Rulemaking

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PART I. JUDICIAL DEVELOPMENTS

A. The Rulemaking Process

1. Statement of Basis and Purpose

In 1000 Friends of Maryland v. Browner, the D.C. Circuit upheld the Environmental Protection Agency’s (EPA’s) approval of Maryland’s State Implementation Plan under the Clean Air Act. The battles in this case were typically complicated, both legally and technically, and for the most part turned on issues specific to the Clean Air Act. However, the court also rejected the argument that the agency had failed to provide an adequate statement of basis and purpose. There is, of course, no metric for the level of explanatory detail in the statement of basis and purpose; one cannot just say that here the court accepted an explanation rating of “7” on the basis-and-purpose scale. The court offered standard, fairly abstract, and therefore unhelpful, generalizations about the relative laxity of the basis-and-purpose requirement: the statement need not be “exhaustive” nor address every issue raised by commenters, it “must simply enable a reviewing court to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them the way it did.”

Three points might be made. First, the court’s overall approach seems fairly forgiving. Second, the judgment as to the adequacy of the statement of basis and purpose will always be contextual; here part of the context was that there had been a grand total of one commenter (namely, the petitioner) on the

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1. 265 F.3d 216 (4th Cir. 2001) (Traxler, J., joined by Luttig & Thornburgh (W.D.N.C.), JJ.). This case is also discussed herein in Environmental and Natural Resources Regulation (infra 305-06).
2. Id. at 238 (quotations and citations omitted).
proposed rule. Third, the court explicitly noted that the petitioner's own comments on the proposed rule had themselves largely ignored the issue that the petitioner now found missing from the statement of basis and purpose. Indeed, the EPA had argued that the petitioner had waived its substantive argument by failing to make it when commenting on the proposal.\(^3\) The court concluded that the petitioner had not waived the argument; its comments on the proposed rule had at least mentioned the issue a couple of times. However, when rejecting the petitioner's challenge to the statement of basis and purpose, the court stated:

> Although the [agency's] explanations may not have been as detailed as the Petitioner would have liked, we nonetheless conclude that through these documents the EPA adequately addressed the somewhat general comments of the Petitioner and sufficiently explained the basis and purpose of its actions.\(^4\)

Thus, the court tied the basis-and-purpose requirement to the notice-and-comment process: the skimpier and more perfunctory the comments submitted, the more bare-bones an acceptable statement of basis and purpose. Implicitly, it adopted a view of notice-and-comment rulemaking more as an exchange between the immediate participants, and less as a mechanism for informing a larger audience.

2. "Logical Outgrowth" Requirement

A final rule must be the "logical outgrowth" of the proposal, otherwise interested parties are effectively denied notice and so an opportunity to comment. Cases in which a court finds that the final rule so deviated from the proposal as to require a new round of notice and comment are few and far between, but the Ninth Circuit recently set aside an EPA rule on this ground.\(^5\)

The EPA had issued a "general permit" (in essence a regulation) under the Clean Water Act limiting the discharge and accumulation of bark and debris from water-based log transfer facilities in Alaska. Piggy-backing on Alaska's water quality standards, the proposal would have allowed each facility to create a "zone of deposit"—an area in which significant accumulations

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3. *Id.* at 227-28.
4. *Id.* at 238.
5. NRDC v. USEPA, 279 F.3d 1180 (9th Cir. 2002) (Thomas, J., joined by Graber & Gould, JJ.).
of bark and debris that would otherwise violate state water quality standards are permitted—limited to one acre in size. After the comment period, but before publication of the final permit, Alaska modified its interpretation of its standards, concluding that these operations could have a zone of deposit larger than one acre—indeed, as large as the entire operation. The EPA’s final permit reflected this new understanding by abandoning the one-acre limit. While EPA and Alaska communicated with regard to the change, no public notice was given about it.

The Ninth Circuit set aside the final general permit. Changing from a one-acre zone of deposit to one the size of the entire operation involved “a fundamental policy shift, rather than a natural drafting evolution, between the draft permit and the final permit.” The court’s emphasis was on what “the public” would reasonably have anticipated to be up for grabs in the proceeding. Though the court does not say so in so many words, what gives the challengers’ claim particular strength here is that the altered provision grew out of state law; it therefore reasonably appeared to commenters that the provision was not subject to change by the EPA and therefore understandably drew little or no attention from commentators.

3. Communication and Cooperation between Regulated and Regulator

The Fifth Circuit’s decision in Texas Office of Public Utility Counsel v. FCC is an interesting example of the tension between the quasi-on-the-record model of informal rulemaking that has grown up over the past few decades, on the one hand, and the goal of ensuring an informed agency decision maker, familiar with the setting that it regulates, on the other. To be sure, the court seemed unaware of this interesting tension, but the case merits a glance nonetheless.

This case involved a challenge to an FCC order under the much-litigated 1996 Telecommunications Act. The background is too complicated to sort out here; the specific order in question concerned relations, and charges, between providers of local telephone service and providers of long-distance service. The different providers are normally opponents on issues of telecommunications-

6. Id. at 1188.
7. 265 F.3d 313 (5th Cir. 2001) (Garza, J., joined by Parker & Ellison, JJ.).
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tions regulation. In this instance, however, they had formed the Coalition for Affordable Local and Long Distance Service (CALLS) and worked out a mutually acceptable proposal. The CALLS agreement became, apparently without change, the FCC’s proposed order. After notice and comment, the FCC made some minor changes to the proposal, conducted a brief second round of notice and comment, and promulgated the final order.9

The order was challenged by consumer interests and, on their behalf, by a number of state agencies concerned that it would result in higher prices, particularly for rural customers. The court upheld the order almost across the board. What makes the case interesting is the petitioners’ effort to challenge the order on the ground that the fix was in—a group of industry insiders with unique access drew up a proposal, had private meetings to ensure that the FCC approved the arrangement, and shut out other interests. Thus, the notice-and-comment process was a sham and the agency was unduly influenced by the interests it was supposed to regulate. Simply by reading the court’s opinion, it is difficult to evaluate this characterization. It does acquire some surface plausibility, however, from the fact that throughout the opinion the court refers not to “the FCC Order,” or “the challenged action,” but to “the CALLS Order.”

The petitioners’ objections to the process left the court thoroughly unmoved. Implicitly, the court was endorsing a view of the rulemaking process in which “off the record” contacts and cooperation are at least acceptable, if not welcome.

The petitioners made three legal arguments—two standard and one novel. First, they argued that there had been improper ex parte contacts between the industry coalition and the FCC. Such a claim is an uphill battle in an informal rulemaking; it is the rare case in which ex parte contacts so undermine the legitimacy of notice-and-comment rulemaking as to compel a court to set aside the resulting rule. Here the court endorsed contact between the agency and the regulated community, stating, without citation, that the APA requires only that the agency give notice of any ex parte contacts (as it did here). The extent and nature of the contacts is hard to determine from Judge Garza’s opinion, but that very casualness is itself a sign of how little bothered by the contacts the court was.

The petitioners’ second challenge was that the notice-and-comment pro-

9. Although labeled an “order” by the agency, this and similar FCC “orders” are for administrative law purposes “rules,” and are referred to as “rules” and “regulations” in the underlying statute. See 47 U.S.C. § 254(a) (2000).
cess had been a sham. To be precise, they challenged the adequacy of the second, very brief period for comments on the revised rule, which followed a first full round of notice and comment. The court did not consider whether the second comment period was adequate. The revised proposal was little different from the original; since it was the "logical outgrowth" of that proposal, it could have been promulgated as a final rule with no additional procedures. Therefore, the further, bonus comment period was immune from attack. Even if it had been inadequate in its own right, it still went beyond what the agency was required to do, which was nothing.

