Rulemaking

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Chapter 7
Rulemaking*

PART I. JUDICIAL DEVELOPMENTS

A. Authority to Regulate

Agencies are, of course, creatures of statute. An agency "literally has no power to act . . . unless and until Congress confers power upon it."\(^1\) Occasionally an agency has its hand slapped by a reviewing court when it makes bold assertions of jurisdiction to regulate. The most notable and controversial recent example involved the Food and Drug Administration’s attempt to regulate tobacco. Less visible but still notable is the recent case of American Library Association v. FCC.\(^2\) This was a challenge to a Federal Communications Commission (FCC) regulation that required that digital television receivers be capable of recognizing the “broadcast flag,” code embedded in the broadcast that keeps the transmission from being rebroadcast. Thus, the regulation did not apply to the broadcast transmission; rather, it directly and exclusively regulated what happened to transmitted content after it had been received. The FCC invoked its “ancillary jurisdiction”; the court found that since no statute gives the FCC authority to regulate post-transmission activity, “the rules are ancillary to nothing.”\(^3\)

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2. 406 F.3d 689 (D.C. Cir. 2005). This case is also discussed herein in Judicial Review (supra at 104-05).
3. Id.
B. Ingredients of a Rulemaking

An "informal" rulemaking under section 4 of the Administrative Procedure Act (APA) (5 U.S.C. 553) has many ingredients—statutory authority, data compiled by the agency, data supplied by commenters, satisfaction of particular statutory requirements (cost, technology, etc.), consideration of alternatives, paperwork reduction, unfunded mandates reform, impacts to small businesses—the list could continue for many lines. Litigants displeased with a final rulemaking go over the list with a fine-toothed comb to determine where the agency could be vulnerable. This strategy met with mixed, although interesting, results this year in Chamber of Commerce v. SEC.4

The petitioner brought a challenge to new SEC rules regarding governance of mutual funds, alleging a failure to adhere to all of the necessary ingredients for a proper rulemaking. The new rules would have significant impacts on mutual fund governance, as they required funds engaging in many common transactions to have (1) an "independent" chairman and (2) a board with no less than 75% "independent" directors.

First, the petitioner argued that the SEC had not established a "rational connection between the facts found and the choice made," citing Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co. ("State Farm").5 More to the point, the petitioner argued that the SEC disregarded the only empirical data submitted for the record which had cast doubt on whether a fund with an independent chairperson would produce better fund performance. The SEC did not do its own study of the issue, and no other empirical data or study was presented by any other commenter.

The court affirmed the SEC's decision to dismiss the findings of the available study and not undertake a study of its own, explaining that:

although we recognize that an agency acting upon the basis of empirical data may more readily be able to show it has satisfied its obligations under the APA, see Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC, 737 F.2d 1096, 1124 (D.C. Cir. 1984) (in informal rulemaking it is "desirable" that agency "independently amass [and] verify the accuracy of" data), we are acutely aware that an agency need not—indeed cannot—base its every action upon empirical data; depending upon the nature of the problem, an agency

4. 412 F.3d 133 (D.C. Cir. 2005).
5. Id. at 140 (citing State Farm, 463 U.S. 29, 43 (1983)).
may be “entitled to conduct . . . a general analysis based on informed conjecture.”

The court deferred to the SEC’s decision, concluding that the SEC reached its conclusion after considering “many comments” and “its own and its staff’s experience.”

The court ruled that the SEC’s decisionmaking was flawed for other reasons, however. First, it accepted the petitioner’s argument that the SEC did not adequately consider the costs associated with requiring an independent director. Of course, the APA does not explicitly require consideration of costs, although organic statutes often do. In this case, the court concluded that “the Commission violated its obligation under 15 U.S.C. § 80a-2(c), and therefore the APA, in failing adequately to consider the costs imposed upon funds by the two challenged conditions.”

Interestingly, the statutory provision referred to, 15 U.S.C. § 80a-2(c), does not use the word “costs.” Rather, it requires consideration of whether a proposed action will “promot[e] efficiency, competition, and capital formation.” One may be skeptical as to whether these terms are in fact synonymous with costs—“efficiency,” for instance, certainly does not necessarily equate to lower costs (for example, new storm windows may be very efficient during a Wisconsin winter but they cost a bundle). Obviously, considering costs is a sensible thing to do, but it is unclear that Congress required it.

Finally, the court ruled that the SEC failed adequately to consider available alternatives to the independent director requirement. Many commenters had argued that simply requiring full disclosure to the public of whether a fund’s chairperson was independent would adequately protect investors, and

6. Id. at 142 (citing Melcher v. FCC, 134 F.3d 1143, 1158 (D.C. Cir. 1998)).
7. Id.
8. Id. at 144.
9. The court may have been moved by an article analyzing two D.C. Circuit cases requiring agencies to consider costs—even in the absence of an explicit statutory command—under the assumption that “reasoned decisionmaking” (required in all informal rulemaking by the U.S. Supreme Court under State Farm) naturally implies consideration of costs. Richard Stoll, Cost-Benefit Analysis Through the Back Door of “Reasoned Decisionmaking”?., 31 ELR 10228 (Feb. 2001).
10. 412 F.3d at 144-45 (citing SEC v. Chenery Corp., 332 U.S. 194, 196-97 (1947)).
in fact two of the five SEC Commissioners had advocated that alternative. The court recognized that agencies are not required to consider every "conceivable" alternative, citing State Farm, but ruled that the disclosure alternative was neither "frivolous or out of bounds" and the SEC "therefore had an obligation to consider it."11

There was no ambiguity in the court's opinion that the SEC violated both the organic securities statute and the APA: "In sum, the Commission violated its obligation under 15 U.S.C. § 80a-2(c), and therefore the APA, in failing adequately to consider the costs imposed upon funds by the two challenged conditions."12 Remarkably, however, the court did not set aside or vacate the rule, but merely remanded it to the SEC for additional consideration with no specified deadline.13 Judicial remands without deadlines, as federal agency cognoscenti must recognize, usually mean absolutely nothing happens for years (if then), while the unlawful agency rule remains fully in effect and enforceable.

Another ingredient for a proper rulemaking is consideration of small businesses under the Regulatory Flexibility Act ("RFA").14 Very generally, unless an agency can certify that its rule will have no significant impact on small businesses (as defined but not relevant here), the agency must prepare a "regulatory flexibility analysis" that explains how the agency considered and either adopted or rejected alternatives that would exempt small businesses or at least minimize burdens on small businesses. If the rulemaking procedures of § 553 are required, then the requirements of the RFA are triggered as well.

