

ENHANCING THE ROLE OF PUBLIC INTEREST ORGANIZATIONS IN RULEMAKING VIA PRE-NOTICE TRANSPARENCY

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In 1983, then-Administrator William Ruckelshaus promised that under his leadership, EPA would operate “in a fishbowl.” I wish to reaffirm this commitment and take the opportunity to provide guidelines about how we will ensure transparency in our interactions with all members of the public.

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INTRODUCTION

The basic template for legislative rulemaking under our quasi-constitution of administrative law, the Administrative Procedure Act (“APA”), could not be much simpler. The default process for making such a rule is notice and comment. Using this procedure, an agency must give notice to the world of the “subjects and issues involved” in its proposal.² It must provide interested members of the public a chance to comment on the noticed proposal.³ On issuing the rule in its final form, an agency must include a “concise general statement of . . . basis and purpose.”⁴ In short, the agency must declare what it is thinking about regulating, give others a chance to say what they think about the agency’s thoughts, and wrap things up by justifying the agency’s ultimate regulatory choice. Back in

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1. Memorandum from Lisa Jackson, Adm’r, EPA, to EPA Employees (Apr. 23, 2009), <http://blog.epa.gov/administrator/2009/04/24/memo-to-epa-employees-transparency-in-epas-operations/>.

2. 5 U.S.C. § 553(b)(3) (2006) (requiring notice of “either the terms or substance of the proposed rule or a description of the subjects and issues involved”).

3. *Id.* § 553(c).

4. *Id.*

1946, the APA's drafters did not intend for this process to be difficult.⁵

The modern reality of significant legislative rulemaking is well known to be complex, burdensome, and opaque.⁶ Much of the opacity arises from the fact that most policymaking decisions are made well *before* an agency ever issues a notice of proposed rulemaking ("NPRM").⁷ Rather than serve as a vehicle for policymaking, the notice-and-comment process is instead, to a rounding error, a means for establishing a record for judicial review of rules.

Much of the complexity flows from efforts made during the great "reformation" of American administrative law in the 1960s and 1970s to open up the policymaking process to greater participation by regulatory beneficiaries.⁸ In part as a consequence of adoption of an "interest representation" model of rulemaking, participation in the notice-and-comment process can demand substantial resources—in time, money, information, and expertise—from outside parties seeking to influence regulatory outcomes. Of course, the same might also be said for the judicial review process that follows most significant rulemaking.

Not everyone, however, enjoys the same amount of time, money, information, and expertise. We can thus think of administrative

5. *Cf.* *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 248 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part and dissenting in part) (noting that the APA contemplated a "simple and speedy practice" for rulemaking that courts have transformed "into a laborious, seemingly never-ending process").

6. For a prominent statement of this critique, see Richard J. Pierce, *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 65 (1995) ("[C]ourts have transformed the simple, efficient notice and comment process into an extraordinarily lengthy, complicated, and expensive process . . ."). Along these lines, in a recent conversation with the author, a senior agency official in charge of legal oversight of rulemaking at his agency explained that, given the various statutes, executive orders, guidance documents, and court decisions that have accumulated over time, the set of requirements and related guidance he keeps for agency rulemaking now fills six thick, three-ring binders. The size of this pile is all the more impressive given that these binders do not include court decisions.

7. *See, e.g.*, E. Donald Elliott, *Reinventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (1992) (describing notice-and-comment rulemaking as Kabuki theatre, "a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues"); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1775 (1975) ("Indeed, the content of rulemaking decisions is often largely determined in advance through a process of informal consultation in which organized interests may enjoy a preponderant influence.").

8. *See generally* Stewart, *supra* note 7 (characterizing changes in administrative law that expanded participation rights of regulatory beneficiaries as a great "reformation"). For a brief summary of the reformation's manifestations in the notice-and-comment rulemaking process, see *infra* Part I.A.

procedural law as handing interested persons (i.e., potential litigants) hammers with which to pound agencies. Common sense, along with a very basic public choice analysis, suggests that regulated parties will generally be able to use these hammers with greater force than public interest groups. A particular regulatory action that threatens the bottom line of a concentrated group of profit-seeking entities will attract their concentrated attention. Such entities will invest in lawyers, consultants, scientists, lobbyists, and politicians to protect their profits. Notwithstanding the strength and sophistication of many public interest groups, in many contexts they simply lack the resources to make for a good fight. Thus, it is possible that changes made to the rulemaking process that were intended, in part, to enable strong public interest group participation may often disfavor such groups.⁹

Part I of this Essay briefly examines the validity of this concern that the rulemaking process as currently structured unduly favors industry over public interest groups. It concludes that this concern has substantial justification. By shoving policymaking into the pre-notice period, the current process tends to deprive public interest groups of information they need in order to attempt to influence regulatory outcomes. Also, the resources necessary to participate in the rulemaking process (from pre-notice all the way through judicial review) naturally tilt the process in favor of those with money and power—namely corporate interests.

Part II then briefly discusses one suggestion for slightly redressing the balance of power: require prompt, electronic, and searchable disclosure of communications to agency officials directly bearing on the merits of potential rulemaking, regardless of whether a notice has been issued. Adopting this type of policy would not, of course, correct the basic problem of the resource imbalance, but then nothing, realistically, could. It would, however, make it somewhat easier for public interest groups to obtain the information they need to influence rulemaking in a timely way before an agency's policy choices crystallize.

9. For an especially pointed analysis of the unintentional consequences of pluralistic reform of rulemaking, see Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1324–25 (2010) (contending that reforms designed to shed sunlight on the rulemaking process have enabled regulated industries to overwhelm agencies with technical information, leading to “information capture”).

I. DO WE HAVE A BALANCE OF POWER PROBLEM?

A. *A Quick Review of Our Current Procedural Framework for Notice-and-Comment Rulemaking and How We Got There*

The complexity of modern notice-and-comment rulemaking can, to a considerable extent, be laid at the door of the great “reformation” of administrative law that the federal courts led during the 1960s and 1970s.¹⁰ As characterized by Professor Richard Stewart, the basic thrust of this reformation was to push administrative procedures towards an “interest representation” or pluralistic model of legitimacy.¹¹ To ensure proper representation of all relevant interests, courts aggressively construed agency duties of notice, comment, and explanation to expand opportunities for meaningful participation by outsiders—especially public interest groups—in the rulemaking process.¹²

Prior to the reformation, taking the APA at its word, an agency could issue a sketchy notice of a proposed rule that provided only a “description of the subjects and issues involved.”¹³ The agency had to accept comments from the public and was required to “consider[] . . . the relevant matter presented,” but the APA provided no express mechanism for enforcing this duty.¹⁴ As part of any rule adopted by notice and comment, an agency was required to include a “general statement of . . . basis and purpose,” but the APA insisted that this statement be “concise.”¹⁵ Regulated parties directly affected by a legislative rule would have standing to challenge it in federal court, but regulatory beneficiaries often did not.¹⁶ Judicial review as to facts and policy was extremely lax, in essence inquiring whether any conceivable set of facts could justify the agency’s policy choice.¹⁷

10. For the seminal article on the “reformation,” see generally Stewart, *supra* note 7.

11. *Id.* at 1712.