The petitioners' most interesting, though equally unsuccessful, argument was that the agency's communications with the regulated entities amounted to a de facto negotiated rulemaking, triggering the procedural requirements of the Negotiated Rulemaking Act (NRA)—which, of course, had not been followed. The court dismissed the argument quickly on the ground that the NRA's requirements are entirely voluntary. By definition, then, there were no requirements to trigger. This is a fair reading of the Act, and it is consistent with the limited NRA case law. However, the more straightforward and appropriate basis for the ruling would have been that the Act itself forbids judicial review of "any agency action relating to establishing . . . a negotiated rulemaking committee." The petitioners' argument was not only a loser on the merits, it could not be made in the first place.

The larger issue lurking in the case was delegation. The FCC order was largely the work of the parties it regulated. To be sure, the FCC was not a mere rubber stamp; at least, it was not a mere rubber stamp in any way that a court could meaningfully control. There was a full notice-and-comment process; the FCC received and evaluated comments; it made changes (though minor) to the proposal; and the court did find arbitrary and capricious one minor aspect of the order that seemed to be no more than a private compromise unsupported by any independent judgment or evaluation by the agency.

11. See, e.g., USA Loan Servs., Inc. v. Riley, 82 F.3d 708 (7th Cir. 1996) (holding that assurances made by an agency during the negotiated rulemaking process are unenforceable).
13. The order established a "Universal Service Fund" to subsidize poor and rural telephone users. The size of the fund was a matter of contention, with different studies varying by an order of magnitude as to an appropriate amount. The industry coalition picked a number somewhere in the middle; the FCC went along. The court was not satisfied that the agency had exercised any
But the order was, in effect, a kind of self-regulation with the FCC's imprimitur. The advantages and disadvantages of such arrangements are well known; in essence one is trading expertise off against rent-seeking. This one case, at least, shows a high level of judicial comfort with an agency delegating to regulated interests.

B. Exceptions to Notice-and-Comment Requirements

"[I]nterpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" are exempt from the APA's notice-and-comment requirements. As usual, the past year saw a number of cases struggling with these categories. It is not clear whether we are any closer to figuring out when an agency pronouncement is a substantive or legislative rule, requiring notice and comment, and when it falls within the exceptions. But now, at least, combatants have more ammunition.

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independent judgment here and remanded for justification of the number. 279 F.3d at 327-38. This is the one part of the opinion in which the court is concerned that government regulation should reflect more than private compromise.


15. And some that did not struggle at all. See, e.g., Edelman v. Lynchburg College, 122 S. Ct. 1145, 1150 n.7 (2002) (stating in passing that Equal Employment Opportunity Commission was not required to follow notice-and-comment procedures in adopting regulations concerning time limits for filing and "verifying" charges of discrimination, even though underlying statute required compliance with the APA, since § 553(b) excepts "rules of agency organization, procedure, or practice"); New York State Electric and Gas Corp. v. Saranac Power Partners, L.P., 267 F.3d 128 (2d Cir. 2001) (per curiam) (concluding with little analysis that what FERC described as a "general policy" was an interpretive rule, exempt from notice and comment); Gunderson v. Hood, 268 F.3d 1149, 1154 (9th Cir. 2001) (where statute limits eligibility for an early release program to prisoners convicted of a "nonviolent" offense, where Bureau of Prison regulation states that a felony that "involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives" is not a nonviolent offense, and where Bureau of Prisons "program statement" further specifies that all offenses under a particular section of 18 U.S.C. qualify as such felonies that "involve" such conduct, the program statement is an interpretive rule not requiring notice and comment).
1. Procedural Rules

In an interesting decision, Public Citizen v. Department of State, the D.C. Circuit held that a Department of State policy with regard to processing FOIA applications did not require notice and comment. When answering an FOIA request, the Department searched only for documents generated prior to the date of the request, as per a published “guidance document” adopted without notice and comment. Public Citizen challenged this date-of-request cutoff policy on the merits and on the ground that it was not exempt under section 553. The district court and the court of appeals both held that it fell within the APA exception for procedural rules, though the court of appeals went on to set it aside on the merits. Relying on circuit precedent, under which the relevant inquiry is not whether a particular requirement “has a substantial impact on parties” but rather whether it “encodes a substantive value judgment,” the court considered the key factor to be that the Department’s policy applied to all FOIA requests equally. The policy did not reflect a “substantive” value judgment, only a desire for the efficient processing of FOIA requests. The fact that the rule might have significant consequences—as a practical matter narrowing the scope of the request and/or the agency’s obligation to provide records—did not take the rule out of the APA exemption; procedural rules always have consequences for the rights and obligations of parties.

The court treated the issue as straightforward. However, it is not so clear that this was a procedural rule; it directly affected what records had to be provided in response to an FOIA request. It was thus as “substantive” as a regulation going to the scope of any of the FOIA exemptions, or a rule about whether old records have to be retrieved from an off-site location; in this sense, it was indistinguishable from rules that are undeniably substantive and require notice and comment. This case illustrates the difficulty of defining the scope of the exception, notwithstanding its apparent simplicity.

2. Guidance Documents and Policy Statements

The D.C. Circuit also wrote a new chapter in the long-standing controversy over agencies’ reliance on guidance documents, staff manuals, internal memos, and the like in place of full-fledged regulations. The standard story

is that the increasing procedural burdens of "informal" rulemaking have forced rulemaking underground. Courts can and occasionally do police this tendency by finding that an informal expression of agency policy is a legislative rule requiring a full-fledged notice-and-comment rulemaking process. The overarching question is how fiercely courts should do so: does reliance on policy statements and the like improve efficiency and transparency, providing the public with useful information that would otherwise be unavailable, or does it undermine the APA's procedural protections, allowing the agency to make law without input or oversight?17

In General Electric Co. v. EPA,18 the D.C. Circuit found that an agency policy statement under the Toxic Substances Control Act (TSCA) was a legislative rule. TSCA prohibits the manufacture, processing, distribution, and use of polychlorinated biphenyls (PCBs) unless the EPA determines that the activity will not result in an "unreasonable risk of injury to health or the environment."19 EPA regulations permit two necessary uses of PCBs: the cleanup and disposal of PCB remediation waste and the disposal of PCB bulk product waste.20 The regulations specify particular methods for handling and disposing of these wastes. The regulations also allow for "risk-based disposal" arrangements; the EPA will approve other disposal arrangements if an applicant establishes that the alternative will "not pose an unreasonable risk of injury to health or the environment."21

These regulations were adopted after notice-and-comment proceedings and were not challenged. Separately, however, the EPA issued a "PCB Risk Assessment Review Guidance Document," which explained what the EPA would deem adequate to demonstrate no unreasonable risk. Under the Guidance Document, an applicant could either calculate cancer risks using an EPA-approved potency factor, and separately consider non-cancer risks, or present a single calculation using the EPA's "total toxicity factor" (TTF)—a specific level of exposure to PCBs that reflected the EPA's judgment, all

18. 290 F.3d 377 (D.C. Cir. 2002) (Ginsburg, J., joined by Randolph & Tatel, JJ.). This case is also discussed herein in Environmental and Natural Resources Regulation (infra 313-14).
20. See 40 C.F.R. §§ 761.61(a),(b), 761.62(a),(b) (2002).
21. Id., §§ 761.61(e), 761.62(e).
things considered, of a not-unreasonable risk. The EPA itself had relied on this TTF in establishing the generic requirements set out in the actual regulations. The real fight here, it appears, was over this number, which General Electric (GE) considered an overestimate of the dangerousness of PCBs. GE argued, and the court of appeals agreed, that the Guidance Document was a legislative rule; therefore the court had jurisdiction to review it. More important, the rule was invalid because the EPA had, concededly, issued it without following the notice-and-comment requirements of the APA and TSCA.