In United States Telecom Ass'n v. FCC,15 the FCC argued that an order issued to telecommunications providers was not subject to § 553. The court disagreed, but found that the FCC's errors were harmless because the agency had substantially complied with notice and comment procedures anyway. (See discussion in section D, below.) However, the court found that the agency

11. Id. at 145.
12. Id. at 144.
13. Id. at 145. AdLaw Section Council Member Judge A. Raymond Randolph of the D.C. Circuit has often spoken and written of the mandatory term "shall" in 5 U.S.C. § 706, specifying that rules must be "set aside" by a reviewing court if found violative of the law. Judge Randolph was not on the panel in this case, however. For a thorough review of the practice of remand with vacatur, see Ronald M. Levin, "Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law, 53 Duke L.J. 291 (2004).
15. 400 F.3d 29 (D.C. Cir. 2005).
“utterly failed” to follow the Regulatory Flexibility Act, and the failure was not harmless because the agency did not prepare any explanation of the rejection of alternatives designed to minimize the impact on small entities.\textsuperscript{16} To remedy the situation, the court stayed enforcement of the rule against small entities pending the required analysis by the FCC upon remand.\textsuperscript{17}

C. 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. Most rules are,\textsuperscript{18} but not all. \textit{International Union, United Mine Workers v. Mine Safety and Health Administration}\textsuperscript{19} was a challenge to regulations governing the ventilation of coal mines. The proposed rule would have required that mines ensure air flow at a \textit{minimum} of 300 feet per minute. The final rule maintained that requirement, but also added a \textit{maximum} air flow limitation of 500 feet per minute. The Notice of Proposed Rulemaking had not mentioned the possibility of capping air flow speed.

The D.C. Circuit held that the logical outgrowth test was not satisfied. The decision largely speaks for itself, but two quick points may be made. First, the agency had argued that the petitioners had actual notice of the possibility of a cap because it was discussed by various commenters on the proposal. The court did not flatly deny that a party \textit{might} receive notice via its participation in the commenting process rather than directly from the agency, but it was quite wary of such a proposition. Here, no commenter had specifically proposed the 500 fpm limit, and, most important, the agency itself never expressed interest in or a plan to adopt a cap. Adequate notice requires some indication by the agency that it might pursue a certain path.\textsuperscript{20}

\textsuperscript{16} \textit{Id.} at 41.
\textsuperscript{17} \textit{Id.} at 42-43.
\textsuperscript{18} See, e.g., \textit{Crawford v. FCC}, 417 F.3d 1289, 1296-97 (D.C. Cir. 2005) (in light of notice, petitioner “should have anticipated” agency decision); \textit{New York v. U.S. EPA}, 413 F.3d 3 (D.C. Cir. 2005) (where proposed rule had anticipated a menu of voluntary alternatives, but final rule had imposed mandatory requirements, logical outgrowth test was satisfied because one of foreseeable possible outcomes was the proposed approach would not be adopted).
\textsuperscript{19} 407 F.3d 1250 (D.C. Cir. 2005).
\textsuperscript{20} \textit{Id.} at 1260-61. The court relied heavily on \textit{Shell Oil Co. v. EPA}, 950 F.2d 741, 750-51 (D.C. Cir. 1991).
The second observation is that, as is typical, the court's conclusion depended on the level of generality at which the notice is characterized. If the question is whether commenters knew that "regulation of air flow speed" was on the table, the answer is yes, of course they did. But the court asked a narrower question—whether they knew that a speed limit was on the table—to which the answer was no. The more narrow the level of generality at which the issue is characterized, the more promising a logical outgrowth challenge.

D. Enough Is Enough Notice and Comment

Several cases this year seem to let an agency off easy when it comes to the procedural requirements for informal rulemaking set forth in 5 U.S.C. § 553(c). Typically, rulemakings commence with a Federal Register publication seeking comments on the terms of and/or ideas for a new rule. These can take the form of an "Advance Notice of Proposed Rulemaking," which seeks general comments even before a proposed rule is drafted, or a "Notice of Proposed Rulemaking," which seeks comments on a more concrete proposal, usually the actual text of a proposed rule.

However, the APA authorizes dispensation of Federal Register notice where persons subject to a proposal "are named and either personally served or otherwise have actual notice thereof in accordance with law."21 With respect to the opportunity to comment, the APA provides "[a]fter notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation."22

The APA allows an agency to make a rule effective without prior notice and comment if it makes a "good cause" finding and explains why such a process would be "impracticable, unnecessary, or contrary to the public interest."23 While the D.C. Circuit has recently held that this exception can be utilized in only the most extraordinary circumstances,24 several cases in the

22. 5 U.S.C. § 553(c).
24. In Utility Solid Waste Activities Group v. EPA, 236 F.3d 749 (D.C. Cir. 2001), the court vacated EPA's attempt to correct, without first proposing the correction for public comment, certain language in a final rule that resulted from "erroneous use of the Word Perfect find/replace command in the drafting of
Chapter 7: Rulemaking

past year (including one in the D.C. Circuit) nevertheless upheld agency final rules that were issued without prior notice and comment.

*Federal Express Corp. v. Mineta*\(^{25}\) involved a challenge to the last two of four consecutive “final” rules issued by the Department of Transportation (“DOT”) to govern compensation to air carriers for losses from the September 11th attacks. Each rule was made immediately effective under the good cause exception, with the agency seeking public comments on the rule after its effective date. It appears that many of the comments were then considered and responded to in each subsequent “final” rule. The DOT argued, for example, that an opportunity to comment on the fourth rule was provided when the agency invited comments on the already effective third “final” rule. The court ruled that, “[a]lthough perhaps DOT should not have labeled the First through Third rules as ‘final,’ the agency has made a ‘compelling showing’ that it provided ‘a meaningful opportunity to comment’ before the Fourth Final Rule became effective.”\(^{26}\) The court further noted that “[r]emanding this matter for the agency to take further comments would serve no useful purpose whatsoever.”\(^{27}\)

In stark contrast, the Ninth Circuit vacated a rule by the Bureau of Prisons resulting in a sentence reduction for prisoners who had completed a substance abuse treatment program while an interim rule was in place. In *Paulsen v. Daniels*,\(^{28}\) prisoners challenged an interim rule adopted by the Bureau without notice and comment which denied a sentence reduction (otherwise granted) to prisoners completing a substance abuse program if the prisoner had been convicted of a crime involving a firearm. The court stated, “[i]t is antithetical to the structure and purpose of the APA for an agency to implement a rule first and then seek comment later.”

In a similar case, the FCC issued an order requiring land line phone companies to allow customers to carry their phone numbers over to wireless carriers where a certain amount of geographic overlap existed between the two carriers.\(^ {29}\) The petitioners argued that the order was a rule that should

\(^{25}\) 373 F.3d 112 (D.C. Cir. 2004).
\(^{26}\) *Id.* at 120 (citations omitted).
\(^{27}\) *Id.* at 1005.
\(^{28}\) 413 F.3d 999 (9th Cir. 2005).
\(^{29}\) U.S. Telecom Ass’n v. FCC, 400 F.3d 29 (D.C. Cir. 2005).
have been subject to APA notice-and-comment procedures. The FCC insisted that the order merely clarified obligations under previous orders, was therefore interpretive, and exempt from notice and comment. The court ruled that the order was in fact a legislative rule subject to the APA, but nevertheless refused to remand or vacate the rule based upon what appears to be an “almost is good enough” theory. The court noted that the FCC had provided ample notice and opportunity for public comment, as the FCC had published a Federal Register notice seeking comment before finalizing the rule, and that the FCC had responded to comments in its final “order” document published in the Federal Register. The general public would have never known there was a proposed rule to comment upon, because the FCC has styled its request for comments under the heading of “Petition for a Declaratory Ruling,” rather than as a Notice of Proposed Rulemaking. The court nevertheless found that the procedural failure was harmless and declined to vacate the rule on that basis.

