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ARTICLES

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ARTICLES

ADMINISTRATIVE LAW THROUGH THE LENS OF IMMIGRATION LAW

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INTRODUCTION

Immigration law is a type of administrative law, but that is sometimes easy to forget. Immigration law can seem to be in its own world, divorced from the evolution of important legal concepts.[1] But this Article finds immigration law in step with administrative law regarding a major topic: nonlegislative rules.

By examining prominent controversies in immigration law related to the use of nonlegislative rules, this Article will explore the administrative law controversy surrounding agency use of these rules through the perspective of immigration law. Studying immigration nonlegislative rules exemplifies how general principles of administrative law manifest in immigration law. It also shows how attempts to reform the use of nonlegislative rules in immigration law must take into consideration the challenges that all agencies face regarding notice-and-comment rulemaking and also must acknowledge a debate that is much larger than immigration law itself.

Agencies formulate all kinds of rules, and not all of them are the product of notice-and-comment rulemaking. Nonlegislative rules (also called, among other things, sub-regulatory rules and guidance documents) consist of agency work product such as policy statements and interpretive statements. When agencies produce nonlegislative rules, the Administrative Procedure Act (APA) does not require the agency to seek out or to respond to public input. These sub-regulatory rules provide agencies with a flexible means to act and to communicate with agency employees and with regulated parties. These positive attributes are counterbalanced, however, by concerns that agencies overuse the exemptions for policy statements and interpretive rules to evade the procedural requirements of notice-and-comment rulemaking. Another concern is that these agency actions practically, even if not legally, bind regulated parties. A regulated party feels obligated to comply, because the agency is expressing its plans for enforcement, even if those plans are not legally binding. The practical binding effect of these rules made without public participation, along with an increase in agency reliance on nonlegislative rules, has made these rules

1. Scholars have referred to immigration law as a "constitutional oddity" and as a "neglected stepchild of our public law." *See* Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925, 937 (1995); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1631 (1992).

a prominent topic of debate in administrative law.

United States Citizenship and Immigration Services (USCIS), a part of the Department of Homeland Security (DHS), is an immigration agency that employs nonlegislative rules on a massive scale. Every day, USCIS adjudicates approximately 30,000 applications.[2] U.S. citizens, lawful permanent residents, and U.S. employers file paperwork in the hope of obtaining approval for a family member to gain legal immigration status or for a prospective employee to gain permission to work in the United States, and USCIS adjudicates those applications. USCIS adjudicators measure those applications against statutes, regulations, and a dizzying array of nonlegislative rules. The Administrative Appeals Office (AAO) within USCIS then hears administrative appeals of certain decisions made by front-line USCIS adjudicators.

This Article will analyze problems and innovations related to USCIS's use of nonlegislative rules to adjudicate applications for benefits. USCIS's use of guidance documents is problematic because of: (1) USCIS's own confused explanation of the proper use of such guidance; (2) underuse of the notice-and-comment rulemaking process by USCIS; (3) abrupt changes in adjudication standards introduced by USCIS through nonlegislative rules; and (4) confusion about the effect of USCIS's nonlegislative rules in appeals to the AAO. Recently, USCIS has acknowledged that its use of nonlegislative rules vexes its stakeholders and accordingly has implemented a draft memorandum for comment procedure. The draft memorandum for comment procedure allows stakeholders to comment on a guidance document before implementation, but does not grant the full procedural rights of notice-and-comment rulemaking to stakeholders.[3]

Examination of the controversy surrounding nonlegislative rules through the lens of immigration law serves both immigration specialists and administrative law generalists. Immigration specialists will discover that concerns about the use of nonlegislative rules in immigration law actually are concerns about administrative law, and that concerns about the use of guidance documents cut across administrative law. Immigration specialists will also discover that even USCIS's new draft memorandum for comment procedure is not exclusive to immigration law. This Article concludes that the new procedure is a pragmatic and positive advancement for immigration benefits adjudication. While positive, however, the procedure is not perfect, nor is it a substitute for notice-and-comment rulemaking. USCIS should still place higher priority on notice-and-comment

2. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., A DAY IN THE LIFE OF USCIS (2010) [hereinafter A DAY IN THE LIFE], *available at* http://www.uscis.gov/USCIS/About Us/day-in-the-life.pdf.

3. *See infra* Part II.B.

rulemaking.

Administrative law generalists will discover an overlooked corner of the debate over nonlegislative rules, including another example of an agency voluntarily subjecting itself to limited features of notice-and-comment rulemaking in its development of guidance documents. USCIS uses guidance documents to muddle through in the extremely sensitive context of immigration law, where USCIS makes fundamentally life-altering decisions that go beyond monetary penalties or disbursements. USCIS's decisions directly affect where and with whom an individual will live and work. The beneficiaries of USCIS's adjudications are individual foreign nationals, and in a major petition category reserved for family members, more than 70% proceed without representation.[4]

From the perspective of the individual foreign national, USCIS is a Goliath, using guidance documents to avoid setting legally binding rules and thus keeping stakeholders (and the public) on shaky ground. Employers find it difficult to predict whether a proposed employee will obtain permission to work. Family members worry that an agency decision will split up the family. Part I will explore the debate over the use of guidance documents in administrative law generally. Part II will then connect that debate to immigration law by examining how USCIS uses guidance documents problematically and by evaluating the new draft memorandum for comment procedure. By looking at administrative law through the lens of immigration law, the negative effects of guidance documents are cast in a new light, while also acknowledging that other forces may push USCIS to use such documents.

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4. In response to a Freedom of Information Act request, for fiscal years 2007–2011, United States Citizenship and Immigration Services (USCIS) produced the total number of petitions or applications filed in certain categories and also the number of those petitions or applications that were accompanied by Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative. *See infra* Appendix. The author calculated the percentage of receipts accompanied by Form-G-28. For Form I-130, Petition for Alien Relative, Form G-28 accompanied only 27% of receipts during fiscal year 2011. *See infra* Appendix. Form G-28 indicates either attorney representation or representation by an accredited nonprofit representative, so the calculation does not necessarily indicate the number of petitions with attorney representation. *See* 8 C.F.R. § 292.1(a)(4) (2011). Of the categories included in the Appendix, the representation rates are much lower for the family-based petition (Form I-130) and the naturalization application (Form N-400) than in the employment-based categories (Form I-129 and Form I-140). The representation rate for Form I-485, the Application to Register Permanent Residence or to Adjust Status (to permanent resident), which is used in both family-based and employment-based cases, was 47% in fiscal year 2011. *See infra* Appendix.

I. THE DEBATE OVER NONLEGISLATIVE RULES IN ADMINISTRATIVE LAW

A. A Brief Introduction to Agency Rules

Federal administrative agencies, while not a part of the Legislative Branch, perform legislative-like rulemaking functions. When Congress delegates power to an agency through a statute, it may include the power to create rules related to the enforcement of the statute. Agencies formulate all kinds of "rules" because the APA defines the word *rule* broadly.[5] The APA defines a rule as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . ."[6] Agency rules serve various purposes. Some agency rules address details not directly addressed in the applicable statute. Others interpret terms used in the statute. Still others announce agency priorities and practices, and yet others set up procedural rules for agency adjudication.

Not only do agencies formulate rules to serve various purposes, but agencies also formulate different kinds of rules with varying levels of force. If an agency wishes to see its rule survive a potential future legal challenge, the procedure it uses to formulate the rule must be appropriate. Some rules have the force of law. This means that both the agency and regulated parties are bound by the rule.[7] A legally binding rule is determinative on the issue. Other rules do not have the force of law and instead are advisory or provide guidance. Rules with the force of law must be developed according to certain procedures, while nonbinding rules are exempt from many procedural requirements.

Under the APA, generally two forms of rulemaking will produce a rule that carries the force of law—formal and informal rulemaking. Under formal rulemaking, the agency holds an actual hearing where evidence is received.[8] Under informal rulemaking, the agency need not hold an actual hearing, but if an agency still wants a rule to carry the force of law, it must follow specific procedures.[9] Usually an agency must publish a Notice of Proposed Rulemaking in the *Federal Register* and provide the public an opportunity to comment on the proposed rule.[10] The agency must consider

5. *See* Administrative Procedure Act, 5 U.S.C. § 551(4) (2006).

6. *Id.*

7. The distinction between a force of law rule and a non-force of law rule also has implications for judicial review. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218 (2001).

8. *See* 5 U.S.C. §§ 556–557 (2006).

9. *Id.* § 553(b)–(d).

10. *See id.* § 553(b)–(c).

the public's comments and generally must publish a final version of the rule at least thirty days before the rule becomes effective.[11] This informal rulemaking is often referred to as "notice-and-comment" rulemaking. It is up to Congress to determine whether an agency must proceed through formal rulemaking or whether notice-and-comment rulemaking is an option, but Supreme Court precedent sets a high bar for statutes to meet to require the use of formal rulemaking.[12]

The APA allows for exemptions from the procedural requirements of notice-and-comment rulemaking. While using some of these exemptions results in a nonbinding rule, the use of others may still produce a binding rule. Notice in the *Federal Register* is not required for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice."[13] Notice is also not required if the agency has good cause to decide that notice would be "impracticable, unnecessary, or contrary to the public interest."[14] If notice is not required, then neither is the opportunity to comment, nor the opportunity for the agency to consider nonexistent comments. Also, separate exemptions exist for the requirement that a rule must be published at least thirty days before its effective date. The at-least-thirty-day rule does not apply where the agency has good cause, to interpretive rules and policy statements, or to rules that grant exemptions.[15]

This Article focuses on policy statements and interpretive rules. Policy statements and interpretive rules are exempted from the requirement of soliciting and considering comments and from the thirty-day requirement, but invoking these exemptions means that any rule promulgated will not have the force of law.[16] Interpretive rules advise the public of the agency's interpretation of a statute while policy statements advise the public of how the agency plans to exercise its power.

Distinguishing between nonlegislative and legislative rules is one of the most complex tasks in administrative law.[17] An agency may justify the announcement of a policy without providing advance notice or any opportunity for comment by explaining that the content of the policy

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11. *See id.* § 553(d).

12. *See* United States v. Fl. E. Coast Ry., 410 U.S. 224, 227–28 (1973) (holding that an agency need not use formal rulemaking unless the statute explicitly provides that the rule be made after a hearing on the record).

13. 5 U.S.C. § 553(b).

14. *Id.*

15. *Id.* § 553(d).

16. *See* William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1322–23 n.2 (2001).

17. It is not unusual to find judges referring to this area of law as extremely complex. *See, e.g.*, Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1108 (D.C. Cir. 1993) (referring to this area of the law as "enshrouded in considerable smog").

statement does not have the force of law and that an agency official remains free to exercise his or her discretion. To a regulated party, however, the policy statement may function practically as a legally binding rule, leaving the regulated party feeling that the procedure does not match the effect.

Despite language that a policy statement is not intended to bind agency adjudicators, a regulated party may understandably view a memorandum from a high-ranking agency official as announcing a firm standard from which agency adjudicators will not deviate. From the regulated party's perspective, the agency skirted the procedural rules and protections of notice and the opportunity to comment to achieve the same practical effect as a legally binding rule. Policy statements and interpretive rules, however, are technically open to challenge in agency adjudications or before a court. They stand in contrast to agency rules that are legally binding; the wisdom of those rules is not on the table.[18]

Deciding whether an agency has properly used the policy statement or interpretive rule exemptions from notice-and-comment rulemaking is very difficult.[19] A court will only attempt to decide if an agency properly invoked an exemption after the fact. If an agency issues a rule via a policy statement or enforces a statute or regulation based on the contents of a policy statement, a regulated party might challenge the agency's decision to promulgate by policy statement or to enforce based on the contents of the policy statement. The regulated party might argue that the agency made a procedural error and should have engaged in notice-and-comment rulemaking procedures.[20] Only then will a court make the determination. The next section takes a closer look at the tools and approaches courts use to make such determinations.

B. A Taxonomy of Agency Rules and Distinguishing Between Different Types of Agency Rules

Since the enactment of the APA, judges and scholars have sought to create a taxonomy of rules and to clarify how to distinguish between binding and non-binding rules. The effort continues in the twenty-first century. Cases from the U.S. Court of Appeals for the D.C. Circuit are a good guide to explore the struggle.

A "taxonomical guide"[21] is necessary. The binding rules discussed above

18. Such rules may be challenged on other grounds, such as a constitutional violation. But the regulated party may not argue that the agency should pick a different rule to apply.

19. *See* John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 893 (2004) ("Among the many complexities that trouble administrative law, few rank with that of sorting valid from invalid uses of so-called 'nonlegislative rules.'").

20. *See* Funk, *supra* note 16, at 1324.

21. *See* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the*

are called "legislative rules" and have the force and effect of law.[22] Non-binding rules are called "nonlegislative rules" and, as discussed above, do not have the force and effect of law.[23] Two examples of nonlegislative rules are policy statements and interpretive rules. At times, other names are used to refer to nonlegislative rules, such as *guidance document*, *sub-regulatory rule*, or the name of a more specific type of guidance document, such as a reference to an agency manual, a guidance letter, or operating instructions.

While policy statements and interpretive rules are both examples of nonlegislative rules, they do retain their own independent characteristics, despite "the tendency of courts and litigants to lump [them] together . . . ."[24] As explained above, policy statements lay out an agency's proposed approach toward a particular issue. The D.C. Circuit has explained, "By issuing a policy statement, an agency simply lets the public know its current enforcement or adjudicatory approach. The agency retains the discretion and the authority to change its position—even abruptly—in any specific case because a change in its policy does not affect the legal norm."[25] Policy statements "[do] not seek to impose or elaborate or interpret a legal norm."[26] Interpretive rules, on the other hand, reflect an agency's interpretation of a "legal norm . . . that Congress has devised."[27] When issuing an interpretive rule, the agency "does not claim to be exercising authority to itself make positive law."[28] Instead of exercising its own authority to create a legal norm, the agency instead interprets an already existing norm.

There is also a distinction between "substantive" and "procedural" rules under the APA.[29] Under the APA, substantive rules are those that are not procedural,[30] but not all substantive rules are legislative rules. A policy statement, for example, may be substantive (if it does not establish a procedure) but it does not have the force of law and therefore earns the nonlegislative label.[31]

The taxonomy defines labels, but the task of placing those labels on

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Like—Should Federal Agencies Use Them to Bind the Public?, 41 DUKE L.J. 1311, 1319 (1992).

22. *See* Funk, *supra* note 16, at 1322.

23. *See id.* at 1322–23.

24. Syncor Int'l Corp. v. Shalala, 127 F.3d 90, 93–94 (D.C. Cir. 1997).

25. *Id*. at 94.

26. *Id.*

27. *Id.* Interpretive rules also may interpret a regulation. *Id.*

28. *Id.*

29. *See* Elec. Privacy Info. Ctr. v. Dep't of Homeland Sec., 653 F.3d 1, 5 (D.C. Cir. 2011); *see also* JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 74 n.114 (4th ed. 2006).

30. *Elec. Privacy Info. Ctr.*, 653 F.3d at 5–6.

31. *See* LUBBERS, *supra* note 29, at 74 n.114; Anthony, *supra* note 21, at 1323.

specific agency rules remains. During litigation, although the agency may have given a particular label to one of its rules, an opposing party may argue that the agency's label is incorrect.[32] Therefore, the fundamental question is whether the agency properly invoked an exemption from notice-and-comment rulemaking.