This case is important both because of the blackletter test it sets out and for the general attitude it reflects. Over the years, the D.C. Circuit has offered different tests for identifying legislative rules. In GE v. EPA, the panel ignored or rejected many of them. The EPA had invoked Molycorp, Inc. v. EPA, which set out three fairly pro-agency factors: "(1) the Agency's own characterization of its action; (2) whether the action was published in the Federal Register or the Code of Federal Regulations; and (3) whether the action has binding effects on private parties or on the agency." The GE court dismissed the first two factors pretty much without discussion and latched on to the third. The petitioner, on the other hand, cited Community Nutrition Institute v. Young, in which the court looked to whether the agency action "imposes any rights and obligations" or "genuinely leaves the agency and its decisionmakers free to exercise discretion." The GE panel was more sympathetic to this test, but observed, echoing prior panels, that its two parts largely overlap: an agency statement that binds the agency and eliminates its discretion will also impose rights or obligations on private parties. Thus, the question came down to whether or not the document was

22. TSCA provides for direct review of "rules" in the court of appeals. 15 U.S.C. § 2618(a)(1)(A) (2000). The EPA had argued that this provision applies only to legislative rules; by concluding that the Guidance Document was such a rule, the court concluded that it had jurisdiction regardless of whether its jurisdiction was so limited.


24. 197 F.3d 543 (D.C. Cir. 1999).

25. Id. at 545.


27. Id. at 948.

binding, whether it had "the force of law." 29 This is a practical rather than a formal inquiry.

Applying the test, the court found that the Guidance Document was binding. An applicant had to use one of the two approaches to risk assessment the document identified and no other; if the applicant used the EPA's total toxicity factor, the agency was bound to accept it. While the EPA might in the future change the TTF in light of new information, that did not make it any less binding for the present; after all, any binding norm is subject to future change.

Overall, the opinion shows real hostility to agencies operating outside the section 553 process. My own view is that it was probably useful and appropriate for the EPA to provide applicants with additional guidance as to how the agency would handle applications for non-generic cleanup plans and that requiring a full-fledged rulemaking might simply keep that information from being produced. Particularly important here is the fact that the TTF used in the Guidance Document had been relied on in the legislative rule and therefore had been subject to public comment. The EPA's position as to the key issue of scientific uncertainty and regulatory policy (a) was not new or surprising and (b) had been subject to notice and comment. 30

3. Interpretive Rules

Air Transport Ass'n of America v. FAA 31 involved a fight between airlines

29. GE v. EPA, 290 F.3d at 382-83. The court here relies heavily on Professor Anthony's article, in particular the following "well-stated" articulation of the general standard: a document is a legislative rule, not exempt from notice and comment, if it "expresses a change in substantive law or policy (that is not an interpretation) which the agency intends to make binding, or administers with binding effect." Id. (quoting Anthony, supra note 17, at 1355).

30. The fact that the EPA could have taken exactly the same position reflected in the Guidance Document in the course of an informal adjudication, considering an individual application, is not the key point. If it did so, GE would have had the opportunity to contest it. What makes the problem hard, and lends support to the court's approach and its conclusion, is that the EPA had already committed itself to a particular position without (on the court's account) opportunity for GE's input, either through rulemaking or adjudication.

31. 291 F.3d 49 (D.C. Cir. 2002) (Henderson, J., joined by Edwards & Garland, JJ.). This case is also discussed herein in Transportation (infra 489-90).
and airline pilots over FAA rest requirements. The FAA had taken a pro-pilot interpretation of its detailed regulations governing rest periods for commercial pilots. The regulations themselves were promulgated pursuant to notice-and-comment rulemaking and appear in the Code of Federal Regulations (CFR). The challenged interpretation was set out in a letter responding to an inquiry from an individual pilot. The airlines argued that the interpretation was (a) inconsistent with the regulations themselves and (b) a new substantive rule requiring notice and comment. The D.C. Circuit rejected both challenges.

The regulations require pilots to have a certain amount of rest during the 24-hour period ending with the completion of a flight; this amount can be reduced if the pilot will have a certain amount of rest after the flight’s completion and before the next flight. In determining rest requirements, therefore, a key factor is the time at which a flight is, or will be, completed (“will be,” because the necessary amount of rest must often be determined before a flight actually takes off). The disagreement here concerned whether what counts is the flight’s actual or scheduled time of completion. The regulations refer to “scheduled flight time”; in the letter, the FAA took the position that this means how long the flight is actually expected to take. It reasoned that once actual expected flight time is known, that becomes the “schedule”; the airlines argued that the regulatory phrase refers to the pre-announced timetable. Under the FAA’s approach, if a pilot is about to take off on what is supposed to be a four-hour flight, which would allow the requisite postflight rest period, but traffic and weather conditions indicate that the flight will take six hours, which will not allow sufficient postflight rest, the flight cannot leave the gate.

The court upheld the letter on the merits as a reasonable interpretation of the agency’s own regulation, to which it owed particular deference. Having so concluded, it then unsurprisingly found that it was an interpretive rule, not requiring notice and comment. The opinion looked to familiar factors: the

32. The case illustrates how deference on the merits may undercut judicial enforcement of procedural requirements. One strong tradition in administrative law is that courts are not really in a position to second-guess agencies substantively, but can and should be rigorous with regard to procedural requirements. Here, the two are not so easily separated. The court first asks whether this understandable but somewhat questionable “interpretation” can be upheld on the merits. Noting the need for super-strong deference to an agency’s interpretation of its own regulations, it finds the letter a permissible reading. That conclusion makes the answer to the procedural question a foregone conclusion. If the letter is an acceptable reading of the regulations, then by
letter “spell[ed] out a duty fairly encompassed within the regulation that the interpretation purport[ed] to construe”; even absent the letter there would have been a sufficient basis to enforce the requirements it specified; it did not impose new rights or duties; it was not published in the CFR; and the FAA did not invoke its general rulemaking authority. The opinion is not flatly inconsistent with *GE v. EPA*, but there is at least some tension between the two. Certainly, this panel was more relaxed about agency guidance outside of section 553 rulemaking.

In the final section of the opinion, the court considered the petitioners’ argument that even if this was an interpretation, it was a new one, reflecting a change from the FAA’s long-standing understanding of the regulations. The petitioners invoked the *Alaska Professional Hunters* principle that a significant change to a settled interpretation is a de facto modification of the underlying rule and requires notice and comment. Although the question was perhaps closer than the court was willing to acknowledge, here it found no firmly settled, or definitive, prior interpretation with which the letter conflicted and accordingly no change that would trigger notice-and-comment requirements.

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33. These last two factors are two of the four indicia of a substantive rule set out in *American Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). The court deemed them “inapplicable” here, by which it meant that they point to the letter being an interpretive rather than a substantive rule. 291 F.3d at 56 n.9. The D.C. Circuit has held in other post-*American Mining Congress* cases that whether a rule is published in the CFR is not indicative of whether it is a substantive rule. *See Health Ins. Ass’n of Am. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994) (stating that publication in the CFR affords at most “a snippet of evidence of agency intent”).

34. *Alaska Professional Hunters Ass’n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999).

