

A R T I C L E

Administrative Law, Filter Failure, and Information Capture

by Wendy E. Wagner

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There are no provisions in administrative law for regulating the flow of information entering or leaving the system, or for ensuring that regulatory participants can keep up with a rising tide of issues, details, and technicalities. Indeed, a number of doctrinal refinements, originally intended to ensure that executive branch decisions are made in the sunlight, inadvertently create incentives for participants to overwhelm the administrative system with complex information, causing many of the decisionmaking processes to remain, for all practical purposes, in the dark. As these agency decisions become increasingly obscure to all but the most well-informed insiders, administrative accountability is undermined as entire sectors of affected parties find they can no longer afford to participate in this expensive system. Pluralistic oversight, productive judicial review, and opportunities for intelligent agency decisionmaking are all put under significant strain in a system that refuses to manage—and indeed tends to encourage—excessive information. This Article first discusses how parties can capture the regulatory process using information that allows them to control or at least dominate regulatory outcomes (the information capture phenomenon). It then traces the problem back to a series of failures by Congress and the courts to require some filtering of the information flowing through the system (filter failure). Rather than filtering information, the incentives tilt in the opposite direction and encourage participants to err on the side of providing too much rather than too little information. Evidence is then offered to show how this uncontrolled and excessive information is taking a toll on the basic objectives of administrative governance. The Article closes with a series of unconventional

but relatively straightforward reforms that offer some hope of bringing information capture under control.

I. The Basics of Information Capture and Filter Failure

In the early 1970s, legal visionaries like Joseph Sax, Lynton Caldwell, and Ralph Nader pressed for a system of rules that would give the public greater access to administrative decisions. Their battle against smoke-filled rooms populated only by well-heeled insiders bore fruit, and Congress adopted important reforms aimed at letting the sunshine in.

An explosion of laws followed, requiring open records, rigorous processes for advisory groups, access to congressional deliberations, and demands that agencies go the extra mile to include all interested participants and to take their views into consideration.¹ During this same time, the courts also stepped up their oversight of the agencies. Most notably, they expanded standing rules to enable public interest representatives to challenge agencies in court when agency rules diverge significantly from promises made by Congress.

But every successful reform movement has its unintended consequences. What few administrative architects anticipated from the new commitment to “sunlight” was that a dense cloud of detailed, technical, and voluminous information would move in to obscure the benefits of transparency. And because rulemaking processes are by their very nature blind to the risks of *excessive* information, committed as they are to the flow of information and expansive participation, a new phenomenon—called “information capture”—is taking hold.

In the regulatory context, information capture refers to the excessive use of information and related information costs as a means of gaining control over regulatory decisionmaking in informal rulemakings. A continuous barrage of letters, telephone calls, meetings, follow-up memoranda, formal comments, post-rule comments, peti-

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1. Negotiated Rulemaking Act, 5 U.S.C. §§561–570.

tions for reconsideration, and notices of appeal from knowledgeable interest groups over the life cycle of a rulemaking can have a “machine-gun” effect on overstretched agency staff.² The law does not permit the agency to shield itself from this flood of information and focus on developing its own expert conception of the project. Instead, the agency is required by law to “consider” all of the input received.

The root cause of information capture is not administrative law’s commitment to open government and transparency, but rather its failure to require participants to self-process the information they load into the system, termed “filter failure” here.³ In most social and legal settings, participants have meaningful incentives to process and hone the information they communicate. Most notably, they want to be sure that the desired message is communicated in an efficient and effective way. Many areas of law are also sensitive to the problem of information excess and even consciously require actors to filter information before the legal system will recognize it. Most court battles, at least at the appellate level, involve explicit limits on the pages, margins, and even font size of briefs; the time allocated for oral argument; and the number of pages of attachments. And trials before juries—however indirectly—require counsel to distill and abbreviate the key message for a group of lay persons with average attention spans and educational levels. Trial courts also impose a number of important filters on evidence to ensure that counsel, rather than the judicial system, bear the cost of processing this information prior to introducing the evidence at trial.⁴

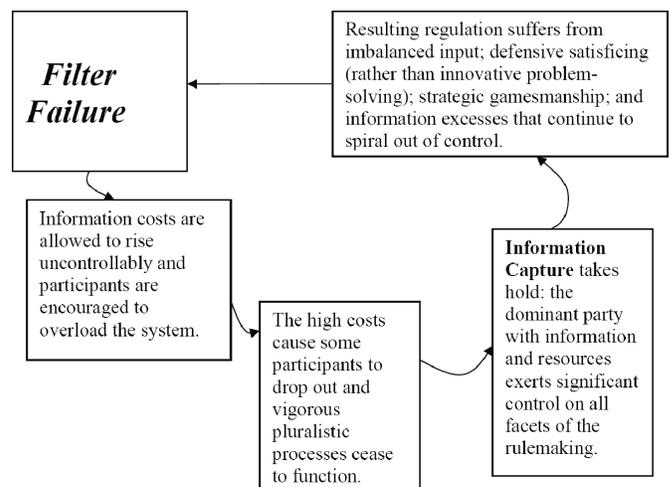
But administrative law is different. A commitment to open government and full participation is understood to preclude limits or filters on information, and the administrative system operates on the working assumption that all information is welcome and will be fairly considered.⁵ Indeed, the historic myth of agencies as experts may have locked the courts, Congress, and even the president into a kind of unrealistic expectation with regard to the unlimited capacity of agencies to resolve any question put to them.

Yet without filters, parties have little reason to economize on the information they submit to agencies. Participants are not held to any limits on the information they file, nor must they assume any of the costs the agency incurs in process-

ing their voluminous filings.⁶ Indeed, a variety of court rulings actually encourage regulatory participants to err on the side of providing far too much information, rather than too little. But as information costs rise, so do the costs of participation and this can affect the ability of some groups to continue to participate in the process and ultimately may cause thinly financed groups to exit for lack of resources.

In a participatory system already struggling against the odds to generate balanced engagement from a broad range of affected parties, filter failure is likely to be the last straw. Pluralistic processes integral to administrative governance threaten to break down and cease to function when an entire, critical sector of affected interests drops out due to the escalating costs of participation. Instead of presiding over vigorous conflicts between interest groups that draw out the most important issues and test the reliability of key facts, the agency may stand alone, bracing itself against a continuous barrage of information from an unopposed, highly engaged interest group. The agency will do its best to stay abreast of the information, but without pluralistic engagement by the opposition, which helps filter the issues, and without the support of procedural filters that impose some discipline on the filings of dominant participants, the agency may find itself fighting a losing battle. A system that puts the decisionmaker at the mercy of an unlimited flood of information from an unopposed group, which in turn can reinforce its filings by a credible threat of litigation, is captured by information. Figure 1 illustrates the dynamics of filter failure and information capture.

