TESTIMONY OF

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on

"Justice Denied: Rules Delayed on Auto Safety and Mental Health"

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My name is Tom McGarity. I hold the Joe R. and Teresa Lozano Long Endowed Chair in Administrative Law at the University of Texas School of Law, where I teach courses in Administrative Law, Torts and Environmental Law. I am also a member of the Board and immediate past president of the Center for Progressive Reform. I began writing about the ossification of informal rulemaking more than twenty years ago when I published the first thoroughgoing analysis of the ossification problem while serving as a consultant to the Carnegie Commission on Science, Technology and Government.[1] My most recent article on the pathologies of informal rulemaking in the twenty-first century, entitled "Administrative Law as Blood Sport," was published in 2012.[2] I am very pleased to be here to testify on the topic of the broken federal rulemaking process. Please note that I am expressing my own views and not necessarily those of the University of Texas or the Center for Progressive Reform.

A Broken Rulemaking Model.

The authors of the original Administrative Procedure Act (APA) envisioned rulemaking as a relatively straightforward process for making agency policy through open procedures that relied heavily on agency expertise and invited the public to participate in the policymaking process. Under the original model, the agency was obliged to provide a "general notice" of proposed rulemaking containing: "(1) a statement of the time, place, and nature of public rulemaking proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms of substance of the proposed rule or a description of the subjects and issues involved."[3] After issuing the notice of proposed rulemaking, the agency had to "give interested persons an opportunity to participate in the rulemaking through submissions of written data, views, or arguments with or without opportunity for oral presentation."[4] After considering the comments, the agency was required to "incorporate in the rules adopted a concise general statement of their basis and purpose." The APA also provided for judicial review of rulemaking under which the reviewing court was to "hold unlawful and set aside agency action, findings and conclusions found to be . . . arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law."[5]

The basic model prescribed by the APA remains in effect. It has the great virtue of allowing affected members of the public to participate directly in the policymaking process by submitting information and views during the comment phase of the rulemaking and by challenging final rules in court under the "arbitrary and capricious" test. It also ensures that the agency explains the rule's basis and purpose to the

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[1] Thomas O. McGarity, Some Thoughts on Deossifying the Rulemaking Process, 41 Duke L. J. 1385 (1992).

[2] Thomas O. McGarity, Administrative Law as Blood Sport, 61 Duke L. J. 1671 (2012).

[3] 5 U.S.C. § 553(b).

[4] 5 U.S.C. § 553(c).

[5] 5 U.S.C. § 706(2)(A).

satisfaction of a reviewing court. Informal rulemaking has not, however, evolved into the flexible and efficient process that its supporters originally envisioned.

During the 1980s and 1990s, the rulemaking process became increasingly rigid and burdensome as presidents, courts and Congress added an assortment of analytical requirements to the simple rulemaking model and as evolving judicial doctrines obliged agencies to take great pains to ensure that the technical bases for rules were capable of withstanding judicial scrutiny under what is now called the "hard look" doctrine of judicial review. Professor E. Donald Elliott, himself a former General Counsel of the Environmental Protection Agency, referred to this phenomenon as the "ossification" of the rulemaking process, and I wrote an article based on my study for the Carnegie Commission describing the ossification phenomenon, identifying some of its causes, and suggesting some ways to "deossify" the rulemaking process.

It is fair to say that the problem has become even worse during the twenty-first century, at least in the case of "high stakes" rulemaking where the outcome of the rulemaking process really matters to the stakeholders.[6] First, the rulemaking battles have spread to arenas that are far less structured and far more political than the agency hearing rooms and appellate courtrooms of the past. Second, the roster of players has expanded beyond the relevant government officials, the advocates for the regulated industry and beneficiary groups, and the occasional congressional aide to include advocacy organizations with broad policy agendas, think tanks, grass roots organizations, media pundits, and internet bloggers. Third, because rulemaking battles are fought by many players in multiple arenas, they have become far more strategic, and the range of allowable tactics has broadened rather dramatically. Finally, in today's deeply divided political economy, the players no longer make a pretense of separation between the domains of politics and administrative law, and they are far less restrained in the rhetoric they employ in their attempts to influence agency policymaking.