35. In another case, the D.C. Circuit similarly skirted the *Alaska Professional Hunters* problem by finding a new definitive prior interpretation. *See Darrell
C. The Power and Obligation to Make Rules

1. Retroactive Rulemaking

National Mining Ass’n v. Department of Labor\(^3\) involved a sweeping challenge to regulations governing administration of the Black Lung Benefits Act. Under the Act, mine operators are financially responsible for paying out claims (and must obtain insurance for the purpose of doing so) to their former employees who are disabled by black lung disease; the Department of Labor’s Office of Workers’ Compensation Programs oversees the Act and adjudicates individual applications for benefits. In December 2000, the Secretary of Labor promulgated extensive revisions to the regulations governing adjudication of individual claims. Overall, the changes were seen as pro-applicant; mine operators expected significant increases in their insurance rates as a result of the changes.\(^3\)

Mine operators, insurance companies, and the National Mining Association challenged the new regulations in the federal District Court for the District of Columbia, which upheld them across the board.\(^3\) In a per curiam opinion, the court of appeals largely agreed with the district court, but set aside certain aspects of the regulations.\(^3\) For present purposes, the important part of the ruling is its discussion of retroactivity.

The plaintiffs challenged 14 specific provisions in the new regulations as impermissibly retroactive, and the court duly considered them one by one. I will not repeat the specific discussion here. Several general aspects of its approach and rulings are important, however.

First, the court began with the standard premise that retroactive rulemaking, while not per se impermissible, requires explicit congressional authorization. Such authorization was lacking here; therefore, any retroactive provision was invalid. Second, it accepted application of the new regula-


37. For an extensive critique of the Black Lung Program, with reference to the potential ameliorative effect of these new rules, see generally Brian C. Murchison, Due Process, Black Lung, and the Shaping of Administrative Justice, 54 ADMIN. L. REV. 1025 (2002).


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tions to all claims for benefits that were filed on or after the regulations’ effective date. That is, as long as a claim was filed with the regulations in effect, then the regulations were, by definition, not retroactive.\textsuperscript{40} Third, the court rejected a simple distinction between procedural and substantive rules. The easiest way out of the case, offered by the Secretary and relied on by the district court, would have been to say that the regulations were all procedural, only covered adjudications yet to occur, and were not retroactive even as applied to claims that were already pending, though not yet adjudicated. The court of appeals cautioned, however, that “procedural” rules can be impermissibly retroactive. Its stated test was: “where a rule ‘changes the law in a way that adversely affects [a party’s] prospects for success on the merits of the claim,’ it may operate retroactively [and thus be invalid] even if designated ‘procedural’ by the Secretary.”\textsuperscript{41}

Applying this standard, the court held that several new rules could not be applied to claims that were already pending when the regulations were promulgated, at least in circuits in which judicial precedent had been to the contrary.\textsuperscript{42} The impermissibly retroactive provisions included a new rule that benefits would not be reduced by recoveries under state workers’ compensa-
tion laws, a change in the definition of the basic condition for which benefits may be received, and an expansion of the list of dependents and relatives who can receive benefits. In fact, one would think that such retroactive changes would have been set aside even under the procedural/substantive distinction rejected by the court, for they are not really "procedural" by any definition. To the extent they change the previous rule, they modify the amount and scope of liability, doing much more than merely increasing the chances that one party or the other will be able to prove its case under legal principles that have not changed.

A second instance of judicial hostility to retroactive rulemaking was Sierra Club v. Whitman. There a citizens' group found itself in the unusual position of asking the court to compel an agency to make a rule (a nonattainment designation under the Clean Air Act) retroactive. The district court refused and the court of appeals affirmed, with no sympathy toward the plaintiff's argument. The appeals court adopted Justice Scalia's position that the APA forbids retroactive rulemaking, found no authority for such rules in the Clean Air Act, and opined that even if such authority could be found, a retroactive nonattainment designation would be "far from reasonable" in light of its attendant compliance costs and, potentially, noncompliance penalties.

2. What Is a Rule?

In Sugar Cane Growers Cooperative of Florida v. Veneman, the D.C. Circuit rejected the Department of Agriculture's claim that its actions were not covered by section 553 because they did not amount to a "rule" at all. The case concerned a government support program for sugar growers and arose out of competitive struggles between cane sugar growers and beet sugar growers, against the background of government programs that had produced a massive oversupply of warehoused sugar. Pursuant to statutory authority, in 2000 the Department conducted a payment-in-kind program through which growers could

43. 285 F.3d 63 (D.C. Cir. 2002) (Randolph, J., joined by Henderson & Rogers, JJ.). This case is also discussed herein in Environmental and Natural Resources Regulation (infra 315).
45. Sierra Club, 285 F.3d at 68.
46. 289 F.3d 89 (D.C. Cir. 2002) (Silberman, J., joined by Tatel & Garland, JJ.). This case is also discussed herein in Agriculture (infra 190-92).
destroy their crops in return for receiving surplus sugar the government had stored. After an informal discussion with interested parties, it decided to repeat the program in 2001. The Department issued a press release and published in the Federal Register a “Notice of Program Implementation” that set out the details of the program. Among other things, the notice stated that farmers who increased their production acreage above existing levels would be excluded from the program in future years.

The court of appeals concluded that establishment of the program was a “rule” and accordingly had to be issued through notice and comment. The agency had sought to portray the press release and notice as a one-time action, essentially an informal adjudication. The court did not buy the argument and stated:

The August 31 press release, the September Questions and Answers and most notably the September 7 Notice of Program Implementation set forth the bid submission procedures which all applicants must follow, the payment limitations of the program, and the sanctions that will be imposed on participants if they plant more in future years than in 2001. It is simply absurd to call this anything but a rule “by any other name.”

The decision may well be correct, but the court’s brief discussion does not demonstrate why. The real question is: how ministerial was the decision to implement the program and the specification of its details? Not every “Notice of Program Implementation” is a rule. If a statute dictates that the program occur and sets out its details, and the agency is simply implementing that congressional decision, an announcement that the program is under way or an advertisement of its existence should not be deemed a rule. Implicit in the court’s decision in Sugar Cane Growers, then, is a silent interpretation of the statute. Also implicit is real dubiousness about the avoidance of section 553.

47. Id. at 96.
48. The court briefly explained why section 553 procedures are so important. Displaying some judicial hubris, it identified “perhaps the most important” feature of the process as not the chance for affected parties to be heard or the agency to be informed, but the fact that the process produces a statement of basis and purpose, “which needs to take account of the major comments—and often is a major focus of judicial review.” Id. at 96-97.
Chapter 8: Rulemaking

3. Choosing between Rulemaking and Adjudication

One unusual decision on the “what is a rule” question merits brief mention. United States v. Roberts involved a criminal prosecution for conspiracy to distribute a controlled substance. The particular substance at issue was not actually listed on the schedule of controlled substances. However, by statute the drug laws apply equally to so-called “analogues” of scheduled substances. The defendants argued that the drug they had possessed was not sufficiently similar to a listed substance to sustain the prosecution. This included a procedural argument under section 553. The assertion was that the Drug Enforcement Administration’s determination that the two substances were analogous was a legislative rule requiring notice and comment. The court rejected the argument. The DEA had not engaged in a rulemaking; and if notice-and-comment rulemaking were necessary to identify each “analogous” drug, then the whole statute would be pointless. The court’s conclusion is clearly correct, but its reasoning is somewhat conclusory and beside the point. From the administrative lawyer’s perspective, this is really a case about the choice between adjudication and rulemaking. It would be entirely appropriate for an agency to develop a list of analogous substances by rule (assuming that the statute gives it rulemaking authority). But it could also pursue the adjudicatory avenue. That the adjudication here was a criminal prosecution raises potential notice concerns sounding in due process but does not change the fundamental point that law can be made through adjudication.