12. See *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 251–52 (2d Cir. 1977) (insisting, notwithstanding the absence of supporting language in the APA itself, that an agency’s notice of a proposed rule must include any scientific information on which the agency relied in fashioning the proposal); *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 393–94 (D.C. Cir. 1973) (imposing on agencies a duty of responding to comments that “step over a threshold requirement of materiality”), *cert. denied*, 417 U.S. 921 (1974).

13. 5 U.S.C. § 553(b)(3) (2006).

14. *Id.* § 553(c).

15. *Id.*

16. See Peter L. Strauss, *Changing Times: The APA at Fifty*, 63 U. CHI. L. REV. 1389, 1401–05 (1996) (explaining the relatively restrictive approach to standing under the APA that courts applied until *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970)).

17. See William Funk, *Rationality Review of State Administrative Rulemaking*, 43 ADMIN. L. REV. 147, 149 (1991) (noting that prior to the seminal

During the 1960s and 1970s, the scope of potential regulation vastly increased with the creation of agencies such as the Environmental Protection Agency (“EPA”), the Consumer Product Safety Commission (“CPSC”), and the Occupational Safety and Health Agency (“OSHA”). At the same time, concerns deepened that regulated parties had “captured” various agencies, which therefore were adopting policies biased in favor of special interests rather than optimally serving the public interest.¹⁸

Partially in response to such concerns, the federal courts, led by the D.C. Circuit, dragged a radically different model for legislative rulemaking out of the sparse provisions governing notice and comment in the APA. The courts reasoned that without information concerning agency rulemaking efforts, outsiders can neither know that a rulemaking implicates their interests nor critique the agency’s grounds for action. They therefore cannot meaningfully participate in the comment process—which cannot be right.¹⁹

To address these concerns, the courts reworked the APA’s notice provisions in two especially notable ways. First, an agency’s final rule must be a “logical outgrowth” of the noticed proposal.²⁰ The functional idea behind this abstraction is that a proposal should put an interested person who reads it on notice that issues of concern to her are “on the table.”²¹ This sort of notice prevents an agency from blocking meaningful comments by sandbagging interested parties with misleading notices.²² Second, courts insisted that agencies

case of *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), which required “searching and careful” review of facts necessary to justify rulemaking, federal administrative law simply presumed the existence of such facts).

18. See Sidney A. Shapiro, *Administrative Law After the Counter-Reformation: Restoring Faith in Pragmatic Government*, 48 U. KAN. L. REV. 689, 693 (2000) [hereinafter Shapiro, *Counter-Reformation*] (discussing the diagnosis of agency “capture” by regulated interests that helped justify the “reformation”).

19. *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977) (“To suppress meaningful comment by failure to disclose the basic data relied upon is akin to rejecting comment altogether.”).

20. See Jack M. Beermann, *Common Law and Statute Law in Administrative Law*, 63 ADMIN. L. REV. 1, 7–8 (2011) (discussing the lax approach that courts took to the notice requirement in the years immediately following adoption of the APA and identifying the “logical outgrowth” test for adequacy of notice as a nonstatutory test developed by the courts as they tightened their control over rulemaking).

21. See, e.g., *Am. Med. Ass’n v. United States*, 887 F.2d 760, 768 (7th Cir. 1989) (“[T]he relevant inquiry is whether or not potential commentators would have known that an issue in which they were interested was ‘on the table’ . . .”).

22. See, e.g., *Chocolate Mfrs. Ass’n of U.S. v. Block*, 755 F.2d 1098, 1104 (4th Cir. 1985) (stating that agencies do not have “carte blanche” to issue rules that vary from original proposals and requiring that notices “be sufficiently

disclose any “scientific data” on which they may have relied in their NPRMs.²³

Interested outsiders might submit the most insightful comments in the world, but their work will not matter much if agencies ignore them. Courts therefore decided not to take the APA’s admonition that agencies accompany rules with “concise” contemporaneous explanations literally.²⁴ Instead, such explanations must contain a response to any material comments offered during the notice-and-comment process.²⁵

The reformation also included two especially notable changes to judicial review. First, courts enabled regulatory beneficiaries (and public interest groups) to obtain judicial enforcement of these new requirements by relaxing standing rules.²⁶ Second, courts developed “hard-look” review of agency policy decisions. The conceptual roots of hard-look review can be traced back to the *Chenery* doctrine, which stands for the idea that the validity of agency discretionary action must rise or fall based on the validity of the agency’s contemporaneous explanation for it.²⁷ By demanding a “concise general statement of basis and purpose” for rules developed through notice and comment,²⁸ the APA provided a hook for the *Chenery* doctrine to apply to rulemaking. As it first evolved, the hard-look doctrine instructed courts to examine such explanations to ensure that an agency itself had taken a “hard look” at the regulatory problems confronting it.²⁹ Later, the hard-look doctrine came to be

descriptive to provide interested parties with a fair opportunity to comment and to participate in the rulemaking”).

23. See, e.g., *Nova Scotia*, 568 F.2d at 251–52.

24. See *Pierce*, *supra* note 6, at 65 (“To have any realistic chance of upholding a major rule on judicial review, an agency’s statement of basis and purpose now must discuss in detail each of scores of policy disputes, data disputes, and alternatives to the rule adopted by the agency.”); *Wagner*, *supra* note 9, at 1355 (“Even for the minor rules, the EPA typically prepares a one-hundred-plus-page report on its response to comments, as well as anywhere from a few to dozens of pages of ‘significant changes’ in the small, three-column type of the *Federal Register*.” (footnote omitted)).

25. *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 393–94 (D.C. Cir. 1973) (requiring agencies to respond to material comments), *cert. denied*, 417 U.S. 921 (1974); see also, e.g., *La. Fed. Land Bank Ass’n v. Farm Credit Admin.*, 336 F.3d 1075, 1080 (D.C. Cir. 2003) (declaring that agencies must respond “to those comments which, if true, . . . would require a change in [the] proposed rule” (internal quotation marks omitted) (quoting *Am. Mining Cong. v. EPA*, 907 F.2d 1179, 1188 (D.C. Cir. 1990))).

26. See *Strauss*, *supra* note 16, at 1401–05 (discussing the Court’s shift in its approach to standing and connecting this shift to the “reformation” of administrative law toward an interest representation model).

27. *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943).

28. 5 U.S.C. § 553(c) (2006).

29. *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970) (observing that it is a reviewing court’s task to ensure that “the agency

associated instead with courts taking a “hard look” at agency policy choices to ensure their rationality.³⁰ In theory, this form of review is supposed to be quite lax, but in practice, particularly where vague law and politicized courts come into play, one person’s policy judgment may be another person’s clear error.

