The U.S. Rulemaking Process

Has it become too difficult?

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The modern process for making administrative policy—the informal, notice-and-comment rulemaking process—was developed in the U.S. when the Administrative Procedure Act (APA) was enacted in 1946.

The "notice-and-comment" label derives from the fact that the APA requires:

- publication of a notice of proposed rulemaking,
- opportunity for public participation in the rulemaking by submission of written comments,
- publication of a final rule and accompanying explanation.

This applies to the substantive rulemaking of every agency of the federal government and provides the procedural minimum for most significant rulemakings. More elaborate public procedures such as oral hearings may be used voluntarily by agencies in matters of great import.

As the virtues of this streamlined process for policymaking became more apparent, Congress began to authorize more rulemaking and agencies began to shift their focus from case-by-case policymaking to rulemaking. The "consumer decade" of the 1970s led to the enactment of major new health, safety, and environmental laws, all of which con-

tained broad rulemaking powers. By the end of the 1970s agencies were proposing and finalizing regulations at an unprecedented rate.[1] Then the reaction set in—concerns about over-regulation arrived with the Reagan administration. The White House and Congress sparred over how to control the bureaucracy, and challenges to rules also began to receive a more hospitable reception in the courts as standards of judicial review tightened.

Since then, Congress, presidents, and the courts have each taken steps to require that agencies follow more rigorous rulemaking procedures. Congress has enacted both agency-specific and government-wide statutes requiring additional procedural and analytical requirements. Presidents beginning with the Nixon administration have issued executive orders giving the White House Office of Management and Budget (OMB) increasing power to review agency proposed and final rules before they can be published in the *Federal Register*. And judicial review of rules continues to be quite intensive. The result of all these developments is that informal rulemaking is now in danger of being ensnared in the same type of red tape that government has traditionally been accused of inflicting upon the public.

Congressional Add-ons

Although the APA remains largely unamended, Congress has enacted several important statutes that have made rulemaking more complicated both procedurally and analytically. It began by enacting several "hybrid rulemaking" provisions with additional oral hearing procedures in some important statutes governing major health and safety agencies.[2] After a lot of criticism, Congress stopped doing this, but these laws are still on the books.

Second, it enacted a series of new analytical requirements modeled on the environmental impact statements originating in the 1970 National Environmental Policy Act. This law was hailed by environmentalists and other pro-regulatory forces, and was used extensively to slow down development that might harm the environment, but the EIS model spawned a series of other impact analysis requirements that proved to be primarily useful for business groups and others who were skeptical of regulation.

These include the Paperwork Reduction Act of 1980—an act that not only created the Office of Information and Regulatory Affairs (OIRA) in OMB, but gave it the authority to review forms, questionnaires, and also the paperwork impact of rules that contain reporting requirements. In the same year, the Regulatory Flexibility Act was enacted, requiring agencies to do an analysis of proposed and final rules' impacts on small businesses and small communities, and to analyze alternative approaches to the rules as well. This law was markedly strengthened in 1996 by the Small Business Regulatory Enforcement Fairness Act, which subjected these requirements to judicial review.

A year earlier, in 1995, Congress enacted the Unfunded Mandates Reform Act, which requires agencies to do special assessments where proposed and final rules have an impact on state and local governments, and where the rule has a major impact on the private sector.

Presidential Add-ons

In addition to this list of statutory accretions to Section 553 of the APA, there have been a series of presidential additions. In 1971, President Nixon started this train by establishing a low-visibility, low-impact type of White House review of rules. Several agencies were required to submit a summary of their rule proposals, a description of the alternatives that had been considered, and a cost comparison of alternatives.

President Carter ushered in the first comprehensive system of presidential review by means of an executive order issued in 1978.[3] Under his order, executive agencies were required to:

- publish semiannual agendas of any "significant" regulations under development by the agency,
- have the agency head ensure that the "least burdensome of the acceptable alternatives" was proposed,
- prepare a "regulatory analysis" that examined the cost-effectiveness of alternative regulatory approaches for "major rules" involving an impact of over $100 million.

He also established a White House group of economists to review the regulatory analyses prepared for proposed major rules and to submit comments on the proposed rules during the public comment period.

President Reagan upped the ante considerably with an executive order[4] that turned the review process into a clearance process for virtually all substantive rules issued by executive agencies, to be performed by the newly established Office of Information and Regulatory Affairs.

The Clinton administration then produced E.O. 12866 in 1993. This order, which remains operative (pending a

review by the Obama administration), carried over many of the principles of the Reagan order, although it also made some significant modifications that simplified the process, made it more selective, and introduced more transparency into the OMB/agency consultations.

Nevertheless, E.O. 12866 retained the traditional level of $100 million annual effect on the economy for those major proposed and final rules that must be accompanied by cost-benefit assessments when forwarded to OIRA. One hundred million dollars in 1978 equals over $326 million in today's dollars.[5]

In addition to the cost-benefit analysis required for major rules, and the several statutes mentioned above, another group of separate impact statements are required by a series of executive orders from various presidents, requiring special analyses during the rulemaking of a series of issues ranging from litigation impacts, takings of private property, federalism, environmental justice, protection of children, consultation with Indian tribal governments, and energy use impact.