My 2012 article on "blood sport" rulemaking highlights many of the tactics that stakeholders now use for slowing down or influencing the outcome of high-stakes

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[6] Several empirical and quasi-empirical studies claim to demonstrate that federal rulemaking is not as ossified as I and others have suggested. *See* Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414 (2012); William S. Jordan, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere With Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393 (2000). Although this is not the place for a detailed response to those studies, they generally look at all rulemaking activities of a single agency or a group of agencies. I am willing to concede that the rulemaking process is functioning reasonably effectively for rules of little consequence, like the hundreds of pesticide tolerances and state implementation plan approvals that the Environmental Protection Agency (EPA) undertakes every year. It even works reasonably well for many rules designated "major" because of their impact on the economy. For rules that really matter and to which regulatees are prepared to devote substantial resources, however, the existing rulemaking model is not working. I am happy to limit my observations in this testimony to "high stakes" rulemakings, which I define as major rulemaking exercises in which the stakes are especially high, the agency is attempting to implement a new regulatory program or major expansion of an existing program, or the proceedings have the potential to establish an important precedent with large economic consequences for the regulated industries or the beneficiaries of the regulatory program.

rulemaking proceedings, many of which are employed outside the APA's notice-and-comment process.[7] Under the pressure of constant opposition from the regulated industries and with only sporadic countervailing pressure from beneficiaries of the regulated programs, statutory deadlines are missed, ambitious policy goals remain unachieved, and the protections envisioned by the authors of the statute gradually erode away.

Along with many other scholars, I am convinced that the current rulemaking process is not merely ossified -- it is broken.

Not surprisingly, agencies that are committed to fulfilling their statutory missions have sought out policymaking vehicles outside of the broken informal rulemaking process. These alternative policymaking tools often lack transparency, provide regulated entities with little notice of the agency's position on critical issues, and offer few, if any, opportunities for the public to participate in the policymaking process.

Congress can play an important role in fixing the APA's broken rulemaking model. And these hearings offer a welcome opportunity to shine a spotlight on the broken rulemaking process and to consider rulemaking vehicles that allow agencies to implement statutory policies in a timely, effective and transparent fashion.

The Unfortunate Side Effects of a Broken Rulemaking Model.

The fact that the rulemaking model is broken has yielded several unfortunate side effects, including the inability of agencies to attain the goals of their statutes, inefficiency in implementation, reduced incentives to revise existing rules, and reduced incentives to innovate.

Frustrating the Attainment of Statutory Goals.

The first, and most obvious, consequence of the broken rulemaking model is the negative impact on the agencies' attempts to implement their statutory goals. Most regulatory statutes were enacted to accomplish broad public policy goals, and they rely on the agencies to achieve those goals by filling in the implementation details through rulemaking or, in some instances, through rules articulated in individual adjudications. As informal rulemaking has become increasingly burdensome, some agencies have effectively given up on meeting their statutory goals in some important areas of their responsibilities.

The experience of the Occupational Safety and Health Administration (OSHA) in promulgating occupational health standards is a good example of this phenomenon. The goal of occupational health safety and health standards is to "assure so far as possible

[7] I elaborate on these points at some length in Thomas O. McGarity, Administrative Law as Blood Sport, 61 Duke L. J. 1671 (2012).

every working man and woman in the Nation safe and healthful working conditions."[8] OSHA is to achieve that goal by promulgating occupational health standards that "assure, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life."[9]