Presidents and the Congress have also played their part in “ossifying” the rulemaking process. Presidents of both political parties have used executive orders to centralize control of administrative rulemaking in the Office of Information and Regulatory Affairs (“OIRA”), a subdivision of the Office of Management and Budget in the Executive Office of the White House.³¹ Satisfying OIRA review requires agencies to prepare cost-benefit analyses for significant regulatory actions.³² A common criticism of OIRA review is that it is secretive and generally favors regulated interests.³³ Congress has contributed to deliberative burdens by requiring agencies to issue various “impact statements” as part of the rulemaking process in statutes including, among others, the Regulatory Flexibility Act³⁴ and the Unfunded Mandates Reform Act.³⁵

The result of all of these encrustations on the rulemaking process is that significant legislative rulemaking via notice-and-comment rulemaking, which was once easy and supposed to be so, is

has . . . really taken a ‘hard look’ at the salient problems, and has . . . genuinely engaged in reasoned decision-making” (footnote omitted), *cert. denied*, 403 U.S. 923 (1971).

30. *See* *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

31. Shapiro, *Counter-Reformation*, *supra* note 18, at 707–09.

32. *See* *Regulatory Planning and Review*, Exec. Order No. 12,866 § 6(a), 58 FED. REG. 51,735 (Oct. 4, 1993); *Improving Regulation and Regulatory Review*, Exec. Order No. 13,563 § 1(b), 76 FED. REG. 3,821 (Jan. 18, 2011).

33. *See, e.g.*, RENA STEINZOR ET AL., CTR. FOR PROGRESSIVE REFORM, BEHIND CLOSED DOORS AT THE WHITE HOUSE: HOW POLITICS TRUMPS PROTECTION OF PUBLIC HEALTH, WORKER SAFETY, AND THE ENVIRONMENT, WHITE PAPER # 1111 4 (2011), *available at* http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf (“[E]very single study of its performance, including this one, shows that OIRA serves as a one-way ratchet, eroding the protections that agency specialists have decided are necessary under detailed statutory mandates, following years—even decades—of work.”); *cf.* RICHARD L. REVESZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* 171–83 (2008) (proposing reforms to OIRA to enhance transparency and correct anti-regulatory bias while maintaining cost-benefit analysis as tool for review of rules).

34. 5 U.S.C. §§ 603–05 (2006) (requiring agencies to prepare impact statements discussing the effects of rules on small businesses at the proposal and final issuance stages of rulemaking).

35. 2 U.S.C. § 1532(a) (2006) (detailing impact-statement requirements for “any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any 1 year”).

now a complex, time-consuming, resource-intensive procedural maze.

B. Does the Current Model Unduly Favor Regulated Interests?

It bears noting at the outset that it is impossible to find a neutral corner from which to judge whether rulemaking outcomes optimize the “public interest” because the “public interest” is contested in interesting cases—one person’s “capture” sometimes turns out to be another person’s exceptionally well-reasoned policy choice.³⁶ We should expect people with especially strong commitments to environmental protection, such as staffers at Sierra Club, to place a lower value on economic development than staffers at the United States Chamber of Commerce. Regardless of the technical pretensions of cost-benefit analysis, we lack objective means for precisely balancing the competing, incommensurate preferences of such groups.

That said, one stark difference between regulated parties and public interest groups is that the former seek to influence regulations to protect or enhance their bottom lines. They have money, sometimes lots of it, at stake. As Upton Sinclair observed, “It is difficult to get a man to understand something when his job depends on not understanding it.”³⁷ We should therefore expect this profit motive to affect how regulated parties assess not just their own private interests but also how they perceive the public interest—even if they act with the best of faith. It is obvious that, provided the opportunity and the power, profit-driven, regulated parties would not choose to regulate themselves in a socially optimal way.³⁸ Likewise, given the chance to exercise undue influence, such parties would naturally attempt to persuade agencies to adopt policies that favor corporate interests more than they otherwise would.

It does not follow, however, from the less-than-astonishing fact that regulated entities follow their perceived self-interest that they

36. Cf. Sidney A. Shapiro, *The Complexity of Regulatory Capture: Diagnosis, Causality, and Remediation*, 17 ROGER WILLIAMS U. L. REV. 221, 223–24 (2012) [hereinafter Shapiro, *The Complexity of Regulatory Capture*] (noting that the concept of capture is “elusive” and suggesting defining it operationally “as occurring when agencies consistently adopt regulatory policies favored by regulated entities”).

37. UPTON SINCLAIR, I, CANDIDATE FOR GOVERNOR: AND HOW I GOT LICKED 100 (1935).

38. See, e.g., Edmund L. Andrews, *Greenspan Concedes Error on Regulation*, N.Y. TIMES (Oct. 23, 2008), <http://www.nytimes.com/2008/10/24/business/economy/24panel.html> (reporting Greenspan’s rueful admission at a congressional hearing on the collapse of the housing bubble that “[t]hose of us who have looked to the self-interest of lending institutions to protect shareholders’ equity, myself included, are in a state of shocked disbelief”).

can succeed in systematically distorting regulatory outcomes away from the public interest. The primary protector of the public interest in a regulatory context should be the agency itself. Agency officials are perfectly aware of the existence and force of industry bias.³⁹ Moreover, many agency officials identify quite strongly with their regulatory missions; for example, the EPA is the home of many environmentalists.⁴⁰ It is therefore possible that any imbalance in the regulatory process between regulated entities and public interest groups is nothing to be too worried about.⁴¹

Of course, for what it is worth, this hopeful view of the administrators' power to triumph over special interests in order to serve the public good runs counter to the main underlying premise of the great reformation of American administrative law. Broadly speaking, this premise was that agencies had been "captured" by the industries they were supposed to regulate.⁴² The reformation sought to solve this problem by opening up regulatory procedures and judicial review to participation by regulatory beneficiaries (and public interest groups representing them).⁴³

Although these reforms expanded the formal powers of regulatory beneficiaries to participate in the procedural moves of rulemaking and judicial review, they did not eliminate some of the root causes of industry influence over agencies. Regulated parties naturally have far more frequent and intimate contact with agencies than public interest groups. Some of these contacts occur as part of the day-to-day process of implementing regulations. Regulated entities seek information concerning regulatory requirements from agencies; agencies inspect regulated parties and converse with them about the results.⁴⁴ When an agency turns to policymaking, it must obtain relevant information concerning the problems it confronts.

39. See, e.g., Shapiro, *The Complexity of Regulatory Capture*, *supra* note 36, at 228–29, 234–41.

40. STEVEN P. CROLEY, *REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT* 49 (2008) (noting that many administrators are primarily motivated by "some philosophical commitment to the agency's regulatory mission").

41. *Cf. id.* at 5 (contending that the "cynical" view of dysfunctional government inspired by public choice theory is oversold and that under conditions that "are plausible given the real-world legal-institutional environment in which federal administrative agencies operate—regulatory outcomes can and sometimes do advance broad social interests and increase social welfare").

42. Shapiro, *Counter-Reformation*, *supra* note 18, at 693.

43. *Id.* at 693–94.