Figure 1: A Flowchart of Filter Failure and Information Capture



2. JAMES M. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 51 (1960).
 3. Clay Shirky coined the term “filter failure” at the September 2008 Web 2.0 Expo New York in his speech, *It’s Not Information Overload. It’s Filter Failure*, available at <http://web2expo.blip.tv/file/1277460/>.
 4. See, e.g., FED. R. EVID. 403 (permitting exclusion of relevant evidence if its value is substantially outweighed by other dangers).
 5. See, e.g., Sheila Jasanoff, *Transparency in Public Science: Purposes, Reasons, Limits*, 69 LAW & CONTEMP. PROBS. 21, 21-22 (2006) (discussing the commitment to and gradual expansion of the public’s right to access information underlying agency decisions).

6. The Freedom of Information Act is an exception to this general rule; it allows the agency to ask the requester to reimburse it for reasonable expenses incurred in responding to the information request. 5 U.S.C. §552, available in ELR STAT. ADMIN. PROC.

From the standpoint of a resourceful party, the ability to gain control of the rulemaking process through the use of excessive information may even be turned into a strategic advantage. Using technical terms and frames of reference that require a high level of background information and technical expertise, and relying heavily on “particularized knowledge and specialized conventions,” these fully engaged stakeholders can deliberately hijack the proceedings. Aggressively gaming the system to raise the costs of participation ever higher will, in many cases, ensure the exclusion of public interest groups that lack the resources to continue to participate in the process. Doing so all but assures that the aggressor will enjoy an unrestricted playing field and the ability to control the public input through all phases of the rulemaking life cycle.

Even when agency staff can withstand the technical minutia coming at them at high speed and under tight time constraints, they face an administrative record that is badly lopsided, and threats of lawsuits against the substance of their regulation that come predominantly from only one sector (industry). This skewed pressure may not cause them to cave in to each and every unopposed comment and technical addendum, but it likely affects at least some of the choices incorporated into the final rule.⁷ And when time is short, information capture becomes even more severe. Agency staff, even those who began their careers as true believers in their agency’s mission, may find themselves relieved to have regulations written by industry because this ensures a quicker path toward a final, binding rule.⁸

Collective action theory already highlights the grim plight of public interest groups saddled with multiple handicaps in organizing and participating. The resultant underrepresentation of the diffuse public—at least relative to its actual stake in the issue—is a constant worry for political processes. Information capture adds a new worry to the collective action story.

The costs of organizing are no longer the only impediment that public interest representatives need to overcome; instead, inflated information costs, beyond what is justified or necessary, further drive up the cost of participation and simultaneously lower the payoff, at least to public interest groups that will find it increasingly difficult to translate the issues into tangible public benefits. In economic terms, as the costs go up and the payoff goes down, these thinly financed and salience-dependent groups that represent the public will drop out of the process.⁹ Indeed, they may even drop out midway through the rulemaking after realizing that they can no longer justify their involvement to donors and other funders.

These rising information costs can take a variety of forms in the regulatory system. Communications bulging with undigested facts are the most common type of information excess and include redundancies and peripheral issues that must be culled out; discussions pitched at too specialized a level or demanding an unreasonable level of background information from the reader; and discussions delving into very intricate details, many of which are of trivial significance. All of these information excesses serve to inflate the participants’ costs in processing the information. Secrecy and deception also impose unjustified information costs on other participants if they are not able to access the information cheaply or at all. Even thinly supported litigation threats and marginally meritorious lawsuits can increase information-related costs for recipients (that is, defendants) to unreasonable levels.

The results of this information capture resemble the outcomes expected from more traditional forms of capture, but the mechanisms through which industry capture occurs are actually quite different from and at odds with these early public choice models. Most versions of old-fashioned agency capture depend on wooing malleable agency staff and officials with contributions or promises of future employment.¹⁰ Information capture, by contrast, thrives even in cases in which officials are principally opposed to the skewed outcomes that may result. The end result, however, is the same. In information capture, just as in old-fashioned capture, the stakeholders with relatively greater resources are able to dominate the outcomes and often do so free of oversight by onlookers—not because the deals have been struck through financial inducements, but because they are so technical and complicated that in practice they take place at an altitude that is out of the range of vision of the full set of normally engaged and affected parties.

II. How Administrative Law Enables Information Capture

The Administrative Procedure Act (APA)¹¹ and related open government statutes create the perfect substrate for the growth and nourishment of information capture. Administrative law instructs interest groups that if they plan to file comments that can be backed by legal challenge, then the comments need to cover the waterfront of their concerns and ideally do so in detail. At the same time, administrative law places no restrictions on the size, number, detail, or technicality of the issues that can be raised—the sky is the limit. As a result, parties can inadvertently or deliberately exert substantial control over the agency’s agenda in the number, diversity, detail, and even

7. See, e.g., Wendy E. Wagner et al., *Air Toxics in the Boardroom: An Empirical Study of EPA’s Hazardous Air Pollutants Rules 19-22* (Nov. 13, 2009) (unpublished manuscript, on file with the *Duke Law Journal*).

8. For examples of these informationally overloaded regulations, see Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 *DUKE L.J.* 1321, 1347-51, 1378-96 (2010).

9. See, e.g., NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 8 (1994).

10. See, e.g., Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 *J.L. ECON. & ORG.* 167, 178 (1990) (“‘Capture’ is the adoption by the regulator for self-regarding (private) reasons, such as enhancing electoral support or postregulatory compensation, of a policy which would not be ratified by an informed polity free of organization costs.”).

11. Administrative Procedure Act, 5 U.S.C. §§551–559.

the framing of the multiple comments they lodge, as well as with the information they share earlier in the process. As long as the court reviews the agency's action based on an unlimited record that commenters have a hand in creating, information becomes almost akin to a choke collar that can be used at the whim of interest groups to control the agency's factual record and even its policymaking agenda.