OSHA got off to a good start in its early years by promulgating occupational health standards for asbestos, vinyl chloride, 14 carcinogens, benzene, cotton dust, and a number of other chemicals. As the rulemaking process became more burdensome during the 1980s and 1990s, the agency's rulemaking output dramatically dropped. These standards provided important health protections to thousands of American workers and, in the case of the cotton dust standard, benefitted the industry as well.[10] Standard setting for the many hazardous chemicals to which employees are exposed in many workplaces came to a complete halt in 2001. During the George W. Bush Administration, OSHA did not promulgate a single occupational health standard of any consequence. The agency's output remained unchanged under the Obama Administration, until OSHA published a notice of proposed rulemaking for silica dust, a notorious workplace contaminant, last August. OSHA predicts that the proposed rule, should it ever go into effect, will save nearly 700 lives and prevent 1,600 new cases of silicosis annually. That rulemaking is just underway, and I predict that it will be years before the agency brings it to a successful completion. In the interim, the lives of hundreds of workers will be needlessly lost to this entirely preventable disease.

Inefficiency.

In addition to frustrating congressional policy goals, the current broken state of the informal rulemaking process deprives the government of one of rulemaking's greatest virtues -- administrative efficiency. Informal rulemaking allows agencies to resolve highly technical issues generically in a single proceeding, rather than addressing the same issues over and over again in individual adjudications. By allowing agencies to resolve recurring issues generically, informal rulemaking contributes to the overall efficiency of the implementation process. But when generic rulemaking becomes too resource-intensive for the agency to consider, the taxpayer is the ultimate loser.

Reduced Incentives to Revise Existing Rules.

Nearly every president since President Carter has ordered the regulatory agencies to revisit their existing rules with a view toward revising or eliminating outdated or ineffective rules. Yet once an agency has endured the considerable expense and turmoil of writing a rule, it has every incentive to leave well enough alone. Even when forced by

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[8] 29 U.S.C. § 651(b).

[9] 29 U.S.C. § 655(b)(5).

[10] See Sidney A. Shapiro, Ruth Ruttenberg & James Goodwin, Saving Lives, Preserving the Environment, Growing the Economy: The Truth About Regulation (Center for Progressive Reform 2011)

statute to revisit existing rules, agencies are very reluctant to change them, because that would involve a new rulemaking initiative. For example, the Environmental Protection Agency (EPA) has a statutory obligation to reexamine its national ambient air quality standards (NAAQS) every five years, but it has rarely completed the process without the additional incentive of an agency-forcing lawsuit. In recent years, it has revised several of the standards, but the revisions have entailed a major expenditure of agency resources, and all have been challenged in court. By the time the agency completes the rulemaking for one NAAQS revision, the process of reconsidering that revision is already well underway.

Reduced Incentives to Innovate.

The ossification of the informal rulemaking process reduces agency incentives to experiment with flexible or temporary rules. Experiments are welcome in an atmosphere in which rules can be undone if they do not produce the anticipated changes or if they cause unanticipated side effects. But experimentation is riskier in an atmosphere in which any change is likely to be very costly and most likely irreversible.

Perverse Effects of the Broken Rulemaking Model.

The interventions that resulted in a broken approach to making rules have had two unanticipated consequences. Agencies that have the authority to do so have begun to make policy in individual adjudications, and agencies have resorted to less formal policymaking techniques such as policy statements, interpretative rules, manuals, and interim final rules that are never finalized. Both of these perverse effects come at considerable cost to the policymaking process.

Increased Incentives to Avoid Rulemaking by Adjudicating.

Some agencies have become so frustrated with the hurdles that informal rulemaking must overcome that they have attempted to make policy through case-by-case adjudication when they have the authority to take that route. The Federal Trade Commission, for example, has rulemaking authority, but it rarely exercises that authority unless Congress specifically orders it to do so. Instead, the agency makes policy in individual enforcement actions. Similarly, the National Highway Traffic Safety Administration has effectively given up on rulemaking unless specifically required by statute, focusing instead on its statutory power to force the recall of motor vehicles that contain "defects" related to safety performance. The move away from rulemaking to adjudication gives the agency the flexibility to allow policies to evolve through the gradual process of stare decisis. So long as the adjudicatory record supports the specific action, the agency can avoid explaining the factual and policy underpinnings for broad rules that it articulates in adjudications.