44. *Cf. Sierra Club v. Costle*, 657 F.2d 298, 401 (D.C. Cir. 1981) ("Informal contacts may enable the agency to win needed support for its program, reduce future enforcement requirements by helping those regulated to anticipate and shape their plans for the future, and spur the provision of information which the agency needs").

The primary source of this information will generally be, naturally enough, industry contacts.⁴⁵ As Professor Stewart observed nearly forty years ago, pushing rulemaking procedures towards an interest-representation model does little to alter this fundamental dynamic.⁴⁶

It is one thing to speculate, however soundly, on the likelihood of industry contacts swamping public interest group contacts in the rulemaking process. It is another to study ninety rules to document it, which is what Professors Wagner, Barnes, and Peters recently did in their study of the rules that the EPA issued between 1994 and 2009 to limit hazardous air pollutants (the “HAPs” rules).⁴⁷ They documented that during the pre-notice period, when the bulk of the real policymaking takes place, EPA officials had an average of 178 contacts per rule with interested parties—including regulated parties, public interest groups, and states.⁴⁸ A whopping 170 of these contacts were with regulated parties, 9 were with states, and a measly 0.7 were with public interest groups.⁴⁹

This wild imbalance does little to instill confidence in the efficacy of the current procedural model as a means of “ventilating” issues at effective times.⁵⁰ That said, one must be careful in drawing too many conclusions from this study. For one thing, one might generally expect some disproportion in pre-notice contacts as part of the natural order of things; if an agency needs information concerning a particular device or process, then it needs to consult with firms that use them. Also, although the HAPs study took an admirable amount of work, it still only surveyed one particular area of rulemaking by one particular agency. Federal rulemaking is a vast and varied enterprise, which is one reason it is hard to study.

45. See, e.g., Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 834 (2003) (noting the concern that agency dependence on industry for information may help the latter capture the former).

46. Stewart, *supra* note 7, at 1777 (observing that, notwithstanding greater use of formal procedures, “agencies will continue to be exposed to intensive pressures from regulated or client groups, on whom the agencies must rely for information, political support, and other forms of cooperation if the agency is to survive and prosper”).

47. Wendy Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: Empirical Study of EPA’s Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 128–29 (2011).

48. *Id.* at 124.

49. *Id.* at 125.

50. See Stephanie Stern, *Cognitive Consistency: Theory Maintenance and Administrative Rulemaking*, 63 U. PITT. L. REV. 589, 600 (2002) (surveying sources indicating that industry insiders, lawyers, and empirical studies all agree that pre-notice contacts are a far better means to influence agency policy than post-notice comments).

Agencies can (and sometimes do) go out of their way to seek public input before issuing a formal NPRM.⁵¹

Even if agency policymaking mostly occurs before a public interest group is likely to be able to participate, one might still conclude that the current model for notice-and-comment rulemaking finds ample justification in the role it enables such groups to play through commenting and during judicial review. Even here, however, there are grounds for concern over the imbalance between the resources of regulated parties and public interest groups. Regulated parties will keep spending on comments and subsequent litigation up to the point that the expected costs to them of such efforts exceed the benefits to the parties. As regulated parties may expect to protect or enhance their profits by successfully pushing regulations in their favor, this conduct is in some part self-financing. Public interest groups, by contrast, must constantly engage in triage (a) to determine which agency regulatory efforts to investigate and track, and (b) to determine which of these regulatory efforts to challenge—whether in the notice-and-comment process or in subsequent litigation. They must, in short, seek maximum legal and policy bangs for their very limited bucks. It is rather as if the current model for judicial review of agency action supplies both regulated parties and public interest groups with guns to fire at agencies without ever noticing that one side in the fight has far fewer bullets than the other. The HAPs study is again highly suggestive in this regard. It found that industry interests submitted, on average, 35 comments per HAPs rule, whereas public interest groups submitted 2.4.⁵² Moreover, eighty-three percent of significant changes made in response to comments favored industry.⁵³

II. TILTING THE BALANCE A BIT THROUGH ENHANCED PRE-NOTICE TRANSPARENCY

In truth, it is hard to assess the degree to which notice-and-comment procedures, as currently designed, have contributed to regulatory departures from some pure, Platonic essence of the public interest. Still, if you create a process that costs resources, you should expect interests with more of those resources (e.g., money or information) to dominate that process. We therefore should expect

51. For instance, the Department of Energy holds public meetings to discuss “framework documents” and seek public input for development of energy conservation standards for appliances before issuing an NPRM. *See, e.g.*, Energy Conservation Program: Public Meeting and Availability of the Framework Document for High Intensity Discharge Lamps, 77 FED. REG. 11,785–86 (Feb. 28, 2012) (to be codified at 10 C.F.R. pt. 431).

52. Wagner, Barnes & Peters, *supra* note 47, at 128–30.

53. *Id.* at 130–31.

corporate interests to dominate notice-and-comment rulemaking, and the empirical evidence is at least strongly suggestive that they often do.⁵⁴ It therefore seems worthwhile to consider how one might, with the right will, redress this imbalance.

A. *Many Potential Paths*

Given that agency policymaking is such a complex, multi-faceted process, it naturally follows that there are many different approaches one might try to redress the imbalance in power among agencies, regulated parties, and public interest groups. Maybe the best and simplest approach would involve strengthening agencies to decrease their dependence on (and vulnerability to) regulated parties. One might, for instance, properly fund regulatory agencies to enable them to increase their scientific and technical resources. Alternatively, one might increase the effective strength of agencies by decreasing the amount of work it takes to adopt a rule. Many observers of the regulatory process have long claimed that it has “ossified” due to needless burdens on rulemaking created by the courts, Congress, and the President.⁵⁵ Steps could be taken to reverse this trend.

One might instead try reducing the power of regulated parties. Reducing the power of the powerful is hard to do—they have, after all, the power. As a political matter, were such an effort to ever get off the ground, it would likely need to involve a generally applicable change to the law that would not, on its face, “pick on” one side or another. Continuing in this speculative vein, it is reasonable to suspect that hard-look style arbitrariness review could systematically favor regulated parties as compared to public interest groups, because it tends toward highly technical, fact-sensitive issues that fall within the special expertise of regulated parties. If this is so, then transforming hard-look review into something more like a “soft look” might tend to favor the public interest by depriving those wishing to challenge agency action of a weapon that regulated parties are generally better able to wield.⁵⁶

Still another set of strategies might involve steps to strengthen public interest groups. For public interest groups to exercise effective influence over policymaking, they need both timely information and the resources to act on that information. It is possible to imagine a world in which the federal government writes large checks to public interest groups to correct the resource

54. See, e.g., *supra* notes 47–49, 53–54 and accompanying text.

55. See generally Pierce, *supra* note 6.

56. Cf. Sidney A. Shapiro, *Substantive Reform, Judicial Review, and Agency Resources: OSHA as a Case Study*, 49 ADMIN. L. REV. 645, 652–54 (1997) (favoring a moderate “soft-look” approach to judicial review, which he designates “pass-fail” review).

problem. The economic and political constraints of the real world, however, make such steps very unlikely. A more plausible strategy might involve changes in the regulatory system to make it easier for public interest groups to gain timely access to information regarding agency regulatory efforts. The next Subpart fleshes out such a strategy.