Even worse, agencies themselves develop coping strategies that can aggravate the information capture problem. If the agency receives reams of unprocessed material from interest groups and is held responsible for synthesizing it, then the agency's own process is likely to mirror these information pathologies, if not exacerbate them. An enormous record of highly technical and somewhat extraneous comments that delve into tedious and often unnecessary detail will tend to be reflected in the agency's own rule in order to avoid accusations of insufficient attention to detail. Such an opaque rule may have the added benefit of being more likely to escape rigorous judicial scrutiny and may even discourage thinly financed parties from taking on the rule as a litigation project. Along these same lines, if the agency must respond to all comments yet cannot change the rule substantially without starting over, then the agency will engage interested parties much earlier in the process of developing the rule, even though this might defeat the idea of ensuring balanced and vigorous participation by a diverse set of interest groups. Even litigation threats at the conclusion of a rule may cause the agency to develop nontransparent coping mechanisms for adjusting rules after the fact, an exercise made easier when the rule generally escapes understanding by most onlookers.

In the abstract, courts would seem ideally suited to provide a reality check on Congress's unrealistic faith in the agency's ability to stay abreast of the avalanche of information that must be processed when developing a rule. But in APA case law, the courts have generally reinforced, and even expanded, the incentives for information excess and filter failure.¹²

The courts' first unhelpful contribution to administrative process is to relegate to obscurity the one provision Congress did make for requiring agencies to filter information. In the APA, the agency is required to provide a "*concise general statement* of their basis and purpose [for the rule]."¹³ Despite the intent of the provision, courts hold an agency in violation of the "concise general statement" requirement only when the agency fails to provide enough information, not when it provides too much.¹⁴ From this case law, Prof. Richard Pierce concludes that "[t]he courts have replaced

the statutory adjectives, 'concise' and 'general' with the judicial adjectives 'detailed' and 'encyclopedic.'"¹⁵

The demise of the concise general statement is just the beginning of the trouble, however. Not only do the courts reject the need for filters on the agencies' communications (despite some congressional intent otherwise) but their opinions greatly exacerbate the risk of information excess and inaccessible rulemakings. By far the strongest incentive for agencies to actively load their rule and record with details and defensive statements is the hard look doctrine.¹⁶ Adding to the litigation worries created by hard look review is the occasional demand by courts that the agency develop substantial evidence in support of its protective regulation.¹⁷ The agency's only responsible course of action when faced with these doctrinal demands is to engage in defensive overkill when developing rules.

The incentives for information excess arising from judicial review affect not only the agencies but also the interest groups that participate in the rulemaking process. Case law sends a signal to these parties that is quite similar to that transmitted to the agencies; namely, to include in their comments highly specific, very detailed, extensively documented comments on every conceivable point of contention, and to back up their comments with the threat of litigation. Attorneys working primarily for industry stress that the most important task for their clients is to "build the best record" they can, observing that "[w]ritten comments are the single most effective technique" for doing so: "Make sure that you submit to the Agency *all* relevant information supporting your concerns in the rulemaking. This is the best way to convince the Agency to respond favorably to your concerns."¹⁸ Because there are no limits to the information that agencies are expected to process, there is no need for these commenters to provide succinct statements of their complaints. Instead, they can leave the task of processing the information to the agencies.

Several unrelated doctrines further reinforce the incentives for stakeholders to use information as an offensive weapon in their dealings with agencies. First, the courts generally require that only parties that file comments during the notice-and-comment period can later be involved in litigation against the agency.¹⁹ The courts' demand that parties exhaust their administrative remedies was originally conceived of as a way to save agency resources, both by avoiding "premature interruption" of the rulemaking process and by bringing the courts into the picture only as a last resort. But because the threat of litigation may be

12. Cf. JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 126 (1999) ("It seems virtually undeniable that the major procedural developments in American administrative law from the Administrative Procedure Act to the present have been the work largely of the courts or of the chief executive.")
 13. 5 U.S.C. §553(c) (emphasis added).
 14. See, e.g., *Indep. U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 854–55 (D.C. Cir. 1987) (holding that the Secretary of Transportation's statement of basis and purpose failed to provide an adequate account of how the rule served the Merchant Marine Act's objectives, and thus vacating the rule).

15. 1 RICHARD J. PIERCE JR., ADMINISTRATIVE LAW TREATISE §7.4, at 596 (5th ed. 2010).

16. *Id.* at 593.

17. See, e.g., *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 614, 10 ELR 20489 (1980).

18. Andrea Bear Field & Kathy E.B. Robb, *EPA Rulemakings: Views From Inside and Outside*, 5 NAT. RESOURCES & ENV'T, Summer 1990, at 5, 9–10 (collecting the most important advice from the top attorneys interviewed for their report).

19. See generally *McKart v. United States*, 395 U.S. 185 (1969) (setting out the reasons for exhausting remedies first within the agency before raising the issue with the court).

the only, or at least the best, way for stakeholders to get the agency's attention during the rulemaking process, they have strong incentives to err on the side of including every plausible argument in their comments in order to lay the groundwork for future legal action. Additionally, and more worrisome from the standpoint of information excess, the courts have held that more general comments from affected parties—even if lodged in writing and on time—are usually not material enough to matter legally. To preserve issues for litigation, affected parties are thus best-advised to provide comments that are specific, detailed, and well-documented.²⁰ Finally, the courts have signaled that an agency ignores these material comments at its peril, but this creates a situation in which interested parties can overwhelm the rulemaking process when it is in their interest to do so. With no limits on the extent or nature of the information they can file, the temptation to drown the agency in criticisms and accompanying documentation is likely irresistible, at least for some resourceful interested parties. As the D.C. Circuit remarked in a case with a record that spanned more than 10,000 pages:

[T]he record presented to us on appeal or petition for review is a sump in which the parties have deposited a sundry mass of materials that have neither passed through the filter of rules of evidence nor undergone the refining fire of adversarial presentation . . . The lack of discipline in such a record, coupled with its sheer mass . . . makes the record of information rulemaking a less than fertile ground for judicial review.²¹

A number of adverse consequences flow from this design of administrative process. The most obvious cost is the diminishment of pluralistic oversight of agency actions. Information costs not only increase the costs of participation substantially, particularly for groups that lack inside information, but the resulting clouding of the issues can simultaneously work to reduce the payoff or benefits of participation for these same groups. Second, because of the costs informational avalanches impose on agencies, they might resort to gathering information outside the established notice-and-comment process, thereby limiting transparency and reducing accountability in order to avoid the burdens of official responses to comments made through the more formal avenues. Third, because of the APA's structure and courts' interpretation of it, agencies engage in defensive rulemaking, which inhibits creativity and encourages satisficing. The final consequence is the difficulty of reversing informational failure once it occurs.

