if it is challenged in court. We will address this issue later in this chapter when we consider judicial review.

4. Hybrid Rulemaking Procedures

The discussion concerning the procedures applicable to informal rulemaking has made clear that many statutes have added various requirements to the basic APA informal rulemaking procedures. In addition, agencies are subject to a significant number of requirements that they engage in some form of regulatory analysis in conjunction with rulemaking. Since it is probably a rare rule today that is subject only to the APA's procedures, lawyers must be attuned to these other sources of procedural requirements.
a. Statutory Requirements

1. National Environmental Policy Act (NEPA)

In 1970, Congress passed the National Environmental Policy Act (NEPA), which requires agencies to complete an Environmental Impact Statement (EIS) before engaging in activities (including rulemaking) that may have a significant effect on the human environment. See 42 U.S.C.A. § 4332(2)(c); see generally Nicholas Yost, NEPA Deskbook (3d ed. 2003). These EISs describe in some detail the effect the proposed action will have on the environment and the effects that alternatives to the proposed action would have. Because NEPA does not require agencies to take, or not take, some particular action on the basis of the EIS, NEPA is known as imposing procedural, rather than substantive requirements. Like the procedures of the APA, however, agencies are subject to judicial review concerning compliance with NEPA’s procedural requirements.

2. Regulatory Flexibility Act (Reg-Flex)

Congress enacted the Regulatory Flexibility Act in 1980 and significantly amended it in 1996. The Act requires agencies to create a Regulatory Flexibility Analysis (RFA) whenever they propose a rule that may have a significant economic impact on a substantial number of small businesses, organizations, or governments. 5 U.S.C.A. § 601 et seq. See generally Paul R. Verkuil, A Critical Guide to the Regulatory Flexibility Act, 1982 Duke L.J. 213 (1982). Despite the language of the Act, courts have consistently interpreted it to require an RFA only when the significant economic effect is on a substantial number of small
entities that actually would be subject to the proposed rule, as opposed to merely affected by it. See, e.g., *Motor & Equipment Manufacturers Association v. Nichols*, 142 F.3d 449, 467 & n. 18 (D.C.Cir.1998). The initial analysis accompanies the proposed rule and includes the reasons why the agency is proposing the action, a statement of the objectives and legal basis for the proposed rule, a description of the affected small entities, the reporting and recordkeeping requirements, an identification of other federal rules that may overlap or conflict with the proposed rule, and a description of any significant regulatory alternatives that would accomplish the stated objectives but minimize the impact on small entities. After an opportunity for comment on the proposed rule and initial analysis, the Act requires the agency to accompany the final rule with a final RFA that summarizes the comments received, the agency’s response to them, and an explanation why any alternative was not adopted that would have reduced the impact on small entities.

Unlike NEPA, the Regulatory Flexibility Act, as originally passed, prohibited any judicial review of an agency’s compliance with the Act. Rather, the Chief Counsel for Advocacy of the Small Business Administration (a free-standing executive agency) was given responsibility for monitoring agency compliance. Acting on complaints about the ineffective nature of the Regulatory Flexibility Act, Congress authorized judicial review of agency compliance in 1996. *Small Business Regulatory Enforcement Fairness Act*, Pub. L. No. 104–121, § 242, 110 Stat. 847 (1996) (codified at 5 U.S.C.A. § 611). If an agency fails to comply with required procedures, a court may remand a rule back to an agency and defer enforcement of the rule against small entities.

An RFA becomes part of the rulemaking record when there is judicial review of a rule. As a result, although a court cannot directly review the substance of an RFA, it can consider the RFA in determining whether a rule is arbitrary and capricious under section 706. In addition, the amendments created special procedural requirements for rules adopted by the Consumer Finance Protection Bureau, EPA, and OSHA that affect small entities. In essence, they require those agencies to create special advisory committees composed of members of small entities to review proposed rules, apparently before they are published for public comment.

3. **Paperwork Reduction Act**

Congress also established the Paperwork Reduction Act in 1980. 44 U.S.C.A. §§ 3501 et seq., which requires agencies to engage in a notice and comment procedure prior to imposing any reporting or recordkeeping requirement on ten or more persons. The agency must determine that the collection of information is necessary for the proper performance of the functions of the agency, is not unnecessarily duplicative of information otherwise available to the agency, takes account of the particular problems of small entities, is written in plain language, and uses information technology to reduce burden. See generally William
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Funk, The Paperwork Reduction Act: Paperwork Reduction Meets Administrative Law, 24 Harv. J. Legis. 1 (1987). As a result of 1995 amendments, these reporting and recordkeeping requirements include both situations where the information is to be reported to a federal agency and where the information is only to be reported to the public.

The agency must also send its proposed requirement to the Office of Information and Regulatory Affairs (OIRA), which Congress created to approve or disapprove these rules. OIRA is part of the Office of Management and Budget (OMB), which is located organizationally in the Executive Office of the President. As OMB’s names implies, it is responsible for management and budget functions for the President, and because of its presence in the Executive Office of the President, among agencies it is often viewed as being more closely connected to the policies of the President. If OIRA approves a paperwork requirement, it assigns it a control number. The act prohibits the government from penalizing a person for failing to comply with an information requirement “if the information collection does not display a valid control number.”

4. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995, Pub. L. No. 104–4, 109 Stat. 48, 42 U.S.C.A. § 3512, entitled “Regulatory Accountability and Reform,” requires federal agencies, to prepare a statement assessing the effect of the regulation before promulgating either a proposed or final regulation that would include a “mandate” resulting in costs over $100 million annually on state, local, or tribal governments or the private sector. See 2 U.S.C.A. § 1532(a). The agency must include a summary of the statement in the proposed and final rules. Whenever the agency is required to prepare such a statement, it must “identify and consider a reasonable number of regulatory alternatives.” 2 U.S.C.A. § 1535(a). Moreover, from among these alternatives, the agency must “select the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule.” Id. The cost and burden referred to are the costs and burdens to state, local, and tribal governments, and the private sector, not the costs and burdens to the federal government. This substantive requirement applies unless it is inconsistent with provisions of another law, or the head of the agency explains why the least costly, most cost-effective, or least burdensome rule was not adopted. 2 U.S.C.A. § 1535(b).

Title II also imposes special coordination requirements on agencies promulgating regulations with effects on state, local, or tribal governments. See 2 U.S.C.A. §§ 1533–34. Title IV of the Act provides for judicial review of the compliance or non-compliance by agencies with some of the regulatory reform requirements. 2 U.S.C.A. § 1571. A court, however, may not enjoin an agency rule if the agency violates the requirements. The court may only order the agency to comply with those requirements after the fact.
5. **Data Quality Act (DQA)**

In 2001, Congress enacted the Data Quality Act, Treasury and General Government Appropriations Act for Fiscal Year 2001, Pub. L. No. 106–554, § 515 (2001), which required agencies to issue guidelines that ensure and maximize the “quality,” “objectivity,” “utility,” and “integrity” of information that they disseminate, to establish an administrative process that allows affected persons to seek and obtain correction of information that does not meet those benchmarks, and to report yearly to the Office of Management and Budget (OMB) concerning the receipt and resolution of complaints. Congress also told OMB to provide policy and procedural guidance to agencies concerning the guidelines that they were required to issue. In February 2002, OMB filled in the missing content of the legislation when it issued government-wide guidelines to agencies concerning implementation of the act. Office of Management and Budget, Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 8452 (Feb. 22, 2002). OMB also renamed the legislation the Information Quality Act (IQA), as it is now known.

In 2004, OMB promulgated guidelines that require regulatory agencies to have independent scientists peer review most of the scientific information disseminated by the government, Office of Management and Budget, Final Information Act Quality Bulletin for Peer Review, 70 Fed. Reg. 2664 (2005), adding an additional procedure to rulemaking. The requirement of independent peer review applies both to scientific information that the government uses to justify regulation and information that is the basis of government reports and web sites. OMB claims authority to specify procedural rules for peer review on the basis of the IQA.

b. **Executive Order Requirements**

The White House has also imposed a significant number of analytical requirements using Executive Orders. An Executive Order is a management directive issued by the President with the expectation that agency administrators will comply in the same way that employees in a private company are expected to follow the instructions of their bosses or risk being fired.

In 1981, President Reagan required executive agencies to assess the benefits and costs of “major” rules, and assigned OIRA to be responsible to oversee agency compliance. As mentioned earlier, Congress created OIRA in OMB to process information paperwork requests under the Paperwork Reduction Act. In order to assure compliance, executive agencies were required to submit proposed rules to OIRA before they were published for notice and comment in the Federal Register in order to give OIRA a chance to review and comment on the proposed rule before it was published for public comment. Similarly, before the agency may publish a final rule, it must submit it to OIRA for comment. E.O. 12,291, 3 C.F.R. § 127 (1982), reprinted in 5 U.S.C.A. § 601 (1988).
After President Clinton took office, he issued Executive Order 12866, which replaced the Reagan executive order. It imposed most of the same requirements for analysis of proposed and final agency rules, although it changed the term from “major rule” to “significant action,” and it likewise appointed OIRA to be responsible for agency compliance. It also maintained the review function of OIRA of proposed and final agency rules, but only if they were deemed “significant.” E.O. 12866, 58 Fed. Reg. 51735 (1993). The Bush administration continued to follow E.O. 12866 with some amendments. One of the changes made in the second Bush administration was to extend E.O. 12866 to guidance documents—policy statements and interpretive rules. E.O. 13422, Further Amendment to Executive Order 12866 on Regulatory Planning and Review, 72 Fed. Reg. 2763 (2007). Upon taking office, President Obama revoked all of the Bush changes to E.O. 12866, E.O. 13497, Revoking Executive Orders 13258 and 13422 Concerning Regulatory Planning and Review (2009), but the Director of OIRA soon indicated that OIRA would, despite the revocation, continue to review agency guidance, which has been the practice in the Obama administration. See Peter R. Orszag, Memorandum for the Heads and Acting Heads of Executive Departments and Agencies (Mar. 4, 2009). In 2011, President Obama supplemented E.O. 12866 with his own E.O. 13563, which among other things required agencies to adopt procedures to ensure the periodic review of existing rules.

The requirement that agencies study the costs and benefits of potential regulation is the most prominent analysis requirement imposed by presidents, but it is hardly the only one. Over the years Presidents have established a long list of other analytical requirements. Among these obligations, agencies are required to analyze the impact of proposed and final rules on states and localities, E.O. 12372, 47 Fed. Reg. 30959 (1982); constitutionally protected property rights, E.O. 12630, 53 Fed. Reg. 8859 (1988); implementation of the North American Free Trade Agreement, Exec. Order No. 12889, 58 Fed. Reg. 69681 (Dec. 30, 1993); environmental justice, E.O. 12898, 59 Fed. Reg. 7629 (1994); civil justice reform, E.O. 12988, 61 Fed. Reg. 4729 (1996); children at risk from environmental and safety risks, E.O. 13045, 62 Fed. Reg. 19885 (1997); federalism, E.O. 13132, 64 Fed. Reg. 43255 (1999); tribal governments, E.O. 13175, 65 Fed. Reg. 67249 (2000); energy supply, distribution or use, E.O. 13211, 66 Fed. Reg. 28355 (2001); and promoting international regulatory cooperation, E.O. 13609, 77 Fed. Reg. 26413 (2012). Unlike E.O. 12286, agencies are not required to submit these analyses to OIRA, and like E.O. 12286, there is no judicial review of compliance with the orders. All of these executive orders commonly provided that they were intended “only to improve the internal management of the Federal government, and [are] not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States. . . .” The intent was to preclude judicial review of agency compliance with the requirements of the orders, and the courts have respected this intent. As a result, neither regulated entities nor regulatory beneficiaries can obtain judicial enforcement of the orders. OIRA, however, has a number of means by which to ensure compliance with the orders, and its power in no small part derives from the commitment of each of the various Presidents to reform and improve the regulatory process. We will have more to say about OIRA’s influence over rulemaking below.
Hypo 2-7: Hybrid Requirements

Imagine that you are a lawyer in the General Counsel’s office in the Department of Agriculture. Before the Department adopts any regulation in Problem 2–5, relating to nutrition standards for school lunches, it wants to know what additional requirements it must meet. In particular, do E.O. 12866 and the Regulatory Flexibility Act apply? If so, what, if anything, would they require the agency to do? Is the agency subject to judicial review if it fails to comply with E.O. 12866 and the Regulatory Flexibility Act? In assessing the requirements of the E.O. and the Act, look to their actual text, not just the synopsis in this book.

Generally, rulemaking in the states imitates the basic notice-and-comment rulemaking under the APA. See generally A. Bonfield, State Administrative Rule Making (1986). Some states, however, have hybrid systems. California is notable in having a highly developed system, including a separate agency, the Office of Administrative Law, operating somewhat in the same status as OIRA, but with the power to disapprove other agencies’ rules for failure to meet substantive and procedural requirements. See generally Marsha Cohen, Regulatory Reform: Assessing the California Plan, 1983 Duke L. J. 231.

c. White House Oversight

OIRA serves as the focal point of White House oversight of the rulemaking process. Over the years, successive administrations have asserted greater control over the rulemaking process. As you read in the beginning of the chapter, the White House may initiate a rulemaking or it may block it from happening. In addition, the White House can change the content of a proposed or final rule, requiring the agency to adopt its policy or political preferences. Agency administrators normally accede to these changes, although discussed in Chapter 6, whether or not the President has the legal authority to require the changes is an open question. Cass Sunstein is a well-known administrative and constitutional law scholar who served as the Administrator of OIRA during President Obama’s first term. Lisa Heinzerling is a well-known administrative and environmental law scholar, who served as Senior Climate Policy Counsel to the EPA Administrator and then as Associate Administrator of EPA’s Office of Policy during the first term of the Obama administration. After returning to academia, both wrote about their experiences with E.O. 12866 and the Obama version, E.O. 13563.
CASS R. SUNSTEIN, THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS: MYTHS AND REALITIES


. . . One of my central themes is that OIRA helps to collect widely dispersed information—information that is held throughout the executive branch and by the public as a whole. OIRA is largely in the business of helping to identify and aggregate views and perspectives of a wide range of sources both inside and outside the federal government. We shall see that while the President is ultimately in charge, the White House itself is a “they,” not an “it.” Outside of the White House, numerous agencies are also involved, and they may well be the driving forces in the process that is frequently misdescribed as “OIRA review.” It would not be excessive to describe OIRA as, in large part, an information aggregator.

Another defining mission is to promote a well-functioning process of public comment, including state and local governments, businesses large and small, and public interest groups. OIRA and agencies work together to ensure that when rules are proposed, important issues and alternatives are clearly and explicitly identified for public comment. OIRA and agencies also work closely together to ensure that public comments are adequately addressed in final rules, perhaps by modifying relevant provisions in proposed rules. Indeed, a central function of OIRA is to operate as a guardian of a well-functioning administrative process, in order to ensure not only respect for law but also compliance with procedural ideals, involving notice and an opportunity to be heard, that may not always be strictly compulsory but that might be loosely organized under the rubric of “good government.”

In explaining these points, I emphasize four propositions that are not widely appreciated and that are central to an understanding of OIRA’s role. These propositions are elaborated at various points in the discussion, and it will be useful to identify them at the outset.

(1) OIRA helps to oversee a genuinely interagency process, involving many specialists throughout the federal government. OIRA’s goal is often to identify and convey interagency views and to seek a reasonable consensus, not to press its own positions. . . .

(2) When a proposed or final rule is delayed, and when the OIRA review process proves time consuming, it is usually because significant interagency concerns have yet to be addressed. Frequently there will be general agreement that a rule is a good idea, and the delay will be a product, not of any sense that it should not go forward, but of a judgment that important aspects require continuing substantive discussion. The relevant concerns might be highly technical; they might, for example, involve a complex question of law, or one or several provisions that are difficult to get right. One goal is to ensure that if a rule is formally proposed to the public, or finalized, it does not contain a serious problem or mistake. . . .

(3) Costs and benefits are important, and OIRA (along with others in the Executive Office of the President, including the Council of Economic Advisers (CEA) and the National Economic
Council (NEC)) does focus closely on them, but they are not usually the dominant issues in the OIRA process. Especially for economically significant rules, the analysis of costs and benefits receives careful attention; to the extent permitted by law, the benefits must justify the costs, and agencies must attempt to maximize net benefits. But most of OIRA’s day-to-day work is usually spent not on costs and benefits, but on working through interagency concerns, promoting receipt of public comments (for proposed rules), ensuring discussion of alternatives, and promoting consideration of public comments (for final rules). . . .

(4) Much of the OIRA process is highly technical. OIRA may seek, for example, to ensure careful consideration of the views of the Department of Justice on a legal issue, or the views of the United States Trade Representative on an issue that involves international trade, or the views of the Department of Homeland Security and the National Security Council on an issue with national security implications, or the views of the Department of Energy on the effects of a rule on the energy supply. In such cases, career officials with technical expertise are frequently the central actors. When rules are delayed, it is often because technical specialists are working through the technical questions. Much of the time, the problem is not that OIRA, or anyone else, has a fundamental objection to the rule and the agency’s approach. It is that the technical questions need good answers. . . .