Judicial Add-ons

Over the years, courts have interpreted the APA to require agencies to disclose important studies relating to proposed rules at the time of the notice of proposed rulemaking and to respond to significant public comments in the expanded preambles of the final rules. The courts have employed a "hard look" test in reviewing the substantive factual and policy bases of rules under the "arbitrary and capricious" test.[6]

The Consequences: A Decline in Rulemaking

Using statistics tabulated by the Competitive Enterprise Institute, the high water mark in both proposed and final rules was at the end of the Carter administration with 7,745 final rules in 1980 and 5,824 proposed rules in 1979. Even in 1983, in the middle of the first term of the anti-regulatory Reagan administration, there were 6,049 final rules and 3,907 proposed rules. But after that, the number of proposed rules continued to decrease until 2005, when it reached only 2,257, and the number of final rules reached its nadir in 2007 with 3,595.[7] This means that the government was publishing 54 percent fewer final rules and 61 percent fewer proposed rules as compared to 1979/1980, and even 41 percent fewer final rules and 42 percent fewer proposed rules than the Reagan administration in 1983. In the last several years, these numbers stayed relatively flat until there was a slight blip upwards in 2008.[8]

Proposals for Reform

In my opinion, the decline in rulemaking doesn't mean that agencies have stopped regulating or making policies. Rather, it means that they have found less transparent, less participatory ways to do it—"guidance," adjudications, and other informal "arm-twisting" techniques.[9] What can be done about this?

Increase agencies' ability to gather scientific and technical information. The APA does not restrict agency activities before the notice of proposed rulemaking (NPRM) stage. However, agencies must develop the information needed to propose a rule, or, sometimes, even to decide whether a regulatory strategy is the best one. If the agency does wish to proceed via rulemaking, it may also have to prepare the various draft analyses described above—each of which has its own information collection (and sometimes peer review) demands.[10] This task is made more difficult by resource limitations, limits on surveys and other collections of information imposed by the Paperwork Reduction Act, and limits on meetings with outside groups imposed by the Federal Advisory Committee Act. In addition, sometimes the scientific information necessary to underpin a rule is not easily obtainable.

Once the rule has been proposed as an NPRM, then agencies must follow the APA process. This means reviewing and answering the public comments—an increasing number, due to the advent of electronic rulemaking. This also often means responding to sophisticated scientific and technical data and arguments. In addition, many agencies have internal rules restricting *ex parte* communications after the NPRM, which makes it difficult to consult with experts off-the-record. Moreover, agencies often must offer a second round of notice and comment if they are contemplating significant unforeseeable changes in the final rule.

The government needs to devote more resources to developing scientific data and research assistance inside

the government, and also needs to lower some of the barriers confronting agencies in collecting information from outside the government.

Consolidate the various analytical requirements. Experts have long recommended that the president and Congress reconsider the need for so many separate analytical requirements.[11] It is difficult to criticize most of these requirements individually, since each has its own constituency. But since agencies must give separate consideration to each of them, it eventually becomes a burden. As sailors know, a few barnacles on a ship are not a problem, but the ship (even the "ship of state") slows down when the hull becomes laden with them.

Streamline the review process. For these reasons the overall rulemaking process takes too long. Internally, agencies must obtain clearance from various offices. The program responsible for drafting the proposed and final rule (and its attendant analyses) must obtain sign-offs from the general counsel's office and various expert policy offices before obtaining agency-head clearance (and then sometimes run a similar gauntlet at the departmental level). And this is even before sending the rule (at both the proposed and final stage) to OMB for its review.

Since the Clinton administration, OMB has operated under a deadline for clearing these rules. Executive Order 12866 mandates a 90-day deadline for completing its review of agency submissions (with the possibility of one 30-day extension). But this still means that there is a potential 240-day delay just for the two OMB reviews, and OMB may send the rule back to the agency for revisions, as well.

According to a recent comment to the Obama administration, which is considering what to do with Executive Order 12866,[12] two professors looked at all rules listed in the government-wide rulemaking agendas from 1995-2008 that resulted in a final rule and found that the average time from publication of the NPRM stage to the final rule for rules listed as significant (and therefore reviewed by OMB) was 503 days. For non-significant rules it was 385 days.[13] Another piece of evidence was that, using the same database, independent agency rules, like those of the SEC—not reviewable by OMB—averaged 354 days, while those of executive departments took 413 days, and those of free-standing executive agencies like the EPA, 482 days. Moreover, this was just the post-NPRM review stage. OMB also reviews NPRMs, and OMB data from 2007 shows that its review of NPRMs averaged about 70 days.