How is a court to tell whether a particular rule really is nonlegislative?[33] Many tests exist, but no one test is completely satisfactory. Some tests apply when the task is to determine whether a rule truly is interpretive (and not a legislative rule),[34] while others are focused on determining whether a rule truly is a policy statement (and not a legislative rule).[35]

To determine whether a rule truly deserves the interpretive label, courts have applied several approaches. One test, the legal effects test, asks whether the agency has created new law, or whether it has merely interpreted existing law.[36] If the promulgated rule creates new law, the rule is a legislative rule and should have been implemented using notice-and-comment rulemaking. A related test asks whether the rule creates a binding norm.[37] If so, it is a legislative rule. And another, more predominant, approach asks whether the rule effects substantive change or whether it is merely a clarification.[38] If it is a substantive change, the rule is legislative. Finally, yet another approach may apply if the agency is changing a prior interpretation through an interpretive rule.[39]

A recent case on a controversial subject illustrates the task of distinguishing between interpretive rules and legislative rules. A privacy organization challenged the Transportation Security Administration's (TSA's) decision to screen airplane passengers with advanced imaging technology.[40] This technology allows screeners to create a "naked" full body scan image of each passenger. TSA implemented this technology

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32. *See, e.g.*, Chamber of Commerce v. Dep't. of Labor, 174 F.3d 206, 208 (D.C. Cir. 1999).

33. The major approaches adopted by courts are discussed here. Scholars have also suggested ways to tackle this distinction. *See, e.g.*, Robert A. Anthony, *"Interpretive" Rules, "Legislative" Rules and "Spurious" Rules: Lifting the Smog*, 8 ADMIN. L.J. AM. U. 1 (1994); Anthony, *supra* note 21, at 1311; David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276 (2010); William Funk, *When is a "Rule" a Regulation? Marking a Clear Line Between Nonlegislative Rules and Legislative Rules*, 54 ADMIN. L. REV. 659 (2002); Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547 (2000).

34. LUBBERS, *supra* note 29, at 78–93.

35. *Id.* at 94–104.

36. *Id.* at 79–81.

37. *Id.* at 81–85.

38. *Id.* at 85–89.

39. *Id.* at 89–93.

40. Elec. Privacy Info. Ctr. v. Dep't of Homeland Sec., 653 F.3d 1 (D.C. Cir. 2011).

under a congressional directive to develop screening techniques that can detect non-metallic dangerous materials.[41] After testing, TSA chose the body scan technology to meet this broad congressional directive.[42] TSA gives passengers an option at checkpoints where the technology is in use: undergo the body scan or be subject to a pat down.[43]

In challenging the decision to implement the body scan technology, the privacy organization argued that TSA violated the APA by failing to use notice-and-comment rulemaking to develop and implement the body scan requirement.[44] The D.C. Circuit agreed, concluding that the decision to use the technology did not fall under any of the exemptions to the requirement to use notice-and-comment rulemaking.[45]

In response to TSA's argument that notice-and-comment procedures were not necessary because the decision to use the technology was merely an interpretive rule, the D.C. Circuit explained that distinguishing between interpretive rules and legislative rules requires asking whether the challenged agency action effects substantive change.[46] TSA argued that its decision merely reflected its interpretation of a congressional directive and did not effect substantive change.[47] The D.C. Circuit disagreed. It stated, "[W]e conclude the TSA's [decision] substantially changes the experience of airline passengers and is therefore not merely 'interpretative.'"[48] Illustrating the fine line between interpretation and substantive change, the D.C. Circuit conceded that there was "some merit" to TSA's argument that it was simply resolving an ambiguity present in Congress's statutory directive.[49] Nevertheless, the D.C. Circuit concluded that the APA "would be disserved" if TSA could interpret that broad statutory directive to bind "to a strict and specific set of obligations" without using notice-and-comment rulemaking.[50]

In an attempt to summarize the D.C. Circuit's decisions addressing the interpretive rule/legislative rule divide, one panel concluded that "insofar as our cases can be reconciled at all," a purported interpretive rule should have been promulgated as a legislative rule if "in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of

41. *Id.* at 3.
42. *Id.*
43. *Id.*
44. *Id.* at 4.
45. *Id.* at 5–8.
46. *Id.* at 6–7.
47. *Id.*
48. *Id.* at 7.
49. *Id.*
50. *Id.*

duties."[51] Other indicators of a legislative rule are "whether the agency has published the rule in the Code of Federal Regulations, . . . whether the agency has explicitly invoked its general legislative authority, . . . [and] whether the rule effectively amends a prior legislative rule."[52] Under the first criterion, an agency letter that explained that certain x-ray results qualified as a "diagnosis" (an existing regulatory term), and thus must be reported, truly was an interpretive rule because the enforcement mandate came from the notice-and-comment regulation, and not from the letter.[53] The letter did not fill a legislative gap and create an enforcement baseline, but rather interpreted an existing term.

In contrast, an agency order was not properly labeled an interpretive rule when it substantively changed an already existing regulation. A Federal Communications Commission order effected substantive change because it required telephone carriers to allow customers to transfer a landline telephone number to a wireless carrier, in contrast to a previous order that did not require location portability.[54] Because the new order did more than "'suppl[y] crisper and more detailed lines than the authority being interpreted,'" it should have been promulgated as a legislative rule.[55]

As the above examples show, determining whether an agency appropriately applied the interpretive rule label is an intensively case-specific inquiry. An agency will argue that it is merely interpreting part of the duties delegated to it, while the party challenging the lack of notice-and-comment rulemaking will argue that the purported "interpretation" in fact invokes substantive change. The line between interpretation and substantive change is a fine one that can be hard to locate. Scholars have debated the varying approaches to locating the line and have suggested alternative methods of drawing the line.[56]

Courts also will engage in a case-by-case, statement-specific inquiry to determine whether an agency-labeled policy statement truly sets flexible guidance or creates something more like a binding norm. While similar to the interpretive rule inquiry in that it is case-specific and involves fine line drawing, the inquiry is different.

The D.C. Circuit has established general criteria for distinguishing between policy statements and legislative rules. Applying those general criteria in a particular case entails a close examination of the language of

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51. Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993).

52. *Id.*

53. *Id.*

54. U.S. Telecom Ass'n v. FCC, 400 F.3d 29, 35 (D.C. Cir. 2005).

55. *Id.* at 38 (quoting *Am. Mining Cong.*, 995 F.2d at 1112).

56. *See supra* note 33.

the purported policy statement and also the agency's behavior regarding the statement. Further complicating matters is that the criteria have evolved over time, to the point where two sets of criteria exist in the D.C. Circuit. However, it is possible to conclude that the absence of mandatory language, flexible direction to agency subordinates, and a flexible, open-minded track record are the hallmarks of a policy statement.

In 1980, the D.C. Circuit laid out two criteria for courts to consider.[57] The first is that a true policy statement only operates prospectively.[58] A true policy statement may not have a present effect or create a binding norm.[59] The second is that a true policy statement must "genuinely leave[ ] the agency and its decision-makers free to exercise discretion."[60] The D.C. Circuit has recognized that identifying rules that genuinely allow for discretion, as opposed to those that practically bind, is an art rather than a science.[61]

The D.C. Circuit "scrutinized the language of the purported statement and the circumstances of its promulgation" to conclude that a pronouncement of the International Commerce Commission was not, in fact, a policy statement.[62] Looking at the language of the pronouncement, the court emphasized its mandatory language, noting that "nothing in it even hints to those who will apply the statement that they may exercise any discretion in doing so," and that the language established a rule that would take immediate effect without any further agency action.[63] The D.C. Circuit also noted that the agency itself "regard[ed] the policy statement as binding."[64]

Later cases reveal a second set of criteria.[65] These criteria are "(1) the Agency's own characterization of the action; (2) whether the action was published in the Federal Register or the Code of Federal Regulations; and (3) whether the action has binding effects on private parties or on the agency."[66] Under these criteria, "the ultimate focus of the inquiry is whether the agency action partakes of the fundamental characteristic of a

57. Am. Bus Ass'n. v. United States, 627 F.2d 525, 529 (D.C. Cir. 1980).

58. *Id.* at 529.

59. *Id.* at 530.

60. *Id.* at 529.

61. *See id.* at 529–30.

62. *Id.* at 530–31.

63. *Id.* at 531–32.

64. *Id.* at 532.

65. *See* Molycorp, Inc. v. EPA, 197 F.3d 543, 545 (D.C. Cir. 1999) (enunciating the criteria for consideration); Croplife Am. v. EPA, 329 F.3d 876, 883 (D.C. Cir. 2003) (noting the differing tests); Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 452 F.3d 798, 806 (D.C. Cir. 2006) (comparing the two sets of established criteria).

66. *Molycorp*, 197 F.3d at 545.

regulation, i.e., that it has the force of law."[67] While it is not entirely clear when either set of criteria will govern, the D.C. Circuit has acknowledged that the two sets of criteria overlap in that they both aim to discover whether the purported policy statement is, in fact, binding.[68]

A survey of some of the D.C. Circuit's leading cases on this issue reveals that the court usually looks to the language of the agency rule and to the agency's own behavior for clues.[69] In one case, the court determined that an agency guidance document was actually a legislative rule because its language and application revealed that it did "purport to bind applicants."[70] The court cited the mandatory language of the document (providing that regulated parties must choose one of two assessment methods) and found that even though the document gave regulated parties two options for compliance, it required compliance with one or the other.[71] Looking to the agency's behavior, the court noted the absence of evidence showing that the agency had not treated the document as binding.[72] Similarly, the court held a purported policy statement to be a legislative rule where the agency "enacted a firm rule with legal consequences that are binding on both petitioners and the agency, and petitioners will be afforded no additional opportunity to make the arguments to the agency."[73] In so determining, the court discussed the document's mandatory language (the agency "will not consider").[74] Finally, the court discovered another faulty label by examining both the language of a document and the agency's own actions.[75] Despite that the agency claimed discretion to deviate from the document, the D.C. Circuit held a document to be a legislative rule where the document also contained mandatory language ("will be used") and where the agency's behavior revealed it to be "close-minded and dismissive" on the issue.[76]

Nevertheless, the D.C. Circuit has also agreed with an agency's policy statement label. In one case, the court looked to the agency's stated

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67. *Id.*

68. Gen. Elec. Co. v. EPA, 290 F.3d 377, 382–83 (D.C. Cir. 2002).

69. *See, e.g.*, *id.* at 383; Chamber of Commerce v. Dep't of Labor, 174 F.3d 206, 212–13 (D.C. Cir. 1999); U.S. Tel. Ass'n v. FCC, 28 F.3d 1232, 1234 (D.C. Cir. 1994); Cmty. Nutrition Inst. v. Young, 818 F.2d 943, 946–47 (D.C. Cir. 1987); Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 537–38 (D.C. Cir. 1986).

70. *Gen. Elec.*, 290 F.3d at 384–85.

71. *See id.* at 384.

72. *See id.* at 385.

73. Croplife Am. v. EPA, 329 F.3d 876, 882 (D.C. Cir. 2003).

74. *Id.* at 881.

75. McLouth Steel Prods. Corp. v. Thomas, 838 F.2d 1317, 1320–21 (D.C. Cir. 1988).

76. *Id.* at 1320–22.

purpose and to the flexibility of the pronouncement.[77] Deviations were possible and the statement did not appear to have any immediate effect.[78] In another case where the D.C. Circuit upheld an agency's policy statement label, the agency document reflected only the agency's views and contained conditional language ("*In general*, it is not appropriate . . . .").[79] Because the agency had not "commanded, required, ordered, or dictated," but rather left room for discretion and did not definitely determine the outcome of any adjudication, the D.C. Circuit held the document to be a true policy statement.[80] Even a recommendation with an arguably practical coercive effect may be a true policy statement if "the practical effect of the agency action is not a certain change in the legal obligations of a party."[81]

Reviewing these opinions of the D.C. Circuit reveals that while it is possible to draw general conclusions about what the court tends to look for (absence of mandatory language, flexible direction to agency subordinates, and a flexible, open-minded track record), the individualized factual inquiry makes it difficult to predict whether the court will agree with any agency's particular use of the policy statement label. This lack of predictability has led scholars to present alternative methods of determining when a policy statement actually deserves the label.[82]

C. Concerns About Nonlegislative Rules

Concern about agency use of nonlegislative rules goes beyond a disapproval of the predictability in labeling agency rules. Scholars and others have questioned whether agencies use the exemptions from notice-and-comment rulemaking too frequently to bind practically, even if not legally, and have also tied the use of nonlegislative rules to a concern about a shift away from notice-and-comment rulemaking. These efforts have led to proposals to reform the way that agencies use nonbinding rules.

A listing of the pros and cons of agency use of nonlegislative rules calls to mind the cliché, "can't live with them, can't live without them." Nonlegislative rules do provide agencies with needed flexibility and the ability to quickly share information with agency employees and the public

77. *See* Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 40 (D.C. Cir. 1974).

78. *See id.* at 40–41.

79. Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 452 F.3d 798, 809 (D.C. Cir. 2006); *see also* Catawba Cnty. v. EPA, 571 F.3d 20, 33–35 (D.C. Cir. 2009).

80. *Ctr. for Auto Safety*, 452 F.3d at 809–10; *see also* Molycorp, Inc. v. EPA, 197 F.3d 543, 545–46 (D.C. Cir. 1999) (explaining that the document at issue contained disclaimers stating that it was intended only to assist and that it was not a substitute for legal requirements).

81. Nat'l Ass'n of Homebuilders v. Norton, 415 F.3d 8, 15 (D.C. Cir. 2005).

82. *See supra* note 33.

at a relatively low cost.[83] If only legislative rules were available, there is no guarantee that agencies would (or could afford to) produce more legislative rules. Instead, agencies might communicate less often with the public and share less information overall, turning instead to more case-by-case adjudications.[84] Agency decisionmaking might become less transparent as regulated parties would have less of an indication about how an agency thinks internally about a particular issue or statutory term.[85] Adjudications could become less consistent also, as front-line adjudicators would receive less direction if there were no policy statements or interpretive rules.[86]

But the usefulness and necessity of nonlegislative rules is countered by a nagging concern that when an agency issues a nonlegislative rule, it is cutting procedural corners.[87] Regulated parties may feel obligated to follow the directives of nonlegislative rules. The sense is that even if the agency says it is keeping an open mind, the safest course is to follow the direction the agency has laid out. A regulated party may find the path of least risk is to follow what the agency indicates it will do.[88] However, this gives the nonlegislative rule the same practical effect as a legislative rule without the procedural protections of notice-and-comment rulemaking. Also, the lack of warning through notice and of an opportunity for public comment allows new information contained in a nonlegislative rule to surprise and shock regulated parties and to lead regulated parties to perceive a need to quickly and dramatically change their behavior.[89]

The idea that an agency may use a nonlegislative rule to bind practically is unacceptable to some. For example, Professor Robert Anthony argued that policy statements—as opposed to interpretive rules—should not be used to bind, whether legally or practically.[90] Professor Anthony recommended that agencies use legislative rule procedures "for any action in the nature of rulemaking that is intended to impose mandatory

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83. *See* Sean Croston, *The Petition is Mightier than the Sword: Rediscovering an Old Weapon in the Battles over "Regulation Through Guidance,"* 63 ADMIN. L. REV. 381, 382–84 (2011); Funk, *supra* note 16, at 1323; Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 408 (2007).

84. *See* Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 520, 576 (1977).

85. *See* Stephen M. Johnson, *Good Guidance, Good Grief!*, 72 MO. L. REV. 695, 727–28 (2007).

86. *Cf.* Croston, *supra* note 83, at 383; Mendelson, *supra* note 83, at 409.

87. *See* Croston, *supra* note 83, at 384–87; Funk, *supra* note 16, at 1323.

88. *See* Mendelson, *supra* note 83, at 400, 407, 412.

89. *See* Croston, *supra* note 83, at 385–87. There are additional concerns about nonlegislative rules related to judicial review. *See* Johnson, *supra* note 85, at 704.