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**Lisa Heinzerling, A Former Insider’s Reflections on the Relationship between the Obama EPA and the Obama White House**


As I will explain, OIRA’s actual practice in reviewing agency rules departs considerably from the structure created by the executive order governing OIRA’s process of regulatory review. The distribution of decision-making authority is ad hoc and chaotic rather than predictable and ordered; the rules reviewed are mostly not economically significant but rather, in many cases, are merely of special interest to OIRA staffers; rules fail OIRA review for a variety of reasons, some extra-legal and some simply mysterious; there are no longer any meaningful deadlines for OIRA review; and OIRA does not follow—or allow agencies to follow—most of the transparency requirements of the relevant executive order.

Describing the OIRA process as it actually operates today goes a long way toward previewing the substantive problems with it. The process is utterly opaque. It rests on assertions of decision-making authority that are inconsistent with the statutes the agencies administer. The process diffuses power to such an extent—ceding, depending on the situation, to the views of other Cabinet officers, career staff in other agencies, White House economic offices, members of Congress, the White House Chief of Staff, OIRA career staff, and many more—that at the end of the day no one is accountable for the results it demands (or blocks, in the case of the many rules stalled during the OIRA process). And, through it
all, environmental rules take a particular beating, from the number of such rules reviewed to the scrutiny they receive to the changes they suffer in the course of the process. . . .

II. The Common Law of 13,563

The common law of EO 13,563 determines the most important features of the current process of regulatory review: who is the decision maker, what is reviewed, why particular actions fail regulatory review, when actions emerge from review, and what is disclosed about the process. If one has read EOs 12,866 and 13,563, which in theory govern this process, surprises are in store once we look at the way the process actually operates.

A. Who Decides?

. . . EO 12,866 puts OIRA initially in charge of the process of regulatory review. But if, according to EO 12,866, a dispute arises between OIRA and the action agency, the dispute is to be resolved through a highly specified process that involves recommendations from the Vice-President and an ultimate decision by the President or by the Vice-President acting on his behalf. . . .

This is not how regulatory review works today. In my two years at EPA, I do not recall ever hearing of Vice-Presidential involvement in a regulatory matter. Moreover, the OIRA process in the Obama administration was not structured to funnel disputes between OIRA and the agencies to Vice-President Biden for his recommendations. It was far messier and more ill-defined than that. From my perspective, it was often hard to tell who exactly was in charge of making the ultimate decision on an important regulatory matter. . . .

B. What Is Reviewed?

[M]ost of the rules OIRA reviews are not economically significant. In the Obama administration so far, some 80 percent of the EPA rules that have been reviewed were not economically significant. Moreover, many of the rules under review lack any obvious interagency dimension. So how does OIRA come to review them? . . .

C. Why Do Rules Fail?

One of the most vexing questions concerning regulatory review has to do with the basis on which regulatory actions fail this review. When a regulatory action goes to OIRA for review, it goes fully formed, reflecting the agency’s best judgment about the proper path in the relevant circumstances. EPA rules go to OIRA after an extensive period of internal development and review. In many cases, the rules have been under development for years, with dozens or more agency personnel working on them. In the case of the most significant rules, they have gone to the Administrator herself for initial selection of options and later for final review. It is a matter of some consequence, then, when OIRA does not allow such rules to issue, or requires substantial changes before they may issue.

One reason why OIRA might disapprove of an agency’s planned action is that it disagrees with the agency’s interpretation of the statute the agency is charged with adminis-
tering. Notably, neither EO 12,866 nor EO 13,563 gives OIRA the authority to second-guess agencies’ interpretations of the statutes they administer. Indeed, both executive orders explicitly state that nothing in them permits a departure from existing law. . . .

Another way rules can fail the OIRA review process is to fail cost-benefit analysis. . . .

We have seen that rules might fail OIRA review because they do not have a positive enough cost-benefit profile, and that President Obama’s executive order on regulatory review has not appreciably helped rules get over this hurdle. Another reason why rules might fail OIRA review is that they simply fail “on the merits.” . . .

Under the common law of 13,563, then, rules can fail for a variety of reasons: they can reflect an OIRA-disapproved understanding of the role of cost-benefit analysis under the relevant laws; they can fail a cost-benefit test; or they can be bad ideas on some unspecified theory of the “merits.” Perhaps these are some of the reasons so many EPA rules seem permanently stuck at OIRA, as I next discuss.

D. When Does Review End (and Begin)?

The common law of 13,563 also determines the timelines under which OIRA operates. . . . EO 13,563 explicitly reaffirms EO 12,866, which is the executive order that sets forth timelines for OIRA review: 10 days for pre-rule actions, 45 days for final rules on subjects already reviewed and little changed, 90 days for everything else. . . .

This is not the way the OIRA process now works. Many, many rules linger at OIRA long past the 90- or 120-day deadline. Many pre-rule actions stay long past 10 days. Some rules have been at OIRA for years. . . .

To sum up, on the matter of deadlines, OIRA has broken entirely free from the constraints of EO 12,866. The 10-day, 45-day, and 90-day time limits on OIRA review perhaps survive as benchmarks, but nothing more. To maintain the fiction that deadlines still exist, OIRA extends review indefinitely at the “request” of agency heads—but these requests, in my experience, often are instigated by OIRA itself. To make matters worse, OIRA has fudged its own failure to meet the deadlines imposed by EO 12,866 by simply not “receiving” some regulatory packages until long after they are sent. . . .

E. What Are We Told?

The last facet of the common law of EO 13,563 compounds the problems created by OIRA’s other innovations to the regulatory review process prescribed in EO 12,866: OIRA follows, and allows the agencies to follow, almost none of the disclosure requirements of EO 12,866. . . .

OIRA does not explain in writing to agencies that items on their regulatory agenda do not fit with the President’s agenda. OIRA does not keep a publicly available log explaining when and by whom disputes between OIRA and the agencies were elevated. . . .

Instead, as discussed above, OIRA simply hangs onto the rules indefinitely, and they wither quietly on the vine. . . .
Some agencies do post “before” and “after” versions of rules that have gone to OIRA. These redlined documents often feature hundreds of changes. There is nothing here like the “complete, clear, and simple manner” of disclosure contemplated by the Executive Order. There is also often no document that explains which changes were made at OIRA’s behest. . . . Who is responsible, for example, for the hundreds of technical changes made to the EPA’s scientific analyses of air quality rules? We simply do not know.

When Professors Lisa Bressman and Michael Vandenbergh surveyed EPA officials appointed during the first Bush (1989–1993) and Clinton (1993–2001) administrations, they found that as many as nineteen White House offices were involved in reviewing EPA rules, with as many as ninety-three percent of the respondents explaining that they became involved in debates with institutional entities other than OIRA. See Lisa Schultz Bressman & Michael P. Vandenbergh, Inside the Administrative State: A Critical Look at the Practice of Presidential Control, 105 Mich. L. Rev. 47, 66, 68 (2006).

Points for Discussion

a. Impact

Are you surprised by the degree of White House involvement in the details of some rulemakings? On what grounds does Sunstein defend these practices? Why is Heinzerling critical of them? Is she opposed to White House oversight or the manner in which it is conducted?

b. Political Considerations

Professor Shapiro contends that when the White House decides on the terms of a rule, it is more likely that it will be influenced by political considerations than by the scientific and policy evidence in the rulemaking record:

Like their counterparts in agencies, White House officials . . . are . . . sensitive to public policy arguments based on expertise, but they also more concerned with the political ramifications of such decisions. As a result, the White House may seek to control a regulatory outcome out of a desire to obtain good public policy, but it may also seek to do so in order to curry favor with the political donors or to forestall potential political attacks on the President if agency policy preferences are followed. Since they are not running for office, agency administrators and their staffs do not share these political concerns except indirectly in response to pressure from the White House (or Congress) or in order to avoid such pressure. . . .

Moreover, when White House officials intervene, they do not have the same awareness of an issue and its relationship to other issues as agency administrators who have overseen the development of a rule. Not having the advantage of
being in the discursive process that occurs in agencies, White House officials are not as attuned to the advice of the career staff or to the rulemaking record. Agency officials are permitted to make their case to the White House about their preferred resolution of an issues, but the White House will never grant enough time for an agency to make reviewers on the outside as fully informed as agency insiders.


Does it matter that the White House might pick a different solution to a regulatory problem than the one favored by an agency? Usually agencies can pick from a range of solutions. Should not the White House be able to choose the solution it favors as long as that solution is not inconsistent with the scientific and policy evidence in the rulemaking record, even if the solution is not the best one indicated by the record?

c. Business Interests

Professor Rena Steinzor and her coauthors from the Center of Progressive Reform (“CPR”) found that 65% of the 5759 persons who met with OIRA represented industry interests, which was five times the number of attendees who represented public interest groups. An overwhelming number (nearly 95%) of the lawyers, consultants, and lobbyists who attended these meetings represented business interests as compared to 2.5% who represented public interest groups. OIRA was also much more likely to meet alone with industry interests than with public interests. Seventy-three percent of the more than 1000 meetings involved only industry interests, while a mere 7% involved only public interests. Rena Steinzor, Michael Patoka & James Goodwin, *Behind Closed Doors at the White House: How Politics Trumps Protection of Public Health, Worker Safety, and the Environment* (2011), available at [http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf](http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf). How does this information affect your answer to the question posed in the previous note? Is this imbalance a matter for concern or just an unavoidable aspect of regulatory politics, where industry interests often have the upper hand? Does this imbalance necessarily mean that the White House changes rules as preferred by industry interests?

d. Rulemaking Ossification

Professor Seidenfeld has identified 110 separate procedural steps that an agency might have to complete if every analytical requirement contained in statutes and executive orders applied to a proposed rule. Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 F.S.U. L. Rev. 533, 536–37 (2000). Moreover, there have been additional requirements added since his study. Not all of these requirements would apply in every rulemaking, but even if only a few of them applies, and the additional requirements were taken as seriously as NEPA or E.O. 12866, the time and resources necessary for agencies to engage in rulemaking would be increased substantially.
The slow-down is referred to as the “ossification” of rulemaking, and as Professor McGarity explains, many observers think it has fundamentally changed the nature of the process:

As the “rulemaking era” dawned in the early 1970s, the courts, commentators, and most federal agencies agreed that informal rulemaking under section 553 of the Administrative Procedure Act (APA) offered an ideal vehicle for making regulatory policy. . . . Twenty years later, the bloom is off the rose. . . . During the last fifteen years the rulemaking process has become increasingly rigid and burdensome. An assortment of analytical requirements have been imposed on the simple rulemaking model, and evolving judicial review doctrines have obligated agencies to take greater pains to ensure that the technical basis for rules are capable of withstanding judicial scrutiny. Professor Donald Elliot, former General Counsel of the Environmental Protection Agency, refers to this troublesome phenomenon as the “ossification” of the rulemaking process, and many observers from across the political spectrum agree with him that it is one of the most serious problems current facing regulatory agencies.


It may be, however, that these averages reflect the fact that, while routine rules do not take all that long to complete, complex and controversial rules are a different matter. As Professor Richard Pierce has observed, “[i]t is almost unheard of for a major rulemaking to be completed in the same presidential administration in which it began. A major rulemaking typically is completed one, two, or even three administrations later.” Richard J. Pierce, Waiting for Vermont Yankee III, IV and V? A Response to Beermann and Lawson, 75 Geo. Wash. L. Rev. 902, 912 (2007). The EPA told the Carnegie Commission reports that it takes about five years to complete an informal rulemaking. Carnegie Comm’n., Risk and the Environment: Improving Regulatory Decision Making 108 (1993). A Congressional report found that it took the FTC five years and three months to complete a rule using hybrid rulemaking, and this report does not take into account additional analytical requirements that have been

Professor Shapiro offered the following timetable for a major rule in congressional testimony, which supports the previous estimates:

The five year or more timeframe for important rules should be no surprise, as the following, entirely realistic time schedule for significant rules indicates:

- 12–36 months to develop a proposed rule
- 3 months for OIRA review of the draft proposal
- 3 months for public comment
- 12 months to review comments and write final justification
- 3 months (or more) for OIRA review of the final rulemaking
- 2 months delay under the Congressional Review Act
- 12–36 months for judicial review (assuming a court stays the rule)

**TOTAL: 47–95 months (3.9–7.9 years)**

This estimate of 4 to 8 years assumes the comment period only takes 3 months, which is usually not the case, and that an agency can respond to rulemaking comments, which can number in the hundreds or even thousands, in 12 months. It also assumes the agency does not have to (1) hold an informal hearing, (2) utilize small business advocacy review panels under the Small Business Regulatory Enforcement Fairness Act (SBREFA), (3) consult with advisory committees, and (4) go through the Paperwork Reduction Act process at OIRA. Although some of these activities might be undertaken simultaneously with the development of a rule or responding to rulemaking comments, these activities also have the potential to delay a rule by another 6–12 months.


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**Food for Thought**

There is a considerable academic literature debating whether the increased accountability attributable to the various analytical obligations imposed by Congress and the President have greater costs, in terms of slowing down the rulemaking process, than benefits, in terms of making agencies smarter about the rules that they promulgate. Besides these analytical requirements, judicial review doctrines are also blamed for slowing the

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2 The Congressional Review Act will be covered in Chapter 6.
rulemaking process, as you will read later in this chapter. This debate crystallizes a continuing conundrum in administrative law described in Professor Verkuil’s comments in Chapter 1—to the extent that one increases procedural requirements to make agency action more accountable or rational, the less efficient is agency action.

The various analytical requirements undoubtedly slow the rulemaking process even if we do not know for certain how much. How does one go about assessing the loss of efficiency that they entail? After all, how one feels about the tradeoff may depend on its beneficial impact on individuals. Accordingly, it is not surprising that environmentalists favor the impact statements required by NEPA when the government might take action adverse to the environment, with a corresponding right to judicial review, but they adamantly object to similar requirements when the government’s proposed action might protect the environment. The same can be said for business interests, which oppose procedural roadblocks to action necessary to do business, such as government licensing, but which support analytical requirements that slow down government action that would raise their costs, such as environmental regulation.

Because these procedural requirements usually only apply to rules subject to notice and comment rulemaking, agencies may seek to avoid rulemaking by relying on the exceptions in section 553, particularly the exceptions for policy statements and interpretative rules. You will study how these types of rules can in effect be a substitute for a legislative rule in Chapter Four. This tactic does not avoid White House review, however. As you read, interpretive rules and policy statements have been subject to review by OIRA since the second Bush administration. Agencies might attempt to employ other strategies to avoid OIRA review, see Jennifer Nou, Agency Self-Insulation under Presidential Review, 126 Harv. L. Rev. 1756 (2013) (describing avoidance strategies), but these have largely not been successful, at least for EPA. See Lisa Heinzerling, A Former Insider’s Reflections on the Relationship Between the Obama EPA and the Obama White House, 31 Pace Envtl. Rev. 101, 124 (2013) (reporting based on her experience working at EPA that “OIRA personnel keep an eagle eye on EPA—on its public announcements, website, etc.—to make sure EPA does not sneak something past it”).

e. Reg-Neg

The interest in Alternative Dispute Resolution (ADR) has led to another hybrid rulemaking process—regulatory negotiation or “reg. neg.,” as it is commonly called. See generally Philip J. Harter, Negotiating Regulations: A Cure for the Malaise, 71 Geo. L.J. 1 (1982). For a comprehensive compilation of materials dealing with this subject, see ACUS, Negotiated Rulemaking Sourcebook (1990). The process works as follows:

In negotiated rulemaking, an agency and other parties with a significant stake in a rule participate in facilitated face-to-face interactions designed to produce
a consensus. Together the parties explore their shared interests as well as differences of opinion, collaborate in gathering and analyzing technical information, generate options, and bargain and trade across these options according to their differing priorities. If a consensus is reached, it is published in the Federal Register as the agency’s notice of proposed rulemaking, and then the conventional review and comment process takes over.


Regulatory negotiation may avoid rulemaking ossification for two reasons: “Because most of the parties likely to comment have already agreed on the notice of proposed rulemaking, the review period should be uneventful. The prospects of subsequent litigation should be all but eliminated.” Id. The Administrative Conference has identified the conditions under which a “reg-neg” is likely to be successful. For example: “The resolution of issues should not be such as to require participants in negotiations to compromise their fundamental tenets, since it is unlikely that agreement will be reached in such circumstances.” Also: “There should be a number of diverse issues that the participants can rank according to their own priorities and on which they might reach agreement by attempting to optimize the return to all the participants.” A.C.U.S., Recommendation 82–4, Procedures for Negotiating Proposed Regulations, 1 CFR § 305.82–4. In 1990 Congress passed the Negotiated Rulemaking Act, 5 U.S.C.A. §§ 561 et seq., which essentially codified the Administrative Conference’s recommendations.

To date, the success of negotiated rulemaking is widely heralded. Although not all negotiations have resulted in consensus and a negotiated proposed rule, many have, and almost without exception no one has challenged these rules in court. Nevertheless, there are some skeptics. Compare Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 Duke L. J. 1255, 1335 (1997) (“Negotiated rulemaking does not appear any more capable of limiting regulatory time or avoiding litigation than do the rulemak-
ing procedures ordinarily used by agencies.”) with Phillip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y. U. Envtl. L.J. 32 (2000). (disputing Coglianese’s conclusions and supporting the efficacy of consultation and negotiation). Assuming that negotiated rulemaking has been successful most of the time it has been tried, why do you suppose that the overall number or percentage of rules adopted through negotiated rulemaking remains small?