Finally, although the U.S. Supreme Court was quite silent with regard to rulemaking during the 2001 term, one case bears mention precisely because it was not about rulemaking. In Federal Maritime Commission v. South Carolina State Ports Authority, the Court continued its expansion of the states’ Eleventh Amendment immunity by holding that a federal agency, like a federal court, cannot adjudicate a claim by a private party against a non-consenting state. The agency itself can pursue administrative enforcement against the

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51. Such problems can also arise when there has been a rulemaking. See, e.g., United States v. Ward, 2001 U.S. Dist. LEXIS 15897 (E.D. Pa. 2001) (Surrick, J.) (dismissing indictment because OSHA regulation alleged to have been violated was unconstitutionally vague).
53. This case is also discussed herein in Adjudication (supra 8-11) and Constitutional Law and Separation of Powers (supra 23-29).
state, but private parties cannot. The decision does not mean that states are beyond the federal government’s regulatory authority, only that one particular avenue of enforcement is foreclosed. The consequences of this decision are hard to predict; indeed, the Justices and the parties disagreed about them. Had it been decided 50 years ago, one would predict that it would lead agencies to turn from adjudication to rulemaking. However, there has already been such a turn, and the adjudications now foreclosed by the decision generally would have involved enforcement of regulations, not the articulation of legal requirements. Perhaps at the margin, however, this decision is one more impetus for agencies to move away from adjudication and toward rulemaking.

4. Tying the Agency’s Hands Through Settlement

A 1986 Department of Justice policy statement (“Meese memo”) prohibits an agency from entering a consent decree “that divests a [government official] of discretion” or “that converts into a mandatory duty the otherwise discretionary authority [of an official] to revise, amend, or promulgate regulations.” The legal necessity of this policy is challenged in a 1999 Office of Legal Counsel memorandum. Although the Meese memo was controversial when it was issued, the interplay of settlements and rulemaking authority has been remarkably uncontroversial in the intervening 15 years. However, one very recent case raises this issue; it is important in itself and may augur greater disputes to come.

In January 2000, a group of environmental organizations sued the Fish and Wildlife Service (FWS) and the Army Corps of Engineers under the Marine Mammal Protection Act (MMPA), the National Environmental Pro-

54. 122 S. Ct. at 1878-79.
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tection Act, and the Endangered Species Act challenging the agencies’ failure to adequately protect the endangered Florida manatee. Various industry organizations intervened as defendants, and the parties ultimately reached a settlement in January 2001. The district court approved the agreement on January 5, 2001, and filed it as an order of the court on January 17, 2001, three days before Bill Clinton left office.

The settlement had two basic provisions. First, FWS was to commence a rulemaking concerning the “incidental taking” of manatees under the MMPA; the Corps agreed to “cooperate” in that effort. The agreement was carefully worded not to oblige the Service to produce a regulation with particular requirements, or any regulation at all. Second, the agreement required the FWS to propose by April 2001, and promulgate in final form by September 2001, new manatee refuges and sanctuaries “throughout peninsular Florida.” Implementation of the agreement seems to have proceeded slowly, and the deadlines were renegotiated twice. The focus of controversy was the establishment of refuges and sanctuaries. Early in 2002, FWS published a final rule identifying 16 possible refuges and sanctuaries; however, it only actually designated two refuges and no sanctuaries, stating that it was delaying any action on the other 14 until December 2002. The plaintiffs returned to the district court, which ruled in July 2002 that the defendants were in violation of the settlement agreement, which the court interpreted to require FWS to establish multiple refuges and sanctuaries over a wide area. The court ordered briefing on the question of remedy.

Now it gets interesting. The Justice Department attorneys representing FWS argued that the underlying agreement was invalid. If the agreement really committed the Service to a particular rulemaking outcome—numerous protective areas throughout the state—it violated the APA. Such a foregone, indeed legally mandated, outcome would make the notice-and-comment process a sham. All an agency can do in a settlement agreement is to promise to propose new regulations and take public comment on them. But it cannot commit to a particular outcome. The district court judge could not have been less moved by this argument. Rejecting it out of hand as self-evidently meritless,

58. “The parties agree that this MMPA incidental take rulemaking proceeding will result in a proposed regulation and, if the requirements set forth in section 101(a)(5) of the MMPA are deemed by the Service to be satisfied, a final MMPA incidental take regulation.” Settlement Agreement at ¶ 1.
59. Id. at ¶ 11.
he ordered FWS to issue final regulations by November 1 and scheduled briefing and a hearing on the question whether to hold the Secretary of the Interior in contempt for failing to carry out the agreement. 60

The ruling may be correct, and the struggle in this case is wrapped up in political considerations, but the legal issue here is much more substantial than it seemed to the district court. Rulemaking settlements do have the potential to conflict with substantive requirements or short-circuit procedural ones. 61 It may be that the filing in the manatee case signals an increased DOJ vigilance about these concerns, hearkening back to, but not identical to, the Meese memorandum. 62

PART II. LEGISLATIVE DEVELOPMENTS

The past year saw enactment of no significant piece of federal legislation affecting rulemaking. Congress did give meaningful attention to two areas that, while broader than rulemaking per se, have important applications to it: regulatory burdens on small business and the continued growth of e-government.

A. Small Business

Among the many proposed and several enacted measures to benefit small business during the past year was yet another Paperwork Act. This one, the Small Business Paperwork Relief Act, 63 (1) requires the Office of Manage-

61. For an illuminating general discussion of the problems posed by rulemaking settlements, see Jim Rossi, Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement, 51 Duke L.J. 1015 (2001). Rossi’s particular concern is that the public interest and subsequent administration’s prerogatives may get short shrift when courts enforce essentially private bargains between an agency and one interested party concerning the scope, content, or timing of rulemaking.
62. Indeed, the specific legal argument made by DOJ has its basis not in the 1986 Meese memorandum, but in the 1999 Clinton OLC memorandum, which stated: “We emphasize that the Administrative Procedure Act generally limits the manner by which executive branch agencies may adopt, amend, or revise regulatory rules and procedures, and thus that it will be important to ensure that the terms of any settlement limiting the otherwise discretionary regulatory authority of an executive branch agency conform to the terms of that Act.” Moss memorandum, supra note 56 at 4.
ment and Budget to publish an annual list of compliance assistance resources available to small businesses; (2) requires each agency to establish a single liaison for small businesses and to further reduce paperwork requirements for businesses with fewer than 25 employees; (3) establishes an interagency taskforce to recommend improvements in information collection and dissemination; and (4) requires agencies to report statistics to Congress and the Small Business and Agricultural Regulatory Ombudsman tabulating enforcement actions against small businesses and the reductions in penalties afforded to them.

Early in the 107th Congress the Senate passed S. 395, the Independent Office of Advocacy Act, which would make mild changes aimed at increasing the strength and independence of the Small Business Administration’s Office of Advocacy (Advocacy).\(^64\) The 107th Congress’s second session saw continued efforts to strengthen Advocacy’s influence in the regulatory process. On May 21, 2002, the House unanimously passed H.R. 4231, The Small Business Advocacy Improvement Act of 2002. The bill’s findings assert that “[e]xcessive regulations continue to burden the Nation’s small businesses” and that “[f]ederal agencies continue to propose regulations that impose disproportionate burdens on small businesses.”\(^65\) The legislation would increase the rank, staffing, and budget of the Office and make its funding a specific line item in the federal budget; however, it would not make meaningful substantive changes to its authority or statutory duties. As of this writing, a conference has yet to be scheduled and seems unlikely to occur. The next Congress may well see legislation along these lines finally enacted.