90. *See* Anthony, *supra* note 21, at 1315.

obligations or standards upon private parties, or that has that effect."[91] To implement a truly nonbinding policy statement, Professor Anthony stated that an agency "should stand ready to entertain challenges to the policy in particular proceedings to which the document may apply, and should observe a disciplined system for maintaining an 'open mind' when passing upon such challenges."[92]

To Professor Anthony, a nonlegislative rule with practical binding effect is one that the agency "treats [in] the same way it treats a legislative rule—that is, as dispositive of the issues that it addresses—or leads the affected public to believe it will treat the document that way."[93] Evidence of the agency's treatment includes: an enforcement action to implement the standard expressed in the nonlegislative rule; the agency's regular application of the standard; an absence of an opportunity to be heard on the standard before it is applied; and whether "affected private parties are reasonably *led to believe* that failure to conform will bring adverse consequences."[94] An agency expression that it retains discretion, despite its issuance of the guidance document, would not sway Professor Anthony's position.[95] His focus on the practical binding effect settles on whether the regulated parties' discretion has been constrained, and is less concerned with restrictions on the agency's discretion.[96]

The disadvantages of using nonlegislative rules to bind practically are enhanced by an agency's increased reliance on nonlegislative rules.[97] Explanations of why agencies tend to favor nonlegislative rules over notice-and-comment rulemaking usually lead to a discussion about ossification. While the assertion is contested,[98] many have argued that the procedural

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91. *Id.*

92. *Id.* at 1316. Professor Anthony elaborated on the procedure:

> [T]he agency should afford the affected party a fair opportunity to challenge the legality or wisdom of the statement, or to suggest that a different policy be adopted in its stead, in a forum that assures adequate presentation of the affected person's positions and consideration of those positions by agency officials possessing authority to take or recommend final action upon them.

Id. at 1375. *But see* Ronald M. Levin, *Nonlegislative Rules and the Administrative Open Mind*, 41 DUKE L.J. 1497, 1499 (1992) (responding to Professor Anthony's approach and noting that it may discourage agencies from providing guidance).

93. Anthony, *supra* note 21, at 1328.

94. *Id.* at 1328–30.

95. *Id.* at 1360.

96. *Id.* at 1360–61.

97. *See generally* Johnson, *supra* note 85, at 695; Mendelson, *supra* note 83, at 398–99.

98. *See, e.g.*, Stephen M. Johnson, *Ossification's Demise? An Empirical Analysis of EPA Rulemaking from 2001–2005*, 38 ENVTL. L. 767 (2008) (examining EPA rules to determine whether notice-and-comment rulemaking has in fact been ossified and finding that the claims of ossification require more conclusive research); Connor N. Raso, Note, *Strategic or*

requirements of notice-and-comment rulemaking push agencies to use the exemptions.[99] The argument is that because notice-and-comment rulemaking has become more complex and time-consuming through statutory requirements, Executive Order obligations, and the complexities of judicial interpretation of the APA's obligations,[100] agencies seek refuge in the form of nonlegislative rules. Professor Todd Rakoff has argued that this movement toward nonlegislative rules is part of a larger phenomenon where "less formal modes of regulation" become more formal over time and are eventually replaced by less formal modes of regulation once those previously informal modes become too formal.[101]

Concern about agency use of guidance documents is not new. In 1965, Congress considered eliminating the exemptions to informal rulemaking.[102] In 1977, Professor Michael Asimow proposed a statutory change to the APA that would require an opportunity for the public to submit comments on a nonlegislative rule after its adoption.[103] The Administrative Conference of the United States (ACUS) adopted the substance of his proposal.[104] In the early 1980s, during the Reagan Administration, there was a push to narrow the exemptions from notice-and-comment rulemaking and to require more pre-adoption public participation in the

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Sincere? Analyzing Agency Use of Guidance Documents, 119 YALE L.J. 782 (2010) (finding evidence suggesting that agencies do not use guidance documents to avoid rulemaking); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483 (1997) (cautioning that ossification may stem from courts' hard-look review but that a mere relaxation of judicial review is also unwarranted).

99. *See, e.g.*, Johnson, *supra* note 85, at 700–01 ("There is a general consensus that the notice and comment rulemaking process for legislative rules has become 'ossified' over the last few decades as Congress, courts and the executive branch have imposed substantial new procedural requirements on the APA notice and comment process." (footnotes omitted)); Jeffrey S. Lubbers, *The Transformation of the U.S. Rulemaking Process—For Better or Worse*, 34 OHIO N.U. L. REV. 469, 473–78 (2008) (discussing the role of ossification in the decline of final rules by 61% and in the decline of proposed rules by 48% from 1979 to 2005); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995) (evaluating alternatives to deossify rulemaking and in the process highlighting sources of ossification).

100. *See* Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159, 164–65 (2000) (noting the increased burden that rulemaking provisions accrued throughout the years); Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 FLA. ST. U. L. REV. 533, 536 (2000) (organizing the increased requirements of administrative rulemaking by the corresponding Executive Order or legislation); OFFICE OF INFO. & REGULATORY AFFAIRS, *The Reg Map*, *available at* http://www.reginfo.gov/public/reginfo/Regmap/index.jsp.

101. Rakoff, *supra* note 100, at 170.

102. *See* Asimow, *supra* note 84, at 575–76 n.262.

103. *See id.* at 578–84.

104. *See id.* at 578 n.266.

creation of nonlegislative rules.[105] Professor Asimow critiqued those proposals and renewed his call for post-adoption public participation.[106]

ACUS again addressed nonlegislative rules in 1992.[107] ACUS expressed its concern about "situations where agencies issue [guidance documents] which they treat or which are reasonably regarded by the public as binding and dispositive of the issues they address."[108] In response to this concern, ACUS recommended that agencies not use guidance documents "to impose binding substantive standards or obligations."[109] When an agency does issue a guidance document, ACUS recommended that the agency make clear to agency staff and to the public that the document is non-binding.[110] To allow for feedback from affected parties, ACUS further recommended that agencies allow "requests for modification or reconsideration" of agency guidance documents.[111] Such a procedure not only would allow affected parties a chance to challenge the contents of a guidance document, but also could serve as a signal to an agency that the subject of the guidance document is better addressed through notice-and-comment rulemaking.[112]

The Office of Management and Budget (OMB), under President George W. Bush, published a final bulletin in 2007 establishing "Agency Good Guidance Practices" in response to concerns "that agency guidance practices should be more transparent, consistent and accountable."[113] OMB recognized the promise of agency guidance—constraining agency discretion and increasing efficiency and fairness—but also acknowledged the existence of "poorly designed or improperly implemented" guidance documents, as well as the lure of overusing guidance documents in lieu of

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105. Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 381.

106. *See id.* at 410–25. Professor Asimow has also critiqued California's requirement of pre-adoption notice-and-comment procedures for nonlegislative rules, stating:

> In an ideal world, perhaps, all rules should be adopted only after prior notice and comment procedure . . . But we live in a less than ideal world, in which administrative agencies have austere budgets and drastically limited staff resources; they must constantly establish priorities among the possible uses of those resources. Yet agencies must grapple with regulatory problems that require intensive use of their resources and quick responses.

Michael Asimow, *California Underground Regulations*, 44 ADMIN. L. REV. 43, 45 (1992).

107. Administrative Conference of the United States, 1 C.F.R. § 305.92-2 (1993).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *See id.*

113. Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3432 (Jan. 25, 2007).

engaging in legislative rulemaking.[114] OMB expressed that the Good Guidance Practices aimed to "ensure" that guidance documents are "[d]eveloped with appropriate review and public participation, accessible and transparent to the public, of high quality, and not improperly treated as legally binding requirements."[115]

OMB's Good Guidance Practices implemented special requirements for the issuance of "significant guidance documents" and "economically significant guidance documents."[116] Under the Good Guidance Practices, agencies must establish internal clearance procedures for significant guidance documents, not deviate from significant guidance documents without justification and supervisory approval, and must conform to certain practices in drafting significant guidance documents, including a prohibition on mandatory language.[117] Agencies also must create "adequate procedures for public comments on significant guidance documents and to address complaints regarding the development and use of significant guidance documents."[118] For significant guidance documents, the Good Guidance Practices do not require an agency to respond to comments, nor do they mandate a pre-adoption opportunity to comment.[119] For economically significant guidance documents, however, the Good Guidance Practices do require pre-adoption comments and an agency response to comments.[120]

A debate over the Good Guidance Practices ensued. The debate addressed such weighty issues as the President's control over executive agencies, the actual effects of procedural restraints on agencies, and the need for OMB oversight over agency use of nonlegislative rules.[121] One

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114. *Id.*

115. *Id.* at 3433. President Obama rescinded an Executive Order tied to the Good Guidance Practices, Executive Order 13,422, but the Office of Management and Budget (OMB) Good Guidance Practices remain (apparently). *See* Exec. Order No. 13,497, 74 Fed. Reg. 6113 (Jan. 30, 2009); Memorandum from Peter R. Orszag, Dir., Office of Mgmt. & Budget, Guidance for Regulatory Review (Mar. 4, 2009) (explaining that President Obama "restored the regulatory review process to what it had been under Executive Order 12866 between 1993 and 2007," and that "[d]uring this period, [OMB] reviewed all significant proposed or final agency actions, including significant policy and guidance documents").

116. Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3432 (Jan. 25, 2007). *See also* Mendelson, *supra* note 83, at 401 (tracing the "good guidance" from Congress's mandate to the Food and Drug Administration to implement good guidance practices, which ultimately inspired OMB's Good Guidance Practices).

117. Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. at 3436–38.

118. *Id.* at 3437.

119. *See id.* at 3437–38.

120. *See id.* at 3438.

121. *See* Connor Raso, Introductory Comment, *Symposium: Reflections on Executive Order 13,422*, 25 YALE J. ON REG. 77, 80–82 (2008).

critique expressed a concern that the Good Guidance Practices could ossify the production of nonlegislative rules and would not necessarily increase the amount of notice-and-comment rulemaking.[122] Additional concerns included a lack of statutory authority for the requirements and a fear that regulated parties could use the comment-and-review process to push for unjustifiable rollbacks of regulatory burdens.[123]

While not in the federal sphere, the 2010 Model State Administrative Procedure Act (MSAPA) presents another reform approach. The MSAPA hinges the acceptability of the use of nonlegislative rules on whether a regulated party is afforded "an adequate opportunity to contest the legality or wisdom of a position taken in the [guidance] document."[124] According to the MSAPA, an agency guidance document may contain binding instructions to agency staff as long as the opportunity to contest exists.[125] It also provides that if an agency diverges from a standard announced in a guidance document in a particular adjudication, the agency must explain why it is following a different course. The explanation must include "a reasonable justification for the agency's conclusion that the need for the variance outweighs the affected person's reliance interest."[126]

In addition to these reform proposals, scholars continue to express concern about guidance documents and to propose changes accordingly.[127] For example, Professor Stephen Johnson recommends amending the APA to encourage opportunities for public participation, as well as rewarding agencies that allow public participation by giving them more deference when a nonlegislative rule is challenged in court.[128] Professor Nina Mendelson has evaluated several reform proposals, including her own proposal to amend the APA to allow petitions for amendment or repeal of nonlegislative rules, and Professors John Manning's and Peter Strauss's proposals to treat guidance documents like precedent.[129]

The use of nonlegislative rules continues to vex the practice and study of administrative law. Courts struggle with the task of evaluating agency decisions to invoke the notice-and-comment exemptions, and reform proposals by scholars and organizations continue to reflect a discomfort with agency use of guidance. Agency guidance is designed under the APA

122. *See* Johnson, *supra* note 85, at 696–97.

123. *Id.* at 732–33.

124. Model State Administrative Procedure Act § 311(b) (2010).

125. *See id.* § 311(c).

126. *Id.* § 311(d).

127. *See, e.g.*, Johnson, *supra* note 85; M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383 (2004); Mendelson, *supra* note 83; Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331 (2011).

128. *See generally* Johnson, *supra* note 85, at 697.

129. *See* Mendelson, *supra* note 83, at 438–46.

to provide a flexible and efficient method for agencies to express themselves and to engage with stakeholders; however, these attributes must be balanced against concerns that agencies overuse nonlegislative rules to achieve a practically binding effect without public participation. As Part II reveals, these same concerns extend to immigration law.

The debate over agency use of nonlegislative rules also invokes a broader, deeper debate over the appropriate amount of power delegated to administrative agencies. Reaction to the use of guidance can be tied to a general distaste for regulation. In fact, some major reform efforts, such as the Bush Administration's Good Guidance Practices, are tied to a desire to decrease agency activity.[130] While not all who caution against agency guidance are anti-regulatory, there is a connection between a distaste for guidance and a distaste for regulation generally. That connection must be considered in the context of the debate over the use of nonlegislative rules in immigration law. Part II also explores this connection.

II. CONNECTING IMMIGRATION LAW TO ADMINISTRATIVE LAW

Every day, individuals and employers file paperwork with the hope of obtaining approval for a family member to gain legal immigration status or for a prospective employee to gain permission to work in the United States. This is a huge undertaking. United States Citizenship and Immigration Services, a part of the Department of Homeland Security, reported that on any given day it processes 30,000 applications for benefits.[131]

USCIS's adjudication framework includes both an initial decisionmaking level and an administrative appeal level. USCIS adjudicators rely on the Immigration and Nationality Act, other federal statutes, federal regulations, and a dizzying array of agency guidance materials, such as the Adjudicator's Field Manual, Operation Instructions, and individual memoranda. When front-line USCIS adjudicators receive an application for a particular immigration benefit, they may approve the application, issue a Request for Evidence for more information, or deny the application.

The Administrative Appeals Office within USCIS hears administrative appeals of certain decisions made by front-line USCIS adjudicators. The AAO is one of eleven program offices that report to the Director of USCIS.[132] By default, the AAO's decisions are not precedential, but they

130. President Bush's Executive Order 13,422 required agencies to identify specific market failures before regulating, among other restrictions on agency activity. *See* Exec. Order No. 13,422, 72 Fed. Reg. 2763, 2763 (Jan. 23, 2007).

131. *See* A DAY IN THE LIFE, *supra* note 2.

132. *See USCIS Organizational Chart*, USCIS, http://www.uscis.gov/ (follow "About us" hyperlink; then follow "USCIS Organizational Chart" hyperlink in the "More Information" box to the right).

may be designated as precedential through a complex and lengthy process that requires the approval of entities outside of USCIS.[133]

This Part connects both problems and innovations related to USCIS's use of nonlegislative rules to administrative law. USCIS's use of guidance is problematic because of: (1) USCIS's own confused explanation of the proper use of such guidance; (2) underuse of the notice-and-comment rulemaking process by USCIS; (3) abrupt changes in adjudication standards introduced by USCIS through nonlegislative rules; and (4) confusion about the effect of USCIS's nonlegislative rules in appeals to the AAO. Recently, however, USCIS has acknowledged that its use of nonlegislative rules vexes its stakeholders[134] and has implemented a draft memorandum for comment procedure to reform its use of nonlegislative rules.

The discussion below reveals that immigration law is in step with administrative law when it comes to its nonlegislative rules troubles and innovations. Simply put, complaints about USCIS's use of guidance documents are complaints about administrative law. A desire to reform USCIS's practices regarding nonlegislative rules cannot be separated from the larger debate about the use of such rules in administrative law generally. Even USCIS's draft memorandum for comment procedure is not exclusive to immigration law. Its role as an important and necessary advancement in immigration law is clear once it is viewed through the broader administrative law debate about guidance documents. That said, USCIS (and the Department of Homeland Security) must be careful not to view nonlegislative rules as the only tool available. Both must also place increased priority on notice-and-comment rulemaking.

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133. *See* Jill E. Family, *Murky Immigration Law and the Challenges Facing Immigration Removal and Benefits Adjudication*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 45, 72–73 (2011) (discussing the role of the Department of Homeland Security General Counsel and of several units of the Department of Justice in designating an Administrative Appeals Office (AAO) decision as precedential).