III. Reform

The problem of information capture runs deep in administrative law, and redressing it may involve a long process of experimentation. The reform proposals offered here approach the information capture from a range of vantage points in the hope of finding at least one entry point for sparking further discussion.

A. Reforms to Reinvigorate Pluralistic Engagement

I. Recalibrating Judicial Review

Given that the courts inadvertently create many of the incentives for regulatory participants to engage in information capture, correcting the standards for judicial review should be a top priority. The courts' current approach to judicial review, as discussed above, is to evaluate the agency's rule based on the information filed by interest groups in protest to the rule and to determine, as a substantive matter, whether the agency's response was arbitrary. Agencies risk being reversed if their final rule is considered inadequate in light of a significant comment raised on the proposal.

The proposal here shifts the courts' focus from substance to process and re-calibrates the courts' review—ranging from hard look to considerable deference—to the robustness of the pluralistic process.²² Under this reform proposal, if a diverse and balanced group of affected parties is involved throughout the rulemaking, then the agency's rule would be afforded considerable deference from the court—a “[s]oft [g]lance” or something similar.²³ On the other hand, if one party dominates all phases of the rulemaking and then sues the agency for failing to make certain accommodations based on its comments, the court would have a strong presumption against the challenger. In this case, the court would afford the agency still more deference, along the lines of the clear error standard used in the appeal of fact from jury trials. By contrast, if a challenger was unable to engage in the rulemaking process because it lacked sufficient resources or specialized knowledge, but its members took a great interest in the consequences of the rule, then the court (almost like it treats parties proceeding *pro se*) would adopt a presumption in favor of the challenger's petition and afford the rule a hard look.

This participation-based standard for judicial review thus uses the courts to help level inherent participatory imbalances, rather than allowing the courts to aggravate these imbalances, however unwittingly. If the agency is not attentive to vigorous engagement by the full range

20. See, e.g., *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 394, 3 ELR 20642 (D.C. Cir. 1973) (holding that a commenter cannot merely assert that a general mistake was made, but must provide specific evidence and argumentation as to the nature of that mistake and its implications).

21. *Natural Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1052, 9 ELR 20367 (D.C. Cir. 1979).

22. Professor Rubin's idea of breaking the ties between rulemaking and stakeholder comments helped generate some of this Article's recommendations. See Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 157 (2003) (arguing that rulemaking should be dictated by “instrumental rationality, rather than . . . public participation”).

23. Thomas O. McGarity, *Professor Sunstein's Funny Math*, 90 GEO. L.J. 2341, 2371 (2002).

of affected parties, for example, it would risk a hard look review of its rule if one of the underrepresented groups decides to file a challenge. Even more importantly, the agencies would have incentives to reach out and engage groups that are likely to be underrepresented in the rule-making process. Calibrating the judicial review standard to the level of pluralistic participation in the rulemaking process may even provide dominant stakeholders with some incentives to engage their adversaries in the substance of a rulemaking: If dominant stakeholders wish to threaten the agency with a credible risk of reversal by the courts (that is, a soft glance review standard rather than clear error), they would need their adversaries to be present at least during the notice-and-comment period.

This calibrated approach to judicial review is not a panacea. The courts will need a way to determine, with some consistency, when imbalance has occurred. The test also requires determining when the ratio between a dominant group and other affected parties is unacceptable. Even with relatively clear rules for determining imbalance and the corresponding standard for review, there will be inevitable variations in how courts employ the applicable soft glance or hard look tests, although these variations are likely to be more modest than the current, roulette-like variations in the courts' opinions. There are other possible problems with practical implementation of this proposal, such as strategic abuses, that will need to be anticipated and addressed.²⁴ One partial solution to stave off abuses may be to add a more rigorously enforced good faith requirement to the petition process.

Ultimately, if this revised approach to judicial review still seems sensible once the kinks are worked out, it could be implemented interstitially by the courts or, ideally, passed into law as an amendment to the APA. A congressional amendment would provide the clearest and most democratic way to usher in the new approach to judicial review, but this may be politically unrealistic. Incremental experimentation by the courts may ultimately be both more realistic and desirable since it gives the approach a test run before it becomes codified as law.

2. Government Ombudsmen

A more comprehensive, but also more costly, method to redress pluralistic imbalance would deploy government intermediaries—agency-selected ombudsmen, advocates, advisory groups or even administrative law judges (ALJs)—to stand in for significantly affected interests that might otherwise be underrepresented in rulemakings. Agency ombudsmen or advocates could scrutinize all rulemakings to ensure, for example, that the agency is considering not just the economic costs of standards but also the public health benefits, particularly with regard to vulnerable populations. If the interests of unrepresented groups (e.g., the diffuse public) are not adequately considered in the proposed rule stage, the advocate would be required

to file comments and build a record for review that could be used by other regulatory participants in the course of judicial review. The concept of formal, government-provided advocates in these types of settings is not new. In fact, the proposal has some of the flavor of the Small Business Reform Act, which institutes a rather elaborate network to ensure that the interests of small businesses are adequately considered.²⁵

Alternatively, rulemakings that are highly technical and suffer from imbalanced engagement during notice-and-comment could trigger an advisory review process in which an expert committee is assembled to review the rule to ensure that issues relevant to missing affected interests (for example, diffuse public benefits such as health protection) have been adequately considered in developing the rule.²⁶ As in current law, the agency would not be required to adopt the suggestions of advisory groups, but a record would be created that could be used as the basis for judicial review. The agency may even be required to respond to critical advisory group opinions or risk the chance of increased judicial scrutiny. The resulting record thus would not only provide an added hook for judicial review challenges brought by an underrepresented group but also should make the underlying issues more accessible to the broader political process.

3. Subsidizing Thinly Financed Groups

A less radical approach to increasing balanced engagement in at-risk rulemakings is to subsidize participation on specific rulemakings in which certain sets of interests, such as those representing the diffuse public, will be otherwise underrepresented. Alternatively, rewards could be offered to indirectly increase incentives for this same type of public-benefitting representation. For example, a monetary prize and positive publicity could be awarded to the author of the most meaningful public-benefitting set of comments on a complex rule, particularly if the party approaches the issues from the perspective of improving public health or environmental protection. There could even be law school or graduate student competitions not only for commenting on a rule but also for proposing compelling policy innovations. An interest group would then be permitted to challenge the rulemaking on behalf of the winning submitter if the agency ignores those comments, and would be entitled to reasonable attorney fees if the group substantially prevailed in the litigation. Through these mechanisms, interest groups and like-minded experts might find that the prospect of remuneration provides an incen-

25. The Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857, was based in part on a concern that information excesses precluded smaller businesses from keeping up with bigger competitors in the provision of regulation. See §§202-203, 110 Stat. at 857-58. The Act, among other things, provides small businesses with an agency ombudsman and related advocates to help protect their interests.