It appears some judicial panels are trying to craft efficient outcomes that do not require what they perceive as meaningless jumping through procedural hoops. However, such outcomes may be a bit ominous for individuals and companies trying to monitor agencies’ rulemaking activities, particularly to those outside Washington and personally unconnected to an agency they are trying to monitor. For example, an airline lawyer who previously worked for DOT and still has lunch on occasion with former colleagues may be well aware that agency has fallen into an odd pattern of consecutive “final” rules that are actually operating as “proposed” rules. The unconnected, however, understandably look for key words such as “proposed” in the Federal Register to trigger the thought that a submission of comments may be desirable. A “petition for a declaratory ruling,” to use the example from United States Telecom Ass’n, would presumably only apply to the party requesting the ruling, and thus would not normally garner close attention by other potentially interested parties.

30. Id. at 40.
31. Id. at 41. The court nevertheless stayed enforcement of the order against small entities because the FCC failed to conduct a Regulatory Flexibility Analysis; see Part I above.
E. "Rules Is Rules, No Matter Their Gloss"

Whether a document released or published by an agency as "policy," "guidance," or some form of writing other than a rule will nevertheless be deemed an illegal "rule in disguise" upon judicial review was again before the courts this year. Typically the agencies win these cases, although each year seems to bring another example of a situation where an agency crossed the line into legislative rulemaking. This year's example is National Association of Home Builders v. United States Army Corps of Engineers, where the D.C. Circuit held that "general permits" issued by the Corps of Engineers under section 404 of the Clean Water Act are rules under the APA. (The precise issue in the case was whether the Corps had issued a "rule" under the Regulatory Flexibility Act; but that Act's definition is derivative of the APA's.) As section 404 subjects literally thousands of types of construction and fill operations that take place each year to the requirement of obtaining a permit, the Corps—out of administrative necessity and with statutory authorization—has adopted the practice of issuing "general permits" for certain categories of activities (such as "single-family housing" and "cranberry production activities"). So long as a party's operations meet the requirements specified in these general permits, the party is acting legally and need not obtain an individual permit. In operation, then, a general permit operates like a rule; it prescribes a set of requirements that apply to all who engage in a particular activity.

The Corps argued that the general permits were not rules, but merely a way to streamline cumbersome individual permitting—which is an adjudicatory process that produces an order. The court disagreed, finding that the general permits carried "easily-identifiable" legal consequences for potential dischargers. "[General permits] create legal rights and impose binding obligations insofar as they authorize certain discharges of dredged and fill material into navigable waters without any detailed, project-specific review by the Corps' engineers." The court observed that "rules is rules, no matter their

32. 417 F.3d 1272 (D.C. Cir. 2005).
34. See 33 U.S.C. § 1344(e) (authorizing promulgation of general permits "after notice and opportunity for public hearing").
35. 417 F.3d at 1276.
36. Id. at 1279.
37. Id. at 1279-80.
The decision was clearly correct; the general permits look, walk, and quack like regulations, and the “permit” label changes nothing.39

Likewise, in United States v. Alabama Power Co.,40 the district court refused to defer to an EPA interpretation of its own regulatory exemptions from New Source Review permitting, because EPA’s “interpretation” was just too far from the regulatory language. The court explained that to do otherwise, and afford deference to the agency, would be to sanction the agency’s practice of avoiding notice and comment rulemaking.41

In most cases, however, when parties challenge an agency pronouncement as an improperly promulgated rule, the agency wins. One curious case from the past year was authored by Judge (now Chief Justice) Roberts regarding the proper calculation of royalties from natural gas extraction on federal land. In Amoco Production Co. v. Watson,42 the plaintiff-appellant, Amoco, extracted natural gas from the San Juan Basin and paid royalties to the government. In 1996, the Minerals Management Service of the Department of the Interior sent a letter to all producers in the San Juan basin setting forth procedures to be followed when calculating royalties owed to the government (the “Payor Letter”). Shortly thereafter, Amoco was notified that its royalty payments from 1989 through 1996 had not been calculated properly and was ordered to make up the difference. It challenged the Payor Letter as an improperly promulgated legislative rule.

The D.C. Circuit took an unusual and unexpected approach in deciding that the Payor Letter did not represent a legislative rule. In fact, those who have been following the D.C. Circuit developments on the “rulemaking vs.

38. Id. at 1285 (citing Granholm ex rel. Mich. Dep’t of Natural Res. v. FERC, 180 F.3d 278, 282 (D.C. Cir. 1999)).

39. The court did not do so, but one might analogize to FCC “orders” that, despite their label, are clearly “rules” and are treated as such by both the agency and the courts. See, e.g., U.S. Telecom Ass’n v. FCC, 400 F.3d 29 (D.C. Cir. 2005) (considering whether the FCC’s “order” was a legislative rule or an interpretive rule without pausing to ask whether it might not be a rule at all). Cf. Cent. Tex. Telephone Coop., Inc. v. FCC, 402 F.3d 205, 210-11 (D.C. Cir. 2005) (discussing whether, and assuming that, an FCC “Opinion and Order” was a rule, despite its label and certain adjudicatory characteristics of the setting).


41. Id. at 1309.

42. 410 F.3d 722 (D.C. Cir. 2005).
guidance” issue since Judge Randolph’s watershed Appalachian Power opinion might be rather stunned at the new Chief Justice’s approach. Rather than looking at whether the Payor Letter changed legal rights and obligations of the parties, the court looked at the authority of the agency employee who signed the Payor Letter’s and the commonplace nature of the letter.

First, the court explained that the letter could not be legislative because the letter signer did not have “the authority to announce rules binding on DOI.” Such a holding would seemingly render almost all guidance documents, letters, and other pronouncements non-legislative. Very few documents (if any) that the D.C. Circuit and other courts have vacated as rules in disguise have actually been signed by the Secretary of a Department or the Administrator of an agency; many of them (such as the press release vacated in CropLife) are not signed by anyone.

Second, the court explained that the letter was commonplace, “the sort of workaday advice letters that agencies prepare countless times per year in dealing with the regulated community.” Yet, without an inquiry into whether

43. Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000). In this case the D.C. Circuit reined in an EPA attempt to impose new obligations on parties through a guidance manual. The most quoted passage from Judge Randolph’s manifesto reads as follows:

Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations.

Id. at 1020.

D.C. Circuit cases following Appalachian Power have generally been even more aggressive on this issue. For example, an EPA press release was vacated for being a rule in disguise in CropLife America v. EPA, 329 F.3d 876 (D.C. Cir. 2003).

44. 410 F.3d at 732.

45. See supra note 43.

46. 410 F.3d at 732 (quoting Indep. Equip. Dealers Ass’n v. EPA, 372 F.3d 420, 427 (D.C. Cir. 2004)).
legal rights and obligations have changed, it is unclear why the commonplace nature of the letter is relevant. Certainly, agencies write many letters for the purpose of clarifying and interpreting complicated regulatory schemes. Yet documents that cross the line into legislating new rights and obligations will likely be styled in the exact same manner as the letters which do not. It seems clear from the opinion (although perhaps the facts are somewhat different) that the agency intended to rely on the Payor Letter to set forth specific procedures for calculating royalty payments that were not previously understood by regulated parties. The result seems to be a significant change in legal rights and obligations (generally the test for legislative rules), reinforcing the surprising nature of this outcome to students of recent D.C. Circuit case law.