C. Judicial Review

The procedural requirements of the APA and other statutes, as well as the substantive requirements for rulemaking in agency mandates, are law, binding on agencies, whether or not they are enforceable by courts. After all, all federal officers are bound by the Constitution to follow the laws of the United States. Nevertheless, as a practical matter, as experience under the Regulatory Flexibility Act has shown, absent judicial enforcement of the law, agencies are less likely to comply with it. We have already seen how courts enforce the APA’s procedural requirements, but we have yet to address how courts enforce other legal requirements. In this portion of the chapter we will consider how courts review agency actions alleged to be substantively unlawful, either because the agency has incorrectly interpreted the governing statute or because the agency’s decision is arbitrary and capricious.

1. Statutory Interpretation

Agencies frequently must interpret statutes in determining what type of rule to adopt, and these interpretations are subject to judicial review under section 706 of the APA. Section 706 directs the reviewing court to hold unlawful agency action “not in accordance with law,” 5 U.S.C.A. § 706(2)(A), and agency action “in excess of statutory jurisdiction, authority, limitations, or short of statutory right,” id. § 706(2)(C). Sometimes the agency is interpreting a statute that applies to many agencies, such as Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment on the basis of race, religion, national origin, or gender. More often the agency is interpreting its statutory mandate, such as the Clean Air Act for EPA, the Endangered Species Act for the Fish and Wildlife Service, or the Federal Trade Commission Act for the Federal Trade Commission.

Since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803), it has been black letter law that: “It is emphatically the province and duty of the judicial department to say what the law is.” At the same time, when agencies act pursuant to statutory mandates, they are acting under a delegation from Congress, have a day-to-day familiarity with the law and its effects, and presumably have some substantive expertise with respect to the subject matter of the mandate. Thus, there may be a reason for courts to act somewhat differently when they deal with agencies’ interpretations of their statutory mandates. This issue is often phrased in terms of whether courts should give “deference” to agency interpretations. In 1984 the Supreme Court decided *Chevron v. Natural Resources Defense*
Council, Inc., 467 U.S. 837 (1984), addressing this issue, perhaps the most cited Supreme Court administrative law decision.

**Chevron v. Natural Resources Defense Council, Inc.**


[The issue in Chevron concerned a section in the 1977 Amendments to the Clean Air Act (CAA) which required polluters in certain areas of the country to obtain a permit from a state regulator before the construction of any “new or modified stationary sources” of air pollution. 42 U.S.C. § 7502(b)(6). The state regulator could not grant the permit unless the polluter met stringent conditions concerning abatement of the new pollution. EPA had promulgated a rule which interpreted the words “stationary source” to include what the agency called a “bubble policy.” According to this policy, an existing plant that contained several pollution-emitting devices could install or modify one piece of equipment without obtaining a permit if the alteration did not increase the total emissions from the plant. In other words, EPA defined the words “stationary source” to include all of the pollution-emitting devices within the same industrial group as though the plant was encased within a single “bubble.”

EPA’s interpretation was challenged by the Natural Resource Defense Council (NRDC) which argued that the word “source” meant each individual pollution-emitting piece of equipment. Under NRDC’s interpretation, a plant would have to obtain a permit any time it created a new source of pollution or modified an existing source if the effect were to increase the pollution from that source. Under EPA’s interpretation, no permit was necessary if the increase in pollution from the new or modified source were offset by decreases in pollution from other pollution-emitting sources within the plant. The Court of Appeals agreed with the NRDC position because the court believed this interpretation better served the goals of the Clean Air Act than the EPA interpretation.]

Stevens, Justice:

. . . The basic legal error of the Court of Appeals was to adopt a static judicial definition of the term “stationary source” when it had decided that Congress itself had not commanded that definition. . . .

When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed
intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.

“The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.” If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations “has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations. . . . If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency’s care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.”

In light of these well-settled principles it is clear that the Court of Appeals misconceived the nature of its role in reviewing the regulations at issue. Once it determined, after its own examination of the legislation, that Congress did not actually have an intent regarding the applicability of the bubble concept to the permit program, the question before it was not whether in its view the concept is “inappropriate” in the general context of a program designed to improve air quality, but whether the Administrator’s view that it is appropriate in the context of this particular program is a reasonable one. Based on the examination of the legislation and its history which follows, we agree with the Court of Appeals that Congress did not have a specific intention on the applicability of the bubble

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9 The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

11 The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.
concept in these cases, and conclude that the EPA's use of that concept here is a reasonable policy choice for the agency to make.

[Using this framework, the Court assessed the statutory language and found it ambiguous on the point at issue; the legislative history, the Court said, was “unilluminating.”]

The arguments over policy that are advanced in the parties' briefs create the impression that respondents are now waging in a judicial forum a specific policy battle which they ultimately lost in the agency and in the 32 jurisdictions opting for the “bubble concept,” but one which was never waged in the Congress. Such policy arguments are more properly addressed to legislators or administrators, not to judges.

In these cases, the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies. Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by these cases. Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred.

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: “Our Constitution vests such responsibilities in the political branches.”
We hold that the EPA’s definition of the term “source” is a permissible construction of the statute which seeks to accommodate progress in reducing air pollution with economic growth.

**King v. Burwell**


Chief Justice Roberts delivered the opinion of the Court.

The Patient Protection and Affordable Care Act . . . provides that “each health insurance issuer that offers health insurance coverage in the individual . . . market in a State must accept every . . . individual in the State that applies for such coverage.” The Act also bars insurers from charging higher premiums on the basis of a person’s health. Second, the Act generally requires individuals to maintain health insurance coverage or make a payment to the IRS. Third, the Act seeks to make insurance more affordable by giving refundable tax credits to individuals with household incomes between 100 percent and 400 percent of the federal poverty line. § 36B. Individuals who meet the Act’s requirements may purchase insurance with the tax credits, which are provided in advance directly to the individual’s insurer.

In addition to those three reforms, the Act requires the creation of an “Exchange” in each State where people can shop for insurance, usually online. An Exchange may be created in one of two ways. First, the Act provides that “[e]ach State shall . . . establish an American Health Benefit Exchange . . . for the State.” Second, if a State nonetheless chooses not to establish its own Exchange, the Act provides that the Secretary of Health and Human Services “shall . . . establish and operate such Exchange within the State.”

The issue in this case is whether the Act’s tax credits are available in States that have a Federal Exchange rather than a State Exchange. The Act initially provides that tax credits “shall be allowed” for any “applicable taxpayer.” The Act then provides that the amount of the tax credit depends in part on whether the taxpayer has enrolled in an insurance plan through “an Exchange established by the State under section 1311 of the Patient Protection and Affordable Care Act.

The IRS addressed the availability of tax credits by promulgating a rule that made them available on both State and Federal Exchanges. As relevant here, the IRS Rule provides that a taxpayer is eligible for a tax credit if he enrolled in an insurance plan through “an Exchange,” which is defined as “an Exchange serving the individual market . . . regardless of whether the Exchange is established and operated by a State . . . or by HHS.” At this point, 16 States and the District of Columbia have established their own Exchanges; the other 34 States have elected to have HHS do so.
Petitioners are four individuals who live in Virginia, which has a Federal Exchange. They do not wish to purchase health insurance. In their view, Virginia’s Exchange does not qualify as “an Exchange established by the State . . .” so they should not receive any tax credits. . . . Under the IRS Rule, however, Virginia’s Exchange would qualify as “an Exchange established by the State . . ., so petitioners would receive tax credits. . . .

When analyzing an agency’s interpretation of a statute, we often apply the two-step framework announced in Chevron. Under that framework, we ask whether the statute is ambiguous and, if so, whether the agency’s interpretation is reasonable. This approach “is premised on the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.” “In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.”

This is one of those cases. The tax credits are among the Act’s key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep “economic and political significance” that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly. It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort. This is not a case for the IRS.

It is instead our task to determine the correct reading of Section 36B. If the statutory language is plain, we must enforce it according to its terms. But oftentimes the “meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.” So when deciding whether the language is plain, we must read the words “in their context and with a view to their place in the overall statutory scheme.” Our duty, after all, is “to construe statutes, not isolated provisions.”

Petitioners’ arguments about the plain meaning of Section 36B are strong. But while the meaning of the phrase “an Exchange established by the State . . . may seem plain “when viewed in isolation,” such a reading turns out to be “untenable in light of [the statute] as a whole.” In this instance, the context and structure of the Act compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase.

Reliance on context and structure in statutory interpretation is a “subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself.” For the reasons we have given, however, such reliance is appropriate in this case, and leads us to conclude that Section 36B allows tax credits for insurance purchased on any Exchange created under the Act. Those credits are necessary for the Federal Exchanges to function like their State Exchange counterparts, and to avoid the type of calamitous result that Congress plainly meant to avoid.
King v. Burwell was not the first time that the Court had refused to defer to an agency interpretation of ambiguous statutory language because it concluded Congress had not delegated the resolution of the ambiguity to an agency. In *Food and Drug Administration v. Brown & Williamson Tobacco Corporation*, 529 U.S. 120 (2000), the Court had doubts that Congress actually intended to delegate interpretive authority to FDA to regulate cigarettes, notwithstanding the presence of a statutory ambiguity. Likewise in *Gonzales v. Oregon*, 546 U.S. 243 (2006), the Court held that Congress’s grant of authority to the Attorney General in the Controlled Substances Act to promulgate regulations either “relating to the . . . control of the . . . dispensing of controlled substances” or “as he may deem necessary and appropriate for the efficient execution of his functions [under the Act]” did not authorize him to promulgate a regulation prohibiting the dispensing of a controlled substance for the purpose of facilitating a patient’s suicide when such dispensing was specifically authorized by state law. Thus, there are some circumstances in which, despite a seemingly broad grant of rulemaking authority under a statute, the agency has not actually been granted lawmaking authority, and hence interpretive authority, over an issue that can arise under the statute.

Take Note Box

The Court’s approach in *Chevron* has been called the “*Chevron* two-step.” In the first step, the court determines whether the statute clearly requires or forbids the agency’s interpretation. If the statute does not clearly answer the question, or in other words the statute is ambiguous, the court proceeds to the second step, determining whether the agency’s interpretation is reasonable or permissible. Step one involves the independent judgment of the court, consistent with *Marbury*; step two is highly deferential to the agency’s interpretation.

In *King v. Burwell*, however, the Court did not go to step two of the process even though the majority treated the language in the statute as ambiguous. The majority declined to defer to the IRS’s interpretation of the language despite having found the statutory language concerning exchanges “established by the state” did not have a definitive meaning. In other words, the Court proceeded as follows. First it asked whether the relevant statutory provision had a clear meaning. Second, having decided it was ambiguous, the Court asked whether Congress had “expressly delegated gap-filling authority to the agency?” Cary Coglianese, *Chevron’s Interstitial Steps*, 85 Geo. Wash. L. Rev. 101, 123 (2017). Since it found that there has been no such delegation, the Court resolved the ambiguity itself without deference to the IRS interpretation at step three.

Other commentators, by comparison, consider the inquiry about whether Congress has delegated interpretive authority to an agency to be the first step in the analysis. Cass R. Sunstein, *Chevron Step Zero*, 69 Va. L. Rev. 187 (2006). The order, however, does not matter as much as the recognition that there are a class of cases where the courts will not use the Chevron framework because of the factors identified in *King v. Burwell*. 

To understand why the Court would ask this question, it is necessary to probe why the Court in *Chevron* decided to defer to EPA’s interpretation of “new or modified stationary sources” of air pollution once it determined that Congress had not definitively defined that term. The Court assumed that Congress’ failure to define the term was an implicit delegation of that responsibility to the agency. By comparison, *King v. Burwell* found that there were reasons why it should not assume, as it had in *Chevron*, that the existence of ambiguous statutory language was such an implicit delegation.

**Points for Discussion**

a. **Step One**

The Court has given mixed signals as to what it will consider at step one to determine if Congress has directly spoken to the precise question at issue. In some cases, the Court determines whether statutory language is ambiguous under a “plain meaning” test. This textualist approach, championed by Justice Scalia looks for “objectified intent” by asking how ‘a skilled, objectively reasonable user of words’ would have understood the text, in the circumstances in which it was uttered.” John F. Manning, *What Divides Textualists from Purposivists*, 106 Colum. L. Rev. 70, 79, 91 (2006). Using the plain meaning approach, the Court has described the analysis at step one as follows:

In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole. If the statute is silent or ambiguous with respect to the specific issue addressed by the regulation, the question becomes whether the regulation is a permissible construction of the statute. If the agency regulation is not in conflict with the plain meaning of the statute, a reviewing court must give deference to the agency’s interpretation of the statute.


What is the advantage of the plain meaning test? Why might a judge limit herself or himself to deciding if a statute is ambiguous from the language that Congress used in the statute?

In other cases, a court will move to step two only if it cannot resolve an ambiguity by applying traditional tools of statutory construction. The starting point is “the language of the statute,” but “in expounding a statute,” a court is “not guided by a single sentence, but look[s] to the provisions of the whole law, and to its object and policy.” *Dole v. United Steelworkers of America*, 494 U.S. 26, 35 (1990). In *Chemical Manufacturers Assoc. v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 126 (1985), for instance, the Court announced it would defer to the agency’s interpretation “unless the legislative history or the purpose or structure reveal a contrary intent on the part of Congress.”
What is the advantage of gong beyond the plain meaning of the words used when a court determines whether a term or word is ambiguous? Should a judge look at all of the available evidence in making this determination? Why or why not?

Justice Scalia was the Court’s leading critic of the use of legislative history, maintaining statutory text is the only authoritative source of congressional intent because it is the only language voted on and approved by the entire body. He also opposed the use of legislative history because it is subject to manipulation by members of Congress (or their staffs) who are seeking to influence judicial review. See John F. Manning, *Textualism and Legislative Intent*, 91 Va. L. Rev. 419 (2005). Justice Breyer, by comparison, defends the use of legislative history as helping judges understand the context and purpose of a statute. Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845 (1992).

Purposivists, such as Justice Breyer, ask how “‘reasonable persons pursuing reasonable purposes reasonably’ would have resolved the policy issue addressed by the words.” Id. at 91. Purposivists assume “that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably,” and they seek “to derive a constructive rather than subjective legislative purpose by asking how a reasonable person familiar with the operative text, the background rules of interpretation, and the full context of the legislation would have resolved the interpretive problem at hand.” Id. at 90.

The interpretation of statutory language is complicated further by the use of canons of statutory construction—a set of tools that assists judges in resolving statutory ambiguity. Some canons involve syntactic or linguistic conventions, as for example courts should interpret different statutory sections to be consistent and should give effect to every statutory provision. Other canons involve normative considerations, such as the “avoidance canon,” which asks courts to construe ambiguous language to avoid raising serious constitutional problems. See Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 Yale L.J. 64, 71–73 (2008). The Supreme Court has not directly addressed the use of canons when reviewing agency constructions of
statutes. Many courts of appeals treat normative canons as the type of “traditional tools” that can be used to resolve textual ambiguity at step one, but a minority of the circuits do not agree. *Id.* at 77–84.


b. Reasons for Deference

What two reasons did the Court give in *Chevron* for assuming that the existence of ambiguous statutory language was an implicit delegation to EPA to resolve the meaning of the ambiguous language? In considering your answer, it may help to remember that the Court said that the resolution of the statutory language involved the determination of public policy. Do you see why the choice of a public policy was involved?

Since the statutory interpretation implicated public policy, the Court said that EPA's resolution of the ambiguity was preferable to a resolution by the courts because it was more politically accountable and had greater expertise. Why did EPA have more political accountability than the judiciary, and why did it have more expertise?

c. Reasons Against Deference

Chief Justice Roberts did note in *King v. Burwell* that in “extraordinary cases . . . there may be reason to hesitate before concluding that Congress has made [an] implicit delegation” to an agency to resolve the meaning of the ambiguous statutory language.” What were the extraordinary circumstances in this case that led the Court to conclude there was no implicit delegation?

In *King v. Burwell*, the other circumstances included the expertise of the IRS. Why does this lead him to conclude that Congress did not intend for the Court to defer to the IRS's interpretation?

d. Judicial Discretion

To decide whether or not to apply Chevron deference, Professor Coglianese suggests the courts are asking: “Is the ambiguous statutory provision so vital to major economic or political issue, or does it present other extraordinary circumstances, such that it is implausible that Congress would have wanted an agency to determine . . . the meaning of
Chapter 2  Rulemaking

the provision?” Coglianese, Chevron’s Interstitial Steps, 85 Geo. Wash. L. Rev. at 123. Then he suggests that the courts are asking: “Do other circumstances indicate that Congress intended for the courts rather than an agency to fill gaps in ambiguous statutory provisions . . . .” Id.

The two question suggested by Professor Coglianese are open-ended and do not give much of an indication when the courts will and will not be wiling to assume ambiguous statutory language is an implicit delegation to agency to resolve the ambiguity. Is this a problem for the courts? Is this a problem for practicing lawyers?