26. Cf. 42 U.S.C. §7409(d)(2)(B)-(C), ELR STAT. CAA §109(d)(d)(B)-(C) (establishing that the Clean Air Scientific Advisory Committee (CASAC) should review the U.S. Environmental Protection Agency's (EPA's) ambient air quality standards at five-year intervals).

24. These are outlined in the full article, Wagner, *supra* note 8, at 1411-13.

tive to engage in complex rulemakings that overcomes the disincentives of participation created by the information capture phenomenon.

4. Adding Information Filters

A final reform to reinvigorate more balanced engagement by all affected interests would encourage or even mandate flat restrictions on the information that participants can load into the rulemaking process. These restrictions could be quite simple—for example, imposing page and volume limits on the filings, much like the limits placed by appellate courts on appellants. Courts could play a supporting role by scrutinizing comments to ensure that the issues raised to the agency were clear and accessible and not obscured by dozens of detailed sub-issues. Participants might also be required to verify the reliability of the data presented and provide supporting analysis for critical assertions of fact. Establishing simple filters on the amount and type of these communications will not solve all problems—there will still be a temptation to fill comments with highly specialized and undigested information. Nonetheless, establishing these filters would be a good start. At the very least, the filters would force all participants to begin to control information excess at the margin.

B *Bypassing the Pluralistic Model*

Even if the previously recommended reforms are implemented, agencies are still likely to focus most of their attention on comments that present a credible risk of judicial review and, as a result, may have less time to develop creative and more comprehensive solutions to regulation. Rather than focusing its energies on developing public-oriented regulatory policy, the agency finds instead that it must devote most of its analysis to preparing rules that can withstand fierce attack from an aggressive group of affected interests and respond to the flood of information loaded into the system by these same groups.

Unlike the reforms presented in the previous Section, the proposal presented in this Section attempts to address the problems created by information capture not by reinforcing adversarial processes, but by circumventing them, at least at an early stage of policy development. Specifically, this policy-in-the-raw reform requires the agency to be largely, if not completely, insulated from stakeholders and political input during the embryonic stage of the development of its regulatory proposal. Although affected parties would become important later in refining and even rejecting the proposals developed during this period, they would become involved only after the agency has had the opportunity to frame and consider regulatory solutions free from their input and pressure.

Although the details are best left for a later discussion, the policy-in-the-raw proposal in broad strokes involves a two-step rule-development process. At the raw stage, a small team of highly regarded policy wonks from inside

the agency would develop a pre-proposal. This team would start with the statutory mandate and sketch out a goal statement based on that text alone. It would then work—essentially in complete isolation—to develop a pre-proposal that best accomplishes that goal. Unlike the current approach to rulemaking, this policy-in-the-raw stage would be led by an agency team that is completely unconnected with and ideally not even aware of stakeholder pressures, litigation concerns, or other legal risks associated with the rulemaking. Its deliberations would be shielded from all stakeholder input, including friendly guidance from staff in the general counsel's office or from politically appointed officials. The team would also be free to approach the proposal in whatever way it sees fit. There would be no requirement that it use analytical tools like cost-benefit analysis, formal alternatives analyses, or other forms of impact assessment, although the team would be free to develop or use these analytic tools if it felt that doing so would be helpful and consistent with the statute's goal.

The pre-proposal developed by this team would be subject to peer review or, as appropriate, input from a Federal Advisory Committee Act (FACA) advisory group comprised of a mix of policy analysts and other specialists (but not stakeholders). The team would have the option of using the comments, suggestions, and questions raised during this review process to modify the pre-proposal, but it would be under no obligation to do so. Any modifications would be wholly at the agency team's discretion, and there would be no risk of judicial reprimand if the team chose to disregard suggestions made during this review.

The final pre-proposal, along with the comments of peer reviewers or the FACA committee, would be published on the Internet and available in hard copy. The preliminary proposal would be expected to be detailed and comprehensive, yet also accessible to regulatory experts who lack specialized knowledge about the issues addressed by the rule. The agency team members responsible for preparing the pre-proposal would operate much like academics—producing innovative yet effective proposals and enjoying reputational rewards based on the quality of their work.

Establishing an initial raw stage for regulatory policy development would counteract information capture in a number of subtle but important ways. First, the proposals developed as part of this process would likely be much more accessible to a wide group of affected parties than existing proposals. Second, policy-in-the-raw allows an agency team to innovate in ways that are decoupled from the participatory and litigation processes. This creates the opportunity for more candid and creative analysis. Finally, the raw period of policy development provides the agency with a litigation-free zone for conducting meaningful alternatives assessments on competing proposals.

C. *Scrambling the Incentives of Regulated Parties Through Competition-Based Regulation*

Rather than engage the missing interests more adversarially or impose filters on participants' regulatory communications, a final reform attempts to scramble the incentives of the most engaged and powerful interest groups and pit these otherwise like-minded interests against one another. Specifically, this proposal focuses on dividing and conquering those parties that have successfully used information capture in the past by creating competition among them.

Competition-based regulation is easiest to understand in the context of product licensing. In current product licensing, the U.S. Environmental Protection Agency (EPA) determines which products are not "unreasonably unsafe" (or the equivalent) through complex and generally unopposed processes that often involve only the manufacturers of the product at issue. Because these manufacturers may dominate the procedures, EPA's deliberations may not benefit from pluralistic oversight. As a result, there is a risk that the agency's decisions will diverge from both statutory goals and what rigorous factfinding might otherwise reveal due to information capture. The alternative here attempts to devise ways to encourage the regulated parties themselves to challenge licensing decisions that are too lenient. Specifically, the manufacturer of a green product could file a petition alleging that a competitor's product, which occupies the same market niche, is much more hazardous in a variety of ways and therefore should be regulated more stringently. The process would be initiated by a petition filed by the green company and would involve an adjudicatory hearing in which the manufacturers would battle each other on the facts. EPA would make a final decision on the merits and issue regulations accordingly.