B. Timely Disclosure of Pre-Notice Contacts

The inspiration for this suggestion is quite simple and direct: On learning that I would be attending a symposium devoted to increasing the influence of public interest groups in rulemaking, I decided to ask a public interest attorney what single change would be most helpful in his work. I spoke at some length with an attorney perfectly suited to answer this question, John Walke, Director of the Natural Resources Defense Council's Clean Air Program, a person hip-deep in the EPA's regulatory process.⁵⁷ His answer came without a hint of hesitation: adopt real-time, searchable, electronic disclosure of pre-notice contacts intended to influence rulemaking.⁵⁸

This response makes a great deal of sense in light of the well-known fact of administrative life that most of the real policymaking in legislative rulemaking occurs well before an agency publishes an NPRM in the *Federal Register*.⁵⁹ It is also consistent with the finding of the HAPs study, discussed above, that the overwhelming majority of agency contacts during the pre-notice period are with regulated parties.⁶⁰ Of course, the basic point of this proposal is to help enable regulatory beneficiaries learn how regulated parties are attempting to influence policymaking before agency views “jell.”⁶¹

57. See John Walke, *John Walke, Clean Air Director/Senior Attorney, Washington, D.C.*, SWITCHBOARD: NAT. RESOURCES DEF. COUNCIL STAFF BLOG, <http://switchboard.nrdc.org/blogs/jwalke/> (last visited July 10, 2012) (explaining that Mr. Walke “work[s] on national legislation, litigation and Environmental Protection Agency rulemakings that will have the greatest impact on ensuring clean air for all Americans. . . . [H]e frequently challenge[s] EPA rulemaking in federal court for running afoul of the Clean Air Act and failing to protect the public.”).

58. For a similar proposal, see Cary Coglianese et al., *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 GEO. WASH. L. REV. 924, 950 (2009) (“Although it may be difficult to establish a bright-line rule for when the development of a new rulemaking begins, the agency should nevertheless attempt in good faith to disclose all pertinent rule-related contacts as early in the process as possible.”).

59. Elliot, *supra* note 7, at 1494 (observing that, under the current legal framework, “public input through formal notice-and-comment rulemaking must come relatively close to the end of the agency’s process, when the proposed rule has ‘jelled’ into something fairly close to its final form”).

60. See *supra* notes 48–49 and accompanying text.

61. Elliot, *supra* note 7, at 1494.

Viewed from a doctrinal standpoint, this proposal would alter the balance between disclosure and secrecy in rulemaking struck several decades ago in the aftermath of *Home Box Office, Inc. v. FCC*⁶² (“HBO”) and *Sierra Club v. Costle*.⁶³ The first of these two cases arose out of a challenge to “pay cable” rules adopted by the Federal Communications Commission (“FCC”) that restricted the ability of cablecasters to run feature films and sports programs.⁶⁴ These rules naturally attracted the concentrated attention of various powerful entities—broadcasters, cable companies, motion picture interests, etc.—who “sought out individual commissioners or Commission employees for the purpose of discussing *ex parte* and in confidence the merits of the rules” at issue.⁶⁵ The D.C. Circuit panel that resolved *HBO* was particularly impressed that many *ex parte* contacts occurred after the close of oral argument in the rulemaking proceeding but before promulgation, “when the rulemaking record should have been closed while the Commission was deciding what rules to promulgate.”⁶⁶ During this time, the Commission “met some 18 times with Commission personnel, cable interests some nine times, motion picture and sports interests five times each, and ‘public interest’ intervenors not at all.”⁶⁷

Confronted with this information regarding industry contacts, the court noted three concerns. First, consistent with worries over agency capture that inspired the reformation, the court observed that it was “particularly concerned that the final shaping of the rules we are reviewing here may have been by compromise among the contending industry forces, rather than by exercise of the independent discretion in the public interest the Communications Act vests in individual commissioners.”⁶⁸ Second, the court insisted that “[e]ven the possibility that there is here one administrative record for the public and this court and another for the Commission and those ‘in the know’ is intolerable.”⁶⁹ Among other problems, such secrecy made effective judicial review impossible, for a court could not know whether the public reasons an agency gave for a decision matched its “real” reasons. Given this circumstance, a court would have to “treat the agency’s justifications as a fictional account of the actual decisionmaking process and must perforce find its actions arbitrary.”⁷⁰ Third, secret, *ex parte* contacts foiled an

62. 567 F.2d 9 (D.C. Cir. 1977) (per curiam), *cert. denied*, 434 U.S. 829 (1977).

63. 657 F.2d 298 (D.C. Cir. 1981).

64. *HBO*, 567 F.2d at 18–19.

65. *Id.* at 51.

66. *Id.* at 53.

67. *Id.*

68. *Id.*

69. *Id.* at 54.

70. *Id.* at 54–55.

important function of rulemaking, which was to expose information on which the agency relied to “adversarial critique” from the public.⁷¹ Against all this, the court also recognized that “informal contacts between agencies and the public are the ‘bread and butter’ of the process of administration and are completely appropriate so long as they do not frustrate judicial review or raise serious questions of fairness.”⁷²

To reconcile these competing concerns, the court held that (a) communications received before issuance of an NPRM generally need not go in a public file, and (b) after issuance of a notice but before issuance of a final rule, “any agency official or employee who is or may reasonably be expected to be involved in the decisional process of the rulemaking proceeding” should refuse to discuss the disposition of the rule with any interested party.⁷³

Although *HBO* has never been formally overruled, its judicialized approach to rulemaking via notice and comment did not last long. Its chief vulnerability is that it is extremely hard to reconcile with the APA’s clear treatment of ex parte contacts. In administrative law vernacular, the APA divides rulemaking into “formal” and “informal” categories. To promulgate a formal rule, an agency must follow the procedures set forth in 5 U.S.C. §§ 556 and 557, which authorize (but for the most part do not require) the use of trial-type procedures. Of most immediate concern, in keeping with the judicial model that underlies formal proceedings, § 557(d) imposes strict limits on ex parte contacts.⁷⁴ Notice-and-comment rulemaking is a species of “informal” rulemaking and not subject to § 557(d). It thus seems clear that, in *HBO*, the D.C. Circuit, by imposing strict limits on ex parte contacts, made a policy choice regarding treatment of notice-and-comment rulemaking that Congress had itself declined to make. Especially in a post-*Vermont Yankee* world, this kind of judicial creativity (or activism) was not likely to last.⁷⁵

Nor did it. In administrative law casebooks, *HBO* is commonly paired with its archrival and nemesis, *Sierra Club v. Costle*, which involved challenges to an EPA rule that promulgated new source performance standards for emission controls of coal-fired power

71. *Id.* at 55.