Professor Heinzerling has suggested that the Court’s use of these questions allows judges to reduce the power of administrative agencies to regulate by returning to the courts through the use of vague and open-ended tests the authority to decide on the meaning of statutory language. Lisa Heinzerling, The Power Canons, 58 Wm. & Mary L. Rev. 1933 (2017). Are you supportive of this project for this reason or do you oppose it for this reason? Assuming a judge’s use of this question is based on her or his views about the proper role of regulatory agencies, is that a proper consideration for judges?

Take Note Box

What happens if an agency wants to adopt an interpretation of a statutory provision that conflicts with a prior judicial ruling on the meaning of that provision? In National Cable & Telecommunications Association v. Brand X Internet Services, 545 U.S. 967, 982 (2005), the Court held a court’s “prior judicial construction of a statute trumps an agency construction otherwise entitled to Chevron deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.” Put another way, a judicial interpretation of a statute trumps an agency’s interpretation under the doctrine of stare decisis only if the prior holding “determined a statute’s clear meaning.” Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 131 (1990); see also United States v. Home Concrete & Supply, 566 U.S. 478 (2012) (holding that an agency cannot overrule a definitive judicial interpretation of a statute made prior to the Chevron ruling). Thus, agencies are free to change a prior interpretation of a statute, even if the prior interpretation was upheld under Step 2 of Chevron, assuming the courts will decide the second interpretation is also a “permissible construction of the statute” at step two of Chevron. How do the reasons the Court gave in Chevron for deferring to an agency construction of a statute at step 2 support the holding in Brand X?
Food for Thought

There has been considerable empirical work that illuminates how *Chevron* has impacted judicial decision-making.

First, scholars have investigated the impact on a decision by a court to go to step two of the analysis. Because of the considerable deference that courts show agencies in *Chevron*’s step two, application of step one becomes critical. Agencies want to show that a statute is ambiguous; persons challenging the agency interpretation want to show that it is not. A study of the impact of *Chevron* in the courts of appeals during 1995 and 1996 found that agencies prevailed 42 percent of the time at step one and 89 percent of the time at step two, giving agencies an overall 71 percent success rate. Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the United States Courts of Appeals*, 15 Yale J. Reg. 1, 31 (1998). What accounts for the higher percentage of wins at step 2?

Second, scholars have found the Court does not always apply the *Chevron* framework in cases involving agency interpretations. See Eskridge and Baer, supra, at 1090 (*Chevron* applied in only 8.3 percent of cases 1983–2005); Merrill, *supra*, at 981 (*Chevron* applied in 36 percent of the cases 1984–1990). As you will study in Chapter 4, the Court has different deference doctrines, and one of the reasons that *Chevron* is not used is because the Court is using a different deference doctrine. See Eskridge and Baer, supra, 1099–1120 (arguing the Court applies a continuum of deference). Nevertheless, Eskridge and Baer have found that the Court has applied no deference doctrine in about one-half of its cases (33.6%) involving an agency interpretation during 1983–2005. The Court instead “relies on ad hoc judicial reasoning of the sort that typifies the Court’s methodology in regular statutory interpretation cases.” Id. at 1083. Why do you suppose the Supreme Court ignores *Chevron* so often?

Overall, agencies win slightly more than two-thirds of the cases challenging a statutory interpretation made by an agency. See Eskridge and Baer, supra, at 1100 (agency interpretations prevailed 68.3 percent of the time in the Supreme Court during 1983–2005); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969, 981–84 (1991) (reporting agency interpretations prevailed 70% of the time in the Supreme Court during 1984–1990).

The same pattern of agency success holds in the circuit courts. A comprehensive study of 1558 cases that were decided between 2003 and 2013 found that 70.0% of the agency statutory interpretations made it to step two, and that agencies were upheld in 93.8% of the cases that made it to step two. Kent Barnett & Christopher Walker, *Chevron in the Circuit Courts*, 115 Mich. L. Rev. 1, 33 (2017). In the 30 percent of the cases decided at step one agencies prevailed just 27.2% of the time. Id.

Finally, scholars have found an ideological pattern to how justices use the *Chevron* framework. A study of voting patterns on the Supreme Court (between 1989 and 2005) and the Courts of Appeals (from 1990 through 2004) finds that “as the law now stands, the application of the *Chevron* framework, and hence the meaning of federal regulatory law, shows a significant effect from the political convictions of federal judges.” Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. Chi. L. Rev. 823, 832 (2006). The study revealed that the most conservative Supreme Court justices were 19 percentage points more likely to validate
an agency interpretation made during the two Bush administrations than they were to validate an agency interpretation made during the Clinton administration. Conversely, the most liberal justices were 6 percentage points more likely to validate an agency interpretation made during the Clinton administration than they were to validate agency interpretations made during the two Bush administrations. Overall, taking into account all decisions in the study, the most conservative judges were 30 percentage points more likely to validate conservative agency interpretations than liberal interpretations, while the most liberal judges were 27 percentage points more likely to validate liberal agency interpretations than conservative interpretations. Id. at 826.

Should the outcome of a case challenging an agency’s interpretation be impacted by a judge’s ideology? If not, is there some way to reform the *Chevron* test to make its application less ideological, or is the only solution to expect judges to exercise greater self-restraint? Or is inconsistency simply inevitable in the application of *Chevron* principles?

**Food for Thought**

When Justice Gorsuch was a lower court judge he described *Chevron* as “no less than judge-made doctrine for the abdication of the judicial duty.” *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J. concurring). The judicial duty, according to then Judge Gorsuch was “to interpret the law and then declare invalid agency actions inconsistent with those interpretations.” *Id.* at 1153. He therefore called for abandoning the *Chevron* framework and returning to the courts the responsibility of undertaking statutory interpretation without *Chevron* deference to agencies regarding ambiguous terms. *Id.* at 1155. Similarly, Justice Thomas has said that “*Chevron* deference raises serious separation-of-powers questions” and he suggested it is therefore “potentially unconstitutional.” *Michigan v. EPA*, 135 St. Ct. 2699, 2712 (2015) (Thomas, J. concurring). He therefore called on the Court to “stop to consider [the Constitution] before blithely giving the force of law to any other agency ‘interpretations’ of federal statutes.” *Id.* at 2714.

Is *Chevron* deference at step two inconsistent with the responsibility of the courts to determine the law according to the separation-of-power scheme of the Constitution? Consider this defense of the *Chevron* framework: Yet *Chevron* does not actually call for abdication of the judicial responsibility . . . as some have suggested, because the judiciary is very much involved in interpreting the statutory provisions. At Step 1, judges determine the clear meaning of the statute and, at step 2, they make pivotal interpretative judgments about whether an agency’s view falls within a reasonable range of constructions that an ambiguous statutory provision can support.” Cary Coglianese, *Chevron’s Interstitial Steps*, 85 Geo. Wash. L. Rev. at 109.
The Food Safety and Inspection Service (FSIS), located in the Department of Agriculture (USDA), is responsible for “the inspection of poultry and poultry products . . . to prevent the movement or sale in interstate or foreign commerce . . . of poultry products which are adulterated or misbranded.” Poultry is adulterated when “it bears or contains any poisonous or deleterious substance which may render it injurious to health. . . .”

FSIS has an important public health mandate. About 7 billion chickens and turkeys are processed annually in the United States. Proper handling during processing is important because about 40 percent of raw poultry is contaminated with salmonella, a bacterium that cause various diseases in humans and animals. Although FSIS inspects poultry processors, at least 40,000 salmonella infections are reported each year to the Centers for Disease Control and Prevention (CDC), a federal agency that tracks infectious diseases. CDC estimates that each year between 40,000 and 4 million people become ill from salmonella and about 500 of these persons die of salmonellosis, an illness that causes fever and intestinal disorders.

Congress has required that “[E]ach official establishment slaughtering poultry or processing poultry products . . . shall have premises, facilities, and equipment, and shall be operated in accordance with such sanitary practices as are required by regulations promulgated by the Secretary for the purposes of preventing the entry into . . . commerce . . . of poultry products which are adulterated.” Accordingly, USDA has published detailed regulations specifying how chicken and turkeys are to be processed to kill harmful bacteria.

Congress has also required that USDA protect the public from unsafe poultry or poultry products that are imported into the United States. For poultry that is imported from countries other than Canada and Mexico, USDA is to ensure that the poultry is “subject to the same inspection, sanitary, quality, species verification, and residue standards applied to products produced in the United States,” and has “been processed in facilities and under conditions that are the same as those under which similar products are processed in the United States.” (Emphasis added). For poultry that is imported from Canada and Mexico, USDA is to ensure that the poultry is “subject to the inspection, sanitary, quality, species verification, and residue standards that are equivalent to United States standards” and has “been processed in facilities and conditions that meet standards that are equivalent to United States standards.” (Emphasis added).

USDA has promulgated a regulation concerning poultry imported from all other countries that reads as follows:
Whenever it shall be determined by the Administrator that the system of poultry inspection maintained by any foreign country, with respect to establishments preparing products in such country for export to the United States, ensures compliance of such establishments and their poultry products, with requirements at least equal to all the provisions of the Act and the regulations in this part which are applied to official establishments in the United States and their poultry products, and that reliance can be placed upon certificates required under this subpart from authorities of such foreign country, . . . Thereafter, poultry products processed in such establishments which are certified and approved . . . shall be eligible, so far as the regulations in this part are concerned, for importation into the United States from such foreign country after applicable requirements of this part have been met.

(Emphasis added).

(a) As a lawyer for the National Broiler Council (NBC), a non-profit trade association formed by domestic poultry producers, how would you advise your client with respect to seeking judicial review of this rule? What is the likelihood for success and what relief would you get if you are successful? Are there other options to litigation?

(b) Assume NBC files a lawsuit in the Southern District of Mississippi arguing that the regulation's requirement that foreign poultry producers be subject to procedures “at least equal to” United States procedures violated the Act, which requires that foreign producers, except those in Canada and Mexico, be subject to procedures that are the “same” as domestic procedures. USDA is the defendant. As a lawyer for the Australian Trade Association (ATA), what are your options? The ATA is interested in the outcome because Australian poultry producers use radiation to kill bacteria on poultry. This process, which is widely used in Europe and Australia, is acknowledged to be more protective of consumers than the procedures used in the United States. It has not been used in the United States, however, because of consumer reluctance to purchase foods that have been radiated. USDA does not currently require domestic poultry processors to use radiation although it acknowledges that this process is the equivalent to any process used in the United States in terms of protecting consumers from salmonella. ATA believes that consumers in the United States can be convinced to purchase radiated poultry if it can be sold in this country.

(c) What arguments should NBC and USDA (and ATA) make to the court?
Hypo Materials

TITLE 21. FOOD AND DRUGS AND POULTRY
PRODUCTS INSPECTION

§ 452. Congressional declaration of policy

It is hereby declared to be the policy of the Congress to provide for the inspection of poultry and poultry products and otherwise regulate the processing and distribution of such articles as hereinafter prescribed to prevent the movement or sale in interstate or foreign commerce of, or the burdening of such commerce by, poultry products which are adulterated or misbranded. It is the intent of Congress that when poultry and poultry products are condemned because of disease, the reason for condemnation in such instances shall be supported by scientific fact, information, or criteria, and such condemnation under this chapter shall be achieved through uniform inspection standards and uniform applications thereof.

UNITED STATES DEPARTMENT OF AGRICULTURE, FOOD SAFETY AND INSPECTION SERVICE, FINAL RULE: REQUIREMENTS FOR IMPORTED POULTRY PRODUCTS


SUMMARY: This rule implements the provisions of the Food Security Act of 1985, Public Law 99–198, that amended the Poultry Products Inspection Act (PPIA). The rule amends the poultry products inspection regulations to specifically require foreign countries to implement a residue sampling and testing program at the point of slaughter for poultry and poultry products offered for importation into the United States. The rule also amends the regulations to make clear that all inspection, sanitation, quality, species verification, and residue standards that are applied to imported poultry products must meet the same standards as those applied to poultry and poultry products produced in the United States.

Background

Section 17 of the Poultry Products Inspection Act (PPIA) (21 U.S.C. § 466) prohibits the importation into the United States of slaughtered poultry, or parts thereof, unless they are healthful, wholesome, fit for human food, not adulterated, and contain no dye, chemical, preservative, or ingredient which renders them unhealthful, unwholesome, adulterated, or
unfit for human food, and unless they also comply with rules and regulations made by the Secretary to assure that imported poultry and poultry products comply with the standards provided for in the Act. The regulations addressing imported poultry or poultry products are contained in 9 CFR part 381. In these regulations the Administrator has established procedures by which foreign countries desiring to export poultry or poultry products to the United States may become eligible to do so.

Section 381.196 of the poultry products inspection regulations provides that a poultry inspection system maintained by a foreign country, with respect to establishments preparing products in that country for export to the United States, must ensure compliance of such establishments and their poultry products with requirements at least equal to all of the provisions of the PPIA and the regulations that are applied to official establishments in the United States and their poultry products. In addition, these regulations provide for certain other system requirements as a means for FSIS to assure that eligible foreign countries are complying with on-going conditions of eligibility.

Export Eligibility Requirements

The Foreign Programs Division, International Programs, of FSIS has primary responsibility for determining that countries producing poultry or poultry products for export to the United States have inspection programs that are designed to assure that all such exports are safe, wholesome, unadulterated and not misbranded and comply with all other provisions of the PPIA and regulations thereunder (9 CFR part 381 et seq.).

To determine eligibility, FSIS conducts a complete evaluation of the country’s inspection system. The evaluation consists of two major parts: A review of foreign system documents, and an on-site review of the country’s inspection system operations.

Continuing Oversight of Eligible Countries

Once the poultry inspection system of a foreign country has been certified by the Agency as eligible to export products to the United States, the individual establishments operating within that country desiring to export products to the United States must apply to their national inspection authorities for certification. The chief inspection official of the foreign country must in turn certify to FSIS that each establishment authorized to export products to the United States meets all the applicable standards.

FSIS personnel conduct periodic on-site reviews of foreign inspection systems. The reviews focus on the full spectrum of risks to the production and processing of acceptable poultry products and how the foreign inspection system controls these risks. The on-site system review provides FSIS with continued assurance that the foreign country is maintaining an inspection system that is at least equal to the inspection system of the United States.
The Food Security Act of 1985

On December 23, 1985, Public Law 99–198, The Food Security Act of 1985, was enacted (hereinafter referred to as the 1985 Farm Bill). Section 1701 of Public Law 99–198 amended section 17 of the Poultry Products Inspection Act (PPIA) (21 U.S.C. § 466) to require residue testing and species verification of imported poultry or parts or products. This legislation is comparable to an amendment to the Federal Meat Inspection Act (FMIA) provided by the Agriculture and Food Act of 1981 (Pub. L. 97–98) that mandated residue and species verification for imported meat products.

Section 1701 of the 1985 Farm Bill adds a new subparagraph (d) to section 17 of the PPIA as follows:

(d) (1) Notwithstanding any other provision of law, all poultry, or parts or products thereof, capable of use as human food offered for importation into the United States shall:

(A) be subject to the same inspection, sanitary, quality, species verification, and residue standards applied to products produced in the United States; and

(B) have been processed in facilities and under conditions that are the same as those under which similar products are processed in the United States.

(2) Any such imported poultry article that does not meet such standards shall not be permitted entry into the United States.

(3) The Secretary shall enforce this subsection through:

(A) random inspection for such species verification and for residues; and

(B) random sampling and testing of internal organs and fat of carcasses for residues at the point of slaughter by the exporting country, in accordance with methods approved by the Secretary.

The primary purpose of the legislation was to add a provision to the PPIA that would require foreign countries currently exporting or desiring to export poultry or poultry products to the United States to develop and implement a program for the sampling and testing of residues. This new requirement would apply the requirements for residue testing that were specified in the Food and Agriculture Act of 1981 for imported meat products to imported poultry products.

Comments on the Proposed Rule

Therefore, on May 1, 1987, FSIS published a proposed rule to implement the provisions of the 1985 Farm Bill with regard to requirements for poultry products intended for export to the United States. FSIS received 31 comments in response to the proposed rule: 7 in favor and 24 not in favor. Those commenters in support of the proposed rule
included 2 industry members, 3 trade associations, 1 government agency and 1 foreign government agency. Those commenters not in support of the proposed rule included 14 industry members, 8 Members of Congress, on behalf of one or more of the 14 industry members, and 2 trade associations. The following are the issues raised by the commenters and FSIS's response to each.

Comment: All of the opposing commenters objected to FSIS's interpretation of the language in the Farm Bill which states that a foreign inspection system be “the same as” the United States inspection system before product can be imported. These commenters felt that the phrase should be distinguished from “at least equal to” because the latter phrase would allow for subjective evaluation of foreign country requirements, would permit standards less than those of the United States, would create an unfair competitive advantage for foreign poultry products and would result in inferior products entering the United States.