When agencies resort to articulating rules in adjudications as a vehicle for avoiding informal rulemaking, however, regulatees are no longer put on notice of the standards of conduct that the agency is applying to them and both regulatee and beneficiary groups are

deprived of the opportunity that informal rulemaking provides to influence the agency's thinking on the rule through the comment process. Moreover, the agency is not as accountable to Congress and the public when it makes regulatory policy through adjudication, because the policymaking process in an adjudication is generally limited to the parties to the particular proceeding.

Increased Incentives to Avoid Rulemaking Through Less Formal Policymaking Tools.

More troublesome, perhaps, from the standpoint of open government is the increasing tendency of agencies to engage in "nonrule rulemaking" through less formal devices, such as guidance documents and technical manuals. Although informal guidance documents and technical manuals are a necessary part of a complex administrative regime, they are typically promulgated without the benefit of comments by an interested public. Adopting these less formal devices as a way to avoid burdensome and intrusive rulemaking requirements would therefore render regulatory agencies much less accountable to the public and pave the way to arbitrary decisionmaking. Since these informal devices can often be employed by officials at relatively low levels in the agency, they may lack sufficient gravitas and permanence to allow companies to rely upon them in making important investment decisions.

The increase in agency use of “interim final” rules is especially worrisome. Often employed because the agency feels that it is necessary to get a rule on the books as rapidly as possible because of some urgent need, interim final rules become effective immediately without the benefit of public comment and remain in effect until the agency finalizes them. Agencies usually invoke the vague “good cause” exception to the notice and comment requirements in section 553(b)(3)(B) to justify interim final rulemaking. The agency typically agrees to accept public comment on an interim final rule and prepare a statement of basis and purpose for the final rule that is supposed to follow. One serious problem with this tool for evading notice-and-comment rulemaking is the fact that the agency need not ever promulgate a final rule. Interim final rules have a tendency to achieve a permanence that belies the agency’s expressed willingness to consider public comments.[11] Agencies that do not want to go to the trouble of a burdensome rulemaking proceeding can avoid it by promulgating an interim final rule and hoping that no stakeholder goes to the trouble of challenging it in court.

The Causes of the Broken Rulemaking Model.

The informal rulemaking process did not become broken out of chance or neglect. It was the result of vigorous efforts by the regulated community to avoid the strictures of federal regulation and the sometimes well-intentioned efforts of regulatory reformers and judges to fit informal rulemaking to a (largely extra-statutory) synoptic model of regulation under which agencies are not supposed to intrude into private markets unless they can

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[11] See Michael Asimow, Interim-Final Rules: Making Haste Slowly, 51 Ad. L. Rev. 703 (1999).

identify an apparent market failure and demonstrate that the benefits of the proposed regulatory intervention outweigh its costs.

The Business Community's Deregulatory Agenda.

In the early years, informal rulemaking became a victim of its own success. Because the original model allowed agencies to impose regulatory requirements so efficiently, the affected industries were initially taken by surprise. By the end of the 1970s, however, the business community had launched an aggressive campaign to "reform" federal regulation. Although their attempts to change the substance of the regulatory statutes were largely unsuccessful, they were successful in larding up the informal rulemaking process with procedural, structural and analytical trappings that had the predictable effect of slowing down the agencies. My book *Freedom to Harm* describes in some detail this thirty-year regulatory reform effort as it affected many agencies administering federal statutes enacted to protect consumers, workers, and the environment.[12]

Burdensome Analytical Requirements.

Congress, presidents and the courts have added to the minimal procedural protections of section 553 of the APA various requirements that agencies provide support for scientific and technical conclusions in a "rulemaking record," respond to public comments that pass a threshold of materiality, and prepare various analyses of the impact of proposed regulations on the economy, small businesses, families, and federalism, most of which were ostensibly designed to make agency rulemaking more transparent and less arbitrary. These procedural and analytical accretia, however, have made the rulemaking process far more burdensome and expensive for all of the participants in the policymaking process, including, most importantly, the agencies.