One of this approach's key attributes is that it provides incentives for adversaries to dredge up useful information regarding optimal environmental solutions that might otherwise be lost in the mounds of undigested regulatory filings. By relying on manufacturers to root out information on inferior competitors, and providing a forum for establishing more stringent regulation of those competitors, the proposal unleashes energy that those outside the competitive process, including regulators, will have difficulty duplicating. An added benefit of this approach is that market forces will help triage the regulatory process. Competitive energy will focus on the worst products and processes (for example, those for which green alternatives have the greatest competitive edge). The striking similarity of this proposal with recent proposals for competition-based reform of the patent system—in which non-patent holders could file petitions to cancel a patent as invalid—attests to policymakers' increasing recognition of the valuable role market forces can serve in supporting regulatory decisions and processes.²⁷

IV. Conclusion

Existing administrative processes suffer from too much rather than too little information. Other areas of law have developed rules that explicitly discourage parties from playing strategic games with information and encourage communications between participants to be productive and efficient. It is past time for the administrative system to take note and change its ways.

27. *See, e.g.*, Patent Reform Act of 2007, H.R. 1908, 110th Cong. §321 (2007) (providing that anyone "who is not the patent owner may file with the Office a petition for cancellation seeking to institute a post-grant review proceeding to cancel as unpatentable any claim of a patent").

R E S P O N S E

Comments on *Administrative Law, Filter Failure, and Information Capture*

by Howard A. Learner

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Professor Wagner presents a strong and provocative set of arguments on how information overload is creating barriers to public participation, obfuscating the most important information for decisionmaking, and capturing and clogging the administrative rulemaking process. The forest can, indeed, become obscured by the trees when it comes to effective, efficient, and fair administrative agency decisionmaking.

First, I generally agree with Professor Wagner's overall assessment of the information overload, filtering, and capture problems, although some tweaks should be considered. Second, I depart from some specific aspects of her framing of an administrative agency's responsibilities: the public agency's role is to affirmatively protect and advance the public's interest, not just be an umpire calling balls and strikes. Third, while some of her proposed reforms are promising for fuller exploration, some of the suggested cures might be as harmful as the diseases.

I. The "Desperately Seeking Data" Challenge: Information Overload That Deters Public Participation and Clogs and Distorts Administrative Decisionmaking

Professor Wagner hits the nail on the head: information overload and the too-often absence of filtering and separating the informational wheat from the chaff can capture and clog the process, unduly raise the price and deter public participation by less well-financed parties, and, ultimately, distort the administrative decisionmaking process. The most important, relevant and persuasive information should be highlighted and not get lost in the morass. As Professor Wagner explains:

A number of important social policies may be adversely affected by administrative law's naïve presupposition that

more information is better. Although this affinity for unbounded information may have originated in the middle of the last century when information was more scarce, in the electronic age, this indiscriminating approach to information is clearly outdated. Indeed, other institutions recognize that effective processing of information is a prerequisite to effective decisionmaking.¹

That's right on target. The administrative law operating paradigm should shift from "more information is good" to "good information that is more persuasive." The weight of the evidence should not be principally measured by page and word count.

There's an analogy here to one of the Chicago's Neo-Futurist Theater Company's recurring productions: "Too Much Light Makes the Baby Go Blind."² We do need better illumination of key facts and salient issues for decisionmaking. However, that requires using better spotlights, rather than floodlights, to address what Professor Wagner identifies as "Filter Failure." Sunlight may be a powerful disinfectant, but staring into the sun for too long is not helpful.

The excessive doctrinal gobbledygook and alphabet-soup technical lingo in administrative agency proceedings likewise deters and impairs meaningful public participation. Rulemakings with tech-speak mumbo-jumbo are as inviting to public participation and engagement as are law review articles with 400 footnotes. In short, they become impenetrable mysticism except to an insiders' cabal.³ The public entry costs for engagement are too high. As Professor Wagner explains: "Using technical terms and frames of reference that require a high level of background infor-

1. Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1326-27 (2010).

2. See http://www.neofuturists.org/index.php?option=com_content&task=view&id=20&Itemid=45 (last visited July 7, 2011).

3. "Cabal"—a secret society—is often viewed as derived from Kabbalah, which are mystical interpretations of Jewish scriptures. <http://en.wiktionary.org/wiki/cabal> (last visited July 7, 2011).

mation and technical expertise, and relying heavily on ‘particularized knowledge and specialized conventions,’ these fully engaged stakeholders can deliberately hijack the proceedings.²⁴

Inaccessible technical language becomes obfuscating or, at best, confusing. “Spontaneous combustion” at a nuclear plant should instead be plainly called a “fire.” “Nuclear power units” become agency nomenclature for “nuclear power plants.” Coal plant “emissions” are the regulatory term-of-art for what most people commonly call “pollution.” The administrative agency, of course, cannot precisely specify what intervening parties and their attorneys write in their documents, but the administrative agencies can: first, speak for themselves in plainer language; and, second, provide guidance that encourages the parties to do so as well.

Professor Wagner points out: “To be a serious player in this game, a participant must enjoy convenient access to relevant information, a significant reserve of resources (mostly technical and legal), and high stakes and motivation. To win, a player need not convince his opponents of the merits of his case; he need only wear them down enough to cause them to throw in their towels and give in.”⁵

That, of course, is just as true in courtroom litigation as in administrative proceedings. The entry costs are too high for most of the public’s robust participation.

One countervailing force is that access to information is now much more readily accessible, cheaper and easier to obtain on the internet. For example, in many utility rate case proceedings in the 1980s and 1990s, consumer and environmental groups and governmental agency intervenors would typically file detailed discovery requests for Securities and Exchange Commission (SEC) filings by the utilities as well as other financial reports and analyst reports. Document production would often be slow and delayed, and utilities could drain intervenors’ more limited resources with various objections and discovery battles. Today, much of that information is readily available on the internet, and a company’s SEC 10-Q filings can be quickly obtained with a few keystrokes at the SEC’s “Edgar” website.⁶ This has a leveling impact on the respective abilities of parties with disparate resources to participate in administrative proceedings.

That offset having been recognized, Professor Wagner correctly identifies the problems and the corrosive and distorting impacts on fair administrative decisionmaking processes. Her point about courts’ increasingly heavy applications of waiver, exhaustion of administrative remedies and other such access limiting doctrines rings very true:

4. Wagner, *Administrative Law*, *supra* note 1, at 1333.

5. *Id.* at 1329.