Another case grappling with the definition of a legislative rule is *Dismas Charities, Inc. v. United States Department of Justice.* 47 This case dealt with a change in the Department of Justice’s interpretation of the statute allowing federal prisoners to serve all or part of their sentences in a community corrections center, or halfway house, rather than in federal prison. A 1992 opinion from the Office of Legal Counsel (OLC) had concluded that the statute allowed the Bureau of Prisons virtually unlimited discretion to assign prisoners to private halfway houses to serve their terms. In 2002, OLC issued a new opinion that read the statute quite differently, significantly narrowing the circumstances in which such assignments were permissible. 48 The 2002 opinion, like its 1992 predecessor, purported to be nothing other than an interpretation of the statute. Neither OLC nor the Bureau of Prisons undertook notice-and-comment rulemaking; they simply changed their practice in light of their revised understanding of the statute.

The Sixth Circuit held that the interpretation was not a legislative rule and not subject to notice-and-comment procedures. Drawing on longstanding, if arguably unhelpful and naïve, caselaw, the court held that the rule was interpretive because it did not change or add to the law but merely explicated existing statutory requirements.

47. 401 F.3d 666 (6th Cir. 2005).
48. The Bureau of Prisons had been allowing certain offenders, typically with very short sentences, to serve their entire sentence in halfway houses (“front end assignments”). It had also been allowing offenders to transfer to halfway houses after serving a significant portion of a long sentence as a way of transitioning back into society (“back end assignments”). In light of the new “interpretation,” the Bureau of Prisons ended all front end assignments and limited back end assignments to less than 10% of an offender’s sentence. *Id.* at 669-71.
Chapter 7: Rulemaking

The distinction [between legislative and interpretive rules] reflects the primary purpose of Congress in imposing notice and comment requirements for rulemaking—to get public input so as to get the wisest rules. That purpose is not served when the agency’s inquiry or determination is not “what is the wisest rule,” but “what is the rule.” The interpretive rule exception reflects the idea that public input will not help an agency make the legal determination of what the law already is. The D.C. Circuit, for instance, in applying the interpretive rule exception, has “generally sought to distinguish cases in which an agency is merely explicating Congress’ desires from those cases in which the agency is adding substantive content of its own.”

The difficulty with this approach, of course, is that the 2002 opinion fundamentally modified a pre-existing interpretation. If the case had arisen in the D.C. Circuit, one would have expected the court to rule that the new interpretation therefore required notice and comment. In *Alaska Professional Hunters Ass’n v. FAA* the D.C. Circuit held that when an agency alters its interpretation of its own regulation the change itself requires notice and comment even though the original, now abandoned, interpretation was not subject to notice and comment precisely because it was merely interpretive. The principle has been much criticized, but the D.C. Circuit remains wholly committed to it.

The *Dismas* court cited *Alaska Professional Hunters* approvingly and (in what is technically dicta) announced that the same rule applies in the Sixth Circuit. However, it distinguished *Alaska Professional Hunters* on the ground that there the agency had modified its interpretation of a regulation; here the

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49. Id. at 680.
50. 177 F.3d 1030 (D.C. Cir. 1999).
52. See, e.g., U.S. Telecom Ass’n v. FCC, 400 F.3d 29, 35 & n.12 (D.C. Cir. 2005) (citing *Alaska Professional Hunters* approvingly). In one very recent case, the court again applied the *Alaska Professional Hunters* principle to set aside a re-interpretation. See Envtl. Integrity Proj. v. EPA, 425 F.3d 992 (D.C. Cir. 2005).
53. *Dismas*, 401 F.3d at 682 (“It is true that once an agency gives a regulation an interpretation, notice and comment will often be required before the interpretation of that regulation can be changed.”).
agency modified its interpretation of a statute. The court may have been stretching a bit to latch on to whatever it could to cabin Alaska Hunters, and the distinction it made has no evident basis in the APA. It is not absurd, however. What underlies Alaska Hunters is the court’s determination to avoid end-runs around notice-and-comment requirements. A legislative rule requires notice and comment; that requirement is eviscerated if the agency can modify the regulation as it sees fit through spurious “interpretation” without notice and comment. (As many have pointed out, this concern would apply equally to the original interpretation, which does not require notice and comment, as to the new, changed interpretation, which does, but that is a separate matter.) When the agency is interpreting a statute, it is not circumventing notice and comment, because the statute is not subject to notice and comment. In theory, it is simply explaining what the statute means, and if it has that wrong the courts can correct it on judicial review.

At any rate, the black-letter rule that emerges from Dismas seems to be that a fundamentally changed interpretation of an agency legislative rule requires notice and comment but a fundamentally changed interpretation of a statute does not. As of now, this is the rule only in the Sixth Circuit. From which side one attacks this rule will depend on one’s views of Alaska Professional Hunters.

F. Undoing Regulations

One case, Tunik v. Merit Systems Protection Board, considered the undoing of a rulemaking and implicitly the issue of which trumps which: adjudication or rulemaking? Rulemaking won. The Merit System Protection Board (the “Board”) promulgates regulations pertaining to Administrative Law Judges (ALJs) and adjudicates claims by ALJs relating to “decisional independence.” The Board promulgated a regulation providing ALJs with a right to file a complaint when an agency has interfered with their decisional independence. Through an adjudication, however, the Board announced that the regulation was no longer valid. The court reinstated the rule, explaining that if a regulation was subject to the notice-and-comment requirements of the APA, it may only be withdrawn using those procedures as well unless a statutory

54. Id.
55. 407 F.3d 1326 (Fed. Cir. 2005). This case is also discussed herein in Adjudication (supra at 17-18).
56. Id. at 1342.
exemption applies. 57 This rule was not covered by the APA’s exemption for matters relating to “agency organization, procedure, or practice,” 58 nor by the exemption for interpretive rules. The court noted that the regulation impacted not only the ALJs personally, but also “the broader interest of the public in having private rights adjudicated by persons who have some independence from the agency opposing them.” 59

PART II. ADMINISTRATIVE DEVELOPMENTS

A. The Big Picture

It is remarkably difficult to get good information on the overall amount of rulemaking being undertaken by federal agencies. But a couple of myth-correcting factoids might be of interest. Caveat Lector: The cautions and qualifications that should be given about the following statistics are too numerous to mention.

One rough-and-ready, though potentially quite misleading, proxy for overall regulatory activity is total pages in the Federal Register. 60 It shows that federal agencies had a busy year; indeed, they’ve had a busy few years. The 2004 Federal Register ran 78,851 pages. There have only been three years in the history of the Federal Register in which it was longer. One was 2002 (80,332 pages). The other two were the final years of outgoing Democratic administrations, when imminent departure concentrates the mind: 2000 (83,294) and 1980 (87,012, the all-time record). Thus regulatory activity in the current administration would seem to going on at an impressive rate. Indeed, in President George Bush’s first term, there were more Federal Reg-

57. Id. 1341-46.
59. Id. at 1344.
60. Although regulatory opponents have often associated total Federal Register pages with overall levels of regulation, the link is quite weak because, among other things, (a) a growth in pages can reflect longer preambles, not more rules, (b) deregulatory actions also take up Federal Register pages, (c) a statutorily required rule that is very lax consumes Federal Register pages but is not an indication of aggressive regulation, (d) an unusual, nonregulatory action (such as the Microsoft settlement in 2002, which consumed thousands of pages all by itself) can create a misleading blip, (e) many Federal Register pages are blank or nonsubstantive, but the proportion varies somewhat from year to year.
ister pages than in any other presidential term ever, and the total pages from the past three years exceed the total for any other three-year period in the nation's history.