For example, the modest APA requirement that the agency provide a "concise general statement of basis and purpose" for final rules has blossomed into requirements that agencies provide a "reasoned explanation" for rules and that they rationally respond to outside comments that pass a "threshold of materiality." These additional analytical requirements invite abuse by well-heeled participants who hire consultants and lawyers to pick apart the agencies' preambles and background documents and launch "blunderbuss" attacks on every detail of the legal and technical bases for the agency rules. The agency cannot afford to allow any of the multifaceted attacks to go unanswered for fear that a court will remand the entire rule to the agency to respond to that comment.

Congress has also enacted statutes specifying broad analytical requirements for all agency rulemaking. The Regulatory Flexibility Act requires agencies to prepare a series of Regulatory Flexibility Analyses for all rules that have a "significant" effect on a "substantial number" of small businesses describing the impact of proposed and final rules on small businesses and exploring less burdensome alternatives.[13] After enactment of the Small Business Regulatory

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[12] Thomas O. McGarity, Freedom to Harm (2013)

[13] 5 U.S.C. § 601 et seq. (1982).

Enforcement Fairness Act in 1996, an agency's failure to prepare Regulatory Flexibility Analyses is subject to judicial review.[14] The Unfunded Mandates Reform Act of 1995 requires agencies to prepare a detailed cost-benefit analysis for all rules that may result in the expenditure of more than $100 million by state governments, local governments, or the private sector.[15]

Presidents have also imposed burdensome regulatory impact analysis requirements on executive branch agencies. Executive Orders issued by Presidents Ford and Carter required agencies to prepare "Inflation Impact Statements" and "Regulatory Analyses" for major rules. The scope of the required analysis increased dramatically during the Reagan Administration with the promulgation of Executive Order 12291, which required agencies to prepare extensive "Regulatory Impact Analyses" (RIAs) detailing the costs and benefits of all major rules, defined to be those with an impact on the economy of more than $100 million.[16] President Clinton modified the requirements to some extent in Executive Order 12866, but not in a way that reduced the burden on the agencies of preparing lengthy and detailed analyses of the costs and benefits of major rules.[17] President Obama left Executive Order 12866 in place, but he supplemented it with Executive Order 13563, which did not affect the nature and content of the required RIAs.[18] An agency's failure to prepare an RIA is not judicially reviewable, but the RIA can play a role in substantive judicial review of the underlying regulation under the "arbitrary and capricious" test.[19]

The process of preparing an RIA involves an information-intense examination of the costs and benefits of the agency's preferred proposal and of numerous alternatives. For important rulemaking efforts the agencies usually employ numerous consultants and devote one or more person-years of agency staff to the RIA preparation process. A comprehensive RIA for a major rulemaking exercise can cost more than a million dollars. Although RIAs often provide very useful information to decisionmakers and the public about how various regulatory options will affect regulatees and beneficiaries, it is not always clear that the benefits of a lengthy RIA outweigh the costs of preparing it.

Centralized White House Review.

Executive orders signed by every president since President Johnson have required major rules to undergo some form of centralized interagency review. During most of that period, the reviews were administered by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget. In part, this increase in presidential supervision is the result of a determined insistence by the presidents to maintain control over the regulatory bureaucracy. But it has also represented an attempt by the White House and OIRA to redirect the substantive policies of the agencies away from interventionist "command and control" approaches and

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[14] Pub. L. No. 104-121 § 605(a)(1)

[15] Unfunded Mandates Reform Act of 1995, Pub. L. 104-4 (1995).

[16] Executive Order No. 12291, 3 C. F. R. 127 (1982).

[17] Executive Order 12866, 3 C.F.R. 638 (1993)

[18] Executive Order 13563, 3 C.F.R. 215 (2011).