6. See U.S. SEC, Filings & Forms, at <http://www.sec.gov/edgar.shtml> (last visited July 8, 2011).

these approaches incentivize parties to paper the record and exacerbate information overload in the administrative process. Experienced litigators know that it’s best to protect their clients’ interests by “includ[ing] in their comments highly specific, very detailed, extensively documented comments on every conceivable point of contention, and to back up their comments with the threat of litigation.”⁷ Woe to the intervenor party—industry or public interest—that omits a plausible legal argument in its comments before an agency, but then seeks to raise that legal issue on appeal after it has reviewed the final agency order.

II. The Administrative Agency’s Responsibility to Assert and Protect the Public Interest Is Even More Fundamental When the Process Is Distorted by “Filter Failure and Information Capture”

Professor Wagner’s layered views of administrative agencies’ public responsibilities are partly skewed. In part, Professor Wagner argues that the agency is deterred from reaching a fair and balanced decision when the pluralism of the participating groups is undermined by barrages of information and data submittals by well-financed business interests that impose undue information cost and time burdens “caus[ing] thinly financed groups to exit for lack of resources.”⁸ The public’s interests suffer accordingly. That’s correct.

In part, however, Professor Wagner also seems to view the administrative agency as an overwhelmed *arbiter* that should be seeking to reach a result that balances among the competing parties—although made more difficult by informational overload that deters public representation. The principal role of many regulatory agencies, such as the Federal Communications Commission, Federal Energy Regulatory Commission, and Consumer Products Safety Commission, is different: protecting and advancing the public’s interests, not just be an umpire calling balls and strikes. A fair and balanced approach is vital. Recognize, though, that the regulated businesses have strong economic incentives to vigorously and effectively advocate their interests. The role of the public regulatory agency is instead to protect the public’s interests, especially where monopoly or oligopoly businesses are involved and the public’s opportunities to vote with their wallets in more competitive markets are limited.

In addition, the agencies need not necessarily be lambs without defenses against voracious wolves with sharp “information capture” teeth. Trial courts manage litigation with pre-trial orders focusing and limiting discovery

7. Wagner, *Administrative Law*, *supra* note 1, at 1362.

8. *Id.* at 1332.

and various case management orders and rulings designed to focus information-gathering and decisionmaking on the most relevant issues. Administrative agencies can move further in adopting best practices for managing their rulemaking proceedings. There should be more training of key agency officials on what the agency's role is and how to fairly, efficiently and effectively manage rulemaking proceedings. Different agencies have different types of expertise, experiences and capabilities. Improved case management and training can help to mitigate some of the troublesome, real-world impacts that Professor Wagner correctly points out.

III. Some Observations on Professor Wagner's Specific Reform Proposals

Professor Wagner laudably proposes a buffet of proposed reforms—some of which she actively advocates (e.g., “re-calibrating judicial review”⁹) and others that she characterizes as “policy-in-the-raw” (“bypassing the pluralistic model”¹⁰). Some gain more traction than others. Some can be torqued to greater benefit. Some are much less persuasive.

1. Better Case Management and Training Are the Predicate Reforms: First of all, better case management practices by administrative agencies and good training for key rulemaking personnel are very important initial improvements. Experienced litigation and regulatory attorneys can identify those court cases and administrative proceedings that were run effectively by judges and agency personnel who deployed effective case management tools, and they can also moan about the opposite.

Managing rulemaking proceedings effectively *is* a skill. The “science” of case management and training programs is becoming more robust. Better implementation across the wide range of federal and state administrative agencies conducting rulemaking processes is a key starting point. These reforms warrant more emphasis than Professor Wagner's paper provides.

2. Effective Advocates Find Ways to Mitigate Filter Failure and Information Capture by Focusing on the Most Important Issues and Building Coalitions to “Scramble the Incentives” and Realign the Players: Smart capable attorneys find ways to advocate effectively even on an unevenly-resourced playing field. One counterstrategy to information flooding by a well-financed party is for advocates to focus their own and the agency decisionmakers' attention on the most important, determinative points. Don't get lost in the haze and maze; get focused. Experienced appellate advocates almost never attempt to make more than three points at oral argument. Trial attorneys focus religiously on the storyline and evidence leading up to their closing argument. While a multifaceted and more open-ended rulemaking proceeding may have more mov-

ing parts—and concerns about building a strong record for appeal as well as waiver problems—that does not excuse failures to focus the most attention on the most important issues, information and structures. In short, what are the advocate's best, most persuasive arguments? Don't get sucked into responding to each and every point made by an opponent; don't follow every distracting tangent.

Public interest attorneys, who typically face more financial constraints, are often forced to “go for the jugular” and focus their participation out of necessity more so than bill-by-the-hour private attorneys with deeper-pocketed business clients. For certain businesses, the legal costs may be quite cheap compared to the regulatory compliance costs, and for their attorneys, the financial rewards often come with more hours and higher billings. (In some cases, today's more constrained legal market is modifying billing practices.)

Professor Wagner's final reform suggestion—“Scrambling the Incentives of Regulated Parties through Competition-Based Regulation”—plays out differently and more optimistically as effective advocates on various sides maneuver for success.¹¹ The rulemaking process is often more robust and pluralistic with shifting alliances and less traditional coalitions than Professor Wagner suggests. For example, effective public interest environmental and public health advocates have forged alliances with pollution control equipment manufacturers to advocate stronger mercury pollution reduction standards for coal plants. Nuclear plant owners and the natural gas industry, which economically compete with the coal industry, are now aligning with environmental and public health organizations to advocate for the U.S. Environmental Protection Agency to issue strong greenhouse gas and other pollution reduction standards for coal plants. When it comes to natural gas “fracking” regulations, by contrast, the shoe may be on the other foot.

The railroad industry may align with environmental groups on regulations involving cleaner engines and better pollution control equipment for trucks, and, conversely, the trucking industry may see public health groups as logical allies for regulations to reduce pollution from locomotives. The Clean Air Act's technology-forcing standards (“best available control technology” and “maximum available control technology”) provide incentives for businesses with the next level of sophisticated pollution control equipment to devote considerable economic resources to litigate and advocate for stronger pollution control standards that expand their product markets and profit opportunities.

The point is that effective litigators and other policy advocates must be and are skilled at building coalitions that realign and scramble the forces before administrative agencies engaging in rulemaking processes. This repositioning can foster more of the participatory system, through which Professor Wagner seeks to “generate balanced engagement from a broad range of affected parties” sharing cost burdens and countering some of the very real

9. *Id.* at 1327.

10. *Id.* at 1422-23.