134. U.S. CITIZENSHIP & IMMIGRATION SERVS., QUESTIONS AND ANSWERS: USCIS AMERICAN IMMIGRATION LAWYERS ASSOCIATION (AILA) MEETING, APRIL 7, 2011 1 (2011), *available at* http://www.uscis.gov/USCIS/Outreach/Notes%20from%20Previous%20 Engagements/2011/April%202011/AILA%20_040711.pdf ("Many AILA members and other stakeholders consider the current employment benefit adjudications environment to be the most difficult and challenging experienced in decades."). In 2010, USCIS announced an agency-wide policy review and sought stakeholder input to prioritize its review. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., *USCIS Announces First Ten Areas of Focus for Agency-wide Policy Review*, USCIS (July 26, 2010), http://www.uscis.gov (follow "News" hyperlink; click "News Releases" hyperlink on the left-hand side; then scroll down to "July 2010"). USCIS Director Alejandro Mayorkas said, "As an agency, we must achieve consistency in the policies that guide us and in how we implement them for the public benefit." *Id.*

A. The Troubles with Nonlegislative Rules in Immigration Law Are Administrative Law Problems

USCIS's use of nonlegislative rules frustrates private immigration attorneys. The American Immigration Lawyers Association (AILA) has expressed its concern over the use of such rules in immigration law.[135] AILA has complained to USCIS about changing adjudication standards, confusion as to the binding effect of guidance documents, and a lack of transparency accompanying the use of guidance.[136] One attorney aptly described her confusion and frustration with the use of guidance in immigration law:

> I was confused. For years, I kept trying to figure out what the consequences were if someone travels during the pendency of certain applications and petitions. There aren't many regulations one can turn to, and what guidance is available is found in aging memoranda, timeworn letters to practitioners, scattered minutes of liaison meetings between the American Immigration Lawyers Association (AILA) and the legacy Immigration and Naturalization Service (INS) and now the U.S. Citizenship and Immigration Services (USCIS), the U.S. Department of State (DOS), U.S. Customs and Border Protection (CBP), and Immigration and Customs Enforcement (ICE). Then, there are minutes of AILA meetings and telephone conferences with Service Center Operations and the four individual Service Centers (with their idiosyncratic ways of dealing with travel issues), and statements of government officials at AILA conferences. If that's not enough, add to the mix the word-of-mouth exchanges among immigration practitioners, not to mention the advice given on a variety of listservs, and in a second, you'll understand why, with no single repository to turn to for answers, one is left with the vague feeling that somewhere, at some time, someone said something about the issue you're now facing.[137]

The practice of immigration law includes a dearth of firm rules.[138] This lack of stability can be disconcerting when advising a client about major life

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135. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., QUESTIONS AND ANSWERS: USCIS AMERICAN IMMIGRATION LAWYERS ASSOCIATION (AILA) MEETING, MARCH 19, 2009 2–3 (2009), *available at* http://www.uscis.gov/files/nativedocuments/aila_aao_qa_19march09.pdf. The American Immigration Lawyers Association is the premier organization representing the interests of private bar immigration attorneys. *See* AM. IMMIGRATION LAWYERS ASS'N, *About AILA*, AILA.ORG, http://www.aila.org/content/default.aspx?docid=1021 (last visited Aug. 6, 2012).

136. QUESTIONS AND ANSWERS: USCIS AMERICAN IMMIGRATION LAWYERS ASSOCIATION (AILA) MEETING, MARCH 19, 2009, *supra* note 135, at 2–3.

137. Naomi Schorr, *Didn't Somebody Say Something About That Somewhere? Travel During the Pendency of Applications and Petitions*, 12 BENDER'S IMMIGR. BULL. 1817 (2007). This excerpt raises a related problem of access to guidance documents. While USCIS does post guidance documents on its website by topic, it does not appear to post historical documents.

138. *See generally* Family, *supra* note 133.

decisions that could affect family unity or employment.

While it may present cold comfort, immigration law practitioners and scholars should realize that they are not alone in their frustration about agency use of nonlegislative rules. Other agencies routinely vex their own stakeholders with guidance documents. For example, one scholar has described the Federal Aviation Administration's (FAA's) use of guidance in a way that will sound very familiar to immigration lawyers:

> Imagine that you are the owner of a small business operating private charter flights . . . If the FAA issues interpretive guidance stating that your current business practices fail to comply with applicable legal standards, you could elect to disobey the FAA's guidance and challenge its policies during any enforcement proceeding against you. However, doing so may result in the FAA temporarily seizing your aircraft or suspending your FAA certification pending the outcome of the proceeding. Moreover, the likelihood of persuading an agency hearing officer or a court that your actions comply with the applicable legal standards appears slim, as both will accord the FAA's interpretive guidance a high degree of deference.[139]

Other agencies also use guidance to a great extent. For example, the Food and Drug Administration has relied on guidance to regulate prescription drug advertising instead of amending regulations dating to the 1960s;[140] the Environmental Protection Agency reported that it issued over two thousand guidance documents from 1996 to 1999;[141] and the Department of Education primarily has relied on guidance documents to implement Title IX.[142]

As Part I reveals, frustration with guidance documents is not unique to immigration law. Administrative law generally grapples with the rush to use guidance documents over notice-and-comment rulemaking, misuse of the notice-and-comment exemptions, and the negative effects of nonlegislative rules on stakeholders. The proper use of guidance documents is an unresolved issue that is fundamental to all of administrative law, even at the state level. The issue of the use of nonlegislative rules in immigration law cannot be unhinged from the debate about nonlegislative rules generally. Therefore, this Part analyzes USCIS's troubles with guidance documents from the broader perspective of administrative law.

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139. Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 ADMIN. L. REV. 343, 344 (2009) (footnote omitted).

140. Lars Noah, *The Little Agency that Could (Act with Indifference to Constitutional and Statutory Strictures)*, 93 CORNELL L. REV. 901, 905 (2008).

141. Mendelson, *supra* note 83, at 399.

142. *See id.* at 404 (describing that since the enactment of Title IX, the Department of Education has issued only one notice-and-comment rule).

There are a few general considerations to keep in mind while exploring USCIS's troubles with guidance documents. First, because USCIS uses guidance documents problematically, it is easy to forget that nonlegislative rules can serve a positive purpose. An area of the law as technical and as fast-moving as immigration law could never be administered effectively by only notice-and-comment rulemaking. USCIS needs flexible tools to keep up with the demands of extremely complex statutes that are not static and that are administered by a diffuse and large group of low-level adjudicators around the country. USCIS needs mechanisms to communicate with adjudicators in a more nimble manner than notice-and-comment rulemaking allows, and guidance documents are at least more transparent than word-of-mouth conversations between low-level adjudicators and supervisors.

Nevertheless, guidance also has its downsides, such as its inherent uncertainty. But this drawback need not always outweigh the benefits of guidance. Guidance documents do provide a window into the agency's outlook and attitude. Without some guarantee of other insights, it would be a mistake to dismiss guidance documents whole-handedly. Without guidance, there would still be uncertainty in adjudication, and there would be less information available about how the agency would likely act in a given scenario.

Second, it is important to recognize that arguments against the use of guidance documents in immigration law are connected to arguments against the use of guidance generally. In arguing for greater restrictions on USCIS's use of guidance, proponents must recognize that their argument is a part of a much larger debate with wide-ranging reach, and that some calling for more restricted use of guidance documents do so because of an anti-regulatory agenda. If USCIS should not use guidance, then presumably it should be more difficult for all agencies to act.[143]

143. Is it possible that only certain agencies should be restricted in their use of guidance? While comprehensive treatment of this question is beyond the scope of this Article, there is some precedent for this proposition. Congress has mandated certain guidance practices for the Food and Drug Administration (FDA) through its authorizing statute. *See id.* at 401 (describing how Congress required some public participation and ordered the FDA to issue the Good Guidance Practices). The answer may be that Congress should take a more active role and specifically rein in USCIS's use of nonlegislative rules. After all, USCIS is a Goliath compared to the individual foreign nationals who are seeking benefits from it. And the nature of the benefits they seek—the right to live with family, for example—certainly signals a need to make sure there is sufficient awareness of the applicable rules. Perhaps Congress should specifically restrict USCIS's use of guidance, but not other agencies'. While this Article defers answering the question of whether greater external controls are needed in immigration law, this Article recognizes that such questions are part of a wide debate with far-reaching repercussions that cut to the heart of our administrative state.

This broader perspective helps to diagnose USCIS's troubles with nonlegislative rules. It also frames a broader perspective on internal efforts by USCIS to reform its use of guidance documents through the draft memorandum for comment.

1. USCIS's Problematic Explanation of Nonlegislative Rules

The Adjudicator's Field Manual (the Manual) "comprehensively details USCIS policies and procedures for adjudicating applications and petitions."[144] In addition to collecting those policies and procedures, the Manual instructs adjudicators how to use the information contained in it. The Manual contains a section titled "Adherence to Policy" that instructs USCIS adjudicators about a difference between correspondence and policy.[145] According to the Manual:

> It is important to note that there is a distinction between "correspondence" and "policy" materials. Policy material is binding on all USCIS officers and must be adhered to unless and until revised, rescinded or superseded by law, regulation or subsequent policy, either specifically or by application of more recent policy material. On the other hand, correspondence is advisory in nature, intended only to convey the author's point of view. Such opinions should be given appropriate weight by the recipient as well as other USCIS employees who may encounter similar situations. However, such correspondence does not dictate any binding course of action which must be followed by subordinates within the chain of command.[146]

As examples of "policy," the Manual lists statutes and regulations, field manuals, operations instructions, precedent decisions, and memoranda bearing the label "P," for policy.[147] Examples of correspondence include non-precedent decisions and memoranda not bearing the label "P."[148]

The Manual uses terminology that is not only inconsistent with the APA, but also appears to take a position that is plainly at odds with it. The Manual names statutes and regulations as types of "policy." Also, the Manual explains that some guidance documents, such as memoranda bearing the label "P," are binding on the agency. This seems to contradict the APA; policy statements do not have the force of law. Also, placing "P"

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144. U.S. CITIZENSHIP & IMMIGRATION SERVS., *Introduction to the Adjudicator's Field Manual*, USCIS (2011) [hereinafter *Field Manual Introduction*], http://www.uscis.gov (follow "Resources" hyperlink; then under "Other USCIS Links" follow "Immigration, Handbooks, Manuals and Guidance" hyperlink; then follow "Adjudicator's Field Manual" hyperlink).

145. U.S. CITIZENSHIP & IMMIGRATION SERVS., ADJUDICATOR'S FIELD MANUAL § 3.4 (2011).

146. *Id.* § 3.4(a).

147. *Id.*

148. *Id.*

memoranda in the same category as statutes gives the impression that they are of equal weight. To further complicate matters, the Introduction to the Manual states, "Important Notice: Nothing in this manual shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person."[149] Under the Manual's own version of administrative law, statutes and regulations belong in the same category as some guidance documents. Certain guidance documents are binding on the agency, but those documents do not create any legally enforceable right. The agency must rely on those documents, but the public may not.

One commentator argued that this language in the Manual does not indicate that the agency is bound to a "P" stamp memorandum in the sense that it is law, but rather indicates that agency employees are bound to look at memoranda bearing the "P" stamp and to thereafter exercise their own discretion.[150] If that is true, and this portion of the Manual does simply present a "managerial directive,"[151] where does that leave correspondence? If the "P" stamp is merely a managerial directive that adjudicators must read and consider the memorandum, are adjudicators not even obligated to read correspondence (including memoranda not bearing the "P" stamp?) That does not seem so, considering that the Manual instructs adjudicators to give correspondence its "appropriate weight."[152] The better reading of the Manual is that it expects adjudicators to toe the line when it comes to "policy," but that there is discretion when it comes to correspondence.

This commentator also argued that because agency management remains free to change any memorandum bearing the "P" label, the existence of mandatory terms directed toward lower-level agency adjudicators does not transform the memorandum into law.[153] This argument triggers the debate referenced in Part I—how does one tell when a legislative rule is masquerading as a policy memorandum?

The mandatory language would appear to work against the nonlegislative rule label under the D.C. Circuit precedent discussed in Part I, but the application of that precedent is unpredictable.[154] For example, one district court held that when the Manual states that "policy material is binding on all USCIS officers," that "simply refers to the fact that an

149. *Field Manual Introduction*, *supra* note 144.

150. Geoffrey Forney, *The AAO and USCIS Policy Memoranda*, 16 BENDER'S IMMIGR. BULL. 821, 828 (2011).

151. *Id.*

152. U.S. CITIZENSHIP & IMMIGRATION SERVS., ADJUDICATOR'S FIELD MANUAL § 3.4(a) (2011).

153. Forney, *supra* note 150, at 829.

154. *See generally* Wilderness Soc'y v. Norton, 434 F.3d 584 (D.C. Cir. 2006).

agency's interpretation of its own regulations is binding, not that the guidelines establish an independent source of binding legal authority."[155] Even if the Manual's explanation of guidance prevails in court, however, that does not excuse USCIS's description of administrative law. The description in the Manual leads to the impression that "P" stamp policy memoranda are special and that they are binding on the agency.

The inherent confusion about nonlegislative rules, a feature of mainstream administrative law, is evident in USCIS's own language in the Manual. The Manual's use of the terms "correspondence" and "policy," including the description of some guidance documents as binding policy, creates unnecessary confusion in an already baffling area of the law. At the very least, the Manual should be revised to conform to more recognized terminology and to the structure of the APA. It should explain the taxonomy of the APA and that nonlegislative rules are not binding on anyone, even the agency. While such a revision cannot magically erase the fundamental bewilderment surrounding the use of nonlegislative rules, it would at least eliminate the additional confusion presented by an inaccurate description of this corner of administrative law. This is especially important given the low representation rates in some categories. The Manual misleads stakeholders into believing that at least some guidance documents belong in the same category as statutes and regulations, thus presenting nonlegislative rules as binding, when the law says otherwise.[156]

2. USCIS's Controversial Uses of Nonlegislative Rules

Beyond a controversial description of nonlegislative rules, USCIS also uses guidance in ways that result in strife. First, USCIS seems to favor guidance over notice-and-comment rulemaking. Second, the agency abruptly changes adjudication standards through guidance. Third, the Administrative Appeals Office has refused to follow guidance issued by other facets of USCIS.

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155. Broadgate Inc. v. U.S. Citizenship & Immigration Servs., 730 F. Supp. 2d 240, 246 (D.D.C. 2010) (citation omitted).

156. USCIS has also communicated misleading information to AILA. When AILA complained about the AAO's refusal to follow policy memoranda, USCIS said in response:

> The AAO, like any other adjudicative program within USCIS, is required to follow applicable law, regulations, binding decisions and agency policies. If AILA is aware of decisions that are contrary to existing statutes, regulations, binding case law, precedent decisions, or applicable policy guidance, USCIS requests those decisions be brought to the attention of the AILA liaison.

USCIS-AILA Liaison Committee Agenda, October 28, 2008, 13 BENDER'S IMMIGR. BULL. 1487, 1534 (2008).

a. Use of Nonlegislative Rules Instead of Notice-and-Comment Rulemaking

USCIS relies on guidance to a great extent. In fact, from the founding of the Department of Homeland Security in 2003 to November 2011, USCIS placed twenty-one proposed rules in the *Federal Register*.[157] About half of those notices deal with procedural issues (such as the adjustment of application fees) and the establishment of a genealogy program.[158] As far as regulations are concerned, many questions remain unanswered. Even when regulations are developed, the wait can be very long. For example, USCIS issued a notice of proposed rulemaking in 2011 addressing an issue Congress asked it to address in 2002.[159]

There are, however, significant immigration law issues that are governed by nonlegislative rules.[160] While agencies do have discretion to decide whether to use guidance or to implement notice-and-comment rulemaking (as long as the guidance truly is guidance), USCIS's use of guidance in the absence of regulation is often controversial.[161] Two examples that set the

157. Searching for USCIS "proposed rules" since the inception of the agency through November 4, 2011, on www.regulations.gov reveals twenty documents. A broader search for USCIS "rules" within the same timeframe reveals forty-eight documents, which includes one proposed rule apparently mistakenly not classified as a proposed rule in the system, twenty-four rules invoking some exception from informal rulemaking (eleven interim rules, five final interim rules, three final rules with a request for comments, and five final rules with no request for comments), eleven corrections or re-openings, one rule suspension, and eleven final rules generated as the product of a notice of proposed rulemaking.

158. *See supra* note 157.