Not that all of this activity is necessarily a bad thing. Under the so-called Regulatory Right to Know Act, OIRA must present Congress with an annual report detailing the costs and benefits of federal regulation. The most recent draft report, made available for comment on March 23, 2005, paints a very rosy picture of the benefits of the major rules that went through OIRA between October 1, 2003 and September 30, 2004. In sum, costs were substantial, totaling between $3.8 and $4.1 billion; but these were a fraction of the benefits, which were from $12.6 to $108.5 billion. Reviewing the previous ten-year period, OMB found annual costs between $34.8 and $39.4 billion and benefits between $68.1 and $259.6 billion.

B. The Quality of the Information Quality Act

As illustrated by the discussion above of Chamber of Commerce v. SEC, much of the controversy surrounding many rulemakings (and other important agency decisions) comes down to disagreement over the quality of the information relied on by the agency. Because data disputes are so central to many rulemaking challenges, administrative law practitioners who represent regulated industries have been intrigued and encouraged by the Information Quality Act ("IQA"), while those with the opposite perspective or different clients have been bothered and dismayed. Passed quietly in 2000, the IQA

64. OMB, Draft Report, supra note 62, at 3.
65. For contrasting views on the IQA, compare Karl S. Bourdeau, Information Quality Act Challenges to Flawed Use of Science, 19 NAT. RES. ENVT. 41 (Spring 2005) (endorsing the IQA as a valuable tool to ensure sound and responsible agency reliance on scientific information, though lamenting the nascent trend of denying judicial review under the Act) with Thomas O. McGarity et al., Truth and Science Betrayed: The Case Against the Information Quality Act (Center for Progressive Regulation, March 2005) (labeling the IQA a "solution in search of a problem" that will lead to delay, distract agencies from more important work, and undermine effective regulation).
Chapter 7: Rulemaking

(formerly known as the “Data Quality Act”) requires OMB and agencies to develop guidelines ensuring the “quality, objectivity, utility, and integrity” of information disseminated to the public, and allows “affected persons” to request an agency to “correct” information it has disseminated.66

The “request for corrections” (RFC) procedure, now in place and functioning at most federal agencies,67 is starting to be considered, at least by regulated industries, as an effective way to influence agency rulemakings. For example, where an agency has published incorrect information outside of a rulemaking, the information can be corrected before the agency relies on it to begin a rulemaking. Where rulemaking has already commenced, a request for correction can be submitted independent of the regular comment process. The agency’s impulse will be to consider the request in the ordinary course, along with other comments on the proposed rule, and doing so will often be entirely appropriate.68 However, in some circumstances it may act on the request and make the correction before it publishes the final rule.69 This can

69. EPA’s policy, for example, is to consider requests for correction prior to final agency action in a rulemaking where (a) an earlier response to the request for correction would not unduly delay final action and (b) the requestor shows a reasonable likelihood of suffering harm from the dissemination of the incorrect information. See Guidelines for Ensuring and Maximizing the Quality, Objectivity and Integrity of Information Disseminated by the EPA, October 2002, p. 32. Similarly, the Department of Transportation states that when an RFC is made in the context of a rulemaking the agency will “normally” respond “in the next document we issue in the matter,” which might well be the preamble to the final rule. However, it will “consider” making an earlier
help inform other interested parties commenting on the rule, correct public perception, and possibly affect the outcome of the rulemaking. Furthermore, there is no deadline for submitting a request for correction, providing parties who may have missed a filing deadline for judicial review with an alternative way to refocus agency attention on an issue. 70

Three recent developments under the IQA bear noting.

1. **Requests for Corrections**

The IQA requires each agency to report the number of IQA requests it receives each year to OMB. 71 In August 2004 OMB went further, instructing the agencies to post the requests and the agency responses on publicly available web pages. 72 The agencies were to have these sites in place by December

response if (a) doing so will not delay the final action in the matter and (b) there was likely to be “an unusually lengthy delay” before the final document was issued or the requestor would suffer actual harm were the correction delayed until the agency took final action. U.S. Dep’t of Transp., *Guidelines for Ensuring and Maximizing the Quality, Objectivity and Integrity of Information Disseminated by the Department of Transportation*, § VIII(h). These sorts of provisions are typical.

70. One Fish & Wildlife Service official recently testified:

Our current approach to IQS requests which are received during a rulemaking but after the close of a comment period is to prepare our response prior to the final rulemaking, with release of a written response after the final rule is published. In such a case, all the issues raised in the IQA petition are addressed separately from the rulemaking, and a separate response is prepared prior to the publication of the rule. The responses to the questions in the petition do, however, inform the rulemaking process. This approach has served to raise issues that may have been overlooked in the more general rulemaking process and, we believe, improved our final products.

*Improving Information Quality in the Federal Government, Hearing Before the Subcomm. on Regulatory Affairs of the House Comm. on Gov’t Reform, 109th Cong. (July 20, 2005), Prepared Testimony of Tom Melius, Ass’t Dir. for External Affairs, U.S. Fish & Wildlife Service at 4.*

71. IQA § 515(b)(2)(C).

1, 2004. As of June 2005, OMB was aware of 26 agencies with "OMB compliant" web sites.\textsuperscript{73} Some of these go beyond OMB’s requirements. For example, at the suggestion of James Conrad and Sid Shapiro, EPA now posts "third party correspondence" filed in connection with correction requests.\textsuperscript{74}

The statistics available on these sites and collected by OMB\textsuperscript{75} show that on the one hand RFCs are increasing but on the other hand they have not become overwhelming.\textsuperscript{76} Indeed, it would seem that the agencies are taking the requests seriously and addressing them in a reasonably timely fashion. EPA has received 32 such requests since 2002, and is currently responding to requests in about three months.\textsuperscript{77} The Department of Health and Human Services ("HHS") has received 24 requests in this time frame, and appears to be responding in about 6 months.\textsuperscript{78} The Department of Transportation received nine requests from August 15, 2004 to August 15, 2005 and responded to several within weeks. The Fish and Wildlife Service received five requests in FY 2004 and responded to all but one in four to eight weeks.\textsuperscript{79} Overall, then, requestors are receiving responses much faster than would typically be expe-

\textsuperscript{73}\ OMB, Draft Report, supra note 62, at 55 (listing the sites).
\textsuperscript{74}\ See http://www.epa.gov/quality/informationguidelines/thirdparty.htm.
\textsuperscript{75}\ OMB’s tallies appear in OMB, Information Quality, supra note 67, and, somewhat updated, in chapter III of OMB, Draft Report, supra note 62.
\textsuperscript{76}\ Just how burdensome the IQA is proving to federal agencies is a matter of dispute between its supporters and its detractors. For contrasting portrayals of the first year of RFCs, see OMB, Information Quality, supra note 67, at 8, 9 (noting that agencies had not been overwhelmed by RFCs and that there had been no slowdown in the regulatory process), and OMB Watch, The Reality of Data Quality Act’s First Year: A Correction of OMB’s Report to Congress 5-6, 8-9 (July 2004) (concluding that many more substantive requests had been filed than OMB realized and that the IQA has in fact led to a regulatory slowdown).
\textsuperscript{77}\ See http://www.epa.gov/quality/informationguidelines/iqg-list.html. Some individual requests have taken far longer for EPA to answer. For example, one petition, challenging claims on various EPA web pages that bromate was a likely human carcinogen, was filed July 21, 2003; EPA responded April 28, 2004; the requestor filed a request for reconsideration on September 23, 2004; EPA responded to that request June 9, 2005. See id., RFC#12385.
\textsuperscript{78}\ See http://aspe.hhs.gov/infoquality/requests.shtml.
\textsuperscript{79}\ See http://www.fws.gov/informationquality/ (accessed Oct. 15, 2005). However, one FWS official has said that the Service’s guidelines, which call for a response within 45 business days, are unrealistic and must be amended. See Melius testimony, supra note 70.
rienced through the notice and comment process. Were the number of requests to soar, no doubt the response time would as well. So far, there has been no inundation, but neither is the burden on agencies trivial.