Response: As a result of the legislation, the PPIA does provide that imported poultry and poultry products must comply with certain standards which are “the same as” those applicable to products produced in the United States. However, this does not mean that all the regulations of a foreign country must be precisely, word for word, “the same as” those in the United States. In our view, the Act does not prohibit a foreign country from having requirements more stringent than those applicable to products produced in the United States. If a requirement is narrow and specific (e.g., a product standard, maximum water intake level), it can be relatively easy to determine whether the foreign country’s requirement is “the same as” ours. However, if our requirement is general and is applied on a case-by-case basis (e.g., facility requirements to preclude adulteration), the requirement can be met by a similarly general requirement. A general requirement permits variations within an established framework. FSIS applies “the same as” requirement by assessing whether the alternative procedures, even if they employ different inspectional techniques, are at least equal to the requirements applicable to domestically produced product. That is, the means of achieving products the same as ours in a foreign country will, in some respects, vary from the means employed in the United States. Interpretation of the law in this way provides the only reasonable basis for comparing inspection systems, since literal application of the term “the same as” would prohibit all imports of poultry products from foreign countries and would be nothing more than a non-tariff trade barrier. The USDA presently recognizes the poultry inspection systems in five countries (Canada, France, Israel, Great Britain and Hong Kong). Again, literal application of the term “the same as” would require the USDA to withdraw its recognition of those countries’ eligibility to ship poultry and poultry products to the United States. USDA does not believe it was the intent of Congress that such action be taken.

These foreign inspection systems have evolved in widely varying cultural and political environments under various animal health, public health and food production circumstances. This has resulted in a variety of specific procedures and processes used in maintaining national inspection controls. The quality of the finished product is what is important and decisive. Nonetheless, there are certain features that any system must
have to be considered “the same as” ours. These basic requirements are currently in FSIS regulations (9 CFR 381.196).


[The Agriculture Committee in markup amended the 1985 Farm Bill to adopt an equivalency requirement. The Committee report explained that the change would:]

(7) amend the Poultry Products Inspection Act to require all poultry and poultry products, capable of use as human food that are imported into the United States, to be subject to inspection, sanitary, quality, species verification, and residue standards applied to poultry products produced in the United States. The Amendment also would require that such products be produced in facilities and under conditions at least equal to those under which similar products are processed in the United States. Any imported poultry article that does not meet the standards would not be permitted entry into the United States. . . .

131 Congressional Record 33358 (Nov. 22, 1985)

Mr. Helms. On behalf of Senator ZORINSKY and myself, I send [a] purely technical amendment[ ] to the desk and ask that [it] be immediately considered.

The PRESIDING OFFICER. The amendment will be stated.

The assistant legislative clerk read as follows:

The Senator from North Carolina (Mr. HELMS) for himself and Mr. ZORINSKY, proposes an amendment numbered 1163.

On page 455, line 18, strike out “at least equal to” and insert in lieu thereof “the same as”.

Mr. HELMS. Mr. President, this amendment . . . changes the provision relating to inspection of imported poultry products to provide that imported poultry must have been processed in facilities and under conditions that are the same as those under which similar products are processed in the United States. This change clarifies the provision to reflect the original intent of the provision as adopted by the committee in markup.

The PRESIDING OFFICER. Is there further debate? The Chair hears none. The question is on agreeing to the amendment.

The amendment (No. 1163) was agreed to.
same: Identical, equal, equivalent. The word “same,” however, does not always mean “identical.” It frequently means of the kind or species, not the specific thing.

same . . . adj. 1. Identical with what is about to be or has just been mentioned. . . . 2. being one or identical though having different names, aspects, etc. . . . 3. agreeing in kind, amount, etc.; corresponding . . .

Points for Discussion

a. Impact of Legislative History

As you consider Hypo 2–8, ask yourself how a judge’s approach to legislative history and purpose might affect the outcome. What do the materials concerning legislative history reveal about Congress’ intent?

b. Impact of Goals and Purpose

What is the purpose of the statute? Why did Congress pass it? Does the purpose support the banning of chicken that is produced using a different but equally protective of processing? Does your answer depend on whether the judge is a textualist or purposivist? Why or why not?

2. Substantive Decisions

When an agency promulgates a rule, it reaches two types of substantive decisions. First, it determines on the basis of the evidence available to it, what are the relevant facts. Next, it decides what type of rule, if any, is appropriate in light of those facts, choosing the regulatory option that will best further its statutory mandate. Section 706 authorizes courts to review both types of conclusions when it mandates that the “reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion or not otherwise in accordance with law; . . . [and] (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title. . . .” 5 U.S.C.A. § 706.
Judicial review of the agency’s substantive decisions under section 706 involves three issues: (1) What is the scope of review: “arbitrary & capricious” or “substantial evidence”; (2) What constitutes the rulemaking record to be reviewed by the court; (3) What obligation does the scope of review impose on an agency to explain its decision?

a. Scope of Review

As section 706 states, the “substantial evidence” standard applies when an agency must comply with sections 556–557, which involves “formal” rulemaking (and adjudication, which will be addressed in the next chapter). Thus, in informal rulemaking, the “arbitrary and capricious” scope of review will normally apply. In the agency’s statutory mandate, however, Congress sometimes requires the use of a “substantial evidence” standard for judicial review of informal or hybrid rulemaking. See Note, Convergence of the Substantial Evidence and Arbitrary and Capricious Standards of Review During Informal Rulemaking, 54 Geo. Wash. L. Rev. 541, 542 N. 5 (1986) (list of agencies subject to substantial evidence scope of review for informal or hybrid rulemaking). For example, OSHA uses informal rulemaking to promulgate workplace health and safety standards, but it is subject to a “substantial evidence” scope of review. 29 U.S.C.A. § 655(f). A litigant must therefore check an agency’s statutory mandate to determine whether it imposes a different scope of review on the agency’s rulemaking.

Because so little agency rulemaking is formal rulemaking, the judicial decisions explaining “substantial evidence” review have developed almost entirely in the context of formal adjudication, covered in the next chapter. For purposes here, it suffices to say that the “substantial evidence” standard instructs the court to uphold a rule if it finds the agency’s decision to be “reasonable,” or the record contains “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Consolidated Edison v. National Labor Relations Board, 305 U.S. 197, 229 (1938). The standard does not require that the court agree with the agency’s conclusions; it only requires that the agency’s choice is a reasonable one, even if the court would have made another choice.

Historically, the “arbitrary and capricious” standard was viewed as very deferential, essentially the equivalent of judicial review of economic regulation under substantive due process. See, e.g., Pacific States Box & Basket Co. v. White, 296 U.S. 176 (1935). Unlike “substantial evidence” review, which required the decision to be supported by evidence in a record developed in a trial-like proceeding, “arbitrary and capricious” review required no record or decision to justify the agency’s action. Rather, a challenger had to prove the negative—that there were no facts or good reasons to support the agency action. This all changed in the early 1970s, beginning with Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), which some have called the first modern administrative law case. There, the Supreme Court said that the arbitrary and capricious standard “require[s] the reviewing court to engage in a substantial inquiry... , a thorough, probing in-depth review... [To] find arbitrariness, the court must consider whether the decision was based on a consideration of relevant factors and whether there has been a clear error of judgment...
Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one.” Precisely what this means is the subject of much writing, both scholarly and judicial.

One question has been how does this modern “arbitrary and capricious” standard compare to the “substantial evidence” standard. Although the Supreme Court once suggested that the arbitrary and capricious standard was “more lenient” than the substantial evidence standard, *American Paper Institute, Inc. v. American Electric Power Service Corporation*, 461 U.S. 402, 405 n. 1 (1983), it has never defined the difference between the two standards or explained why one standard would be more lenient than the other. Appellate courts tend to treat the two standards as functionally identical, observing that the two standards tend to “converge” or that any distinction between the two is “largely semantic.” *E.g., Association of Data Processing Service Organizations, Inc. v. Board of Governors*, 745 F.2d 677 (D.C.Cir.1984) (Scalia, J.).

There are two reasons why the arbitrary and capricious and substantial evidence standards have converged. Prior to *Overton Park*, informal actions neither had “records” nor contemporaneous agency explanations to justify why the agency reached its decision, whereas formal proceedings under sections 556 and 557 had both. *Overton Park* initiated the concept of a “record” for an informal agency proceeding. Therefore, while the means by which the record is created (and what may be in it) may differ between formal and informal proceedings, both will have records by which to assess the reasonableness of the agency decision. *Overton Park* is also the origin of the need for an agency to explain its decision in informal proceedings. Consequently, this contemporaneous explanation was similarly subject to judicial review.

Which standard applies, however, might make some difference. Professor Roy Schotland has described the scope of review as a “mood point” which sets the critical attitude with which a court should approach an administrative decision. Thus, a court might be less tolerant of a possible error by an agency in an informal or hybrid rulemaking under a substantial evidence standard contained in the agency’s statutory mandate, compared to section 706’s otherwise applicable arbitrary and capricious standard, if the court perceived Congress’s intent in using the substantial evidence standard was to increase judicial scrutiny.

b. Rulemaking Record

Section 706 requires that a court “review the whole record” when determining whether to affirm a rule. This obligation raises the issue of what constitutes the “whole record” in formal and informal rulemaking.
In formal rulemaking, the APA's drafters envisioned that the “substantial evidence” standard would apply to the evidentiary record created by the hearing procedures specified in sections 556–57. The testimony and documents in the record are “evidence,” and a court can evaluate this information to determine if the agency’s conclusions are supported by “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Consolidated Edison Company of New York v. National Labor Relations Board, 305 U.S. at 229.

There is no similar record required by the APA for informal rulemaking, however. As discussed earlier in the chapter, an agency is not limited to the comments submitted in choosing what type of rule to adopt, but rather it can rely on any relevant information that comes to its attention. For this reason, the Supreme Court in Overton Park defined the “record” for informal proceedings to be the information that the agency actually considered in making the decision. After Overton Park, the record for informal rulemaking normally is composed of the Federal Register notices for the proposed and final rule, the comments that were submitted, and any studies or data created or used by the agency that were not published in the notices.

One of the differences between judicial review of a trial-like proceeding and a rulemaking is the nature of the factual determinations an agency is making. In formal agency adjudications, as well in court trials, the nature of the facts in issue usually relate to what happened in the past. In rulemaking, however, often the “facts” in issue relate to what will happen in the future (thereby justifying a regulation to prevent it). As Judge McGowan noted with respect to an OSHA standard rulemaking:

From extensive and often conflicting evidence, the Secretary [of Labor] in this case made numerous factual determinations. With respect to some of those questions, the evidence was such that the task consisted primarily of evaluating the data and drawing conclusions from it. The court can review the data in the record and determine whether it reflects substantial support for the Secretary’s position. But some of the questions involved in the promulgation of these standards are on the frontiers of scientific knowledge, and consequently as to them insufficient data is presently available to make a fully informed factual determination. Decision making must in that circumstance depend to a greater extent upon policy judgments and less upon purely factual analysis.

. . . [P]olicy choices of this sort are not susceptible to the same type of verification by reference to the record as are some factual questions.

When unknowable facts are being reviewed, the Supreme Court has emphasized that courts should be highly deferential. In *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87 (1983), the Court affirmed a rule stating that licensing boards of the Nuclear Regulatory Commission (NRC) should assume that permanent storage of nuclear waste would have no adverse effect on the environment for purposes of granting a license to nuclear power plants. The Court unanimously reversed a decision of the D.C. Circuit that the NRC did not have sufficient evidence to support this finding. The Court found that because the agency had explored the uncertain risks associated with permanent storage of nuclear waste, the D.C. Circuit should have deferred to the agency’s policy judgment concerning the impact of those risks:

Resolution of these fundamental policy issues lies . . . with Congress and the agencies to which Congress has delegated authority. . . . [A] reviewing court must remember that the commission is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a court must generally be at its most deferential.

*Id.* at 103.

c. Adequate Explanation

In recent years, judicial review has focused on the requirement that agencies provide “adequate reasons” for adoption of the rule. See Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and The Requirement of Adequate Reasons For Agency Decisions*, 1987 Duke L.J. 387. When an agency lacks “adequate reasons,” its action is “arbitrary and capricious.” Nevertheless, a court will normally remand a rule to an agency rather than declaring it to be invalid. Although the agency has not offered an adequate explanation for its rules, the remand recognizes that it might be able to do so if given another opportunity to defend its rule.

The definition of “arbitrary and capricious” as requiring “adequate reasons” started in the 1970s. In *Overton Park*, the Court refused to require agencies to produce written findings as a *procedural matter*. However, in order for it to determine whether the agency decision was arbitrary or capricious, and absent a contemporaneous explanation by the agency, the Court remanded the case back to the district court to take testimony from the head of the agency as to the reasons behind his decision. Moreover, the Court indicated that because these reasons would be given after the fact, they would have to be subject to skepticism. As you might imagine, agency heads do not want to be examined or cross-examined in court as to their reasons for adopting a rule. Consequently, agencies have developed the practice of providing their explanations in writing as part of the final rule. In addition, as a contemporaneous statement, this explanation does not trigger the courts’
heightened scrutiny of *a post hoc* rationalization. If the written statement is inadequate, current practice is to remand the rule to the agency for further explanation, rather than take oral testimony in court on the issue, as will be discussed shortly.

The circuit courts quickly applied *Overton Park* in reviewing informal rulemaking even though *Overton Park* itself involved review of informal adjudication. Judge Harold Leventhal of the District of Columbia Court of Appeals gave the name “hard look” to the scrutiny mandated by *Overton Park*. He explained:

> In the exercise of the court’s supervisory function, full allowance must be given for the reality that agency matters typically involve a kind of expertise—sometimes technical in a scientific sense, sometimes more a matter of specialization in kinds of regulatory programs. Nevertheless, the court must . . . ensure that the agency “has given reasoned discretion to all of the material facts and issues.” The court exercises this . . . role with particular vigilance if it becomes aware, especially from a combination of danger signals, that the agency has not really taken a hard look at the salient problems, and has not genuinely engaged in reasoned decisionmaking.


In *Motor Vehicle Manufacturers Assoc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983), which is included in the problem materials below, the Court confirmed that an agency must give adequate reasons for a rule. When you read the decision, you should look for this confirmation.

When an agency has not provided an adequate explanation, even if the court itself could discern an adequate explanation from the record, the court should remand the case back to the agency. The leading case for this proposition is *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80 (1943). There the Securities and Exchange Commission had disapproved the Chenery Corporation’s reorganization plan on the theory that the officers had violated a common law fiduciary duty by trading in the stock during the reorganization, thereby rendering the reorganization not “fair and equitable” as required by the statute. The Supreme Court held that the SEC erred in its determination that the officers had violated a common law fiduciary duty, so the SEC’s decision could not stand, even though the Court went on to suggest that the SEC could exercise its own policy making authority to declare such trading not fair and equitable. The Court said, “[t]he Commission’s action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order. . . .” The Court noted that Congress had entrusted the agency, not the courts, with the exercise of discretion in implementing the statute, so a court can only review the justification made by the agency, not supply its own.
Hypo 2-9: Judicial Review of Substantive Decisions

In 1975, Congress enacted the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act. The Act clarified that the Federal Trade Commission (FTC) had rulemaking authority, required the FTC to use hybrid rulemaking, and mandated that the Commission promulgate a rule regulating “warranties and warranty practices in connection with the sale of used motor vehicles.”

In 1981, just before the Carter administration left office, the FTC promulgated a rule that required used car dealers to post on a window a standard sticker that contained several consumer warnings. The two most important warnings were:

(a) **Warranty Disclosure:** The dealer was required to disclose to a buyer whether the car was being sold without any warranty (‘As Is’/No Warranty), with a “Limited Warranty,” or with a “Full Warranty” by checking the appropriate box on the window sticker.

(b) **Mechanical Defects Disclosure:** The dealer was required to display a window sticker containing a list of potential major mechanical defects and the dealer was required to check off those defects of which the dealer had knowledge. The dealer, however, was not required to inspect any automobile it was selling.

In 1983, before completion of judicial review of the rule, the FTC announced that it would reconsider its regulation, and the court remanded the rule back to the Commission. After soliciting further comments, the FTC adopted the same rule as previously with some minor changes, but without the known-defects disclosure requirement.

Consumers Union, which opposed deletion of the known-defects provision, sought judicial review of the revised rule in the D.C. Circuit Court of Appeals. Two trade associations, the National Automobile Dealers Association (NADA) and the National Independent Automobile Dealers Association (NIADA), intervened to support the FTC’s decision to drop the known-defects requirement.

(1) If you are a lawyer representing:

(a) Consumers Union, what arguments would you make that the court should reverse the Commission concerning the known-defect rule; or

(b) NADA or NIADA, what arguments would you make that the court should affirm the Commission concerning the known-defect rule.

(2) As you consider what arguments that you can raise on behalf of the parties, please identify the “scope of review” that the court should apply and explain your choice.
Hypo Materials

UNITED STATES CODE ANNOTATED TITLE 15.
COMMERCE AND TRADE

§ 45. Unfair methods competition unlawful; prevention by Commission

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices, in or affecting commerce, are declared unlawful.

§ 57a. Unfair or deceptive acts or practices rulemaking proceedings

(a) Authority of Commission to prescribe rules and general statements of policy

(1) Except as provided in subsection (i) of this section, the Commission may prescribe—

(B) rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title). . . . Rules under this subparagraph may include requirements prescribed for the purpose of preventing such acts or practices. . . .