159. Treatment of Aliens Whose Employment Creation Immigrant (EB-5) Petitions Were Approved After January 1, 1995 and Before August 31, 1998, 76 Fed. Reg. 59,927, 59,929 (Sept. 28, 2011) (to be codified at 8 C.F.R. pts. 216, 245).

160. USCIS is a part of the Department of Homeland Security. Congress delegated rulemaking authority to the Secretary of the Department of Homeland Security. 8 U.S.C. § 1103(a)(3) (2006).

161. As described by two prominent immigration attorneys:

> The Administrative Procedure Act (APA) provides a process for notice of proposed rulemaking and the opportunity for comment by interested members of the public before an agency issues a final regulation. Similarly, the Regulatory Flexibility Act (RFA) requires an analysis of a proposed rule in order to "minimize any significant economic impact of the rule on a substantial number of small entities." Moreover, in enabling legislation over several years, Congress has tasked the agency with the responsibility to issue regulations offering its interpretation of the statute in question. Rather than comply with the APA, RFA and several substantive immigration laws creating new rights or new restrictions, USCIS has adopted a practice of issuing proposed guidance and offering the public a few weeks to respond before the guidance becomes agency "policy." This abbreviated approach circumvents the protections of the APA and RFA, allows for no vetting of the rules by the public, no apparent role for the White House Office of Management and Budget, and no opportunity to analyze the agency's rationale for the policy decisions and legal interpretations developed in policy guidance.

tone for usual immigration law practice involve a complete lack of legislative rulemaking to implement a major statutory change and heavy use of guidance to resolve a multitude of issues regarding significant bars from entering the United States.

The first example demonstrates the use of guidance in the complete absence of regulation. The American Competitiveness in the Twenty-First Century Act of 2000 (AC-21),[162] among other things, allows certain temporary workers to extend their stay past a six-year cap and makes their visas more portable from employer to employer.[163] No less than five USCIS memoranda exist on this topic, but there are no notice-and-comment regulations.[164] None of the agency work-product is in the form of

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Angelo A. Paparelli & Ted J. Chiappari, *Intubation and Incubation: Two Remedies for an Ailing Immigration Agency*, NATION OF IMMIGRATORS, http://www.nationofimmigrators.com/Intubation%20and%20Incubation%20Two%20Remedies%20for%20an%20Ailing%20Immigration%20Agency_10%2024%2011%20%282%29.pdf (last visited Aug. 6, 2012) (footnotes omitted); *see also* OFFICE OF THE CITIZENSHIP & IMMIGRATION SERVS. OMBUDSMAN, RECOMMENDATIONS TO IMPROVE THE QUALITY IN EXTRAORDINARY ABILITY AND OTHER EMPLOYMENT-BASED PETITION ADJUDICATION 7 (2011), *available at* http://www.dhs.gov/xlibrary/assets/cisomb-rec_extraordinaryability_petitions.pdf (recommending notice-and-comment rulemaking over guidance documents to create adjudicatory standards).

162. Pub. L. No. 106-313, 114 Stat. 1251 (2010) (to be codified at 8 U.S.C. § 1184).

163. *Id.* §§ 105–106.

164. Memorandum from Michael A. Pearson, Exec. Assoc. Comm'r Office of Field Operations, Initial Guidance for Processing H-1B Petitions as Affected by the "American Competitiveness in the Twenty-First Century Act" (Public Law 106-313) and Related Legislation (Public Law 106-311) and (Public Law 106-396) (June 19, 2001), *available at* http://www.uscis.gov/files/pressrelease/ac21guide.pdf; Memorandum from William R. Yates, Acting Assoc. Dir. for Operations, Bureau of Citizenship & Immigration Servs., Continuing Validity of Form I-140 Petition in accordance with Section 106(c) of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Aug. 4, 2003) [hereinafter Continuing Validity], *available at* http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2003/i140_ac21_8403.pdf; Memorandum from William R. Yates, Acting Assoc. Dir. for Operations, Bureau of Citizenship & Immigration Servs., Sunset of Additional $1,000 Filing Fee Imposed by American Competitiveness and Workforce Improvement Act (ACWIA) and Return to 65,000 Annual Limit on H-1B Petition Approvals (Sept. 15, 2003) [hereinafter Sunset of Filing Fee], *available at* http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2003/h1b_091503.pdf; Memorandum from William R. Yates, Acting Assoc. Dir. for Operations, Bureau of Citizenship & Immigration Servs., Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the AC21 Act (May 12, 2005) [hereinafter Interim Guidance], *available at* http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2005/ac21intrm051205.pdf; Memorandum from Donald Neufeld, Acting Assoc. Dir. for Domestic Operations Directorate, U.S. Citizenship & Immigration Servs., Supplemental Guidance Relating to Processing Forms I-140 Employment-Based Immigrant Petitions and I-129 H-

a notice-and-comment regulation, despite continuing assurances over the past nine years from the agency that rulemaking is in the works,[165] and despite that AC-21 has produced some tricky procedural and legal issues.[166] While stakeholders appear to be satisfied with the content of the AC-21 memoranda, one commentator has described "this happy situation" as "tenuous at best, since a new memorandum could be approved at any time that could completely change USCIS' extra-legal, unofficial interpretation of regulation-free AC-21."[167] Additionally, this commentator acknowledged that when (if ever) USCIS issues regulations addressing AC-21, those regulations could "disregard[ ] not only . . . AC-21 . . . memoranda, but the decade-long history of how AC-21 has operated in this legal vacuum."[168]

The second example involves a ground of inadmissibility known as the three- and ten-year bars.[169] This ground of inadmissibility provides that if an individual has accrued certain amounts of "unlawful presence" in the United States and then leaves the United States, that individual will be subject to either a three- or a ten-year bar from legally reentering the United States, even if the individual otherwise has legal means of entering (such as through marriage to a U.S. citizen).[170] The meaning of the statutory phrase "unlawful presence" is a significant immigration issue largely governed by memo.[171]

1B Petitions, and Form I-485, Adjustment Applications Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (May 30, 2008), *available at* http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%20 1998-2008/2008/ac21_30may08.pdf.

165. Pearson, *supra* note 164 ("The following guidelines establish interim procedures for use by Service personnel in the processing of new benefits under AC21 and the related legislation. Forthcoming regulations will promulgate substantive standards to be utilized in the adjudication of these new benefits."); Neufeld, *supra* note 164, at 2 n.2 ("At a future date, USCIS plans to incorporate all previous still applicable guidance into forthcoming rulemaking relating to various AC21 . . . statutory provisions.").

166. *See, e.g.*, H. Ronald Klasko, *American Competitiveness in the 21st Century: H-1Bs and Much More*, 77 INTERPRETER RELEASES 1689, 1693 (2000).

167. Brandon Meyer, *The Administrative Procedures Act and USCIS Adjudications: Following the Law?*, IMMIGR. BRIEFINGS, May 2009, at 4, 6.

168. *Id.*

169. 8 U.S.C. § 1182(a)(9)(B) (2006).

170. *Id.*

171. A search for the terms "unlawful presence" and "unlawfully present" in the Code of Federal Regulations yielded a handful of regulations that address some narrow issues regarding the meaning of unlawful presence, but no regulation that generally addresses its meaning. Perhaps the broadest regulation is one that provides that time spent in removal proceedings has no effect on determining unlawful presence. 8 C.F.R § 239.3 (2012). The others address narrow issues related to specific nonimmigrant categories. *See id.* § 214.2(h)(5)(xi)(B); *id.* § 214.2(h)(5)(xii); *id.* § 214.2(h)(6)(i)(C) (providing a thirty-day grace

The statute containing the unlawful presence bars provides that "an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the [Department of Homeland Security] or is present in the United States without being admitted or paroled."[172] In certain instances the application of this statutory provision is relatively straightforward. A temporary worker admitted until a specific date, for example, begins to accrue unlawful presence "the day following the date the authorized period of admission expires."[173]

But determining when unlawful presence begins to accrue in other circumstances is not as clear. For example, not all types of temporary admissions specifically designate admission until a certain date. Students are admitted for the duration of their status.[174] This fact makes for a more complicated scenario for determining when unlawful presence begins to accrue. If USCIS determines there has been a status violation (such as not attending a course of study) while adjudicating another petition for an immigration benefit, unlawful presence begins to accrue the day after the new petition is denied.[175] Similarly, if an immigration judge finds that there was a status violation, unlawful presence begins to accrue the day after the immigration judge's order is issued.[176] In explaining these outcomes, USCIS has stated, "It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated."[177] Therefore, in the

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period from unlawful presence for certain temporary workers when a petition is revoked); *id.* § 214.14(d)(3) (providing that those on the waiting list for a U visa—available to victims of certain crimes—do not accrue unlawful presence while waiting); *id.* § 214.15(i)(3) (clarifying unlawful presence in the context of the V nonimmigrant visa, which is available to those with certain petitions pending on or before December 21, 2000); *id.* § 245.10(m) (discussing unlawful presence in the context of section 245(i) of the Immigration and Nationality Act, which provides special procedures for those with petitions pending on or before April 30, 2001); *id.* § 245.23(c)(3) (providing an exception to the accrual of unlawful presence in the context of T nonimmigrant status, which is available to victims of human trafficking); *id.* § 245.18(d)(2) (addressing the accrual of unlawful presence in the context of a doctor serving in a medically underserved area).

172. 8 U.S.C. § 1182(a)(9)(B)(ii) (2010).

173. Memorandum from Donald Neufeld, Acting Assoc. Dir. Domestic Operations Directorate, U.S. Citizenship & Immigration Servs., Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act 25 (May 6, 2009), *available at* http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/revision_redesign_AFM.PDF.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

context of a student admitted for the duration of his or her status, unlawful presence does not begin to accrue at the moment of a violation, but rather begins to accrue later, after official recognition of the violation.

Another example of a complex unlawful presence calculation stems from an exception. According to the statute, no unlawful presence accrues while a foreign national is waiting to hear back from USCIS on a non-frivolous application for a change or extension of status.[178] In a typical scenario, a foreign national will file an application to change or extend his or her legal immigration status before the current status expires, but USCIS may not adjudicate the application before the current status expires. The statutory tolling would kick in to provide that even though the individual's current status has expired, this individual would not accrue unlawful presence while USCIS considers the application. The statute actually only provides for 120 days of tolling,[179] but USCIS policy is that no unlawful presence will accrue "during the entire period a properly filed [Extension of Status] or [Change of Status] application is pending,"[180] even if it is longer than 120 days.

These agency unlawful presence principles are not contained in a notice-and-comment rule, but rather in a fifty-one page memorandum, dated May 6, 2009, which is a consolidation of no less than six memoranda governing the concept of unlawful presence.[181] The breadth of the memorandum is impressive. In addition to the examples discussed above, it includes twenty-four pages of information about different ways to figure out whether a particular individual has accrued or will accrue unlawful presence.[182] There is no broad legislative rule addressing these issues.

The three- and ten-year bars are especially significant because they can either trap an individual inside the United States or catch an unknowing individual off guard once he or she exits the United States. Even the spouse of a U.S. citizen may be subject to the bars if the spouse entered the United States without inspection. For example, an individual brought across the border without inspection as a child, who then resides in the United States into adulthood, and who then marries a U.S. citizen, is stuck. If the foreign national spouse leaves the United States, an unlawful presence bar to return will kick in.[183] If the foreign national spouse stays, there is no way to

178. 8 U.S.C. § 1182(a)(9)(B)(iv) (2010).

179. *Id.*

180. Neufeld, *supra* note 173, at 35.

181. *Id.* at 1.

182. *Id.* at 9–32.

183. There is the potential for an "extreme hardship" waiver of the unlawful presence bar, but such a waiver is not easy to obtain. *See* 8 U.S.C. § 1182(a)(9)(B)(v).

legalize status based on the marriage to the U.S. citizen.[184] Because the three- and ten-year bars kick in upon an individual's exit from the United States, many with unlawful presence are afraid to leave the United States for fear of not getting back in, which can perpetuate unlawful residence. Some also leave without knowledge of how unlawful presence works and find themselves unable to return.[185] Thus, understanding the "rules" about how unlawful presence is accrued is very important to foreign nationals and to attorneys. USCIS should reconsider how it formulates and presents the "rules," especially when so few proceed with representation in family-based cases. While the memorandum on unlawful presence does contain some policy decisions that are favorable to foreign nationals, all of the understanding about unlawful presence contained in this memo could vanish overnight.

Concerns about overreliance on guidance are borne out in immigration law. There are no notice-and-comment regulations, and only guidance, to implement AC-21. Also, USCIS has used nonlegislative rules to implement the application of the crucial statutory term "unlawful presence." Even if the agency action qualifies as an interpretive rule that effects no substantive change and derives its enforcement power from the statute, this is a term that carries the extremely harsh consequence of potential close familial separation for three or ten years, but yet has not received the benefits of notice-and-comment rulemaking.

A dearth of notice-and-comment rulemaking is an issue facing all of administrative law, as explained in Part I. While the generalized nature of the problem does not expunge USCIS's troubles with guidance documents, understanding the forces at work against notice-and-comment rulemaking sheds some light on why USCIS may rely on guidance. As Part I describes, administrative law scholars argue that notice-and-comment rulemaking has become "ossified;" that is, so burdened with procedural obligations that it has become too slow and resource-demanding such that it is unappealing to agencies.[186] Before a Notice of Proposed Rulemaking is even published in the *Federal Register* (which sets in motion the long process of public comment and agency response to public comment) an agency like USCIS must fulfill many obligations. According to USCIS, from a broad perspective, it

184. Under 8 U.S.C. § 1255(a), adjustment of status to lawful permanent residence based on a marriage to a U.S. citizen is not available if the foreign national spouse was not inspected or admitted at the border.

185. In January 2012, USCIS published its intent to propose a rule that would establish a provisional waiver adjudication procedure that may partially alleviate this problem. Provisional Waivers of Inadmissibility for Certain Immediate Relatives of U.S. Citizens, 77 Fed. Reg. 1040, 1040 (Jan. 9, 2012) (to be codified at 8 C.F.R. pt. 212).

186. *See supra* notes 99–101 and accompanying text.

engages in the following steps before it publishes a Notice of Proposed Rulemaking:

- USCIS leadership meets regularly to prioritize rules and decide on whether to initiate new rulemakings.
- Subject matter experts at USCIS draft rules, engaging all interested offices within the agency.
- Rulemaking teams (including economists, privacy specialists, etc.) develop and draft associated rulemaking documents, such as economic evaluations, privacy documents, and Paperwork Reduction Act materials.
- USCIS often holds public stakeholder meetings to obtain views from the public, consistent with Executive Order 13,563.
- During the development process for a rulemaking, USCIS may engage with other components within DHS or with other federal agencies.
- There is a clearance process at USCIS and DHS for leadership to approve rulemakings.
- For regulatory actions that are "significant" under Executive Order 12,866, the Office of Management and Budget (OMB) has up to 90 days to review the regulatory action.[187]

USCIS's pre-publication obligations stem from administrative law. The analyses USCIS must complete regarding costs and benefits, privacy effects, effects under the Paperwork Reduction Act, and Executive Orders 13,563 and 12,866 are administrative law requirements that apply across the board, and not just to immigration law. Lengthy waits for intra-agency approvals are not uncommon.

The action steps listed above are only pre-publication obligations and do not include the procedural obligations of notice, comment, and announcement of a final rule. These pre-publication obligations also do not include any time or effort expended in defending a final rule through potential litigation. Passing judgment on nonlegislative rules is not merely a question of immigration law, but also requires greater engagement in a broader discussion about the state of notice-and-comment rulemaking generally.[188]

b. Changing Standards Through Nonlegislative Rules

A different, but related, controversy arises when USCIS dramatically

187. E-mail from William Wright, USCIS Office of Communications, to author (Dec. 2, 2011) (on file with author).

188. While there certainly may be hurdles peculiar to USCIS regarding notice-and-comment rulemaking difficulties, the general challenges remain.

shifts course by memo.[189] Without warning, a new memo may surface that contains a wholly new approach to a particular issue. This phenomenon is related to the absence of rulemaking because a usual argument against this practice is that any changes should have been accomplished through notice-and-comment rulemaking rather than by memo.[190] Without notice-and-comment rulemaking, there is no advance notice of a coming change and there is no opportunity to comment on a proposed change. Shifting course by memo is also related to the absence of rulemaking because such an overnight shift in course highlights the fragility of guidance-based rules.