2. Availability of Judicial Review

The potential usefulness (or disruptiveness, depending on one’s perspective) of the IQA has been curbed by two United States district court cases holding that an agency IQA disposition does not issue a ticket to court, either via a private cause of action under the Act itself or through judicial review under the APA.80

In Salt Institute v. Thompson,81 the plaintiffs alleged that a division of HHS violated the IQA by reporting the results of a trial study on its website, and recommending that people limit their sodium intake to low levels, without disclosing the methodology and baseline data for the study. Plaintiffs filed a request for correction; HHS treated the matter as a FOIA request and ultimately produced some but not all of the requested information. Alleging that the disclosure was incomplete, the plaintiffs sued. The district court dismissed the complaint as nonjusticiable for three reasons. First, the IQA lacks an express private right of action. Second, a determination under the IQA is not a final action reviewable under the APA. “Agency dissemination of advisory information that has no legal impact has consistently been found inadequate to constitute final agency action and thus is unreviewable by federal courts under the APA.”82 Finally, review was precluded under section

81. 345 F. Supp. 2d 589 (E.D. Va. 2004), appeal pending, No. 05-1097 (4th Cir.). The case has two plaintiffs-appellants: the Salt Institute and the U.S. Chamber of Commerce, and several other industry groups have filed amicus briefs in the court of appeals urging reversal. As of this writing (October 2005) the case has been fully briefed and argued but remains pending. To our knowledge, no other litigation challenging an agency’s action on a RFC is currently pending.
82. Id. at 602.
Chapter 7: Rulemaking

701(a)(2) of the APA because a decision on a request for correction is "committed to agency discretion by law."^83

The court's ruling as to the implied private right of action seems entirely consistent with modern standards for implying private rights of action, which have grown distinctly ungenerous in recent decades. The other two aspects of its ruling, however, are at least questionable. The reference to the nonjusticiability of challenges to agency release of information is simply inapt; the plaintiffs were not challenging the dissemination of information, they were challenging the denial of a specific, congressionally authorized request for agency action. The agency took final action on the petition. The committed-to-discretion theory, which was also the basis for the one other ruling dismissing an IQA claim as nonjusticiable,^84 strikes us as stronger but still debatable. The extensive OMB guidelines provide "law to apply," as do, for that matter, each agency's own guidelines (it being black-letter law that an agency is bound by its own rules). To be sure, the statute leaves it largely to OMB and the agencies to devise the content of the guidelines, and in that sense it may have committed the substantive decisionmaking to agency discretion. But on that reading, a huge amount of what agencies do under broad congressional delegations would be unreviewable, which it simply is not.

3. **OMB's Peer Review Guidelines**

OMB released its final Data Quality Guidelines—which in turn are the basis for each agency's own Guidelines—in January 2002. Several provisions in the Guidelines push agencies toward limiting the studies on which they rely when regulating to those that have been subject to peer review. In particular, the Guidelines impose particularly stringent requirements of objectivity and accuracy on information that is "influential," a term that includes, though it is not limited to, studies or information that an agency relies on in a rulemaking.

In December 2004, OMB went a step further, issuing its final Informational Quality Bulletin for Peer Review, often referred to as the "Peer Review

^83. *Id.* at 603.
^84. See *In re Operation of the Missouri River System Litigation*, 363 F. Supp. 2d 1145, 1174-75 (D. Minn. 2004) (stating that IQA claim is nonjusticiable because of the lack of "any meaningful standard" against which to evaluate the agency's exercise of its discretion).
Guidelines.” The Guidelines’ basic requirement reads: “To the extent permitted by law, each agency shall conduct a peer review on all influential scientific information that the agency intends to disseminate.” “Influential scientific information” is defined as “scientific information the agency reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions.” The agency need not conduct its own peer review for information that has already been subject to peer review, and has a fair amount of flexibility in determining the particulars of any peer review it does conduct. However, more stringent and specific peer review requirements apply with regard to “highly influential scientific assessments.” A scientific assessment is a document that synthesizes a body of scientific knowledge, such as state-of-science reports, technology assessments, or weight-of-evidence analyses; it is “highly influential” if it “could have a potential impact of more than $500 million in any year or . . . is novel, controversial or precedent-setting or has significant inter-agency interest.”

It is in the context of rulemaking that the peer review requirements are apt to be most consequential, because it is in this setting that scientific assessments are most likely to be “influential” or “highly influential.” As is the case with regard to other aspects of the IQA, supporters and opponents have not dissimilar expectations; it’s just that those expectations qualify as hopes for one group and fears for the other. Neither is really sure that anything of consequence will result from the new guidelines, but it is at least possible that they will make it significantly more difficult for agencies to issue scientifically controversial regulations. The new Guidelines took effect with regard to highly influential scientific assessments on June 16, 2005. As of this writing it is simply too early to determine what effect, if any, they have had or will have.

85. OMB, Final Information Quality Bulletin for Peer Review, 70 Fed. Reg. 2664 (Jan. 14, 2005). The final guidelines, which were not significantly changed from the revised proposal issued in April 2004, were greeted with predictable hostility in some quarters. For example, Rep. Waxman has introduced legislation to deprive them of all force and effect, see H.R. 839, Restore Scientific Integrity to Federal Research & Policymaking Act, § 7, 109th Cong. (2005).
86. Id. § II.1, 70 Fed. Reg. at 2675.
87. Id. § I.6.
88. Id. § III.1.
C. E-Rulemaking

On the e-rulemaking front, there was progress but no major breakthrough. Individual agencies continued to create and refine electronic docket management systems; as it historically has, the Department of Transportation (http://dms.dot.gov/) seems to continue to lead the pack. Individual agency sites vary significantly in their ease of use, completeness, speed, and accuracy.

These efforts have improved notice-and-comment rulemaking, particularly by making the rulemaking docket more accessible, without transforming it. Two things, by and large, have not happened. First, rulemaking has not become significantly dialogic. Agencies might do more to encourage dialogue, particularly in the form of comments on comments during a reply period after the close of comment period. The FCC is one example of an agency whose informal practice tends strongly in this direction.