As another commenter, a former regulator and congressional aide wrote: "I hate to be accused of channeling Bill Clinton, but [Keep it Simple Stupid]. That was the goal of those who crafted the Administrative Procedure Act, and we've all done a good job of gumming up the works in the last few decades." [14]

So, in the spirit of change, I would propose that we should go back to a more coordinative role for OIRA. It should be a resource for the agencies, not a stumbling

block. Make it a group of expert analysts who can *help* the agencies do economic analysis, risk analysis, priority-setting, and consideration of alternative approaches for important rules, and a group who, like the Carter group, can comment on agency rulemakings informally and formally. To free OIRA staff to do this, only a small selection of truly major rules (e.g., those with over a $300 million impact on the economy) should have to be sent to OIRA for White House and interagency review, unless the president directs otherwise on a rule-by-rule or agency-by-agency basis.

Revive collaborative approaches to rulemaking. In addition to revising OIRA's role, I would like to see a renewed emphasis on collaborative approaches to rulemaking. In the 1980s and early '90s, agencies often formed negotiated rulemaking committees to seek consensus on the text of a proposed rule. For various reasons ranging from front-end costs, concerns about the Federal Advisory Committee Act, and OIRA staff negativity, these efforts have tailed off in recent years.[15] I believe that in certain situations, this process can work well and produce long-term savings of time and money for the agency and affected stakeholders.

Harness the Internet. Finally, I think the power of the Internet needs to be better harnessed on behalf of rulemaking. It clearly has great potential for increasing meaningful public participation and for democratizing the process even more. But the government-wide portal, www.regulations.gov, needs continuing improvements to keep up with technology; nagging legal questions concerning e-rulemaking (e.g., copyright, privacy, security issues) need to be answered; and agencies need to develop the wherewithal to handle the increasing number of comments that will inevitably result.

In Summation

The once-streamlined notice-and-comment rulemaking process has become too complicated—"ossified" to use a word favored by academics.[16] The many additional analytical requirements need to be re-evaluated. The OMB review process needs to be more of a help than a hindrance, and the potential power of e-rulemaking needs to be harnessed in a way that produces benefits to the public and the agencies.

About the author:
Professor Lubbers has taught at American University's Washington College of Law since 1996. Before that he was the research director for the Administrative Conference of the U.S., the federal government's advisory agency on procedural reform. He has degrees from Cornell University and the University of Chicago Law School.

Endnotes:

1. Using statistics tabulated by the Competitive Enterprise Institute, the high water mark in both proposed and final rules was at the end of the Carter administration, with 7745 final rules in 1980 and 5824 proposed rules in 1979.
2. These included the Consumer Product Safety Commission, Environmental Protection Agency, Federal Trade Commission, and Occupational Safety and Health Administration.
3. Exec. Order 12044, Improving Government Regulations, signed March 23, 1978; 43 Fed. Reg. 12,661 (Mar. 24, 1978).
4. Exec. Order 12291, Federal Regulation, signed February 17, 1981; 46 Fed. Reg. 13,193 (Feb. 19, 1981).
5. See "The Inflation Calculator," available at http://www.westegg.com/inflation/.
6. The "hard look" test was used in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983). The Supreme Court did put the brakes on judicial supplementation of rulemaking procedures in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978).
7. Clyde W. Crews, Jr., Competitive Enterprise Institute, "Ten Thousand Commandments," 2009.
8. In 2008 there were 2,475 proposed rules and 3,830 final rules.
9. Lars Noah, "Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority," 1997 WIS. L. REV. 873.
10. Executive Office of the President, Office of Management & Budget, Final Information Quality Bulletin for Peer Review, 70 Fed. Reg. 2664 (Jan 14, 2005).
11. Administrative Conference of the U.S., Recommendation 93-4, "Improving the Environment for Agency Rulemaking," 59 Fed. Reg. 4670 (Feb. 1, 1994), available at http://www.law.fsu.edu/library/admin/acus/305934.html. Recommendation I(A): "The President should consider the cumulative impact of existing analytical requirements on the rulemaking process before continuing these requirements or imposing new ones." Recommendation II(C): "Congress should reconsider the need for continuing statutory analytical requirements that necessitate broadly applicable analyses or action to address narrowly focused issues."
12. Public comments on OMB recommendations for a new executive order on regulatory review, available at http://www.reginfo.gov/.
13. See comment by Professors Jacob E. Gersen and Anne Joseph O'Connell, at 1, posted Feb. 27, 2009 (comment No. 6).
14. See comment by Peter D. Galvin, at 5, posted March 20, 2009 (comment No. 106).
15. Jeffrey S. Lubbers, "Achieving Policymaking Consensus: The (Unfortunate) Waning of Negotiated Rulemaking," 49 S. TEX. L. REV. 987 (2008).
16. Thomas O. McGarity, "Some Thoughts on 'Deossifying' the Rulemaking Process," 41 Duke L.J. 1385 (1992); Richard J. Pierce, Jr., "Seven Ways to Deossify Agency Rulemaking," 47 ADMIN. L. REV. 59 (1995). See also Jody Freeman, "Collaborative Governance in the Administrative State," 45 UCLA L. REV. 1, 9 (1997) ("Indeed, one could argue that the increasing analytic requirements imposed on agencies and the reinvigoration of aggressive judicial review in recent appellate cases makes the ossification … even worse.").