(e) Judicial review; petition; jurisdiction and venue; rulemaking record; additional submissions and presentations; scope of review and relief; review by Supreme Court; additional remedies

(1) (A) Not later than 60 days after a rule is promulgated under subsection (a)(1)(B) of this section by the Commission, any interested person (including a consumer or consumer organization) may file a petition, in the United States Court of Appeals for the District of Columbia circuit or for the circuit in which such person resides or has his principal place of business, for judicial review of such rule. . . .

(B) For purpose of this section, the term “rulemaking record” means the rule, its statement of basis and purpose, the transcript required by subsection (c)(5) of this section, any written submissions, and any other information which the Commission considers relevant to such rule. . . .
(3) Upon the filing of the petition under paragraph (1) of this subsection, the court shall have jurisdiction to review the rule in accordance with chapter 7 of Title 5 and to grant appropriate relief, including interim relief, as provided in such chapter. The court shall hold unlawful and set aside the rule on any ground specified in subparagraphs (A), (B), (C), or (D) of section 706(2) of Title 5 (taking due account of the rule of prejudicial error), or if—

(A) the court finds that the Commission’s action is not supported by substantial evidence in the rulemaking record (as defined in paragraph (1) (B) of this subsection) taken as a whole, . . .

The term “evidence,” as used in this paragraph, means any matter in the rulemaking record.

(4) The judgment of the court affirming or setting aside, in whole or in part, any such rule shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification, as provided in section 1254 of Title 28. . . .

Federal Trade Commission, Final Rule: Sale of Used Motor Vehicles


A. Deceptive Practices in the Industry. The record in this proceeding provides substantial evidence of deceptive acts and practices by used car dealers. The principal abuses recorded relate to oral misrepresentations by dealers regarding: (1) warranty responsibilities for after-sale repairs and (2) mechanical condition at the time of sale. Such oral statements are often inconsistent with the warranty terms, or disclaimers thereof, provided in the written sales contract and with the dealer’s actual knowledge of the car’s mechanical condition at the time of sale. Consumer injury occurs because consumers make purchasing decisions based on dealer deception and not only fail to get the car they bargained for but face unexpected expensive repair bills. . . .

2. Mechanical Condition Practices—a. Materiality of Mechanical Condition Information. The utility of a vehicle as a means of transportation is directly affected by mechanical condition. Therefore, it is not surprising that consumer research indicates a consistent concern about mechanical condition. In fact, mechanical condition at the time of sale is reported by consumers as the most important factor in reaching a purchasing decision. Consumers who are aware of defects prior to purchase are able to use that information in pricing and selecting
vehicles, as well as in budgeting for repair expenses. For example, record surveys indicate that consumers who had potential used car purchases inspected prior to purchase made significant use of inspection results in subsequent bargaining for repairs and price reductions or in making purchasing decisions.

Defect information is also important because repairs resulting from hidden defects are costly to consumers. . . .

The great bulk of repair cost is borne by the purchaser. Moreover, out-of-pocket costs caused by defects often go beyond the cost of repairs. . . .

Therefore, the Commission finds that mechanical condition information is material to the used car transaction. Dealer misrepresentations regarding mechanical condition and failures to disclose known defect information are therefore deceptive acts and practices. Record evidence regarding such deceptive acts and practices is set forth below.

B. Deception Concerning the Mechanical Condition of Used Cars. The record contains significant evidence demonstrating oral misrepresentations by used car dealers of material facts concerning the mechanical condition of vehicles offered for sale. These deceptions include failures to disclose known defects, oral misrepresentations of sound mechanical condition and unsubstantiated claims about the car’s mechanical condition.

One record study presented survey evidence demonstrating that dealers fail to disclose known defects. The California Public Interest Research Group (CALPIRG) undertook a survey which tested for the degree of known mechanical defect disclosure by dealers to consumers. The survey used trained test shoppers who participated in actual sales transactions up to the point of determining what disclosures were made. After a test car was taken from the dealer’s lot to a diagnostic center for inspection, the test shopper returned the car with a copy of the diagnostic report and discussed the report with the salesperson. The test shoppers then broke off negotiations. A second test shopper returned on a follow-up visit to determine whether the defect results of the diagnosis were being disclosed to the new prospective buyers. CALPIRG reports that, in 75 of the 101 completed tests, the follow-up purchaser did not receive defect information that had been provided to the dealer. In 47 of these 75 cases of non-disclosure, the second test shopper dealt with the same salesman who had been given the diagnostic results by the first test shopper.

In addition to the CALPIRG Study, the record is replete with testimony and documentary evidence citing dealer failure to disclose known defects. . . .

Closely linked to the failure to disclose known defects is the dealer practice of orally representing a car’s mechanical condition as sound when such is not the case. Record testimony and documentary evidence regarding such misrepresentations are supported by data reported in several studies. . . .
C. Dealers Know That Defects Are Present in Used Cars at the Time of Sale.

The record demonstrates not only that many used cars have serious defects at the time of sale but also that dealers often know that these defects are present at the time of sale. This knowledge is obtained through inspections and evaluations that are made before the car is placed on the lot for sale.

The record shows that dealers routinely inspect vehicles for defects. Those dealers who purchase cars at auctions can and do inspect for defects after purchase and have an option to rescind or renegotiate the sale if they find sufficient problems with the vehicle. Moreover, many auction facilities have rules requiring disclosure of known defects by the selling dealer so that the buying dealer obtains knowledge of defects at the auction.

Even when not purchasing at auction, the industry practice is to appraise a vehicle before purchase. The appraiser typically takes the vehicle for a road test, visually inspects the body and mechanical condition of the car, and estimates the extent of repairs needed to make it saleable. After dealers obtain vehicles, there is still further opportunity to inspect and evaluate in more detail, in order to determine what level of warranty coverage will be appropriate for the particular car. If the inspection uncovers problems that are sufficiently great, a dealer may decide to wholesale the vehicle to another dealer, or to sell it “as is” rather than with a warranty.

D. Remedies.

2. Disclosure of Known Defects. The record shows that dealers go to great lengths to learn the mechanical condition of the cars they sell. They obtain knowledge of defects from various sources. The record reflects that, at auctions, dealers may inspect after purchase and, in fact, may rescind or renegotiate if problems found are severe. After purchase by dealers, additional defects are discovered during further inspections, appearance reconditioning and repairs. In addition, dealers also become aware of defects through third-party service contract company inspectors (who examine cars for defects when deciding which cars qualify for the service contract), through sellers, and through selling or servicing the car previously.

Despite their knowledge of defects, many dealers do not disclose defects to prospective purchasers. However, the record also shows that, when dealers are faced with an obligation to disclose known defects, they are likely to comply rather than evade the requirement. Although Wisconsin’s mandatory inspection and disclosure law is not a perfect analogue to the Commission’s Rule it is worthy of note that under the Wisconsin law more buyers

254 There are important differences between the Commission’s Rule and the Wisconsin law. Under the Wisconsin law, dealers must inspect and check either “OK” or “Not OK” for each system and subsystem listed on a disclosure statement. It could be argued that dealers in Wisconsin have some incentive to check “Not OK”, thereby disclosing known defects, since an “OK” check may carry post-sale repair responsibilities for the dealer.
received pre-purchase defect information from dealers. This increase in disclosure of defects is even more significant in light of the fact that costs of dealer inspections did not increase substantially; from this we conclude that dealers did not simply begin to find more defects but instead began to disclose more defects.

Federal Trade Commission, Final Rule: Sale of Used Motor Vehicles


a. Materiality of Mechanical Condition Information. The utility of a vehicle as a means of transportation is directly affected by its mechanical condition. Therefore, it is not surprising that consumer research indicates consumers’ consistent concern about mechanical condition. In fact, mechanical condition at the time of sale is reported by consumers as the most important factor in reaching a purchasing decision.

Mechanical condition information is also important because needed repairs resulting from hidden defects are costly to consumers. Therefore, the Commission finds that mechanical condition information is material to the used car transaction. Dealer misrepresentations regarding mechanical condition are therefore deceptive acts and practices.

b. Deception Concerning the Mechanical Condition of Used Cars. The record demonstrates that misrepresenting a car’s mechanical condition is a common dealer practice.

c. Consumer Reliance on Dealer Representations and Injury. The record clearly demonstrates the existence of a substantial information disparity between the buyer and seller in the used car market relating to the mechanical condition of used cars.

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253 The Wisconsin Study indicates that 28.1 percent of pre-law used car buyers who bought from dealers were aware of defects prior to purchase. This percentage increased to 38.7 percent among those who purchased from dealers following passage of the mandatory inspection law. This increase in defect awareness was accompanied by an increase in the number of buyers who stated that their knowledge of defects came from information supplied by the dealer. In the Wisconsin Study, one percent of pre-law respondents said that they learned of defects before purchase from dealers. In the post-law sample, 9 percent said they learned of defects before purchase from dealers.

256 The record shows that, after implementation of the Wisconsin law, two-thirds of the dealers reported that they incurred no additional costs to inspect in order to comply with the mandatory disclosure scheme.
Based on the evidence in the rulemaking record, the Commission finds that many used car dealers have knowingly misrepresented the mechanical condition of the cars they sell and thereby cause substantial injury to consumers. . . .

A. Disclosure of Known Defects

The 1981 Rule contained provisions requiring dealers to disclose certain material defects, if known at the time of sale. . . . [T]he Commission has decided not to include a known defect disclosure requirement in the Rule, to make the warranty and “as is” disclosures on the Buyers Guide more prominent, and to make other minor adjustments to the Buyers Guide.

In reaching its decision, the Commission carefully analyzed the rulemaking record including the comments submitted during the recent comment and rebuttal periods to determine the potential effects of the known defects disclosure requirement, both intended and unintended. The Commission has concluded that the known defects disclosure requirement will not provide used car buyers with a reliable source of information concerning a car’s mechanical condition and that the provision would be exceedingly difficult to enforce. . . .

1. The Reliability of Information Disclosed Under a Known Defects Disclosure Requirement

Any benefits from a known defects disclosure requirement depend on the extent to which dealers have detailed knowledge about the mechanical condition of the vehicles they sell and whether the dealer’s knowledge of defects can be communicated in a way that will not be confusing to potential used car buyers.

a. Dealer Knowledge of Defects. In order to provide useful disclosures under the known defects disclosure requirement, dealers must have knowledge of specific defects. If dealers do not ordinarily possess knowledge about specific defects, they would only be able to discover such information through additional inspections. Inspections will be costly and will ultimately raise the price of used cars. Therefore, in determining the costs and benefits of the known defect disclosure requirement, the issue of whether dealers ordinarily have knowledge about specific defects is an important one.

Despite the importance of this question, there is relatively little direct evidence that addresses it. The record does indicate that most experts and commenters agree that all dealers assess the general condition of the cars they sell and that individual dealers may examine cars thoroughly. However, even during the initial rulemaking proceeding there was disagreement concerning what the record reveals about the extent of the average dealer’s knowledge of the condition of specific systems in his or her cars at the time of sale. . . .

The Commission’s current review of both the preexisting rulemaking record and the additional comments submitted during the present proceeding indicates that the conclusion
that dealers ordinarily know about specific defects may well be incorrect and, in any event, is not supported by a preponderance of substantial reliable evidence.

First, careful inspections do not always reveal or predict mechanical problems that may occur shortly after the sale. Thus, there is little basis for inferring knowledge from the mere fact that failures occur after purchase. In Wisconsin, where dealers are required to inspect their cars and disclose the results of the inspection, one record study indicates that 51 percent of Wisconsin used car buyers ultimately repaired problems not known when they bought their cars. These data are consistent with another record study which indicates 52.1 percent of Wisconsin consumers, who purchased cars after the Wisconsin law went into effect, discovered defects after the sale. Moreover, in a comment supporting the “known defects” provision, Detroit II, a company currently providing warranties for used cars, points out that even after cars are inspected for inclusion in their warranty program and all “known defects” are repaired, a survey of their buyers revealed that “slightly over 50% of them have some sort of mechanical problem within 45 days of the sale.” The Detroit II figures are within the range of the incidence of mechanical problems experienced by used car buyers generally.

Second, dealer knowledge about general condition of a car does not necessarily mean that the dealer has knowledge of specific defects. Although there is evidence that dealers have a high degree of confidence in their ability to assess the general condition of a car through a walk-around examination and a test drive, this general assessment of overall condition is probably sufficient to protect the dealer's interest only because most buyers are likely to perform no more than a similarly superficial examination. Moreover, the dealer's evaluation is likely to focus on the cost of appearance reconditioning or detailing because, as the record indicates, many consumers believe that a “good looking” car is also mechanically sound. There is, however, no evidence that such measures are ordinarily adequate to reveal specific mechanical defects.

Third, although the record contains anecdotal evidence indicating that dealers know about specific defects, other record evidence supports the conclusion that most dealers do not have knowledge of specific defects. Indeed, the record contains extensive testimony from dealers and vocational educational instructors that the inspection process is uncertain and imperfect.

Even though the utility of a “known defects” disclosure depends on dealers having system-by-system information about the cars they sell, the provision gives dealers little incentive to inspect their cars. Under the provision, honest dealers who learn of defects must reveal their knowledge on the disclosure portion of the window sticker, whereas dealers who avoid gaining this knowledge may honestly leave the sticker blank. Disclosing “known defects” calls attention to the car’s problems, but does not reward the dealer’s integrity for revealing these problems. Thus, a dealer who regularly inspects and honestly discloses all “known defects” may be put at a competitive disadvantage relative to dealers who do not inspect. This factor may then have the unintended and perverse effect of discouraging, rather than encouraging, inspections and disclosure of defects.
b. **Buyer Knowledge Under the Defects Disclosure Provision.** When the Commission promulgated the Rule in 1981, it cited data from the Wisconsin Study suggesting that the Wisconsin law increased overall consumer awareness of defects prior to purchase and that the law made it more likely that consumers would receive defect information from the dealer. However, contradictions in the data presented in the Wisconsin Study become apparent upon close review. On the one hand, the data show some increase in the percentage of post-law buyers who knew about defects before the sale and those who received pre-purchase defect information from dealers. On the other hand, data from the study shows that more consumers in Minnesota (a state with no defect disclosure requirement) reported awareness of defects prior to sale than consumers in post-law Wisconsin.

Finally, the data in the Wisconsin Study do not show that the Wisconsin defect disclosure requirement made it more likely that consumers would receive the information they felt they needed concerning the car’s mechanical condition. Approximately 32 percent of pre-law consumers reported that they lacked needed information on the car’s mechanical condition. This percentage decreased only slightly for post-law consumers (28.52 percent). Moreover, there was essentially no difference in the percentage of pre-law and post-law consumers reporting that the dealer gave them accurate information on the mechanical condition of the car they purchased (62.6 percent vs. 62.8 percent). . .

In addition to our serious questions concerning the effectiveness of a defect disclosure provision in making consumers aware of defects prior to purchase, we are equally concerned that the defect disclosure provision included in the 1981 Rule may confuse consumers and cause them to make inaccurate assumptions about the condition of a car after reading the defect disclosure. . . Thus, buyers may not only be getting no useful information about a car’s condition, but may be affirmatively harmed by mistakenly inferring that the dealer’s lack of knowledge about defects means that no defects exist.301 Unscrupulous dealers or salespersons could easily exploit the likelihood that consumers will mistake the absence of a disclosure for a claim that the car is of high quality. For example, dealers might highlight that there are no “known defects” in the car or argue that the requirement to disclose known defects makes an independent inspection unnecessary—“If we knew of any problems, we’d have to tell you about them.” . .

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301 The “known defects” disclosure in the 1981 Rule contained a warning that the absence of a disclosed defect does not necessarily mean that the car is free from defects. However, there is no evidence that this warning would be effective. For example, a consumer comparing a car with a disclosed defect and car with an undisclosed defect may find the inference that the car with no disclosed defect was in better condition irresistible despite the warning.


WHITE, Justice:

. . . Within months of assuming office, Secretary Brock Adams . . . issued a new mandatory passive restraint regulation, known as Modified Standard 208. The Modified Standard mandated the phasing in of passive restraints beginning with large cars in model year 1982 and extending to all cars by model year 1984. The two principal systems that would satisfy the Standard were airbags and passive belts; the choice of which system to install was left to the manufacturers. . . .

In February 1981, however, Secretary of Transportation Andrew Lewis reopened the rulemaking due to changed economic circumstances and, in particular, the difficulties of the automobile industry. Two months later, the agency ordered a one-year delay in the application of the standard to large cars, extending the deadline to September 1982, and at the same time, proposed the possible rescission of the entire standard. After receiving written comments and holding public hearings, NHTSA issued a final rule (Notice 25) that rescinded the passive restraint requirement contained in Modified Standard 208.

In a statement explaining the rescission, NHTSA maintained that it was no longer able to find, as it had in 1977, that the automatic restraint requirement would produce significant safety benefits. This judgment reflected not a change of opinion on the effectiveness of the technology, but a change in plans by the automobile industry. In 1977, the agency had assumed that airbags would be installed in 60% of all new cars and automatic seatbelts in 40%. By 1981 it became apparent that automobile manufacturers planned to install the automatic seatbelts in approximately 99% of the new cars. For this reason, the life-saving potential of airbags would not be realized. Moreover, it now appeared that the overwhelming majority of passive belts planned to be installed by manufacturers could be detached easily and left that way permanently. Passive belts, once detached, then required “the same type of affirmative action that is the stumbling block to obtaining high usage levels of manual belts.” For this reason, the agency concluded that there was no longer a basis for reliably predicting that the standard would lead to any significant increased usage of restraints at all. . . .