72. *Id.* at 57.

73. *Id.*

74. See 5 U.S.C. § 557(d)(1)(B) (2006) (barring ex parte contacts during formal proceedings between “interested persons outside the agency” and persons within the agency who are or “may reasonably be expected to be involved in the decisional process”).

75. See generally *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519 (1978) (insisting, in no uncertain terms, that courts should not create additional procedural requirements for notice-and-comment rulemaking under the APA beyond those imposed by Congress).

plants.⁷⁶ One of the challengers, the Environmental Defense Fund (“EDF”), claimed that the rule was procedurally defective because of a flurry of ex parte contacts (both written and oral) that occurred after the close of the comment period.⁷⁷ Rather than apply the APA as interpreted by *HBO*, the D.C. Circuit Court tested this complaint against the procedural framework established for notice-and-comment rulemaking under the Clean Air Act Amendments of 1977.⁷⁸ As amended, § 307 of the Act now codifies elements of the reformation; unlike the unadorned text of 5 U.S.C. § 553, it requires the EPA to disclose information on which it relies in NPRMs and to respond to any significant comments offered.⁷⁹ Significantly, like § 553 of the APA, § 307 does *not* bar ex parte contacts.⁸⁰

Faced with the EDF’s procedural argument, the court conceded that ex parte contacts can create the danger of “secret record[s]” for those in the know and fake public records for everyone else.⁸¹ Whereas the *HBO* court found this danger intolerable, the *Sierra Club* court was far less concerned. It stressed that the scope for politics to distort technical decisionmaking was limited by the requirement that the EPA provide a public justification for its ultimate decision.⁸² Realistically, that public justification would not provide a full explanation of everything that affected the agency’s decision-making process. The EPA would likely not explain, for instance, that “we softened some emissions requirements because, according to our best analysis, Senator Robert Byrd of West Virginia, where there is an awful lot of coal, is a United States Senator.” This, however, is life in a democracy.

The court also stressed that agency contacts with industry are both practically important for effective regulation and play a key role in legitimating the entire regulatory enterprise:

Under our system of government, the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public from whom their ultimate authority derives, and upon

76. *Sierra Club v. Costle*, 657 F.2d 298, 312 (D.C. Cir. 1981).

77. *Id.* at 386 (noting the EDF’s claim that the EPA had weakened its rule “as a result of an ‘ex parte blitz’ by coal industry advocates conducted after the close of the comment period”).

78. *Id.* at 391.

79. 42 U.S.C. § 7607(d)(3), (6) (2006).

80. *Sierra Club*, 657 F.2d at 395 (“In contrast to other recent statutes, there is no mention [in § 307] of any restrictions upon ‘ex parte’ contacts.”).

81. *Id.* at 401 (“The possibility of course exists that in permitting ex parte communications with rulemakers we create the danger of ‘one administrative record for the public and this court and another for the Commission.’”) (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 54 (D.C. Cir. 1977)).

82. *Id.*

whom their commands must fall. As judges we are insulated from these pressures because of the nature of the judicial process in which we participate; but we must refrain from the easy temptation to look askance at all face-to-face lobbying efforts, regardless of the forum in which they occur, merely because we see them as inappropriate in the judicial context. Furthermore, the importance to effective regulation of continuing contact with a regulated industry, other affected groups, and the public cannot be underestimated. Informal contacts may enable the agency to win needed support for its program, reduce future enforcement requirements by helping those regulated to anticipate and shape their plans for the future, and spur the provision of information which the agency needs.⁸³

Everything in the preceding quote seems true. Also, the United States Chamber of Commerce probably could not have said it better itself.

The court concluded that the EPA's treatment of post-comment-period contacts from industry groups was well within the law. Section 307 of the Clean Air Act requires the EPA to include in its rulemaking docket as soon as possible "[a]ll documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking."⁸⁴ The EPA had gone the extra mile to honor this requirement by docketing all written comments it had received as well as most oral meetings.⁸⁵

Most to the present point, the court disposed quickly of the EDF's plea for an extension of *HBO's* bar on ex parte contacts:

Lacking a statutory basis for its position, EDF would have us extend our decision in *Home Box Office, Inc. v. FCC* to cover all meetings with individuals outside EPA during the post-comment period. Later decisions of this court, however, have declined to apply *Home Box Office* to informal rulemaking of the general policymaking sort involved here, and there is no precedent for applying it to the procedures found in the Clean Air Act Amendments of 1977.⁸⁶

The court further stated that:

Where agency action resembles judicial action, where it involves formal rulemaking, adjudication, or quasi-

83. *Id.* at 400–01 (footnotes omitted).

84. 42 U.S.C. § 7607(d)(4)(B)(i) (2006).

85. *Sierra Club*, 657 F.2d at 387, 397–400, 400–04 (noting that all written comments were docketed, approving of the EPA's treatment of written comments, and approving of the EPA's docketing of oral meetings).

86. *Id.* at 402 (footnotes omitted).

adjudication among “conflicting private claims to a valuable privilege,” the insulation of the decisionmaker from ex parte contacts is justified by basic notions of due process to the parties involved. But where agency action involves informal rulemaking of a policymaking sort, the concept of ex parte contacts is of more questionable utility.⁸⁷

Bars on ex parte contacts make sense for judicial action, not legislative action. To the degree an agency is acting like a court, they should apply; to the degree an agency is acting like a junior varsity legislator, they should not. In general, informal rulemaking involves broad policymaking—in other words, quasi-legislative action. Therefore, except in unusual situations where an agency is using notice-and-comment rulemaking to determine “conflicting private claims to a valuable privilege” that implicate due process,⁸⁸ there is no basis for courts to impose a bar on ex parte contacts in notice-and-comment rulemaking.⁸⁹

The courts’ unwillingness to follow *HBO*’s lead and severely limit ex parte contacts in the rulemaking process has left agencies with discretion to control such contacts largely as they see fit. A grand survey of how all regulatory agencies have used this discretion is beyond the scope of this Essay. If, however, the EPA, FCC, Department of Transportation (“DOT”), and Department of Energy (“DOE”) are representative examples, then it seems that many agencies are striving to ensure transparency of contacts *after* some formal, public step has been taken to initiate a rulemaking process.⁹⁰ These policies do not, however, directly address the problem of influence occurring *before* such steps are taken.

Starting with the EPA, this Essay opened with a quote from Administrator Jackson’s “Fishbowl Memo” that she distributed to EPA employees soon after she began her tenure.⁹¹ The Fishbowl Memo has the following to say about transparency in rulemaking:

87. *Id.* at 400 (footnotes omitted).

88. *See* Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 224 (D.C. Cir. 1959) (establishing that “basic fairness” justified a bar on ex parte contacts during ostensible rulemaking used to conduct the essentially adjudicative task of resolving “conflicting private claims to a valuable privilege”).

89. *See* Elec. Power Supply Ass’n v. Fed. Energy Regulatory Comm’n, 391 F.3d 1255, 1266 (D.C. Cir. 2004) (declaring that “[*HBO*] was based on the due process clause”).