[19] See Thomas O. McGarity, Regulatory Analysis and Regulatory Reform, 65 Tex. L. Rev. 1243, 1317-30 (1987).

toward less intrusive market-oriented approaches. Since deregulatory policies can often be implemented by doing nothing at all, ossification can be a useful tool for advancing deregulatory policies while avoiding public accountability for those policies. When the White House has wanted to slow down the rulemaking process for particular rules, often at the behest of the regulated entities, the OIRA review process has been the primary vehicle for accomplishing that goal.

Perhaps more than any other aspect of the current regulatory process, the desire to avoid the OIRA review process induces agencies to find alternatives to informal rulemaking for regulating private conduct. Over the years agency officials have complained that the prospect of OIRA review exerts a powerful disincentive to issue protective regulations that also increase regulatory burdens. Even if most rules sail through the OIRA review process untouched, OIRA review may nevertheless have a chilling effect on agency attempts to implement statutory commands through rulemaking.

Overly Aggressive Judicial Review.

The courts have played a prominent role in rendering rulemaking unattractive through aggressive application of the "hard look" doctrine, under which the courts carefully examine the administrative record and the agency's explanation to determine whether the agency applied the correct analytical methodology, applied the right criteria, considered the relevant factors, chose from among the available range of regulatory options, relied upon appropriate policies, and pointed to adequate support in the record for material empirical conclusions. The Supreme Court in 1983 summarized the hard look doctrine in a four-part test that remains the keystone of judicial review under the "arbitrary and capricious" test for judicial review under the APA and many agency statutes. Under this test, the court must set aside an agency rule 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."[20]

Although judicial application of the hard look doctrine has varied widely from circuit to circuit and from case to case within circuits, it has had a profound effect on the way that agencies go about writing major rules that are likely to be challenged in court. The branch of hard look review under which the court sets aside a rule if the agency "entirely failed to consider an important aspect of the problem" has inspired the agencies to write preambles to final rules and supplementary explanations that go on for hundreds of pages as the agency staffs engage in herculean efforts to leave no stone unturned. The requirement that the agency respond to comments that cross a "threshold of materiality" has resulted in equally vigorous attempts by agency staffs to characterize, segregate and respond to the thousands of comments that agencies engaged in high stakes rulemaking typically receive.

There is a genuine risk of judicial overreaching when courts undertake this review of the agency's explanations, because remanding for failure to consider an important aspect of the

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[20] Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto Ins. Co., 463 U.S. 29, 42 (1983).

problem or failure to respond to a relevant comment is an easy way for a court to dispose of a rulemaking challenge without appearing to extend itself beyond the range of its institutional competence. In remanding for further analysis, the court is not ruling that the agency is wrong or irrational; it is merely holding that the agency's analysis is incomplete. Yet the message that the agencies hear is that their explanations must be exceedingly thoroughgoing in every regard, or the courts may send their rulemaking initiatives back to the drawing board.

Savvy program managers know that in the complex and constantly shifting institutional environment of modern rulemaking, a trip back to the drawing board can send the project spinning off in odd directions or, worse, can be a consignment to oblivion as the agency commits limited staff resources to other projects, institutional memory fades, and more immediate priorities press old rulemaking initiatives to the bottom of the agenda. The key to successful rulemaking is therefore to make every effort to render the rule capable of withstanding the most strenuous possible judicial scrutiny the first time around. As a result, the process of assimilating the record and drafting the preambles to proposed and final rules may well be the most time-consuming aspect of informal rulemaking. I have even seen instances in which the agency elicited a separate round of public comment on the staff-prepared summary of the previous comments to be sure that the agency correctly understood them. It is easy to see how notice-and-comment rulemaking can degenerate into an endless process of public comment and analysis. The prospect of having to go through the immense effort of assembling and digesting the record and drafting a preamble capable of meeting judicial requirements for reasoned justification provides a strong incentive for agencies to seek out ways to avoid rulemaking.

Possible Solutions.