A memorandum that changed the adjudication standard for a high-profile temporary worker status exemplifies this controversy. One visa category for highly skilled workers is called H-1B.[191] This is a nonimmigrant category that allows temporary admission to an individual coming to the United States to fill a specialty occupation.[192] A specialty occupation is one that requires "theoretical and practical application of a body of highly specialized knowledge" and requires the "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States."[193] As a part of an H-1B application to USCIS, the potential employer must submit a petition to USCIS seeking H-1B status for a potential employee (or seek renewal of that status).[194] The petition must also include a Labor Condition Application approved by the Department of Labor.[195]

While there are legislative rules governing the H-1B category,[196] there are also many policy memoranda that address it.[197] Of particular controversy is a nineteen-page memorandum dated January 8, 2010, from Donald Neufeld, the Associate Director for Service Center Operations for USCIS.[198] This "Neufeld Memo" (the Memo) to USCIS Service Center

189. Paparelli & Chiappari, *supra* note 161 ("Because these policies have largely been issued without notice-and-comment rulemaking, and are often poorly reasoned, incomplete, contradictory or wholly non-existent, the stakeholder community has been at the mercy of agency adjudicators . . . .").

190. *See* Alaska Prof'l. Hunters Ass'n., Inc. v. FAA, 177 F.3d 1030 (D.C. Cir. 1999).

191. 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2006).

192. *Id.*

193. *Id.* § 1184(i)(1)(A)–(B).

194. 8 C.F.R. § 214.2(h)(1)(i) (2011).

195. *Id.* § 214.2(h)(4)(ii)(B)(1).

196. *See, e.g.*, *id.* § 214.2(h).

197. *See, e.g.*, Pearson, *supra* note 164; Interim Guidance, *supra* note 164; Memorandum from Barbara Q. Velarde, Chief, Serv. Ctr. Operations, U.S. Citizenship & Immigration Servs., Requirements for H-1B Beneficiaries Seeking to Practice in a Health Care Occupation (May 20, 2009), *available at* http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/health_care_occupations_20may09.pdf.

198. Memorandum from Donald Neufeld, Acting Assoc. Dir. Domestic Operations

Directors changed the standard used to determine whether an H-1B petitioner (potential employer) would hold the necessary employment relationship with the H-1B beneficiary (potential employee).[199]

For purposes of the H-1B category, a regulation defines an employer as:

> [A] person, firm, corporation, contractor, or other association, or organization in the United States which:
>
> (1) Engages a person to work within the United States;
>
> (2) *Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee*; and
>
> (3) Has an Internal Revenue Service Tax identification number.[200]

The Neufeld Memo addresses what constitutes an employer-employee relationship for the purpose of adjudicating H-1B petitions. As the Neufeld Memo explains, prior to the issuance of the Memo, USCIS relied on common law principles and Supreme Court cases in adjudicating whether the appropriate relationship existed for H-1B purposes.[201] According to the Memo, the absence of agency guidance on the subject caused problems, "in particular, with independent contractors, self-employed beneficiaries, and beneficiaries placed at third-party worksites."[202] The Memo made it more difficult for self-employed entrepreneurs and staffing firms to prove an employer-employee relationship exists, thus narrowing access to the H-1B category.

The Neufeld Memo established a vision of control—that is, petitioner control over the beneficiary—that calls into question employment arrangements other than the classic scenario of an employer offering a job to an employee to work on the employer's premises. The Memo instructs that in adjudicating H-1B petitions, "[t]he petitioner must be able to establish that it has the **right to control** over when, where, and how the beneficiary performs the job,"[203] and it lists eleven factors that USCIS "will consider" in adjudicating these petitions.[204] The Memo further advises that these factors are a part of a totality of the circumstances test aimed at establishing a right of control throughout the length of the beneficiary's

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Directorate, U.S. Citizenship & Immigration Servs., Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements (Jan. 8, 2010) [hereinafter Neufeld Memo], *available at* http://www.uscis.gov/USCIS/Laws/Memoranda/2010/H1B%20Employer-Employee%20Memo010810.pdf.

199. *Id.*

200. 8 C.F.R. § 214.2(h)(4)(ii) (emphasis added).

201. Neufeld Memo, *supra* note 198, at 2.

202. *Id.*

203. *Id.* at 3 (footnote omitted).

204. *Id.*

proposed stay in H-1B status.[205]

Despite the Neufeld Memo's acknowledgement that this inquiry is inherently case-specific, it presents scenarios that would fail the totality of the circumstances test. First, self-employed beneficiaries fail the test because the petitioning company, despite that it may be a separate corporate entity, is the beneficiary, and thus there is no evidence that the petitioning company will have control over the beneficiary.[206] Second, independent contractors fail the test where, for example, a salesperson engaged by the petitioner also sells other products and the petitioner does not set the work schedule or conduct performance reviews of the salesperson.[207] Third, the Memo establishes that third-party placements fail the test.[208] The Memo provides an example of a third-party placement: a computer consulting company that contracts with other companies to provide staff to the other company, and where the other company, and not the petitioning consulting company, supervises the employees' daily work.[209]

Stakeholders have described the requirements of the Neufeld Memo as "demanding, burdensome and commercially unreasonable," and as having been formulated "without APA compliance or policy rationale."[210] The American Immigration Lawyers Association described the Memo as "significantly alter[ing] USCIS's definition of the employer-employee relationship."[211] Ironically, USCIS stated that the purpose of the Memo was to increase transparency and consistency, not to change policy.[212] Instead, it created a firestorm of protest, confusion,[213] and at least one

205. *Id.* at 3–4.

206. *Id.* at 5–6. USCIS may be backing away from this position. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., *Questions & Answers: USCIS Issues Guidance Memorandum on Establishing the "Employee-Employer Relationship" in H-1B Petitions*, Q12, USCIS, http://www.uscis.gov (follow "News" hyperlink; then follow "Public Releases by Topic" hyperlink; then follow "Visas: H-1B" hyperlink and scroll down to "August 2011") (last updated Mar. 12, 2012).

207. Neufeld Memo, *supra* note 198, at 6.

208. USCIS may be backing away from this position. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., *Questions & Answers: USCIS Issues Guidance Memorandum on Establishing the "Employee-Employer Relationship" in H-1B Petitions*, Q13, USCIS, http://www.uscis.gov (follow "News" hyperlink; then follow "Public Releases by Topic" hyperlink; then follow "Visas: H-1B" hyperlink and scroll down to "August 2011") (last updated Mar. 12, 2012).

209. Neufeld Memo, *supra* note 198, at 6–7.

210. Angelo A. Paparelli & Ted J. Chiappari, *New USCIS Policy Clips Entrepreneurs, Consultants and Staffing Firms*, 15 BENDER'S IMMIGR. BULL. 641, 641, 644 (2010).

211. *USCIS Holds Stakeholders Session on New H-1B Employer-Employee Relationship Memorandum*, 87 INTERPRETER RELEASES 1, 438 (2010) (alteration in original).

212. *Id.*

213. Although, as at least one immigration attorney has mentioned, the issuance of the Neufeld Memo did corral into one place an explanation of what adjudicators should

lawsuit.[214]

In the lawsuit, the plaintiffs argued, among other things, that the Neufeld Memo violated the notice-and-comment provisions of the APA; in other words, that the contents of the Neufeld Memo should have been enacted through notice-and-comment rulemaking.[215] As Part I explains, this argument presents a common conundrum for administrative law. The district court held that the Neufeld Memo was not final agency action because it is not a legislative rule.[216] The court held it is not a legislative rule because it is not binding on its face or as applied.[217] To support its holding that the Neufeld Memo is not binding on its face, the court referred to its text, which states that the Memo only intends to provide guidance and then directs adjudicators to consider the totality of the circumstances.[218] Moreover, the court referenced USCIS adjudication outcomes that indicate that the Memo is also nonbinding as applied.[219]

The Neufeld Memo is another manifestation of the perils of guidance; it exemplifies concerns that guidance does a poor job at setting stable rules and about guidance's practical binding effect. Even if the Neufeld Memo legitimately is a nonlegislative rule, its existence and the non-transparent process used to create it nevertheless cause confusion and frustration within the benefits adjudication system.[220] Either adjudicators will effectively treat the Neufeld Memo as binding, which will cause frustration because it technically is not binding, or adjudicators will stray from the Memo, causing confusion as to what exactly is the standard for adjudication. Stakeholders expressed distress that the changes wrought by the Memo were issued without any opportunity for notice and comment.[221] The lawsuit challenging the Neufeld Memo alleged that the Memo "changed

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consider. Gus Shihab, *The January 8, 2010 Neufeld Memo, a Reason to Panic or Breathe the Sigh of Relief?*, IMMIGR. VISA LAWYER BLOG (Jan. 25, 2010), http://www.immigration-visa-lawyer-blog.com/2010/01/the-january-8-2010-nuefeld-mem.html.

214. Broadgate Inc. v. U.S. Citizenship & Immigration Servs., 730 F. Supp. 2d 240 (D.D.C. 2010).

215. *Id.* at 242.

216. *Id.* at 246.

217. *Id.*

218. *Id.* at 245.

219. *Id.* at 247.

220. For example, one immigration attorney posted this response to the government's argument that the Neufeld Memo is merely guidance: "Can you see the milk shooting out my nose? . . . Are they really saying that Service Center Adjudicators are free to ignore this 'contour refining guidance'? Really?" Charles H. Kuck, *Don't Get So Uptight. It's Only a Guideline*, IMMIGR. DAILY (July 6, 2010), http://www.ilw.com/articles/2010,0708-kuck.shtm.

221. *Id.*

existing law" in the absence of rulemaking.[222] This allegation shows frustration with the Neufeld Memo, and also displays the general confusion wrought by guidance documents. Guidance documents do not change law.

The H-1B Neufeld Memo also raises another issue common to administrative law: whether an agency may bounce from guidance document to guidance document as a method for changing rules. There is some case law that suggests that, at least in certain circumstances, the answer is no. The D.C. Circuit has held that the FAA could not change a long-standing, authoritative nonlegislative interpretation of a notice-and-comment regulation through another nonlegislative rule.[223] Recognizing that a changed agency interpretation of a statute presents a different scenario, the court stated, "When an agency has given its *regulation* a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment."[224] The existence of a long-standing,[225] authoritative interpretation[226] is a prerequisite to application of this duty to change through notice-and-comment rulemaking. Conditional statements do not establish an authoritative interpretation.[227] In the FAA case, regulated parties had relied on a particular definitive rule for almost thirty years.[228]

c. Agency Appeals and Nonlegislative Rules

There is also confusion and frustration among immigration attorneys about the effect of USCIS nonlegislative rules in appeals to the Administrative Appeals Office.[229] The AAO has overturned years of established guidance that practitioners believed had more staying power. The AAO is a component of USCIS that has no exalted status within the agency. It is listed in the USCIS organizational chart as the same level of the bureaucracy as the front-line adjudicators whose work the AAO

222. Complaint at 2, Broadgate Inc. v. U.S. Citizenship & Immigration Servs., 730 F. Supp. 2d 240 (D.D.C. 2010) (No. 10-cv-0941).

223. Alaska Prof'l Hunters Ass'n v. FAA, 177 F.3d 1030, 1034, 1036 (D.C. Cir. 1999).

224. *Id.* at 1033–34 (emphasis added).

225. *See* Air Transp. Ass'n of Am., Inc. v. FAA, 291 F.3d 49, 55 (D.C. Cir. 2002) (explaining that a guidance document is not a "departure from the past" if the guidance document speaks to issues not yet addressed).

226. *See* MetWest Inc. v. Sec'y of Labor, 560 F.3d 506, 509–10 (D.C. Cir. 2009) (holding that the reasoning of *Alaska Professional Hunters* did not apply where the agency has not established "definitive and authoritative interpretations").

227. *Id.*

228. *Alaska Prof'l Hunters*, 177 F.3d at 1035–36.

229. *See USCIS-AILA Liaison Committee Agenda*, *supra* note 156, at 1534.

reviews.[230] Despite its bureaucratic placement on par with front-line adjudicators, the AAO does not hold itself bound to USCIS guidance.[231]

The AAO has caused controversy by not following USCIS policy. In the first example provided here, the AAO changed the adjudication standard governing what types of investments qualify under the immigrant investor visa. In the second example, the AAO changed the adjudication standard governing what constitutes specialized knowledge under the intracompany transferee visa.

Congress created a category of legal, permanent immigration open to foreign nationals who are willing to invest in the United States.[232] Under 8 U.S.C. § 1153(b)(5), green cards are available through a category known as Employment Based Fifth Preference (EB-5) to those "seeking to enter the United States for the purpose of engaging in a new commercial enterprise."[233] The immigrant investor must have invested, or be in the process of investing, $1 million, or less (now $500,000) if the investment is made in a targeted employment area.[234] The investment must also "benefit the United States economy" and create at least ten full-time jobs.[235]

Implementation of this statutory category has been notoriously unpredictable.[236] Both the United States Government Accountability Office (GAO) and the USCIS Ombudsman have highlighted the roller-coaster history of the program as reasons for the category's historical failure to attract applicants.[237] Even USCIS reported to the GAO that the

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230. *See* Family, *supra* note 133, at 69, 94–95.

231. *In re* Izummi, 22 I. & N. Dec. 169, 196 (BIA 1998). This is one of a small number of AAO precedent decisions.

232. There are other investor-based categories that allow for a temporary stay, but the Employment Based Fifth Preference (EB-5) program allows beneficiaries to become lawful permanent residents of the United States.

233. 8 U.S.C. § 1153(b)(5)(A) (2006).

234. *Id.* § 1153(b)(5)(C)(i). A targeted employment area is "a rural area or an area which has experienced high unemployment (of at least 150 percent of the national average rate)." *Id.* § 1153(b)(5)(B)(ii).

235. *Id.* § 1153(b)(5)(A)(ii). A full-time job is one "that requires at least 35 hours of service per week at any time." *Id.* § 1153(b)(5)(D).

236. For more information on the history and development of the EB-5 program, see David H.E. Becker, *Judicial Review of INS Adjudication: When May the Agency Make Sudden Changes in Policy and Apply its Decisions Retroactively?*, 52 ADMIN. L. REV. 219 (2000); William P. Cook, *The Demand for Rulemaking: The Saga of the EB-5 Program Continues*, *in* IMMIGRATION LAW—BASICS AND MORE, (ALI-ABA Course of Study, May 6, 1999); and Leslie K. L. Thiele & Scott T. Decker, *Residence in the United States Through Investment: Reality or Chimera?*, 3 ALB. GOV'T L. REV. 103 (2010).

237. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-256, IMMIGRANT INVESTORS: SMALL NUMBER OF PARTICIPANTS ATTRIBUTED TO PENDING REGULATIONS AND OTHER FACTORS (2005) [hereinafter IMMIGRANT INVESTORS]; OFFICE OF CITIZENSHIP & IMMIGRATION SERVS. OMBUDSMAN, EMPLOYMENT CREATION IMMIGRANT VISA (EB-5)

uncertainty inherent in the program is likely a contributing factor to the limited interest in the category.[238] Average use of the category—about 700 visas per year—is far below the yearly statutory cap of 10,000 visas.[239]

As the USCIS Ombudsman has noted, uncertainty has "[p]lagued" the immigrant investor program "since inception."[240] Congress created the EB-5 category in 1990.[241] A seismic shift developed from late 1997 through 1998, when concerns about fraud led the agency to reconsider its original program implementation.[242] In November 1997, the United States Immigration and Naturalization Service (INS) (the predecessor to USCIS) placed a hold on the adjudication of certain EB-5 petitions.[243] The INS General Counsel issued an opinion the following month explaining, "Over the last several years, a number of serious issues have arisen regarding the legality of certain types of business arrangements" contained in EB-5 petitions.[244] The General Counsel reviewed these types of business arrangements and found them not to qualify under the EB-5 statute and regulations.[245] The suspect arrangements, which raised questions about whether the foreign national's investment was truly at risk, included: the use of promissory notes as investment vehicles; the use of installment plans as a means of making an investment; the use of an option given to sell or buy the investment at a fixed price; and the use of guaranteed returns.[246]

After the issuance of the General Counsel's legal opinion, INS continued to delay adjudication of EB-5 cases that contained these types of business arrangements.[247] Next, INS ordered its first-tier adjudicators to select four EB-5 petitions containing these types of business arrangements, to immediately remove the hold, and to adjudicate them.[248] INS instructed

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PROGRAM RECOMMENDATIONS, at 6–10 (2009) [hereinafter EB-5 RECOMMENDATIONS], http://www.dhs.gov/xlibrary/assets/CIS_Ombudsman_EB-5_Recommendation_3_18_09.pdf.

238. IMMIGRANT INVESTORS, *supra* note 237, at 9.

239. OFFICE OF CITIZENSHIP & IMMIGRATION SERVS. OMBUDSMAN, ANNUAL REPORT 2011, at 25 (2011) [hereinafter ANNUAL REPORT 2011], http://www.dhs.gov/xlibrary/assets/cisomb-annual-report-2011.pdf.

240. EB-5 RECOMMENDATIONS, *supra* note 237, at 7.

241. *Id.* at 3.

242. *Id.* at 7 n.22, 8.

243. Cook, *supra* note 236, at 1–2. In December 2007, the Department of State decided to suspend processing of these types of EB-5 cases. *Id.*

244. Memorandum from INS Office of the Gen. Chief Counsel to Paul W. Virtue, Acting Exec. Assoc. Comm'r, Office of Programs (Dec. 19, 1997), *available at* http://shusterman.com/eb5investorsinsmemo1998.html.

245. *Id.*

246. *Id.*

247. Cook, *supra* note 236, at 4–5.

248. *Id.*

those first-tier adjudicators to then forward the newly adjudicated petitions to the AAO.[249]

The AAO adjudicated the four selected cases and issued four precedent decisions from late June through July 1998.[250] According to the USCIS Ombudsman, these decisions "altered the previously issued guidance and substituted new and more restrictive interpretations of the law."[251] The 1998 AAO precedent decisions made the EB-5 program harder to access and shifted the ground under people who were in the process of making, or had already made, investments that were no longer acceptable under the program.

While agencies do have substantial discretion to decide whether to create new rules through rulemaking or adjudication,[252] the abrupt change in course here, without prior notice, had negative effects on stakeholders. The change in standards injected intense uncertainty into the EB-5 program and angered stakeholders. As one commentator wrote in 1999:

> Essentially instead of presenting clear guidelines, the AAO opted to dispose of seven (7) years of established EB-5 precedent in favor of a complete reversal of accepted practice and blithely disavowed dozens of the Service's own pronouncements about practices it long held acceptable in the EB-5 Program. And worse, the Service laid down the gauntlet that it fully intended to apply these new rules retroactively to cases long since approved, even to those cases where visas had been issued without [the immigration agency's] objection.[253]

The change in standards, combined with the retroactive applications of those standards, sent a signal to current and potential investors that the decisions of the agency could not be relied upon, and that the law could change without notice. In this EB-5 scenario, the AAO, through precedent opinions, overturned existing guidance from agency officials. Those opinions did provide firmer ground, but did so by injecting a lack of confidence in the system. The precedent decisions overturned existing practices and applied the new standards retroactively.

A changed agency approach to what constitutes specialized knowledge presents a more recent example of shifting adjudication standards. The Immigration and Nationality Act provides a category of legal, temporary

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249. *Id.*

250. *In re* Ho, 22 I. & N. Dec. 206 (BIA 1998); *In re* Hsiung, 22 I. & N. Dec. 201 (BIA 1998); *In re* Izummi, 22 I. & N. Dec. 169 (BIA 1998); *In re* Soffici, 22 I. & N. Dec. 158 (BIA 1998).

251. EB-5 RECOMMENDATIONS, *supra* note 237, at 8.

252. *See* SEC v. Chenery, 332 U.S. 194, 202–03, 207, 209 (1947).

253. *See* Cook, *supra* note 236, at 11; Becker, *supra* note 236, at 203 (calling the changes "unexpected and drastic").

immigration for an intracompany transferee who has specialized knowledge that will be used in a position in the United States.[254] Known as the L-1B visa, an individual seeking this visa must show possession of the requisite specialized knowledge and employment abroad by the petitioning employer for one year within the past three years.[255] There is information about what constitutes specialized knowledge in the statute and in a legislative rule, but those legal rules still leave questions unanswered.[256]

In determining whether a foreign national possessed specialized knowledge rather than just skilled knowledge, the AAO, in 2008, refused to abide by a memorandum known as the "Puleo Memorandum," issued in 1994 and, according to the foreign national's counsel, implemented since then.[257] The Puleo Memorandum presented an understanding of specialized knowledge that the counsel argued was more generous than the standard being applied in the case before the AAO.[258] The AAO took a dismissive view of the Puleo Memorandum, explaining that it "is not legally binding on the agency."[259] According to the AAO, the Puleo Memorandum merely "articulate[d] internal guidelines for agency personnel; [it did] not establish judicially enforceable standards."[260] While the AAO recognized "that the memorandum received wide mention in the immigration press," the AAO determined that "even where an agency memorandum or General Counsel opinion is publicized and discussed in a widely circulated immigration periodical, the document will not be considered as rulemaking that a petitioner may rely on."[261]

As far as administrative law is concerned, agencies have flexibility to determine the effect of a guidance document in adjudication.[262] It is important to remember that policy statements are not legally binding rules. In fact, one of the hallmarks of a true guidance document is agency behavior exhibiting an attitude that the agency does not consider itself bound to the rule expressed in the policy statement. Nonlegislative rules are not meant to be binding.[263]

These ideas are more complex in practice, however. If the pertinent

254. 8 U.S.C. § 1101(a)(15)(L)(1)(B) (2006).

255. *Id.*

256. *Id.* § 1184(c)(2)(B); 8 C.F.R. § 214.2(l)(1)(ii)(D) (2011).

257. Matter of GST Technical Servs., WAC 07 277 53214, at 19–21 (AAO Jul. 22, 2008).

258. *Id.*

259. *Id.* at 21.

260. *Id.*

261. *Id.*

262. Charles H. Koch, Jr., *Policymaking by the Administrative Judiciary*, 56 ALA. L. REV. 693, 713–20 (2005).

263. *Id.* at 713–18.

question is whether an agency acts like it is bound to a rule expressed in a policy statement, precisely which agency actor's actions count? If we are to look at the actions of all levels of agency adjudicators, then all adjudicators, including appellate administrative adjudicators like the AAO, should maintain an open mind and not consider themselves bound by an agency nonlegislative rule. On the other hand, demanding an open mind of all levels of agency adjudicators leads to the shifting ground problem.

The shifting ground problem in turn leads to an argument that adjudicators like the AAO should be bound by agency guidance documents. As explained by Professor Charles Koch, the difference between legislative and nonlegislative rules "should be reflected in the weight given [to them] by an agency's adjudicators."[264] According to Professor Koch, the difference results in providing adjudicators with more leeway when it comes to applying nonlegislative rules, but that adjudicators "should be mindful of the effect policy pronouncements have on the public."[265] Citing the practical binding effect of nonlegislative rules, Professor Koch wrote that "administrative judges should feel some pressure to follow a pronouncement's language."[266]

The AAO's specialized–knowledge decision exemplifies the concern raised by Professor Koch. While the AAO may not be bound to a guidance document, the AAO's decision left immigration attorneys with a familiar uncertainty as to the adjudication standards for a major visa category.[267] Two prominent immigration attorneys, including a former General Counsel of the INS, described the AAO's decision as "effectively ignor[ing] nearly two decades of . . . interpretive guidance."[268] While the AAO may be permitted to ignore that guidance, the AAO shows tone-deafness to the practical binding effect of guidance documents when it does so.

A further complication is that the AAO did not issue this specialized knowledge decision as a precedent decision. The AAO's decision that policy memoranda should not be relied upon, should itself not be relied upon because the opinion is not precedential and therefore is mere "correspondence" under the Adjudicator's Field Manual.[269] But is the

264. *Id.* at 715.

265. *Id.* at 718.

266. *Id.*

267. *See generally* Austin T. Fragomen, Jr. & Bo Cooper, *The Shifting Sands of L-1B Specialized Knowledge*, 1768 PLI/CORP 225 (2009); Kate Kalmykov, *An Overview of the Changing Definition of Specialized Knowledge*, A.B.A SEC. OF INT'L L. IMMIGR. & NATURALIZATION COMM. NEWSL. 5 (2009), http://meetings.abanet.org/webupload/commupload/IC925000/newsletterpubs/ImmigrationNewsletterSummer2009.pdf; Frank A. Novak, *The Life and Times of the L-1B*, IMMIGR. BRIEFINGS, Nov. 2008, at 1.

268. Fragomen, Jr. & Cooper, *supra* note 267, at 234.

269. U.S. CITIZENSHIP & IMMIGRATION SERVS., ADJUDICATOR'S FIELD MANUAL § 3.4

Adjudicator's Field Manual binding? No matter the legality of the agency's action, it is easy to understand the frustrations of an immigration attorney attempting to advise a client as to the state of the law.

B. USCIS's Draft Memorandum for Comment Procedure Is a Pragmatic and Necessary Advancement in the Mainstream of Administrative Law

USCIS itself recognizes the confusion caused by its use of nonlegislative rules. In 2010, USCIS announced an agency-wide policy review and sought stakeholder input to prioritize this review.[270] USCIS Director Alejandro Mayorkas said, "As an agency, we must achieve consistency in the policies that guide us and in how we implement them for the public benefit."[271]

USCIS is in a period of innovation when it comes to stakeholder outreach. In addition to the agency-wide policy review, USCIS has held teleconferences with stakeholders, is engaged in an effort to craft, with stakeholder input, templates for certain adjudicatory actions, and has even released a draft document proposing changes to processing procedures for immigrant investor cases.[272] Most important to the issue of the use of nonlegislative rules is a new effort, beginning in May 2010, to post draft guidance memoranda for comment on the agency's website.[273]

(2011). Front-line adjudicators do appear to be following the decision, however. Fragomen, Jr. & Cooper, *supra* note 267, at 235.

270. U.S. CITIZENSHIP & IMMIGRATION SERVS., *USCIS Announces First Ten Areas of Focus for Agency-wide Policy Review*, USCIS (July 26, 2010), http://www.uscis.gov (follow "News" hyperlink; click "News Releases" hyperlink on the left-hand side; then scroll down to "July 2010").

271. *Id.*

272. *See, e.g.*, U.S. CITIZENSHIP & IMMIGRATION SERVS., *Conversations with the Director, EB-5 Immigrant Investor Program*, USCIS (Sept. 14, 2011), http://www.uscis.gov (follow "Outreach" hyperlink; then follow "Notes from Previous Engagements" hyperlink; then follow "Next" hyperlink at the bottom of the webpage until you get to "September 2011") (providing a review of a small group conversation with stakeholders); U.S. CITIZENSHIP & IMMIGRATION SERVS., *Listening Session—Request for Evidence (RFE) Review and Revision*, USCIS (Apr. 30, 2010), http://www.uscis.gov (follow "Outreach" hyperlink; then follow "Notes from Previous Engagements" hyperlink; then follow "Next" hyperlink at the bottom of the webpage until you get to April 2010) (announcing the Request for Evidence project, which will "engage stakeholders in a concerted effort to review and revise the RFE templates"); U.S. CITIZENSHIP & IMMIGRATION SERVS., PROPOSED CHANGES TO USCIS'S PROCESSING OF EB-5 CASES (2011), *available at* http://www.uscis.gov/USCIS/Outreach/Feedback%20Opportunities/Operartional%20Proposals%20for%20Comment/EB-5-Proposal-18May11.pdf. Notice of upcoming teleconferences may be found on USCIS' website, http://www.uscis.gov, by clicking on "Outreach" and then "Upcoming National Engagements."

273. USCIS posts the drafts on a section of its website called Draft Memorandum for Comment, which is available by visiting USCIS's website, http://www.uscis.gov, clicking on

This opportunity to provide feedback on nonlegislative rules before they are implemented is an innovative development for immigration law. Under the program, USCIS posts a draft memorandum on its website and invites comments from stakeholders and the general public. USCIS is issuing both draft memoranda for comment and interim memoranda for comment through this program. The explanation of the process on the USCIS website contains the following disclaimers:

> USCIS seeks your input on draft policy memoranda. . . . These memos are drafts of proposed or revised guidance to USCIS Field Offices and Service Centers. They are not intended as guidance for the general public, nor are they intended to create binding legal requirements on the public. Until issued in final form, the draft memos do not constitute agency policy in any way or for any purpose.
>
> . . . .
>
> . . . In a continued effort to promote transparency and consistency in our operations, USCIS will periodically post policy memos for public comment to assist USCIS in improving immigration services. USCIS will not post memos containing information that is law enforcement sensitive, confidential or otherwise protected from disclosure under the Freedom of Information Act. USCIS is not required to solicit public comment on the draft policy memos under the Administrative Procedure Act. This informal comment process does not replace any statutory or other legal requirement for public comment on agency action.[274]

Comments are submitted by email and must be submitted before a closing date posted on the draft document, usually a maximum of fifteen days. As of November 2011, the USCIS website does contain a section called "Feedback Updates," which lists the number of comments received, but does not include detailed analysis of the comments.[275] USCIS has posted more than thirty-five draft memoranda (draft and interim) for comment on its website.[276] These memoranda address a wide range of issues.[277]

"Outreach," and then clicking on "Feedback Opportunities."

274. U.S. CITIZENSHIP & IMMIGRATION SERVS., *Draft Memorandum for Comment*, USCIS (Dec. 15, 2011), http://www.uscis.gov/ (follow "Outreach" hyperlink; then follow "Feedback Opportunities" hyperlink; and then follow "Draft Memoranda for Comment" hyperlink).

275. U.S. CITIZENSHIP & IMMIGRATION SERVS., *Feedback Updates*, USCIS (last updated Aug. 2, 2012), http://www.uscis.gov/ (follow "Outreach" hyperlink; then follow "Feedback Opportunities" hyperlink; and then follow "Feedback Updates" hyperlink).

276. Draft documents whose comment period has closed may be found on the "Feedback Updates" page. *Id.* Some of the draft documents listed are not interim or draft memoranda but instead are operational proposals or document templates for comment. *Id.* Draft documents with open comment periods may be found under "Feedback Opportunities."

277. *Id.*

The USCIS Ombudsman reported that "many" stakeholders have "welcomed" the new draft memorandum for comment process "as a significant departure from USCIS's historical approach to policy-making."[278] Stakeholders, however, have complained about the short period to respond to the request for comments and have also asked USCIS to release responses to the comments received.[279] The Ombudsman reported that stakeholders are "discouraged when final policy guidance does not reflect their input or USCIS consideration of it."[280]

While soliciting pre-adoption comments on policy memoranda is not required by the APA, this feedback opportunity is an interesting development for immigration law. The creation of the opportunity signals that USCIS recognizes that its use of nonlegislative rules is far-reaching. It also acknowledges the need for stakeholder input to blunt the effect of a new policy memorandum.