11. *Id.* at 1427.

information distortions and capture that she correctly identifies, recognizes and seeks to overcome.¹² Public interest attorneys, in particular, having limited resources, must be creative in designing strategies and building coalitions to make the regulatory proceedings more multilateral than resource-imbalanced bilateral in order to overcome information capture and succeed in advancing their interests. This is a variant of the “competition-based regulation” that Professor Wagner suggests.¹³

3. “Recalibrating Judicial Review” Is a Very Long-Term Strategy: Professor Wagner states that “correcting the standards for judicial review should be a top priority.”¹⁴ She contends that courts should give more deference to an agency’s decision if there was a robust, pluralistic set of participants in the rulemaking development process. “On the other hand, if one party dominates all phases of the rulemaking and then sues the agency . . . the court would have a strong presumption against the challenger.”¹⁵

While this proposal is intriguing, its implementation is very challenging as Professor Wagner acknowledges. First, how will the courts determine whether there was a participatory imbalance before the agency and what standard should be applied? Second, as Professor Wagner recognizes, the best way to accomplish this revamping of judicial review would be for Congress to enact an amendment to the Administrative Procedure Act, “but this may be politically unrealistic.”¹⁶ Third, it’s likely to take many years for this judicial review approach to be “implemented interstitially by the courts or, ideally” enacted by Congress.¹⁷ In the meantime, other steps can and should be taken.

4. Creating Government Ombudsmen and Subsidizing Thinly Financed Groups With Intervention Funding Can Build on States’ Experiences: Professor Wagner proposes reforms to “redress pluralistic imbalance [by] deploy[ing] government . . . ombudsmen, advocates . . . to stand in for significantly affected interests that might otherwise be underrepresented in rulemakings”¹⁸ and “subsidize participation on specific rulemakings in which certain sets of interests, such as those representing the diffuse public, will otherwise be underrepresented.”¹⁹ In fact, examples of these approaches have been in operation for many years.

The Public Utility Regulatory Policies Act of 1978²⁰ requires states to either provide for consumer intervention funding support²¹ or an “alternative means” of representation for consumer interests²² in utility rate cases and other state regulatory proceedings. State public utilities regula-

tory commissions in Michigan and Wisconsin, for example, have long-established intervention funding programs for consumer, environmental and other civic organizations to support attorney and expert witness expenses. Some states also have statutory provisions for attorneys’ fee awards for court appeals in which administrative agencies’ regulations are overturned. The Illinois Citizens Utility Board and Consumers’ Counsel ombudsmen in Indiana, Iowa, Ohio and Pennsylvania provide an alternative approach. The State Attorneys General also often perform consumer representation roles before state public utilities regulatory commissions.

At the federal level, the new Consumer Financial Protection Agency/Bureau created by Congress in the 2010 Dodd-Frank financial reform law will potentially perform an analogous government ombudsmen role. Likewise, as Professor Wagner recognizes, the Small Business Regulatory Enforcement Fairness Act of 1996 provides small businesses with an agency ombudsman and related advocates to help protect their interests. There are Congressional proposals to establish an Office of Consumer Advocacy to represent consumers on rate and service issues involving electric and natural gas companies before the Federal Energy Regulatory Commission, as well as various ombudsmen in other areas. On the intervention fund side, the federal Equal Access to Justice Act provides fees to parties that prevail on appeals overturning agency actions in certain circumstances.

In short, there is considerable experience at the state level to build upon in further exploring Professor Wagner’s government ombudsmen and intervention funding reforms to spur more public participation. There are also federal precedents from which lessons can be learned. Professor Wagner is on the right track here with a reform that advances a more robust and balanced participatory rulemaking process.

5. Attempting to Head Off Information Capture by Providing for Early Secretive Engagement of Agency Policy Wonks Is Unwise and Impractical:

Professor Wagner proposes a “policy-in-the-raw” by which an agency would somehow start with “a small team of highly regarded policy wonks from inside the agency [to] develop a pre-proposal . . . in complete isolation . . . completely unconnected with and ideally not even aware of stakeholder pressures, litigation concerns, or other legal risks associated with the rulemaking. Its deliberations would be shielded from all stakeholder input.”²³ The only check on these mythical neutral, expert policy wonk Mandarins would be neutral peer reviewers or, “as appropriate, input from a Federal Advisory Committee (FACA) advisory group comprised of a mix of policy analysts and other specialists (but not stakeholders).”²⁴ The agency’s policy wonk team would have complete discretion and be largely unaccountable.

12. *Id.* at 1332.

13. *Id.* at 1427.

14. *Id.* at 1406.

15. *Id.* at 1408.

16. *Id.* at 1413.

17. *Id.*

18. *Id.* at 1414.

19. *Id.* at 1416.

20. 46 U.S.C. §2601.

21. *Id.* §2632(a).

22. *Id.* §2632(b).

23. Wagner, *Administrative Law*, *supra* note 1, at 1423.

24. *Id.* at 1423-24.

Oh, come on. As “they say in Harlan County, there are no neutrals there.”²⁵ This notion of an unaccountable, secretive, non-transparent group of supposedly neutral agency bureaucrats, advised only by some supposedly neutral “mix of [outside] policy analysts” making the key initial regulatory decisions would likely violate the Administrative Procedure Act, FACA, open government principles and common sense. For the outside policy analysts, please check who is paying their salaries, their consulting contracts and other relationships. Here, the proposed cure may well be worse than the disease. Professor Wagner’s other proposed reforms have some challenges, but much more promise.

IV. Conclusion

Professor Wagner clearly identifies the severe, practical, modern-day challenges to fair and balanced administrative agency rulemaking processes that can be strategically manipulated, overwhelmed and captured by a deluge of information and filings by well-financed interests for whom the costs of extensive regulatory intervention is a mere fraction of the potential ultimate regulatory compliance costs. Moreover, this distorted process can squeeze out underfinanced public interest organizations, governmental parties and private businesses from fully participating in the proceedings. The problems are real and serious.

Agencies can deploy improved case management tools to help mitigate the problems, filter the information flow and advance better and more inclusive processes. Effective advocacy, including building coalitions that, in Professor Wagner’s words, “scramble the incentives” can counter presumed dominating private interests. Some of Professor Wagner’s other proposed reforms warrant further hard-nosed exploration, especially those that build on existing mechanisms. Professor Wagner is focusing attention on serious challenges to the integrity of administrative agencies’ rulemaking processes, and her calls for positive solutions are well grounded.

25. *Which Side Are You On*, adapted from the original lyrics by Florence Reese, written in 1931 during a strike by the United Mine Workers of America in which her husband, Sam Reece, was an organizer in Harlan County, Kentucky.