. . . Both the Motor Vehicle Safety Act and the 1974 Amendments concerning occupant crash protection standards indicate that motor vehicle safety standards are to be promulgated under the informal rulemaking procedures of § 553 of the Administrative Procedure Act. The agency’s action in promulgating such standards therefore may be set aside if found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” We believe that the rescission or modification of an occupant protection standard is subject to the same test. . . .
Petitioner Motor Vehicle Manufacturers Association (MVMA) disagrees, contending that the rescission of an agency rule should be judged by the same standard a court would use to judge an agency’s refusal to promulgate a rule in the first place—a standard Petitioner believes considerably narrower than the traditional arbitrary and capricious test and “close to the borderline of nonreviewability.” We reject this view. The Motor Vehicle Safety Act expressly equates orders “revoking” and “establishing” safety standards; neither that Act nor the APA suggests that revocations are to be treated as refusals to promulgate standards. . . .

The Department of Transportation accepts the applicability of the “arbitrary and capricious” standard. It argues that under this standard, a reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute. We do not disagree with this formulation.9 The scope of review under the “arbitrary and capricious” standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a “rational connection between the facts found and the choice made.” In reviewing that explanation, we must “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” Normally, 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. The reviewing court should not attempt itself to make up for such deficiencies: “We may not supply a reasoned basis for the agency’s action that the agency itself has not given.” We will, however, “uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.” For purposes of this case, it is also relevant that Congress required a record of the rulemaking proceedings to be compiled and submitted to a reviewing court, and intended that agency findings under the Motor Vehicle Safety Act would be supported by “substantial evidence on the record considered as a whole.” . . .

The ultimate question before us is whether NHTSA’s rescission of the passive restraint requirement of Standard 208 was arbitrary and capricious. We conclude, as did the Court of Appeals, that it was. We also conclude, but for somewhat different reasons, that further consideration of the issue by the agency is therefore required. We deal separately with the rescission as it applies to airbags and as it applies to seatbelts.

The first and most obvious reason for finding the rescission arbitrary and capricious is that NHTSA apparently gave no consideration whatever to modifying the Standard to require that airbag technology be utilized. . . .

9 The Department of Transportation suggests that the arbitrary and capricious standard requires no more than the minimum rationality a statute must bear in order to withstand analysis under the Due Process Clause. We do not view as equivalent the presumption of constitutionality afforded legislation drafted by Congress and the presumption of regularity afforded an agency in fulfilling its statutory mandate.
The agency has now determined that the detachable automatic belts will not attain anticipated safety benefits because so many individuals will detach the mechanism. Even if this conclusion were acceptable in its entirety, standing alone it would not justify any more than an amendment of Standard 208 to disallow compliance by means of the one technology which will not provide effective passenger protection. It does not cast doubt on the need for a passive restraint standard or upon the efficacy of airbag technology.

Although the issue is closer, we also find that the agency was too quick to dismiss the safety benefits of automatic seatbelts. NHTSA’s critical finding was that, in light of the industry’s plans to install readily detachable passive belts, it could not reliably predict “even a 5 percentage point increase as the minimum level of expected usage increase.” The Court of Appeals rejected this finding because there is “not one iota” of evidence that Modified Standard 208 will fail to increase nationwide seatbelt use by at least 13 percentage points, the level of increased usage necessary for the standard to justify its cost. Given the lack of probative evidence, the court held that “only a well-justified refusal to seek more evidence could render rescission non-arbitrary.”

Petitioners object to this conclusion. In their view, “substantial uncertainty” that a regulation will accomplish its intended purpose is sufficient reason, without more, to rescind a regulation. We agree with petitioners that just as an agency reasonably may decline to issue a safety standard if it is uncertain about its efficacy, an agency may also revoke a standard on the basis of serious uncertainties if supported by the record and reasonably explained. Rescission of the passive restraint requirement would not be arbitrary and capricious simply because there was no evidence in direct support of the agency’s conclusion. It is not infrequent that the available data does not settle a regulatory issue and the agency must then exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion. Recognizing that policymaking in a complex society must account for uncertainty, however, does not imply that it is sufficient for an agency to merely recite the terms “substantial uncertainty” as a justification for its actions. The agency must explain the evidence which is available, and must offer a “rational connection between the facts found and the choice made.” Generally, one aspect of that explanation would be a justification for rescinding the regulation before engaging in a search for further evidence.

In this case, the agency’s explanation for rescission of the passive restraint requirement is not sufficient to enable us to conclude that the rescission was the product of reasoned decisionmaking. To reach this conclusion, we do not upset the agency’s view of the facts, but we do appreciate the limitations of this record in supporting the agency’s decision. We start with the accepted ground that if used, seatbelts unquestionably would save many thousands of lives and would prevent tens of thousands of crippling injuries. . . . We move next to the fact that there is no direct evidence in support of the agency’s finding that detachable automatic belts cannot be predicted to yield a substantial increase in usage. The empirical evidence on the record, consisting of surveys of drivers of automobiles equipped with passive belts, reveals more than a doubling of the usage rate experienced with manual
Much of the agency’s rulemaking statement—and much of the controversy in this case—centers on the conclusions that should be drawn from these studies. The agency maintained that the doubling of seatbelt usage in these studies could not be extrapolated to an across-the-board mandatory standard because the passive seatbelts were guarded by ignition interlocks and purchasers of the tested cars are somewhat atypical. Respondents insist these studies demonstrate that Modified Standard 208 will substantially increase seatbelt usage. We believe that it is within the agency’s discretion to pass upon the generalizability of these field studies. This is precisely the type of issue which rests within the expertise of NHTSA, and upon which a reviewing court must be most hesitant to intrude.

But accepting the agency’s view of the field tests on passive restraints indicates only that there is no reliable real-world experience that usage rates will substantially increase. To be sure, NHTSA opines that “it cannot reliably predict even a 5 percentage point increase as the minimum level of increased usage.” But this and other statements that passive belts will not yield substantial increases in seatbelt usage apparently take no account of the critical difference between detachable automatic belts and current manual belts. A detached passive belt does require an affirmative act to reconnect it, but—unlike a manual seat belt—the passive belt, once reattached, will continue to function automatically unless again disconnected. Thus, inertia—a factor which the agency’s own studies have found significant in explaining the current low usage rates for seatbelts—works in favor of, not against, use of the protective device. Since 20 to 50% of motorists currently wear seatbelts on some occasions, there would seem to be grounds to believe that seatbelt use by occasional users will be substantially increased by the detachable passive belts. Whether this is in fact the case is a matter for the agency to decide, but it must bring its expertise to bear on the question . . .

The agency also failed to articulate a basis for not requiring nondetachable belts under Standard 208. It is argued that the concern of the agency with the easy detachability of the currently favored design would be readily solved by a continuous passive belt, which

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16 Between 1975 and 1980, Volkswagen sold approximately 350,000 Rabbits equipped with detachable passive seatbelts that were guarded by an ignition interlock. General Motors sold 8,000 1978 and 1979 Chevettes with a similar system, but eliminated the ignition interlock on the 13,000 Chevettes sold in 1980. NHTSA found that belt usage in the Rabbits averaged 34% for manual belts and 84% for passive belts. For the 1978–1979 Chevettes, NHTSA calculated 34% usage for manual belts and 71% for passive belts. On 1980 Chevettes, the agency found these figures to be 31% for manual belts and 70% for passive belts.

17 NHTSA believes that the usage of automatic belts in Rabbits and Chevettes would have been substantially lower if the automatic belts in those cars were not equipped with a use-inducing device inhibiting detachment.

18 NHTSA commissioned a number of surveys of public attitudes in an effort to better understand why people were not using manual belts and to determine how they would react to passive restraints. The surveys reveal that while 20% to 40% of the public is opposed to wearing manual belts, the larger proportion of the population does not wear belts because they forgot or found manual belts inconvenient or bothersome. In another survey, 38% of the surveyed group responded that they would welcome automatic belts, and 25% would “tolerate” them. NHTSA did not comment upon these attitude surveys in its explanation accompanying the rescission of the passive restraint requirement.

19 Four surveys of manual belt usage were conducted for NHTSA between 1978 and 1980, leading the agency to report that 40% to 50% of the people use their belts at least some of the time.
allows the occupant to “spool out” the belt and create the necessary slack for easy extrication from the vehicle. The agency did not separately consider the continuous belt option, but treated it together with the ignition interlock device in a category it titled “option of use-compelling features.” The agency was concerned that use-compelling devices would “complicate extrication of [an] occupant from his or her car.” “To require that passive belts contain use-compelling features,” the agency observed, “could be counterproductive [given] . . . widespread, latent and irrational fear in many members of the public that they could be trapped by the seat belt after a crash.” In addition, based on the experience with the ignition interlock, the agency feared that use-compelling features might trigger adverse public reaction.

By failing to analyze the continuous seatbelts in its own right, the agency has failed to offer the rational connection between facts and judgment required to pass muster under the arbitrary and capricious standard. We agree with the Court of Appeals that NHTSA did not suggest that the emergency release mechanisms used in nondetachable belts are any less effective for emergency egress than the buckle release system used in detachable belts. In 1978, when General Motors obtained the agency’s approval to install a continuous passive belt, it assured the agency that nondetachable belts with spool releases were as safe as detachable belts with buckle releases. NHTSA was satisfied that this belt design assured easy extricability: “the agency does not believe that the use of [such] release mechanisms will cause serious occupant egress problems . . .” While the agency is entitled to change its view on the acceptability of continuous passive belts, it is obligated to explain its reasons for doing so . . .

Justice Rehnquist, with whom The Chief Justice, Justice Powell, and Justice O’Connor join, concurring in part and dissenting in part.

I join parts I, II, III, IV, and V-A of the Court’s opinion. In particular, I agree that, since the airbag and continuous spool automatic seatbelt were explicitly approved in the standard the agency was rescinding, the agency should explain why it declined to leave those requirements intact. In this case, the agency gave no explanation at all. Of course, if the agency can provide a rational explanation, it may adhere to its decision to rescind the entire standard.

I do not believe, however, that NHTSA’s view of detachable automatic seatbelts was arbitrary and capricious. The agency adequately explained its decision to rescind the standard insofar as it was satisfied by detachable belts. . . .

The agency’s changed view of the standard seems to be related to the election of a new President of a different political party. It is readily apparent that the responsible members of one administration may consider public resistance and uncertainties to be more important than do their counterparts in a previous administration. A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it
is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.

Points for Discussion

a. The Rulemaking Record

In its second rule, the FTC dropped the requirement that dealers disclose the mechanical condition of a used car. As the lawyer for Consumers Union, how can you argue that the FTC “has offered an explanation for its decision that runs counter to the evidence before the agency”? As a lawyer for NADA or NIADA, how can you argue that the decision is consistent with the evidence in the rulemaking record? What evidence is there in the record that dealers know of the mechanical condition? What evidence is there that they do not?

If the evidence is in conflict, how can the lawyer for NADA or NIADA argue that the agency’s conclusion is not so implausible that it “could not be ascribed to a difference in view or the product of agency expertise”? How can the CU lawyer counter this argument? Which side do you think will prevail? Does this test mean that a court is to defer to how the FTC evaluated the evidence unless its evaluation is clearly incorrect—i.e., implausible? How did the FTC apply its “expertise”? What policy justifications did it give for erring on the side of not requiring disclosure? Are these sufficient.

b. NHTSA’s Interpretation of the Evidence

NHTSA did not offer any rationale for its decision to drop air bags along with automatic seatbelts. This clearly ran afoul of the Court’s requirement that a decision is arbitrary and capricious if it “entirely failed to consider an important aspect of the problem.” But the majority also ruled that the agency had failed to provide an adequate explanation of its decision to drop the automatic seatbelt option. For this holding, the majority faulted NHTSA’s treatment of the evidence (relating to the experience with automatic seatbelts) because the agency did not take into account the impact of inertia on people’s behavior. The four dissenters disagreed with this aspect of the opinion. Was NHTSA’s interpretation of the evidence “so implausible that it could not be ascribed to a difference in view or the product of agency expertise”?

Food for Thought

How clearly must the FTC explain its rationale for dropping the requirement that dealers disclose the mechanical condition of a car? When is an explanation “adequate”? If the agency’s explanation were a law school exam, what grade is passing—i.e., is a “C” or “D” good enough? Should courts “grade” on a pass-fail basis?
Food for Thought

Can the lawyer for CU argue that the FTC had “entirely failed to consider an important aspect of the problem”? In the first FTC rule, the agency found that “the record contains significant evidence demonstrating oral misrepresentations by used car dealers of material facts concerning the mechanical condition of vehicles offered for sale. These deceptions include failures to disclose known defects, oral misrepresentations of sound mechanical condition and unsubstantiated claims about the car’s mechanical condition.” How did the FTC respond to these findings in the second rule? How can the CU lawyer argue that the agency failed to consider an important aspect of the problem—i.e., the wholesale fraud by used car dealers? How might the lawyer for NADA or NIADA respond?

c. The FCC and the Indecency Prohibition

In *FCC v. Fox Television Stations*, 556 U.S. 502 (2009), the Federal Communications Commission ruled that the Fox network had violated the Commission’s indecency prohibition when it failed to bleep out Cher’s remark during the 2002 Billboard Music Awards, “I’ve also had critics for the last 40 years saying that I was on my way out every year. Right. So f* * * ‘em.” The Court of Appeals considered the ruling to be a change of policy by the FCC and overruled the action in part because the Commission had failed to provide a more substantial explanation for its decision, a requirement the circuit court thought that *State Farm* had established. Writing for a plurality, Justice Scalia indicated, “[O]ur opinion in *State Farm* neither held nor implied that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance.” Justice Kennedy, in a concurring and dissenting opinion, joined the four dissenting judges in disagreeing with this pronouncement. These justices required an agency to not only offer a non-arbitrary justification for the new policy, but also to have non-arbitrary reasons for rejecting the prior policy. Unlike the dissenters, Justice Kennedy thought that the Commission met this burden of explanation. All of the Justices apparently agreed that an agency could not meet its burden of proof by merely citing the fact that a new President had taken office and the White House preferred a different policy.

d. Arbitrary and Capricious and Presidential Preferences

When determining whether a rule is arbitrary and capricious, should the courts credit the fact that the agency policy’s decision reflects a policy preference of President (or members of Congress) as long as the policy preference is consistent with the agency’s statutory mandate? See, e.g. Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 Yale L.J. 2 (2009) (endorsing judicial deference on this basis); Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 Mich. L. Rev. 1127 (2010) (same).
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The Supreme Court, however, has yet to endorse this idea. As you just read, all of the Justices in Fox Television agreed that an agency could not meet its burden of proof by merely citing the fact that a new President had taken office and the White House preferred a different policy. In State Farm, Justice Rehnquist indicated in his dissent that “[t]he agency’s changed view of the standard seems to be related to the election of a new President of a different political party,” and suggested that “[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations.” State Farm, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part). Since the Court ignored this argument, “most agencies, courts, and commentators have understood State Farm to reject the notion that political reasons can justify an agency’s discretionary policy choices under the arbitrary and capricious standard of judicial review.” Glen Staszewski, Political Reasons, Deliberative Democracy, and Administrative Law, 97 Iowa L. Rev. 849, 854 (2012).

e.  Hard Look Review

The requirement of adequate reasons, or hard look review, has been controversial. Supporters defend it as necessary and appropriate to ensure agency accountability. See, e.g. Mark Seidenfeld, Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking, 75 Tex. L. Rev. 483, 491, 514 (1997) (arguing that “[a]bandoning meaningful judicial review altogether, in contrast, encourages policies that react to short term political preferences of powerful interest groups. . . .”); see also William H. Rodgers, Jr., A Hard Look at Vermont Yankee: Environmental Law Under Close Scrutiny, 67 Geo. L.J. 699 (1979). Critics blame hard look review, along with rulemaking analysis requirements, for rulemaking ossification. Professor McGarity sees the following linkage between judicial review and ossification:

Fully aware of the consequences of a judicial remand, the agencies are constantly “looking over their shoulders” at the reviewing courts in preparing supporting documents, in writing preambles, in responding to public comments, and in assembling the rulemaking “records.” Because they can never know what issues dissatisfied litigants will raise on appeal, they must attempt to prepare responses to all contentions that may prove credible to an appellate court, no matter how ridiculous they may appear to agency staff. . . .


f.  The Consequences of Hard Look Review

Professor Bill Jordan examines the consequences of hard look review by investigating what actually happens when courts remand rules to agencies under the arbitrary and capricious standard of review. William S. Jordan, III, Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals
Through Informal Rulemaking?, 94 Nw. L. Rev. 393 (2000). After looking at the aftermath of all remands of legislative rules by the D.C. Circuit between 1985 and 1995, he concluded “the hard look version of the arbitrary and capricious standard generally did not significantly impede agencies in the pursuit of their policy goals during the decade under review.” According to Jordan, the evidence indicates that most of the defeats suffered by agencies were “minor” and, when rules were remanded, agencies tended to recover quite quickly when recovery was necessary.