Agencies that are conscientiously committed to carrying out their statutory missions will continue to employ informal rulemaking with all of its burdensome accoutrements if they have no other alternative. For example, EPA's statutes typically require it to use informal rulemaking to fill in the necessary implementation details, and they often specify precise deadlines for EPA action. Its heavy rulemaking output during the past few years is a testament to the ability of a very determined agency to employ even a broken system to achieve important statutory goals. But those efforts consumed scarce resources that are unlikely to be available in such quantities in the future. The agency has on many occasions made policy through less formal devices like guidance documents that are not subject to many of the requirements that afflict informal rulemaking. And it will no doubt continue to do so as the resources available to the agency dwindle.

There are two ways to address the predictable efforts of agencies to avoid the burdens and vicissitudes of informal rulemaking. One approach, much preferred among regulatees, is to extend the reach of centralized review, judicial review, and extra-statutory analytical requirements to less formal policymaking vehicles like policy statements, guidance documents, and interim final rules that are never finalized. For example, both Presidents George W. Bush and Barack Obama took steps to ensure that,

during their administrations, OIRA would have an opportunity to review important guidance documents, policy statements, and the like.[21]

The other approach is to take away the incentive to use rulemaking avoidance devices by relieving the agencies of many of the burdensome aspects of the existing informal rulemaking process. Rather than giving up on informal rulemaking, the agencies and Congress should be attempting to extract it from the morass that currently envelops it.

Greater Oversight of the Real-World Rulemaking Process.

The first thing that Congress can do to fix the broken informal rulemaking model is to step up its oversight of the rulemaking process and of the roles that agency staffs, OIRA desk officers, lobbyists for regulatees and beneficiary groups, think tanks, trade associations, and ordinary citizens play in that process. Congressional oversight of rulemaking should be systemic and not limited to inquiries into particular rulemaking exercises. This subcommittee is taking an important step in the right direction by holding these hearings. It should continue to probe the rulemaking process, perhaps with the aid of the Congressional Research Service and the Government Accountability Office, to build the legislative record necessary to support legislation addressing the failures of the current rulemaking model.

Eliminating Procedural and Analytical Mandates in Statutes.

Some agencies like OSHA believe that their statutes mandate a more formal rulemaking process than the notice-and-comment process envisioned by section 553. Congress could amend those statutes to make its intent clear that formal hearings and other formal procedures are not necessary in particular contexts.

Congress could enact legislation to reduce or eliminate one or more of the many analytical requirements in statutes and executive orders. An agency is most interested in analyzing issues that are directly relevant to the success or failure of the rulemaking initiative in the relevant judicial and political arenas. Eliminating marginally useful analytical requirements would probably not reduce the intensity of the agency's analysis of the pertinent issues. Since the process of producing analytical paperwork is both time-consuming and expensive, the rulemaking process would probably move along more expeditiously after Congress removed unnecessary analytical hurdles.

Since intense analysis of the costs and benefits of proposed and final regulations is more useful in some areas than in others, Congress (and the president) might usefully explore the possibility

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[21] See Executive Order 13422, 3 C.F.R. 191 (2007) (extending OIRA review to "significant" guidance documents, which it generally defined to include guidance documents that would have an annual economic effect of $100 million or more or some other large economic or policy effect); Memorandum from Peter Orszag, Director, White House Office of Management and Budget, to the Heads and Acting Heads of Executive Departments and Agencies (Mar. 4, 2009), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-13.pdf (clarifying that even though President Obama had revoked Executive Order 13422, significant guidance documents would still remain the subject of OIRA review during the Obama Administration).

of reducing or eliminating some aspects of the analytical requirements in some regulatory areas. For example, whether the benefits of analyzing the impact of regulations on small entities are outweighed by the negative impact of such analytical requirements on the flexibility of rulemaking is an open question. Congress might revisit the Regulatory Flexibility Act to form some conclusions as to whether that statute is reducing flexibility, rather than enhancing it.

Finalizing Interim Final Rules.