**B. E-Government**

Surely the most significant recent change to the rulemaking process has been the increased use of the Internet. Much has already happened without any congressional oversight or imprimatur. (Indeed, for many cyberspace enthusiasts that is exactly the point; Congress can only mess up a system that works best as the sum of the untrammeled creativity and initiative of its participants.) Of course, the increased use of the World Wide Web by state and federal agencies is not limited to rulemaking. However, rulemaking is

\(^{64}\) See *Developments in Administrative Law and Regulatory Practice* 2000-2001 (Jeffrey S. Lubbers, ed.) at 135.

\(^{65}\) H.R. 4231, 107th Cong. § 2(a)(1), (2) (2001).
one prominent instance of it. E-Rulemaking is discussed further in Part III of this chapter, but one legislative proposal merits mention here.

On June 27, 2002, the Senate passed S. 803, The E-Government Act of 2002. Introduced by Senator Lieberman (D-CT), the bill would create a new Office of Electronic Government, headed by a Senate-approved administrator, within OMB and require or encourage government use of the Internet in a wide variety of settings. Section 206 of the bill applies to regulatory agencies. As passed by the Senate, it would impose two basic requirements. The first is really an amendment or extension of EFOIA: agencies would be required to establish a Web site with information about the agency and post to the Web site all information required to be published in the Federal Register under 5 U.S.C. § 552(a)(1). The second requirement goes directly to rulemaking: each agency would be required to accept comments on proposed rules submitted by electronic means and to maintain an electronic docket for all section 553 rulemakings. The docket would include all public comments as well as “other materials that by agency rule or practice are included in the rulemaking docket under section 553(c).”

These provisions do not add up to all that much. First, each substantive requirement is qualified by an introductory “to the extent practicable,” and the requirement of posting public comments gets its own additional (and redundant) “to the extent practicable.” Second, there is no statutory timetable for implementation, although OMB is supposed to establish one. Third, actual agency activity has already largely outstripped what the bill envisions, as discussed below. In short, at least with regard to rulemaking, S. 803 seems a classic example of Congress leading from the rear. It responds to important

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66. As introduced, section 206 of the bill went further, requiring the Web site also to include all information that must be made available for inspection and copying under sections 552(a)(2) and (a)(5). Although this would have applied only to information generated after the effective date of the Act, it was apparently deemed too burdensome.


68. Id. § 206(d)(1).

69. Id. § 206(d)(2). It is a sign of how the practice of informal rulemaking has changed since the APA was adopted that the bill refers to something that does not actually exist under the statute, using a reference that administrative lawyers of a generation ago would not have recognized, viz., a 553(c) rulemaking docket.

70. See infra notes 94-102 and accompanying text.
developments and looks impressive. But it would accomplish little and require less than what many agencies are already doing. This may be a completely appropriate role for Congress in this setting, and the ineffectualness of the legislation could be described as one of its strengths.

PART III. ADMINISTRATIVE DEVELOPMENTS

A. Presidential and OMB Oversight of the Rulemaking Process

This has been an interesting year with regard to centralized review of federal agency rulemaking.

1. E.O. 12,866

The first interesting thing that happened was that something did not happen: the Bush Administration left the Clinton regulatory review Executive Order 12,866\(^7\) essentially intact. Many expected that, if only for political reasons, President Bush would amend the Clinton Order. With minor exceptions discussed below, he did not do so. To be sure, there was little or no substantive reason for him to do so; from the Republican Party’s point of view, the shortcomings of the Clinton Order were primarily in its implementation, not in its text. Nonetheless, the fact that the current administration did not feel the need to put its own stamp on the process and issue its own Executive Order is important, for it suggests that centralized OMB review has reached a certain maturity and stability.

This is not to say that OMB review in the current administration is identical to OMB review in the previous administration. The change in personnel and in their mandate from the White House guaranteed the contrary. In September 2001, the administrator of the Office of Information and Regulatory Affairs (OIRA), John Graham, issued a widely distributed memorandum to the President’s Management Council\(^7\) in which he indicated his determina-

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72. President Bush established the President’s Management Council in July 2001. Chaired by the Deputy Director of OMB, it consists of the Chief Operating Officer (essentially, the number two) from each cabinet department, EPA, FEMA, NASA, the National Science Foundation, the Social Security Administration, the heads of OPM and the GSA, and a handful of others. See Memo
tion to “implement vigorously the principles and procedures” of E.O. 12,866. He apparently has done just that. From 1993 to 1999, OIRA returned an average of two rules per year to agencies; none were returned during the last three years of the Clinton Administration.73 Between July 2001 and March 2002, OIRA returned 20 proposed regulations to agencies, more than during the entire Clinton Administration.74

Not only has the substance of OIRA review become more searching, the process has changed in one significant respect. The Executive Order anticipates that OIRA will “notify the agency in writing of the results of its review.”75 If and when the agency takes final action, OIRA “shall make available to the public all documents exchanged between OIRA and the agency during the review by OIRA.”76 In practice, however, discussions between OIRA and agencies have not always left a paper trail. Historically, OIRA has sometimes written a “return letter” when it found a proposed regulation, or its accompanying analysis, wanting. But these were not always made public, and more often, particularly in recent years, OIRA has expressed its reservations orally and informally. In the current regime, OIRA has written, and posted to its Web site, a formal explanation—a return letter—when it has sent back a proposal for reconsideration by the agency. John Graham views this practice as an important step in ensuring a “transparent” process,77 and others have endorsed it.78 At the same time, the pro-

randum from George W. Bush to Heads of Executive Departments and Agencies Re Implementing Government Reform (July 11, 2001) (requiring agencies to designate chief operating officers, creating the Council, and revoking the Clinton administration’s equivalent memorandum, entitled “Implementing Management Reform in the Executive Branch”).

73. James L. Gattuso, Regulating the Regulators: OIRA’s Comeback, in HERITAGE FOUND. EXEC. MEMO. No. 813 at 2 (May 9, 2002).


75. E.O. 12,866, § 6(b)(2).

76. Id. § 6(b)(4)(C).

77. See Memorandum from John D. Graham to OIRA Staff Re OIRA Disclosure (Oct. 18, 2001).

duction and publication of return letters—and, in some cases, "post-return letters," critiquing final agency action—has made some agency officials uneasy. Publicizing these disagreements can be seen as unseemly and may invite or support further disputes and litigation.

The only formal changes to E.O. 12,866 made by the Bush Administration came in E.O. 13,258, issued on February 26, 2002. The amendments remove the Vice President from the regulatory review process. This may partly reflect the fact that the current Vice President is already quite busy. But more important, it strengthens OIRA’s hand in its relations with agencies. While an unhappy agency, or private party, may still obtain relief from the White House when OIRA has upset it, that option is much more theoretical than real. Without the Vice President as a potential sympathetic ear and point of appeal, OIRA will more often be the last word. And the fact that OIRA knows this may encourage it to act somewhat more boldly.

2. Federalism Executive Order

More surprising than the inaction with regard to E.O. 12,866 has been the same inaction with regard to the federalism Executive Order, E.O. 13,132. Reportedly, a new federalism order (which would, among other things, have included language making it harder for agencies to preempt state law) was in the works but was derailed by September 11. In any event, as of this writing, the Bush Administration continues to operate under the Clinton federalism order.

3. Small Business Executive Order


REV. 1489, 1524, 1549 (2002) (proposing that the E.O expressly provide: For each regulatory action that the Administrator of OIRA returns to an agency for further consideration of some or all of its provisions, the Administrator of OIRA shall provide the issuing agency a written explanation for such return, setting forth the pertinent provision of this Executive Order on which OIRA is relying.).

seems essentially symbolic and political. Though trumpeted by the Small Business Administration as a major substantive accomplishment, the order adds nothing substantively and little procedurally to existing requirements. In essence it is a reminder to agencies of the existence of the Regulatory Flexibility Act. It does require agencies to which the Act applies to “establish procedures and policies to promote compliance with” the Act and to take account of the impact of proposed rules on small businesses, “as provided by the Act.” The Small Business Administration’s Chief Counsel for Advocacy (Advocacy) is periodically to notify agency heads of the Act’s requirements and provide training on compliance with the Act. Advocacy also may comment on proposed rules, which, of course, he could do, and has done, without this order. Indeed, in this respect the more important document is a March 2002 Memorandum of Understanding between OIRA and the Office of Advocacy ensuring coordination, information sharing, and full consideration of impacts on small entities during the regulatory review process.