Food for Thought
Do Professor Jordan’s findings refute Professor McGarity’s argument that hard look review slows down rulemaking because it causes agencies to spend inordinate amounts of time justifying a rule in anticipation of hard look review? If you were an agency lawyer, would you be inclined to spend less time justifying a rule because Professor Jordan’s evidence indicates that your agency can recover relatively quickly from a remand?

g. Judicial Review and Judicial Biases
We noted earlier that empirical studies suggest that a judge’s political convictions affect judicial review of statutory interpretation by agencies. The same appears to be true for judicial review of an agency’s reasoning process. One study compared judicial review under the arbitrary and capricious standard by a panel of three judges appointed by a Republican president as compared to three judges appointed by a Democrat. The validation rate of a liberal agency decision by a panel of all Democratic appointees was 29 percentage points higher than the validation rate of a liberal decision by a panel of all Republican appointees. By comparison, the validation rate of a conservative decision by a panel of all Republican judges was 44 percentage points higher than the validation rate of a conservative decision by a panel of all Democratic appointees. Thomas J. Miles and Cass R. Sunstein, The Real World of Arbitrariness Review, 75 U. Chi. L. Rev. 761,788–89 (2008). Assuming that political ideology impacts judicial review of agency reasoning, does the requirement of “adequate reasons” encourage such behavior?

h. Vermont Yankee’s Implications
If Vermont Yankee says that courts are not to impose additional procedures on agencies not otherwise required by law, where is the source of authority for requiring the kind of agency explanation the Supreme Court demands in State Farm? In Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633 (1990), the Supreme Court had this to say in response to a claim that a demand for a reasoned explanation in Overton Park was inconsistent with Vermont Yankee: “[A]lthough one initially might feel that there is some tension between Vermont Yankee and Overton Park, the two cases are not necessarily inconsistent. Vermont Yankee stands for the general proposition that courts are not free to impose upon agencies specific procedural requirements that have no basis in the APA. At most, Overton Park suggests that § 706(2)(A), which directs a court to ensure that an agency action is not arbitrary and capricious or otherwise contrary to law, imposes a general ‘procedural’ requirement of
sorts by mandating that an agency take whatever steps it needs to provide an explanation that will enable the court to evaluate the agency’s rationale at the time of decision.”

i. **Chevron and the Arbitrary and Capricious Standard**

What is the relationship between step two of *Chevron* and the traditional “arbitrary and capricious” test prescribed in § 706(2)(A) of the APA? Recall that at step two courts ask whether the agency’s interpretation of the ambiguous statutory provision is reasonable. Whether the agency has acted reasonably in interpreting the provision may well overlap with whether it has engaged in reasoned decisionmaking in adopting the rule—the test for whether its decision is arbitrary, capricious, or an abuse of discretion. Of course, as in *State Farm*, if there is no challenged agency interpretation of a statute, then *Chevron* is irrelevant.

The Supreme Court has sometimes referred to the adequate reasons requirement of *State Farm* in applying step two, e.g., *Rust v. Sullivan*, 500 U.S. 173 (1991) (“We find that the Secretary amply justified his change of interpretation with a ‘reasoned analysis.’’”), and sometimes the Court engages in the type of analysis that would occur under *State Farm* without acknowledging that it is doing so, see, e.g., *Verizon Communications Inc. v. Federal Communications Commission*, 535 U.S. 467 (2002) (closely examining the agency’s reasons for adopting a particular policy opinion under step two); *New York v. Federal Energy Regulatory Commission*, 535 U.S. 1 (2002) (same). Professor Sunstein proposes that the inquiry whether an agency’s decision is arbitrary and capricious and the test at step two of *Chevron* should be similar. Cass Sunstein, *Law & Administration After Chevron*, 90 Colum. L. Rev. 2072, 2104 (1990). Professor Levin proposes that the two inquiries should be identical. Ronald B. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 Chi. Kent. L. Rev. 1253, 1254 (1997). Do you approve of either of these recommendations?

j. **Arbitrary and Capricious Review in the States**

If the exact content of “arbitrary and capricious” review seems a bit fuzzy in the federal system, generalizing among the states is near to impossible. Some states employ the equivalent of a “hard look” doctrine; others eschew any review of the rationality of rulemaking. See generally William Funk, *Rationality Review of State Administrative Rulemaking*, 43 Admin. L. Rev. 147 (1991). Funk is highly critical of states that do not allow any judicial review of the rationality of rulemaking. Probably the leading academic proponent of no review (albeit also a state Attorney General and state legislator) is Professor David Frohnmayer. See especially David Frohnmayer, *National Trends in Court Review of Agency Action: Some Reflections on the Model State Administrative Procedure Act and New Utah Administrative Procedure Act*, 3 B.Y.U. J. of Pub. Law 1 (1989). His primary argument is that because legislatures have delegated policymaking by rulemaking to agencies, judicial review of that policymaking should be limited to the review courts would make of legislation.

The judicial review provision of the 2010 Model State Administrative Procedure Act, promulgated by the National Conference of Commissioners on Uniform State Laws, mirrors the language in the federal APA’s section 706(2)(A), but as of this date no state has followed
that Model Act. The 1981 Model State Administrative Procedure Act was ambivalent on the subject, including arbitrary and capricious review as an “optional” provision. Professor Bonfield, the reporter for the Act, explained this outcome as the result of concern that some state courts had “substitut[e]d” their judgment for that of the Agency.” Arthur Bonfield, State Administrative Rule Making 574 (1986). Few states adopted the 1981 Act. The 1961 Model State APA was much more popular with almost half the states largely following its provisions. It provided for no judicial review of rules equivalent to “arbitrary, capricious, or abuse of discretion.”

**Major Themes**

The goal of Chapter Two is for you to learn what procedures are required when an agency promulgates legislative (legally binding) rules. The chapter proceeds in chronological fashion, looking at each step of the rulemaking process in the order in which it occurs. As with other sections of the APA, the courts have taken the language of the APA and interpreted it in ways that have expanded on an agency's procedural requirements. Thus, the law of administrative law is found both in the APA and in the case law. This makes for some frustration among students because, unlike civil procedure, the law of administrative procedure is not entirely codified, which means that you must learn it from the case law as well as the APA. Chapter Two also introduces you to how judicial review of agency decisions relating to the promulgation of legislative rules takes place.

**Executive Summary**

**Rulemaking Petitions.** The APA provides that “[e]ach agency shall give an interested person the right to petition for issuance, amendment, or repeal of a rule.” 5 U.S.C.A. § 553(e). The APA does not require any further procedures concerning a rulemaking petition, but an agency’s own mandate might do so.

If any agency does not respond to a petition, the APA provides that “[t]he reviewing court shall compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C.A. § 706(1). Since section 551(13) of the APA defines “agency action” to include “failure to act,” a court can review an agency’s failure to respond to a petition to determine if it has been “unreasonably delayed.” A court will determine this issue using the criteria identified in *TRAC v. FCC*.

When an agency rejects a petition, the scope of review is limited to ensuring that the agency has adequately explained the facts and policy concerns it relied on, and that the facts have some basis in the record. In *Massachusetts v. EPA*, however, the Court held that the reasons that an agency gives for rejecting a petition must conform to the authorizing statute.
Exceptions to Rulemaking Procedures. Section 553 of the APA contains the “notice and comment” procedures applicable to “informal rulemaking,” and it directs persons to sections 556 and 557 if “formal rulemaking” is triggered, but 553 does not apply to certain kinds of rules. There are categorical exceptions (rules that concern military or foreign affairs functions, agency management or personnel, or public property, loans, grants, benefits, or contracts) and specific exceptions (rules of agency organization, procedure, or practice; interpretive rules, general statements of policy; and other rules for which notice and public procedure are impracticable, unnecessary, or contrary to the public interest).

Rules of Agency Procedure. According to JEM Broadcasting, a rule of procedure does not “alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency.” Since, however, procedural rules can have a substantive impact, the court also asked whether a procedural rules substantive impact is “sufficiently grave so that notice and comment are needed to safeguard the policies underlying the APA.”

Informal Rulemaking. The APA itself only recognizes informal and formal rulemaking; hybrid rulemaking is when Congress has imposed additional procedures, or substituted different procedures, beyond those required by the APA. In informal rulemaking, an agency is only subject to the notice-and-comment procedures required by section 553 and must be accompanied by a statement of basis and purpose when they are promulgated.

Formal Rulemaking. In formal rulemaking, agencies must follow the procedures specified in sections 556–57, which essentially require a trial-type proceeding, to promulgate a rule. Students should be aware of what language is necessary in an agency’s statutory mandate to trigger formal rulemaking according to US v. Allegany-Ludlum and Florida East Coast Ry.

Hybrid Rulemaking. In hybrid rulemaking, the additional or substitute procedures differ from statute to statute, but they are more burdensome to the agency than those required for informal rulemaking, while less burdensome than the procedures required in formal rulemaking. Students should be aware of what language is necessary to trigger other types of procedures according to Vermont Yankee.

The National Environmental Policy Act (NEPA), Regulatory Flexibility Act (Reg-Flex), Paperwork Act, and the Unfunded Mandates Act are all examples of hybrid rulemaking. Students should be aware of when these requirements are triggered and what procedures an agency must undertake if the statute applies. The Clean Air Act, discussed in the Sierra Club case, is an example of a statutory mandate that requires hybrid rulemaking. Students should review the rulemaking procedures required by CAA as part of your review of that case.

Executive orders are another source of hybrid rulemaking requirements. Presidents have imposed a number of analytical requirements that agencies must undertake in certain circumstances, and students should review these requirements. Executive Order 12866, the most important of these requirements, requires agencies to study and report on the
likely costs and benefits of proposed and final “significant” rules. Students should be aware of the definition of a “significant” rule since this is the trigger for agencies to undertake these cost-benefit studies.

**Notice of Proposed Rulemaking.** The APA requires that a “general notice of proposed rulemaking shall be published in the Federal Register.” 5 U.S.C.A. § 553(b). A group of older cases require notice to include the data and methodology of any scientific evidence on which they relied. Beyond this requirement, the courts require an agency to “fairly apprise interested persons” of the issues in the rulemaking. If an agency changes a proposed rule in response to comments or for some other reason, there may be an issue of whether parties received adequate notice of the new and changed final rule. The original notice is adequate if the final rule is a “logical outgrowth” of the rulemaking proceeding.

**Opportunity for Comment.** Section 553(c) requires agencies to provide interested persons an opportunity to comment “through submission of written data, views, or arguments.” There is no requirement for an oral presentation or hearing or any time period specified as the length of the comment period, although most agencies will provide for 60 or more days for complex or controversial rules, and they will often extend the time for comments if requested to do so.

**Ex Parte Contacts.** In formal rulemaking the APA places specific prohibition on ex parte communications; i.e., communications made to decision-makers in the agency outside of the prescribed (and public) procedures. See 5 U.S.C.A. § 557(d). Section 553, by comparison, does not prohibit such contacts in informal rulemaking. Congress can, and sometime does, prohibit or limit such contacts in an agency’s mandate, and an agency can adopt prohibitions or limitations on its own. *Sierra Club* ruled the APA did not generally ban ex parte contact in informal rulemaking, but there is an older case, *Sangamon Valley Television Corporation v. FCC*, that established that the due process clause prohibits ex parte contacts when rulemaking involves “conflicting claims to a valuable privilege.”

**Statement of Basis and Purpose.** After receiving comments from interested persons, Section 553(c) requires agencies “after consideration of the relevant matter presented, . . . [to] incorporate in the rules adopted a concise general statement of their basis and purpose.” Despite the reference to “concise” statement of basis and purpose, this is not the practice today as the preamble to a complicated or controversial rule can easily exceed 100 pages of the double-columned, small type Federal Register. The more detailed and expansive statements of basis and purpose are primarily the result of court decisions that either set aside or remanded to the agency rules that the courts found inadequately justified. This issue is discussed below under the topic of “Adequate Reasons.”

**Judicial Review.** Section 706(2) of the APA establishes six grounds for a court to hold that a rule is unlawful. The last provision, referring to a trial de novo, is a historical anachronism, but the courts regularly use the other sections. Students should be familiar with section 706(2).
Statutory Interpretation. Agencies frequently must interpret statutes in determining what type of rule to adopt, and these interpretations are subject to judicial review under section 706 of the APA, which directs a court to hold unlawful agency action “not in accordance with law,” 5 U.S.C.A. § 706(2)(A), and “in excess of statutory jurisdiction, authority, limitations, or short of statutory right,” id. § 706(2)(C). Although since Marbury v. Madison, it is the responsibility of the courts to “to say what the law is,” the Court in Chevron v. NRDC required courts to show deference to an agency’s statutory interpretation in certain circumstances.

Chevron established a now famous two-step test for the judicial review of a rule that contains a statutory interpretation. In step one, the courts ask whether Congress “has directly spoken to the precise question at issue.” If so, the court must apply Congress’ statutory language, but if a statutory word or words are ambiguous, or if the intent of Congress is unclear, a court will move to step two of its analysis. At step two, a court will ask whether an agency’s interpretation constitutes a “permissible construction of the statute.”

Step One. In some cases, the Court determines whether statutory language is ambiguous by using a “plain meaning” test. This approach asks how an objective observer would understand the text of the statute. For this purpose, a court commonly will consider the dictionary definition of the word or words in question. A court might consider other statutory provisions if they shed light on the “objective” meaning of the word or words being considered.

In other cases, a court will start with the language of the statute, but the judges will also consider the entire statute and its object and policy. This can include the legislative history of the statute and the canons of construction, which are a set of tools that judges have developed over the years to aid them in determining the meaning of statutory terms. One such tool, for example, is the “avoidance canon,” which asks courts to construe ambiguous language to avoid raising serious constitutional problems. When a court moves on to these other sources of evidence of Congress’ intent regarding a word or words, a judge is asking how a “reasonable person” would interpret a word or words after considering the full context of the legislation and the rules of construction that judges have developed.

Avoidance of Step Two. At Step two, a court defers to an agency’s construction of a statutory term or terms unless it can conclude the interpretation is unreasonable. On occasion, however, the Supreme Court has avoided the entire Chevron two-step framework and, thus, has avoided the possibility of deferring to an agency’s interpretation at step two. In King v. Burwell, the Court explained the deference at step two of Chevron “is premised on the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps,” but in an “extraordinary case,” there may be reasons to conclude that Congress has not intended such an implicit delegation. The reasons to avoid Chevron may exist if an issue of statutory interpretation presents “a question of deep ‘economic and political significance’ that is central to this statutory scheme.” In resolving that issue, the Court may also consider whether an agency has expertise in the underlying
policy issue that is related to the meaning of a statutory term or terms. It is unclear whether an agency’s lack of expertise is a separate ground for avoiding *Chevron*.

**Substantive Decisions.** When an agency promulgates a rule, it determines on the basis of the evidence available to it, what are the relevant facts, and then it decides what type of rule, if any, is appropriate in light of those facts, choosing the regulatory option that will best further its statutory mandate. Section 706 authorizes courts to review both types of conclusions when it mandates that the “reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion or not otherwise in accordance with law; . . . [and] (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title. . . .” 5 U.S.C.A. § 706.

**Scope of Review.** As section 706 states, the “substantial evidence” standard applies when an agency must comply with sections 556–557, which involves “formal” rulemaking. Thus, in informal rulemaking, the “arbitrary and capricious” scope of review will normally apply. In an agency’s statutory mandate, however, Congress sometimes requires the use of a “substantial evidence” standard for judicial review of informal or hybrid rulemaking. However, as the Court did in *State Farm*, courts do not view the two standards to differ in application in informal or hybrid rulemaking.

Using an “arbitrary and capricious” standard of review, a court will ask whether “the decision was based on a consideration of relevant factors and whether there has been a clear error of judgment. . . .” *Citizens to Preserve Overton Park, Inc. v. Volpe*.

**Adequate Reasons.** The Supreme Court has added another consideration concerning whether or not an agency’s rule is arbitrary and capricious. If an agency has not adequately explained its reasons for promulgating a rule, the court will remand the rule back to the agency for a more adequate explanation. The court will not furnish the missing reasons and uphold the rule. According to the *State Farm* case, an “agency must examine the relevant data and articulate a satisfactory explanation for its action including a “rational connection between the facts found and the choice made.” The Court in *State Farm* further explained: “Normally, 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.”

**Hard Look Review.** The courts insist that their review of the agency’s decisions is a narrow one, intended to give deference to the agency’s fact-finding and conclusions, but the *State Farm* requirement that an agency must establish a “rational connection between the facts found and the choice made” has become known as “hard look” review. Judges and justices appear to vary concerning how demanding they will be concerning the adequacy of an agency’s explanation. In some instance, a minor discrepancy or discrepancies might
be enough for a judge to decide that the agency’s explanation was not adequate, while in other cases a judge will be looking for significant or major problems in the explanation.

Test Your Knowledge
To assess your understanding of the material in this chapter, [click here](#) to take a quiz.