If interim final rules never have to be finalized, the comments that the agency accepts can be a waste of time and effort. More importantly, the agency never gets the benefit of input from outsiders, a result that is entirely inconsistent with purpose of notice and comment rulemaking. Congress could solve this problem by amending the APA to provide that when an agency issues an interim final rule, it must also issue it as a proposed rule and that the interim final rule automatically expires after three years if the agency does not promulgate a final rule during the interim. Congress has already adopted this approach in the context of "temporary regulations" issued by the Internal Revenue Service.[22]

Cutting Back on White House Oversight.

The primary objection to OIRA review of rulemaking is that OIRA's input often goes beyond comments on the agency's analysis to demands that the agency change the substance of the rules. Unidentified White House officials can use the OIRA review process to advance policies that run counter to the agencies' statutes. Agencies are understandably reluctant to cede decisionmaking authority to OIRA, and Congress should be equally concerned about the White House's de facto exercise of unconstrained power over the agencies' implementation of congressional goals. Much of what motivates the agencies to attempt to circumvent the rulemaking process is the prospect of dealing with the acrimonious and time-consuming process of OIRA review.

Abuse of the OIRA review process can be limited and its accountability enhanced by increasing its transparency. OIRA review is not governed by the Administrative Procedure Act, and the transparency of that review process has waxed and waned over the years. OIRA review remains far from transparent, because the rules of engagement with agencies are often ignored in practice. Moreover, the content of conversations between outside lobbyists and White House and OIRA officials concerning particular rulemaking initiatives are not generally disclosed. Still another round of conversations between industry and interest group representatives and government officials can take place after the rule is challenged in court, as the parties negotiate about the content of the regulations as part of an overall effort to settle the litigation. These negotiations are not bound by any rules or procedures, and the contents of the discussions are rarely disclosed voluntarily.

OIRA review will be much less intrusive if the contents of OIRA-agency communications and communications between outside interests and OIRA or other White House officials regarding particular rulemaking initiatives are spread on the public record for all to see. When OIRA staffers know that the time consumed in the review process and the extent to which they attempt to substitute their policy preferences for those of the appointed agency heads and Congress will

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[22] 26 U.S.C. § 7805(e).

become publicly available, they may be less likely to use the review process as a vehicle for affecting substantive agency policy.

A Softer Judicial Look at the Substance of Rules.

Reducing the intensity of substantive judicial review would probably enhance rulemaking flexibility, but it would also leave more room for administrative arbitrariness. We are therefore left with a delicate balance between the increased accountability afforded by judicial review and the risk of overly intrusive judicial interventions as courts strive to perfect an inherently imperfect process through the "hard look" doctrine. I have suggested that a better metaphor for this evaluative function may be that of the "pass-fail prof" who must determine whether a research paper on a topic about which he is vaguely familiar meets the minimum standards for passable work. His disagreement with the paper's conclusions will certainly not cause him to flunk the student. Even a poor analysis will not cause the paper to fail, if the analysis is at least plausible. A check of the citations may reveal that the student could have found more sources or that he may have mischaracterized one of the cited sources, and still the paper may pass. Only where there is an inexcusable gap in the analysis, an obvious misquote, or evidence of intellectual dishonesty will the pass-fail prof put an "F" on the paper and send the student back to try again. When the courts engage in substantive judicial review, they should, like the pass-fail prof, see their role as that of screening out bad decisions, rather than ensuring that agencies reach the "best" decisions.

Congress might think about enacting legislation designed to signal to the courts its intention that they reduce the intensity of judicial review of informal rulemaking. It could, for example, amend the APA to change the scope of review for informal rulemaking. That being said, it is hard to imagine words that could specify less intensive review than the words "arbitrary and capricious." At the end of the day, the scope of rulemaking review may be an issue that is best worked out by the courts with the aid of outside criticism from administrative law scholars.

Conclusion.

In my view, the venerable informal rulemaking process established by section 553 of the Administrative Procedure Act is broken. This committee is in an ideal position to begin the lengthy process of repairing this broken, but extremely valuable policymaking tool. I applaud the members of the committee for their willingness to initiate an ongoing dialogue on the virtues and limitations of informal rulemaking as a vehicle for implementing federal regulatory statutes.