Second, visions of new democratic legitimacy through enhanced public participation have gone unrealized. Mass emails by individual citizens, often duplicative and organized by an advocacy organization, have proved not especially valuable and tend to be dismissed as annoying clutter by those within the agency. Indeed, one particularly well-informed observer, Stuart Shulman, has concluded that mass commenting via email actually does more harm than good. 89

Individual agency projects exist alongside the administration’s overall e-rulemaking initiative. 90 This is one of 25 E-Government initiatives, all overseen by the Office of Management and Budget. In late 2002 OMB named EPA the “managing partner” for the e-rulemaking initiative. An EPA official, Oscar Morales, heads the e-rulemaking Program Management Office. The PMO is overseen by an Advisory Board with representatives from 27 agencies, and an Executive Committee. The e-rulemaking initiative consists of three projects

89. Professor Shulman has made this observation in various fora. See, e.g., Conference on the State of Rulemaking in the Federal Government, American University Center for the Study of Rulemaking (March 16, 2005), available at http://www.american.edu/rulemaking/panel4_05.pdf.

90. Research and writing continues to increase apace. The two best on-line sources of information and citations are www.erulemaking.org (maintained by Prof. Cary Coglianese at Harvard University’s Kennedy School of Government) and http://erulemaking.ucsur.pitt.edu/default.html (the e-rulemaking research group site maintained by Prof. Stuart Shulman at the University of Pittsburgh).
(or “modules,” as its participants like to say): (1) the regulations.gov website, (2) a centralized federal docket management system, and (3) an integrated federal rulemaking system or “Regulation-Writers Workbench.”

1. Regulations.gov

The regulations.gov website, optimistically subtitled “your voice in federal decision-making,” went on-line in January 2003. The site provides access to rules currently open for comment from virtually all federal agencies. Users can search by keyword for proposals of interest government-wide. They can view and download Federal Register notices and submit comments, which are available in either HTML or PDF format. These are important innovations, but in this incarnation the site has limited ambitions: it does not provide access to rulemaking dockets, enable commenters to read others’ submissions, or provide information on rulemakings for which the comment period has closed.

As of June 2005, after approximately two and a half years of operation, the site had received 8.9 million hits, with 1.1 million unique visitors, 12,000 comments submitted, and almost 1 million document downloads. Use of the site has increased each quarter. However, it seems to be functioning primarily as a source of information for users, and not as a conduit for commenting on proposed regulations. A government-wide total of 12,000 comments in two and a half years is quite paltry; almost no one who uses the site submits a comment, and almost no one who submits comments uses the site.

The regulations.gov website has received or been nominated for a number of awards. In 2004, it received a Public Access to Government Information Award from the American Association of Law Libraries and an AFFIRM

93. See EPA, 2005 President’s Management Agenda Results Report 3 (July 2005), available at http://www.epa.gov/pmaresults/pdfs/2005report.pdf (accessed Oct. 18, 2005). In the third quarter of calendar year 2004 the site received almost 1,400,000 hits; approximately 1,000,000 pages were reviewed; and approximately 100,000 items were downloaded. In the fourth quarter, the first two increased slightly, downloads fell slightly. In the first quarter of 2005, hits reach about 1,700,000; more than 1,200,000 pages were reviewed, and downloads shot up to more than 600,000. Id. (bar graph). The huge jump in downloads would seem aberrational.
Service to the Citizen Award. In April 2005, regulations.gov was named as one of 18 finalists chosen from over 1,000 applicants for the Innovations in American Government Award given by the Ash Institute for Democratic Governance and Innovation at the Harvard University's Kennedy School of Government.94 The site was not one of the five winners chosen from the finalists.

2. The Federal Docket Management System

The regulations.gov website has always been conceived as an interim measure, to be replaced by the second module of the e-rulemaking initiative: a single, government-wide docket management system. The initiative managers have held a number of public forums across the country to solicit suggestions and input, consulted with dozens of federal agencies, and made significant progress in its preparation.95 E-Rulemaking officials have opted for a centralized, rather than a tiered or a distributed, design, asserting that the system will save the federal government $94 million over three years.96 The FDMS, which will be based on EPA's e-docket system, will serve as a central repository for agency rulemaking documents, supporting materials, and public comments. It will be both an image- and a text-based system, allow Boolean and compound searches, and also include a listserv. During the time period covered by this chapter, the details of the new system were still being designed.97 One important contribution to that debate was a "scholar's letter" that offered extensive suggestions on the characteristics that would ensure the new site is effective and useful; the letter provides a valuable set of design ideas and a window into the discussions taking place.98

95. For a thorough overview, see U.S. GOV'T ACCOUNTABILITY OFFICE, ELECTRONIC RULEMAKING: PROGRESS MADE IN DEVELOPING CENTRALIZED E-RULEMAKING SYSTEM (GAO-05-777) (Sept. 2005).
96. Id. at 3.
Individual agencies started to migrate their rulemaking e-dockets to the new FDMS in May 2005. The agencies participating in this Phase I were to be EPA, the Department of Housing and Urban Development, the Animal and Plant Health Inspection Service (Department of Agriculture), portions of the Department of Homeland Security, and the National Archives and Records Administration. The current schedule calls for public access to the FDMS in September 2005, and for additional agencies to be added to the system over several years thereafter.99

3. The Rulewriters’ E-Toolbox

For now the “toolbox” remains rather conceptual as e-rulemaking officials’ concentration is focused on developing the FDMS. The plan is to provide a suite of tools “to assist in the development, review, and publication of federal regulations and the analysis of public comments,” including an electronic library, a “collaboration zone” for virtual meetings, workflow and scheduling tools, data mining and other tools for analyzing information, an online rule writing handbook, and “dashboard to display the real-time performance of the process.”100 The timing and final shape and scope of the toolbox both seem quite uncertain.

PART III. LEGISLATIVE DEVELOPMENTS

A. Enacted Legislation

No significant piece of legislation affecting the federal rulemaking process was enacted during the relevant time frame.

Congress did enact the Federal Regulatory Improvement Act of 2004,101 which reauthorized funding for the late lamented Administrative Conference of the United States. This legislation could lead to rulemaking reforms, but any such are a long ways off, since Congress has not seen fit to actually

appropriate funds for the reauthorized ACUS, which remains only a gleam in Congress’s eye.

This period also confirmed, once again, that the Congressional Review Act—hailed by Representative David McIntosh at the time of its passage as “the most significant change in regulatory law in 50 years”102—is an irrelevancy. Joint Resolutions of Disapproval were in fact introduced in both houses concerning two separate agency rules: a Department of Agriculture regulation reopening the border to Canadian beef imports, which had been restricted because of concern over mad cow disease,103 and EPA’s mercury rule.104 Both resolutions actually reached the floor of the Senate, and the first was even approved, 52-46.105 (This marks only the third and fourth times that a Joint Resolution of Disapproval has been voted on by the Senate.106) No action was taken on either House Joint Resolution. Needless to say, had either resolution been passed by both houses, it would have been vetoed by the President. Thus, while two resolutions went almost unprecedentedly far, the real lesson is that the inherent structures of the CRA render it a virtually unusable tool for review of agency rulemaking.