The order imposes no meaningful new responsibilities on covered agencies. It does state that each agency must prepare written procedures and policies to ensure full consideration of the potential impact of new regulations on small businesses; this is not an explicit requirement of existing law. The order also requires agencies to notify Advocacy of any draft rule that may

81. See Press Release, Office of Advocacy, Small Business Administration, President Bush Signs Executive Order to Relieve Regulatory Burden on Small Business (Aug. 15, 2002) (quoting the Chief Counsel for Advocacy as saying that the President had “promised to tear down the regulatory barriers to job creation for small business and give small business owners a voice in the complex and confusing federal regulatory process” and the E.O. “does just that”), available at http://www.sba.gov/advo/press/02-34.html.


84. Executive Order No. 13,272, supra note 82, at § 2(c).

85. Indeed, the office is under a statutory mandate to “represent the views and interests of small businesses before other Federal agencies whose policies and activities may affect small business.” 15 U.S.C. § 634(c)(4) (2000).


87. Executive Order No. 13,272, supra note 82, at § 3(a).
have a significant economic impact on a substantial number of small entities, “[g]ive every appropriate consideration to any comments provided by Advocacy regarding a draft rule,” and respond to any such comments when issuing the final rule. These requirements simply reiterate (indeed, they are sketchier than) the preparation and distribution of regulatory flexibility analyses required by the RFA. The order also contains the standard provision precluding judicial review of (non)compliance therewith.

4. Prompt Letters

The most striking and unforeseen development on this front has been OIRA’s creation of the so-called “prompt letter”—a letter from OIRA to an agency suggesting that it ought to undertake a particular regulatory agency action. OIRA has written six of these, beginning in September 2001: to OSHA, recommending that it promote or require greater use of automatic external defibrillators; to HHS, recommending that it focus on a languishing rulemaking that would require nutritional labels to include transfatty acids; to the EPA, recommending that it pay greater attention to the health risks of particulate matter; to DOT and the NHTSA, recommending that they consider a new automobile crash test for the frontal occupant protection standard so as to prevent injuries to the lower extremities; to the EPA, recommending improvements to the handling and dissemination of Toxic Release Inventory data; and to the Office of Federal Housing Enterprise Oversight, asking it to consider a rulemaking to strengthen the corporate governance of Fannie Mae and Freddie Mac and require them to make certain public disclosures.

The prompt letter is a remarkable initiative; OIRA has never before relied on cost-benefit analysis to suggest and promote, rather than react to and obstruct, government regulation. As Robert Hahn and Cass Sunstein have written, “[u]ntil now, no institution in government has vindicated the hopes of those who believed that cost-benefit analysis could be used to help promote better priority-setting, block senseless rules, and spur agency action when it was justified.”

88. Id. § 3(b), (c).
89. Id. § 8.
In general, prompt letters have been enthusiastically received. However, some wariness has been expressed about their potential to increase OIRA's influence and control at the expense of agency autonomy. OIRA Administrator John Graham has been careful to point out that the prompt letter is not a "directive" and has no legal force: "It is a public request designed to stimulate agency and public deliberation. Final decisions about priorities remain in the hands of the agencies." While this is technically true, obviously the letters will be, and are intended to be, influential in redirecting agency priorities. A cynic might suggest that they are anti-regulatory maneuvers. In this view, their importance lies in the opportunity costs they impose: if an agency pursues the agenda suggested by OIRA, it will be forgoing other initiatives. The validity of this objection hinges on the validity of the underlying cost-benefit analysis; if, really, OIRA is proposing regulatory undertakings that are particularly cost-effective, then the opportunity costs of pursuing them will by definition be less than those of alternative agency activities.

Symbolically at least, the prompt letters are extremely important. Whether they will become a common vehicle for regulatory priority-setting remains to be seen. However, this may be the opening wedge of a new role for OIRA and a new understanding of the role of cost-benefit analysis.

C. Electronic Rulemaking

The increased use of the Internet in the rulemaking process years has been nothing short of extraordinary. The past year has seen a particular acceleration and expansion of e-rulemaking among federal agencies. To varying degrees, rulemaking dockets are available at agency Web sites. Often some or all submitted comments are themselves available, comments can be submitted in electronic format, commenters can read and comment upon others' submissions, and interested persons can sign up for notification by listserv when an agency issues a notice of proposed rulemaking or a final rule, or even when a comment of interest is submitted. A recent survey found that

92. Graham Testimony, supra note 74, at 2.
93. See Ellen Nakashima, OMB Asks Agencies for Action, WASH. POST, Sept. 21, 2001, at A30 (noting the "mixed reactions" of watchdog groups and quoting Wesley Warren of the Natural Resources Defense Council as saying that "if there is going to be the substitution of White House political judgment for the ongoing expertise of agencies, it could be harmful").
94. A thorough but already dated summary of e-rulemaking efforts is General
one in three users of government Web sites, some 23 million people, have used the Internet to send comments to officials on matters of public policy. As of January 2002, 58 percent of Internet users, or 68 million adults, had

Accounting Office, Federal Rulemaking: Agencies' Use of Information Technology to Facilitate Public Participation (GAO/GGD-00-135R) (June 30, 2000). OMB Watch has produced a brief but more recent summary of e-rulemaking systems at a dozen different agencies. OMB Watch, Current E-Rulemaking Systems (June 19, 2002), available at http://www.ombwatch.org/article/articleprint/848/-1/4. The most complete, user-friendly, and impressive e-rulemaking site has historically been that of the Department of Transportation, which is found at http://dms.dot.gov. The site's most recent improvement is a list server that will send the subscriber an automatic e-mail notification when government documents meeting the subscriber's criteria are entered into the DOT's Docket Management System.

The Office of the Federal Register recently established a useful portal through which to access the e-rulemaking sites of numerous federal government agencies. See http://www.archives.gov/federal_register/public_participation/rulemaking_sites.html. The Office also maintains an online list of all proposed rules currently open for comment. See http://www.archives.gov/federal_register/public_participation/fr_e_docket.html.

This transformation has occurred without specific statutory mandate or authority. The pending E-Government Act might change that. Two existing pieces of legislation are sometimes seen as authorizing or requiring some form of e-rulemaking, although that is not the usual understanding. First, the Electronic Freedom of Information Act (EFOIA) requires agencies to provide for electronic access to any record that has been released to any person and is "likely to become the subject of subsequent requests for substantially the same records." 5 U.S.C. §§ 552(a)(2)(D), (E) (2000). That description arguably reaches rulemaking docket sheets, perhaps the actual docket contents, and certainly proposed and final rules. Second, the Government Paperwork Elimination Act (not to be confused with the Paperwork Reduction Act) requires that by October 2003 executive agencies provide "for the option of the electronic maintenance, submission, or disclosure of information, when practicable as a substitute for paper." 44 U.S.C. § 3504 (2000) (note). This provision could be read to apply to proposed and final rules and public comments thereon. However, implementation of the Act has focused on agency information collection covered by the PRA and similar reporting and dissemination efforts.