90. According to one senior agency regulatory official’s sense of the matter after discussions several years ago with contacts at other major rulemaking agencies, about one-half of these agencies have limits on ex parte contacts. E-mail from Neil Eisner, Assistant Gen. Counsel for Regulation and Enforcement, U.S. Dep’t. of Transp. (Apr. 18, 2012) (on file with author).

91. *See* Jackson, *supra* note 1.

It is crucial that we apply the principles of transparency and openness to the rulemaking process. This can only occur if EPA clearly explains the basis for its decisions and the information considered by the Agency appears in the rulemaking record. Therefore, each EPA employee should ensure that all written comments regarding a proposed rule received from members of the public, including regulated entities and interested parties, are entered into the rulemaking docket.

Robust dialogue with the public enhances the quality of our decisions. EPA offices conducting rulemaking are therefore encouraged to reach out as broadly as possible for the views of interested parties. However, while EPA may and often should meet with groups and individuals, we should attempt, to the maximum extent practicable, to provide all interested persons with equal access to EPA. In addition, it is essential to ensure that the public receives timely notice, as far as practicable, of information or views that have influenced EPA's decisions. This means that EPA employees must summarize in writing and place in the rulemaking docket any oral communication during a meeting or telephone discussion with a member of the public or an interested group that contains significant new factual information regarding a proposed rule.⁹²

Certainly the tone of the Fishbowl Memo strongly favors transparency. A close reading of these two quoted paragraphs, however, suggests that the agency has, in essence, reaffirmed the approach to ex parte contacts approved by *Sierra Club*. The memo emphasizes that “it is essential to ensure that the public receives timely notice, as far as practicable, of information or views that have influenced the EPA's decisions.”⁹³ The means for providing this notice, however, is docketing, and the memo's docketing requirements for both documents and oral contacts apply to “proposed rules.”⁹⁴ They do not appear to apply during the pre-proposal stage where much of the real policymaking occurs. Pre-notice contacts may nonetheless find their way into the rulemaking docket, albeit perhaps in digested form, insofar as the agency must “explain[] the basis for its decisions and the information considered.”⁹⁵ At that point, however, notice to the public is no longer timely insofar as decisions have, in practice, been made.

The FCC—the agency on the receiving end of the *HBO* decision—has promulgated an extensive, complex set of rules

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

governing ex parte contacts.⁹⁶ As applied to informal rulemaking, the upshot of these complex rules seems close to that of the Fishbowl Memo. The FCC categorizes agency actions into “exempt,” “permit-but-disclose,” and “restricted” proceedings.⁹⁷ Generally speaking, ex parte contacts can be freely made and need not be disclosed during “exempt” proceedings; they can be freely made but must be promptly disclosed during “permit-but-disclose” proceedings; and they are barred during “restricted” proceedings.⁹⁸

Notably, informal rulemakings under § 553 fall into the permit-but-disclose category.⁹⁹ Thus, once an NPRM has been issued, a party making an ex parte contact with a decision-making official at the FCC is under an obligation to submit a record of that contact to the agency,¹⁰⁰ which discloses such contacts at least twice weekly.¹⁰¹ Provisions are made for limiting distribution of confidential information.¹⁰²

By contrast, notices of inquiry (“NOIs”) fall into the exempt category.¹⁰³ The FCC uses an NOI to alert interested persons that the agency is seeking information regarding a particular topic.¹⁰⁴ The information gathered may later be used to fashion an NPRM. If the pre-NPRM period accounts for the bulk of real policymaking, however, then the FCC’s detailed ex parte rules seem to avoid forcing disclosure just when it may be most needed.

The DOT has operated under an order governing disclosure of ex parte contacts for over forty years. This brief order provides in most pertinent part:

When the contact takes place after the issuance of a notice of proposed rule making in the subject matter, the report should be made and included in the public docket promptly following the contact. *When the contact takes place before the issuance of a notice of proposed rule making and when the substance of the contact forms one of the bases for issuance of the notice, the substance of the contact should be discussed in the preamble to the notice.* If in any case there is a legitimate reason for not discussing the prior contact in the preamble to the notice, then

96. Ex Parte Rules, 47 C.F.R. §§ 1.1200–1.1216 (2011), *available at* <http://www.fcc.gov/encyclopedia/ex-parte-rules-2011>.

97. *Id.* § 1.1200(a).

98. *Id.*

99. *Id.* § 1.1206(a)(1).

100. *Id.* § 1.206(b).

101. *Id.* § 1.206(b)(4).

102. *Id.* § 1.206(b)(2)(ii).

103. *Id.* § 1.1204(b)(1).

104. For an explanation of the FCC’s use of NOIs, see *Rulemaking Process at the FCC*, FCC ENCYCLOPEDIA, <http://www.fcc.gov/encyclopedia/rulemaking-process-fcc#q4> (last visited July 10, 2012).

2012] *ROLE OF PUBLIC INTEREST ORGANIZATIONS* 701

a report of the contact should be made and placed in the public docket when the notice is issued.¹⁰⁵

This policy's treatment of pre-notice contacts is broadly consistent with the disclosure requirements that the reformation imposed on NPRMs in cases such as *United States v. Nova Scotia Food Products Corp.*¹⁰⁶ Under the DOT policy, if a pre-notice contact provides information that forms the basis of a proposal, then the NPRM must disclose the "substance" of that contact. But once again, if policies tend to "jell[]" prior to issuance of the notice,¹⁰⁷ then such disclosures will often come too late to help groups that are "outside the loop" to influence policy.

For a fourth example of an agency's treatment of the problem of ex parte contacts, consider the DOE's *Guidance on Ex Parte Communications*.¹⁰⁸ Generally speaking, the DOE, borrowing the FCC's phrase, takes a "permit-but-disclose" approach to ex parte contacts once it has taken some formal, public step to indicate that it has initiated a rulemaking. This step may take the form of an "advanced notice of proposed rulemaking, a notice of public meeting or, if neither of those documents are utilized, the notice of proposed rulemaking."¹⁰⁹ An "advanced notice of proposed rulemaking" ("ANPRM"), as the name suggests, is a step that the DOE takes to gather information concerning a potential rule before the agency is ready to issue an NPRM. It thus may play an analogous role to the FCC's NOIs. The DOE, however, takes transparency a step further than the FCC insofar as the former imposes ex parte limits on contacts made after an ANPRM, but the latter treats post-NOI contacts as exempt.

Still, there are limits to the DOE's greater openness. The *Guidance* declares:

Phone calls that DOE employees or contractors initiate to gather information as part of the rulemaking process need not be memorialized. If new data is obtained as a result of such contacts after issuance of the notice of proposed rulemaking, it may be necessary to seek public comment on the data for DOE to rely on the data in the final rule.¹¹⁰

105. DEP'T OF TRANSP., DOT ORDER 2100.2 § 3(b), POLICIES FOR PUBLIC CONTACTS IN RULE MAKING (1970) (emphasis added), *available at* <http://regs.dot.gov/requirements/DOT2100-2.pdf>.