Two pending bills107 could slightly increase the chances that Congress would actually disapprove regulations. These would create a new 24-member (12 Senators and 12 Representatives) bi-partisan joint committee to review proposed resolutions of disapproval, which currently are referred to the ap-

106. The two previous instances were (1) the disapproval of OSHA’s ergonomics rule in March 2001 (the one instance in which a regulation has in fact been rejected under the CRA) and (2) a resolution disapproving the FCC’s media ownership rules, which passed the Senate in 2003 by a vote of 55-40 but was never acted on by the House. A Congressional Research Service (CRS) report indicates that as of July 2005, 37 joint resolutions of disapproval have been introduced, relating to 28 different rules. See generally Morton Rosenberg, Congressional Review of Agency Rulemaking: An Update and Assessment After Nullification of OSHA’s Ergonomics Standard (updated July 20, 2005) (CRS Report RL30116).
propriate jurisdictional committee in each house. The proposals would also establish an expedited procedure for considering disapproval resolutions in the House. Presumably a joint committee assigned solely to considering disapproval resolutions would be more likely to report out, and press for passage of, such resolutions, for it would have nothing else to do and would need to justify its existence and/or would not be distracted by other tasks. Opponents object that creation of this committee would mean that agency rules would be reviewed by members lacking in subject-matter expertise and who would be more easily targeted by lobbyists. In any event, alterations of the committee structure would not affect the fundamental obstacles to action under the CRA, which are the constitutionally required bicameralism and presentment provisions.

B. Pending Bills

Several pending bills with some chance of passage would make significant changes to the rulemaking process. Each, however, has failed of passage in Congresses past.

108. H.R. 3148 would also assign the joint committee the task of submitting comments on each agency’s regulatory plan to OIRA and authorize it to review existing regulations in order to suggest to Congress or the relevant agency that they be amended or repealed.

109. One bill has no chance of passage but merits mention nonetheless because the proposal is bold. As he has done in prior Congresses, Representative Hayworth (R-AZ) has introduced a bill that would require congressional enactment for any agency rule (except for those exempted from section 553’s notice-and-comment requirements) to be effective. See The Congressional Responsibility Act, H.R. 931, 109th Cong. (2005). A Senate version is not currently pending, although in years past Senator Brownback (R-KS) has introduced one. See, e.g., S. 908, 107th Cong. (2001). The bill would establish a fast-track, limited debate procedure for considering agency regulations in the form of a bill. The bill’s title implies that it is a response to concerns with the Congress’s delegation of legislative authority to the agencies, aiming to ensure more democratic and accountable policymaking. It seems highly unlikely that it would have any such effect in the real world. Rather, the bill’s most important effects would be (1) an overall reduction in regulatory activity and (2) the elimination of judicial review of agency rulemaking under the APA. The latter consequence is implicit in the fact of enactment of regulations as statutes, and explicit in section 7 of the bill, which states that a regulation contained in an enacted bill would not constitute “agency action” under the APA.
1. **H.R. 725, Paperwork and Regulatory Improvements Act**

This proposed amendment to the Paperwork Reduction Act aims to increase regulatory accounting and evaluation. Section 5 of the bill would make permanent a pilot project created by the Truth in Regulating Act of 2000 that never got off the ground for lack of funding. Under this proposal the General Accounting Office (GAO) would respond to Congressional requests for an evaluation of proposed regulations. The theory seems to be that congressional oversight of the rulemaking process, whether through oversight hearings, new legislation, the Congressional Review Act, or direct participation in the notice and comment process, would be enhanced by an “independent” evaluation of agency regulations. GAO itself is not enthusiastic about H.R. 725; it has expressed concern over the burdens of doing such analyses, opposes making the program permanent, at least without a specific appropriation to support the work, and has suggested trying a genuine, funded pilot program instead. Second, the bill contains a number of provisions to promote “regulatory accounting.” Most important, it would (a) require agencies to submit annual estimates of the costs and benefits resulting from their rules and (b) set up “pilot projects in regulatory budgeting” at three of five agencies (Labor, Transportation, EPA, and two others to be selected by OMB).

2. **H.R. 2840, Defense of Privacy Act**

This bill would add a new section 553a to the APA requiring agencies to prepare initial and final “privacy impact statements” as part of any notice-and-comment rulemaking. The bill is modeled closely on the Regulatory Flexibility Act, which requires agencies to consider the impacts of regulations on small businesses. Indeed, it comes close to just substituting “the privacy of individuals” for every occurrence of “small entities” in the Regulatory Flexibility Act. Thus, the bill would not directly limit the gathering, use, or disclosure of personal information about individuals; rather, it trusts that forcing the agency to stop and think about, and to make public, its decisions in this regard will induce the appropriate level of respect for individual privacy.

110. Another pending bill that would also render the pilot project permanent is H.R. 1167, introduced by Rep. Kelly.

Outside of Congress, there is general consensus that the last thing the rulemaking process needs is yet another analytic or impact statement requirement. The ABA’s Section of Administrative Law and Regulatory Practice formally opposed a prior version of this proposal. While it does not appear that this bill is on the verge of being enacted, earlier versions passed in the House in the 107th Congress and were reported out of the House Judiciary Committee in the 108th Congress. The bill has strong supporters from various parts of the political spectrum. As in the past, the bill was introduced by Rep. Steve Chabot (R-OH); Rep. Jerrold Nadler (D-NY) is a co-sponsor; and it has supporters across the political spectrum.

3. S. 1388, The Regulatory Flexibility Reform Act & H.R. 682, Regulatory Flexibility Improvements Act

Although not identical, these amendments to the Regulatory Flexibility Act largely overlap. Each would require agencies to review all existing regulations with a significant economic impact on small entities every 10 years. In addition, each would expand the coverage of the Regulatory Flexibility Act to a greater universe of agency actions—all rules with either a direct or indirect economic effect on small entities, which would now include non-profit organizations—and require a more detailed and thorough regulatory flexibility analysis, including a consideration of proposed rules’ indirect and cumulative costs on small businesses. One gets a feel for the proposal from what is section 4(b)(1) of both bills. This would amend various provisions dealing with final regulatory flexibility analyses by striking the term “succinct,” striking “summary” each place it appears and replacing it with “statement,” replacing “explanation” with “detailed explanation,” and replacing “description” with “detailed description.”

113. 148 CONG. REC. H7033 (Oct. 7, 2002).
115. Another proposal, the Major Regulation Cost Review Act, H.R. 3143, 109th Cong. (2005), would require such review every five years. Id. § 2 (adding new 5 U.S.C. § 610a). Unlike the other two proposals discussed in the text, this bill expressly requires that the review of existing regulations include a full cost-benefit analysis.
To its supporters, such legislation is a necessary response to federal agencies’ disregard for the RFA; they see the FCC’s failure to prepare a regulatory flexibility analysis set aside in *United States Telecom Association* as typical of a general refusal to take the Act seriously. However, it is hard to see such a piling on of analytic burdens as anything other than an attempt to overwhelm regulatory efforts.

C. ACUS in Exile

In mid-2005, the Subcommittee on Commercial and Administrative Law of the House Judiciary Committee, chaired by Representative Cannon of Utah, initiated "The Administrative Law, Process and Procedure Project." This is a research project being coordinated by the Congressional Research Service. In the words of Rep. Cannon, "[t]he objective of the Project is to conduct a nonpartisan, academically credible analysis of federal rulemaking that will focus on process, not policy concerns.” The topics extend beyond rulemaking, but much of the project’s focus lies there. The goal is to solicit scholarly papers and empirical research which will be presented at a series of public symposia and compiled in a collection. In large measure, the project seems aimed at identifying an agenda for, and jump-starting the work of, the reauthorized but still unfunded Administrative Conference of the United States.