95. PEW INTERNET & AMERICAN LIFE PROJECT, THE RISE OF THE E-CITIZEN 8 (2002). Of course, not all or even a majority of these contacts occurred during section 553 rulemakings.
visited at least one government Web site; less than two years earlier, the number was only 40 million.\(^{96}\)

Thus far, these developments have occurred agency by agency. While there is now a useful portal through which to access all federal government Web sites, www.firstgov.gov, there has been no real coordination among or oversight over the agencies. The Bush Administration is working to change that in ways that may have consequences for e-rulemaking.

In July 2001, OMB established an “E-Government Task Force,” headed by the newly created Associate Director for Information Technology and E-Government.\(^{97}\) In October, the President’s Management Council (PMC) approved a set of recommendations from the task force, leading finally to the publication in February of 2002 of a document entitled “E-Government Strategy.”\(^{98}\) In addition to a fair amount of rather abstract discussion of the benefits of and obstacles to e-government, the strategy document sets out 24 specific e-government initiatives to be implemented in 2002 and 2003. OMB and the PMC are expected to provide overall management oversight; each of the 24 initiatives also has a specific agency identified as the “managing partner.”

Many of these initiatives are focused on transactions between citizens or businesses and the government—paying taxes, filing forms, requesting benefits, and so on. Others are about providing the public with information. But one of the 24 is “Online Rulemaking Management.” The Department of Transportation, which has consistently been at the front of the e-rulemaking pack, is the “managing partner” for the initiative. The plan is that existing e-docket

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96. Id. at 5.
97. See Memorandum from Mitchell E. Daniels, OMB Director, for Heads of Executive Departments and Agencies (July 18, 2001). Daniels noted that electronic government was “one of the five key elements” of President Bush’s Management Plan and “at the core of the President’s management agenda.” Id. Having an Associate Director for Information Technology and E-Government is a step toward creation of a “centralized office to encourage and monitor best practices relating to agency Internet use,” as urged by the ABA Section of Administrative Law and Regulatory Practice. See Section of Administrative Law and Regulatory Practice, Twenty-First Century Governance: Improving the Federal Administrative Process, 52 ADMIN. L. REV. 1099, 1107 (2000). The pending E-Government Act would establish an Office of Electronic Government, headed by a Senate-approved Administrator, within OMB.
systems will “be expanded and enhanced to serve as a government-wide system for agency dockets” through establishment of a “unified cross-agency public comment site.” In theory, this would produce (a) better rules, because “[c]omments would be organized using knowledge management tools” and citizen and business participation would increase by 600 percent, (b) “a more collaborative and transparent atmosphere,” and (c) significant cost savings.

The future of this initiative, and of e-rulemaking generally, is hard to predict. Thus far, e-rulemaking represents a new and improved format for what is still recognizably the section 553 notice-and-comment process. The E-Government Strategy anticipates a more fundamental transformation, but its scope is vague. If rulemaking is really to be remade by the Internet, one perhaps unintended change might be a reduction in the power of individual agencies. On the one hand, the mantra of centralization and coordination suggests less of a focus on individual agencies and potentially a greater role for OMB, the White House, or other overarching institutions. On the other hand, the emphasis on increased participation and transparency—the empowerment of thousands of individuals in some form of virtual self-government—is a move away from the technocratic, Breyerian model of regulation by experts. In this way, the agency would lose authority on each side.

D. Implementation of the Data Quality Act

The Data Quality Act (DQA)—an innocuous-looking, brief, potential time bomb stuck into the 2001 Appropriations Act—requires OMB to issue “Government-wide guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including

99. Id. at 27.
100. Id. at 14.
101. Id. at 27.
102. A useful catalogue of issues confronting the further implementation of e-rulemaking is Jeffrey S. Lubbers, The Future of E-Rulemaking: A Research Agenda, 27 ADMIN. & REG. L. NEWS 6 (Summer 2002).
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statistical information) disseminated by Federal agencies." Agencies must then produce their own guidelines to achieve those information quality goals; the agencies must also establish a mechanism by which affected persons may seek and obtain correction of information disseminated by the agency. OMB issued its information quality guidelines on September 28, 2001; the agencies duly proposed their guidelines; and the final agency guidelines were due on October 1, 2002. The Act’s implications for agency activities generally and rulemaking in particular remain uncertain, but they could be enormous.

Several unresolved issues concerning the interplay between the DQA and section 553 have surfaced in the process of developing agency guidelines. These include:

Is the inclusion of material submitted by a commenter in a docket, paper or electronic, the “dissemination” of “information” by the agency and so covered by the Act? The EPA’s draft guidelines, for example, say no, although if the agency later expressly relies on such information as support for a final rule, it would then be covered.

If a person requests correction of information that appears in a rulemaking docket, must the agency respond to and, as appropriate, correct any misinformation through a mechanism, or on a timetable, separate from the rulemaking process? Or does the consideration of and response to comments under section 553 qualify as the “mechanism” required by the DQA? Many agencies have taken the position that the rulemaking process itself suffices; OMB, among others, is less sure, expressing particular concern about the timeliness of any agency response and correction.

104. Id. § 515(a).
105. Id. § 515(b)(2)(A). The Act’s reference to “agencies” is understood to mean those agencies subject to the Paperwork Reduction Act, which is pretty comprehensive. See 44 U.S.C. § 3502(1) (2000).
106. The Section on Administrative Law and Regulatory Practice submitted comments to eight separate agencies on their proposed guidelines.
Must an agency respond to a section 515 request for correction that could have been made during an official comment period but instead came later? The EPA's draft guidelines say that it will not respond in these circumstances. The ABA Section of Administrative Law and Regulation took issue with this provision. Acknowledging that "it would be optimal to encourage rulemaking-related correction requests to occur inside the . . . comment period . . . as part of comments on the rule," the Section nonetheless took the position that the close of the comment period should not bar a correction request.

Under prevailing administrative law standards, agencies must make available outside studies on which they rely in promulgating a rule. However, they need not obtain, make available, or independently assess the underlying data contained in those studies. A strong reading of the DQA would require the agency to assess the raw data underlying scientific studies before "disseminating" them so as to ensure the "quality" and "objectivity" of the studies. While the DQA applies only to dissemination, not to other uses of information, general rulemaking principles require an agency to disseminate studies on which it relies. The combination might mean that a rulemaking agency could not rely on an outside study without undertaking the herculean, indeed impossible, task of obtaining, evaluating, and vouching for the data.

Management Council, June 10, 2002). OIRA has recommended that agency guidelines include the following unusually inelegant language:

In cases where the agency disseminates a study, analysis, or other information prior to the final agency action or information product, requests for correction will be considered prior to the final agency action or information product in those cases where the agency has determined that an earlier response would not unduly delay issuance of the agency action or information product and the complainant has shown a reasonable likelihood of suffering actual harm from the agency’s dissemination if the agency does not resolve the complaint prior to the final agency action or information product.


110. This distinction was clarified in the recent D.C. Circuit decision upholding the EPA’s revised National Ambient Air Quality Standards on remand from the Supreme Court. American Trucking Ass’ns v. EPA, 283 F.2d 355, 372 (D.C. Cir. 2002) (Tatel, J., joined by Ginsburg & Williams, JJ.).
underlying such a study. The OMB Guidelines seem to stake out a middle
ground on this issue. “Influential” analytic results contained in dissemi-
nated information must be “capable of being substantially reproduced,” but
this requirement does not apply to the original or supporting data, since
those are not being disseminated. 111

Just how the DQA will affect rulemaking is for now still uncertain. The
answers await the final agency guidelines, and subsequent adjustments to and
practice under them.

111. See Office of Information and Regulatory Affairs, U.S. OMB, Guidelines for
Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of
Information Disseminated by Federal Agencies §§ V.3(b), V.9, V.10.