106. 568 F.2d 240, 251–52 (2d Cir. 1977).

107. *See* Elliot, *supra* note 7, at 1494.

108. Guidance on Ex Parte Communications, 74 FED. REG. 52,795 (Oct. 14, 2009).

109. *Id.* at FAQ 2(ii).

110. *Id.* at FAQ 8.

It is understandable that the DOE would excuse its own employees from a duty of summarizing and docketing their efforts to gain information. Any system for disclosing ex parte contacts in rulemaking must balance the burden it creates on the administrative process against potential gains in legitimacy and effectiveness. That said, this exception obviously leaves considerable room for obscuring information that might be better brought to light early in the process.

To summarize, each of these four agencies requires docketing of ex parte contacts at some point in the notice-and-comment process for informal rulemaking, broadly construed. For some agencies, this rule applies after issuance of an NPRM. For others, it may come earlier—for example, the DOE applies a docketing rule after issuance of an ANPRM. Some agency policies expressly recognize that, where an agency relies on information gained from a pre-notice contact to form a proposal, this information should appear in the NPRM. The reformation's approach to agency duties of notice, however, would seem to demand such disclosure in any event.

Each of these policies fails to address an important gap in disclosure requirements. Rulemaking, in the broadest sense, begins when an agency confronts some sort of policy problem. At the very beginning of this process, an agency may not know very much about the problem—how serious it is, whether it justifies the use of limited agency resources, etc. For any problem that eventually does lead to a rule, there must come a point where the agency recognizes that rulemaking is a serious prospect and then begins to devote substantial resources to exploring the policy choices that the hypothetical rule might adopt. After this point, policy decisions are more likely to begin to jell.

Excluding those situations in which an agency is under a statutory obligation to engage in a particular rulemaking, determining the point at which the agency is serious enough about a potential rule to justify imposing docketing of ex parte contacts calls for judgment—it is not a bright line sort of inquiry.¹¹¹ Still, for its own organizational purposes, an agency must decide at some point to place a rulemaking on its internal agenda for the purpose of determining whether to proceed with more formal steps, such as an NPRM, ANPRM, or NOI, as the case may be. The EPA, for instance, treats a rule as having reached the “Pre-Proposal” stage once its Regulatory Policy Officer has determined that a rulemaking has commenced.¹¹² Also, agencies already labor under statutory and

111. See Coglianese et al., *supra* note 59, at 950 (noting that “it may be difficult to establish a bright-line rule for when the development of a new rulemaking begins”).

112. See *Regulatory Development and Retrospective Review Tracker: About Reg DaRRT*, EPA, <http://yosemite.epa.gov/opei/RuleGate.nsf/content/about.html>

executive obligations to publish regulatory agendas identifying at least some potential rules.¹¹³ Agencies, in short, have to determine whether they are engaged in rulemaking well before an NPRM is ever issued. At the point an agency makes this internal determination, it should announce that fact and impose docketing requirements on ex parte contacts.

Of course, expanding docketing requirements would create a new burden on agencies (and on parties that contact them). Some agencies have already, however, developed means for managing such burdens in rules governing ex parte contacts that are already in place. For instance, such rules may contain provisions for dealing with confidential information.¹¹⁴ They may require that parties making oral contacts provide written summaries to an agency promptly.¹¹⁵ They may provide for sharing of information in electronic form.¹¹⁶ They may exclude casual contacts, among other categories.¹¹⁷

Suppose, however, for the sake of argument, that too aggressive an approach to docketing pre-notice contacts would be overly burdensome. Even so, the broader point here is that at least *some* greater disclosure of ex parte contacts earlier in rulemaking proceedings should be eminently manageable. Suppose, for instance, that it would be too burdensome for agencies to require

?opendocument (last viewed June 30, 2012) (discussing EPA's Regulatory Development and Retrospective Review Tracker) .

113. See Coglianese et al., *supra* note 59. In this regard, Executive Order 12,866 requires that:

Each agency shall prepare an agenda of all regulations under development or review, at a time and in a manner specified by the Administrator of OIRA. The description of each regulatory action shall contain, at a minimum, a regulation identifier number, a brief summary of the action, the legal authority for the action, any legal deadline for the action, and the name and telephone number of a knowledgeable agency official.

Exec. Order 12,866 § 4(b), 58 FED. REG. 51,735 (Sept. 30, 1993).

114. 47 C.F.R. § 1.1206(b)(2)(ii) (2011), *available at* <http://www.fcc.gov/encyclopedia/ex-parte-rules-2011> (specifying the FCC's instructions for submitting confidential information in permit-but-disclose proceedings).

115. Guidance on Ex Parte Communications, 74 FED. REG. 52,795, FAQ 7 (Oct. 14, 2009) (requiring interested parties to prepare memoranda memorializing in-person meetings and telephone contacts within one week for placement in the DOE's public docket).

116. 47 C.F.R. § 1.1206(b)(2)(i) (2011) (requiring submission of documents to FCC for docketing in electronic form where feasible).

117. *Id.* § 1.1202(a) (excluding from the definition of "presentation" various types of contacts, e.g., "communications which are inadvertently or casually made, inquiries concerning compliance with procedural requirements if the procedural matter is not an area of controversy in the proceeding, statements made by decisionmakers that are limited to providing publicly available information about pending proceedings").

written memorialization of oral contacts, which would therefore be excluded from disclosure. Such an exclusion would create an obvious route for gaming the system; regulated parties, if they did not know already, would learn that some things are better left unwritten. Still, especially when dealing with highly technical matters, some communications, to be effective, need to be in writing. Requiring prompt, electronic, searchable docketing of all written communications once a rulemaking has become “serious” would mark a major advancement over the current system, helping public interest groups—assuming they have the resources, which is a very big assumption—to find out how regulated parties are attempting to influence policymaking before those policies are effectively chosen.

CONCLUSION

Regulation attempts to control the powerful, who do not much care to be controlled. We should not therefore be terribly surprised when the powerful use the tools at their disposal to fight back against regulatory controls. One of the tools for this fight has been administrative procedural law. The great reformation of American administrative law of the 1960s and 1970s attempted to tilt the law’s balance more towards regulatory beneficiaries, adopting an interest representation model of rulemaking. For public interest groups to play a serious role in this process, however, they need both information and other resources (funding, staff, etc.). The reformation did not correct the problem of resource imbalance. Also, its efforts to promote transparency have been stymied to a large degree because the APA requires disclosure of *ex parte* contacts during informal rulemaking only after an agency issues an NPRM, by which time much of the real policymaking has likely already occurred. Responding to this information problem, to lessen to some small degree the power imbalance in rulemaking, this Essay suggests requiring prompt, electronic, searchable disclosures of contacts with agencies that occur after “serious” rulemaking efforts have begun but before issuance of an NPRM. The precise scope of this disclosure duty could be the subject of debate and experiment but should involve considerably greater and more effective disclosure than occurs now.