While innovative for immigration law, USCIS's draft memorandum for comment is not unique to administrative law. Other agencies have been using similar techniques to depart from the requirements for nonlegislative rules for some time, and OMB's Good Guidance Practices call for a similar procedure for economically significant guidance documents. At least nine other agencies have circulated draft guidance documents for comment: The Department of Health and Human Services;[281] The Department of Interior;[282] The Department of Labor;[283] The Department of Transportation;[284] The Environmental Protection Agency;[285] The Federal Aviation Administration;[286] The Food and Drug Administration;[287] The

278. ANNUAL REPORT 2011, *supra* note 239, at 5–6.

279. *Id.* at 6.

280. *Id.*

281. Mantel, *supra* note 139, at 399 n.278.

282. Announcement of Draft Policy for Candidate Conservation Agreements, 62 Fed. Reg. 32,183, 32,183 (June 12, 1997) (seeking comments on proposed policy).

283. Mantel, *supra* note 139, at 399 n.278.

284. *Id.*

285. *See* ENVTL. PROT. AGENCY, EPA 233-B-03-002, PUBLIC INVOLVEMENT POLICY, (2003), *available at* http://epa.gov/publicinvolvement/policy2003/finalpolicy.pdf; National Pollutant Discharge Elimination System, Wet Weather Discharges, 70 Fed. Reg. 76,013, 76,013 (Dec. 22, 2005) (to be codified at 40 C.F.R. pts. 122–23) (seeking comments on proposed policy memorandum).

286. *See* FED. AVIATION ADMIN., *Aviation Safety Draft Documents Open for Comment*, FAA http://www.faa.gov/aircraft/draft_docs/ (last updated July 24, 2012); FED. AVIATION ADMIN., *Draft Airports Series 150 Advisory Circulars (ACs)*, FAA, http://www.faa.gov/airports/resources/draft_advisory_circulars/ (last updated Oct. 3, 2011); *see also* Mendelson, *supra* note 83, at 428 (describing a FAA draft advisory circular comment process where comments are accepted only from a limited recognized group of industry stakeholders).

287. Mendelson, *supra* note 83, at 426; Jonathan Stroud, Comment, *The Illusion of*

Nuclear Regulatory Commission;[288] and The United States Department of Agriculture (USDA).[289] The idea of soliciting input on nonlegislative rules is also not new, as scholars have raised the possibility since at least the 1970s as a method to ease the guidance dilemma.[290] Most of these proposals have focused on creating a post-adoption opportunity for public comment. A pre-adoption opportunity to comment is a more substantial procedural requirement that the Good Guidance Practices reserve only for economically significant guidance documents.

While stakeholders have responded positively to USCIS's efforts to better engage the public, there have been complaints about the draft memorandum for comment process. Stakeholders have expressed concern about the length of time allotted for response and have expressed an uncertainty whether comments received are actually considered. Because USCIS does not publish responses to the comments it receives, stakeholders are not assured that USCIS has carefully considered the public submissions. These concerns reflect a natural desire for more procedural protections.

The struggle for greater protection has led to at least one lawsuit challenging an agency's use of a draft guidance document for comment.[291] In 1999, the USDA invited comments on a draft policy related to the care of nonhuman primates.[292] The USDA decided not to adopt the draft policy.[293] The Animal Legal Defense Fund sued the USDA, arguing that the decision not to adopt the draft policy was arbitrary and capricious.[294] The U.S. Court of Appeals for the Ninth Circuit, en banc, vacated a three-judge panel opinion that held the decision not to adopt the policy did constitute final agency action ripe for review.[295] While this lawsuit was unsuccessful, it does represent a stakeholder inclination to seek greater participation in agency decisionmaking, despite the reality that an agency is already departing from the law of nonlegislative rules.

The stakeholders' doubts about USCIS's draft memorandum for

Interchangeability: The Benefits and Dangers of Guidance-Plus Rulemaking in the FDA's Biosimilar Approval Process, 63 ADMIN. L. REV. 599, 630 (2011).

288. *See* U.S. NUCLEAR REGULATORY COMMISSION, *Documents for Comment*, U.S. NRC, http://www.nrc.gov/public-involve/doc-comment.html (last updated Mar. 29, 2012).

289. *See* Animal Legal Def. Fund v. Veneman, 469 F.3d 826, 830 (9th Cir. 2006), *vacated en banc*, 490 F.3d 725 (9th Cir. 2007) (challenging decision of the United States Department of Agriculture to not adopt a draft policy it had circulated for comment).

290. *See supra* notes 103–128 and accompanying text.

291. *See Veneman*, 469 F.3d at 830.

292. *Id.*

293. *Id.* at 829.

294. *Id.*

295. Animal Legal Def. Fund v. Veneman, 490 F.3d 725, 726 (9th Cir. 2007) (en banc).

comment process reflect a concern that is larger than that narrow process itself. The desire for more public participation largely stems from the fact that the draft memorandum for comment process, while commendable, is a poor substitute for notice-and-comment rulemaking. Even if the agency was to add more public participation to the draft memorandum for comment process, that would not address all of the problems caused by a lack of legally binding rules. The impediments to notice-and-comment rulemaking, however, signal that the draft memorandum for comment device is a necessary and positive step toward improving the way that USCIS muddles through with guidance documents.

Soliciting pre-adoption comments on nonlegislative rules can be productive and is a pragmatic response to USCIS's troubles with guidance documents. The agency can test the waters for change, stakeholders get some kind of notice as to changes that may be coming, and the resulting guidance document could be the result of a truly collaborative effort. While increased public participation in the creation of guidance documents can be a good thing, it should not be a reason to continue to neglect or further abandon notice-and-comment rulemaking. The benefits of soliciting pre-adoption comments on nonlegislative rules are the advantages of notice-and-comment rulemaking. The reason why pre-adoption comments are attractive is because it makes the process seem more like notice-and-comment rulemaking.

Seeking stakeholder input on draft nonlegislative rules also signals concerns. If guidance documents are not binding, then why is there a need to solicit public input before the nonlegislative rule is adopted? In fact, the use of a pre-adoption opportunity to comment is a signal that the agency at least recognizes the practical binding effect that results when an agency adopts a nonlegislative rule. Also, if stakeholders are starved of and craving the participation level of notice-and-comment rulemaking, then the more limited participation afforded by the guidance document comment process will never be satisfactory. Without a response to public comments, stakeholders will wonder if the agency actually considered public input. If the agency adds a response to the comments to the procedure, that is simply another indication that the agency should be using notice-and-comment rulemaking. Also, adding a response feature may increase the time and effort it takes to issue a nonlegislative rule, thus detracting from its flexibility and efficiency.

A further concern is whether the pre-adoption input process will provide additional incentive for USCIS to shy away from notice-and-comment rulemaking. While there clearly are roadblocks to USCIS's use of notice-and-comment rulemaking, the composition of these obstacles is unclear at this point. Is it the ossification of notice-and-comment rulemaking

generally? Is an agency culture of not using notice-and-comment rulemaking to blame? Does the Department of Homeland Security give low priority to USCIS's efforts to use notice-and-comment rulemaking? Whatever the causes, they should be revealed and fixed. Notice-and-comment rulemaking needs to be a priority for USCIS (and the Department of Homeland Security). The pre-adoption opportunity for comment should be a way to ease a temporary problem of not enough notice-and-comment rulemaking; it is not a permanent excuse to abandon legislative rules.

That being said, the reality is that nonlegislative rules are a recognized and appropriate method for agency action, even in the face of an active docket of legislative rules. If USCIS places value on providing opportunity for public involvement in the development of guidance documents, this should be respected and welcomed. The goal is to reach a point of a healthy balance between the use of legislative and nonlegislative rules.[296] After all, the inherent dilemma of nonlegislative rules probably is impossible to resolve. Their nature demands confusion and a corresponding lack of firm ground. If USCIS chooses to ease the transition from guidance document to guidance document through public involvement, the innovation should be recognized.

CONCLUSION

The use of nonlegislative rules in the adjudication of immigration benefits is problematic. United States Citizenship and Immigration Services, the agency charged with adjudicating applications for immigration benefits, needs to clarify its own explanation of the proper use of guidance documents. The underuse of notice-and-comment rulemaking in this area has persisted for too long and needs to be addressed. Additionally, stakeholders are vexed by the Agency's tendency to abruptly change standards through nonlegislative rules and by confusion over the role of guidance documents in administrative appeals.

USCIS has recognized its troubles with nonlegislative rules and has implemented a new draft memorandum for comment procedure to solicit stakeholder feedback. Through this pragmatic program, the Agency posts draft guidance documents for comment on its website before the Agency adopts the nonlegislative rule. USCIS is voluntarily subjecting itself to some of the concepts behind notice-and-comment rulemaking, but not all of its procedural protections.

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296. The line demarcating the healthy balance may be hard to locate and may vary from agency to agency. What is clear, however, is that such a healthy balance does not exist in immigration law.

While this Article analyzes troubles and advancements with immigration nonlegislative rules, it also connects immigration law and its use of guidance documents to the general debate about the use of nonlegislative rules in administrative law. By looking at administrative law through the lens of immigration law (and vice versa), the Article uncovers that, on the subject of administrative guidance, immigration law is in the mainstream. Complaints about the use of guidance documents in immigration law are truly complaints about administrative law; even USCIS's draft memorandum for comment process fits squarely into mainstream developments in this area. The debate over the use of nonlegislative rules in immigration law is a part of a much broader debate with far-reaching consequences for all regulation. The problems in immigration law regarding guidance documents deserve focused attention as the more general debate progresses. USCIS is using nonlegislative rules to muddle through in an extremely technical and sensitive context. USCIS guidance documents leave individual foreign national beneficiaries and U.S. citizen petitioners on shaky ground when it comes to questions at the core of life's meaning: where and with whom one will live and work.

APPENDIX[297]

	FY 2007		
Form Number	Total Receipts	Receipts with G-28	Percentage with G-28
I-129	448,443	305,213	68%
I-130	941,933	236,634	25%
I-140	235,039	209,472	89%
I-485	1,106,867	647,757	59%
N-400	1,389,176	121,015	9%

	FY 2008		
Form Number	Total Receipts	Receipts with G-28	Percentage with G-28
I-129	410,061	277,011	68%
I-130	630,886	184,979	29%
I-140	101,420	88,313	87%
I-485	573,846	287,875	50%
N-400	536,123	69,906	13%

297. U.S. Citizenship & Immigration Servs., Office of Performance & Quality, *Petition for a Nonimmigrant Worker (I-129), Petition for Alien Relative (Form I-130), Immigrant Petition for Alien Worker (Form I-140), Application to Register Permanent Residence or Adjust Status, Application for Naturalization (N-400): Total Receipts & Total Receipts with a G-28* (Feb. 1, 2012) (on file with author).

	FY 2009		
Form Number	Total Receipts	Receipts with G-28	Percentage with G-28
I-129	353,655	250,254	71%
I-130	687,462	195,069	28%
I-140	57,467	49,949	87%
I-485	589,185	285,511	48%
N-400	548,756	70,941	13%

	FY 2010		
Form Number	Total Receipts	Receipts with G-28	Percentage with G-28
I-129	344,799	235,029	68%
I-130	743,322	194,880	26%
I-140	80,959	70,822	87%
I-485	663,320	306,435	46%
N-400	718,518	88,326	12%

	FY 2011		
Form Number	Total Receipts	Receipts with G-28	Percentage with G-28
I-129	364,782	260,027	71%
I-130	824,855	218,782	27%
I-140	87,179	74,550	86%
I-485	678,669	319,855	47%
N-400	762,618	97,897	13%

AMERICAN BAR ASSOCIATION
SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE

COMMENTS ON H.R. 3010, THE REGULATORY ACCOUNTABILITY ACT OF 2011

OCTOBER 24, 2011

The views expressed herein are presented on behalf of the Section of Administrative Law and Regulatory Practice. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association, and, accordingly, should not be construed as representing the position of the Association.

PREFACE

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On December 2, 2011, the U.S. House of Representatives passed H.R. 3010, The Regulatory Accountability Act of 2011 (RAA or the Act). This is an ambitious piece of legislation that would make sweeping changes to many aspects of agency practice, particularly rulemaking.[1] As of this writing, the legislation is stalled in the Senate, but its prospects may be different after the 2012 elections. Whether or not this proposal is ultimately enacted, it sets a controversial agenda for reform and merits study and debate by everyone interested in the proper functioning of the administrative state. A bold proposal, actually passed by one house of Congress, usefully concentrates the mind.

The American Bar Association's Section of Administrative Law and Regulatory Practice submitted extensive comments on the RAA to the House Judiciary Committee.[2] We are pleased that the Administrative Law Review has agreed to reproduce those comments here.

The Section found much to endorse and much to criticize in the proposal. This should surprise no one who knows the Section, which is a unique, nonpartisan repository of broad expertise in the field. The Section, whose members are drawn more or less equally from academia, government, and private practice, is at its best when it can harness that expertise to improving legislation and agency practice. Submitting these comments was one of those times.

Readers should be aware that the comments discuss the RAA as introduced. The bill was later amended by the Judiciary Committee during markup and further changed on the floor of the House. The comments remain completely relevant to the general policy debate, but some of the details do not apply to the bill as passed.[3]

These comments represent the collective views of the Section and

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1. The Act's essential provisions, and the Section's position regarding them, are set out as bullet points in the summary section of the comments reproduced here. *See infra* pp. 622–23.

2. The Committee held a hearing on the bill on October 25, 2011. *See Regulatory Accountability Act of 2011: Hearing on H.R. 3010 Before the H. Comm. on the Judiciary*, 112th Cong., 1st Sess. (2011). The Section's comments were entered into the record of that hearing. *See id.* at 120.

3. Similarly, the Senate counterpart also varies in a few particulars from all of the House versions. *See* Regulatory Accountability Act of 2011, S. 1606, 112th Cong. (2011).

preparing them was a group effort. Certain individuals took on a particular burden, however, and deserve recognition. Leading that list is Professor Ronald Levin of the Washington University School of Law. Ron was the primary drafter of the comments as a whole and was the one indispensable participant in the process of getting them written; his contributions are evident on every page. The comments also draw from a preliminary document prepared for a meeting of the Section Council. Its authors were Michael Asimow, Marsha Cohen, Bill Funk, Charles Koch, Jeff Lubbers, Jim O'Reilly, Sid Shapiro, and, again, Ron Levin. Jeffrey Rosen of Kirkland and Ellis made invaluable contributions. Jeff, who is a prominent public supporter of the RAA, would personally disagree with much that is contained in these comments, but his participation in the discussions that produced them did much to shape the final product. Jonathan Rusch, Jamie Conrad, and I—the immediate past, upcoming, and current Section chairs, respectively—were all involved in reviewing and editing the text.

I could name more individuals, but I would end up listing much of the entire leadership of the Section. The Section Council had two lengthy, substantive meetings to discuss this legislation. That discussion continued online, through a listserv to which the Council and all the chairs of the Section's many committees subscribe. I can think of few if any Section projects with such broad substantive participation. As Section Chair, I am enormously grateful to the many individuals who engaged in these discussions with such enthusiasm, seriousness of purpose, and cooperative spirit.

The resulting document sets out the collective views of the Section as a body. In significant measure, it also reflects (indeed, we were bound by) relevant official positions of the American Bar Association. The comments do not reflect the views of any specific person, including those specifically mentioned above. Indeed, few Section members would personally agree with every single position taken in the document. That is the nature of a collective determination.

I hope that readers find the result worth reading. I am quite confident they will.

OCTOBER 24, 2011

AMERICAN BAR ASSOCIATION
SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE

COMMENTS ON H.R. 3010, THE REGULATORY ACCOUNTABILITY ACT OF 2011

SUMMARY

The Regulatory Accountability Act of 2011, H.R. 3010, would be a sweeping and consequential revision to the Administrative Procedure Act, particularly with regard to the process of rulemaking. The bill is unusually ambitious and crammed with details that are impossible to summarize. Among its provisions are many that the Section endorses, many it would modify, and many that it opposes.

With regard to the first category, we support provisions that would

- require agencies to maintain a rulemaking record,
- require agencies to disclose data, studies, and other information underlying a proposed rule,
- recognize the consultative function of the Office of Information and Regulatory Affairs (OIRA),
- provide for agencies to consult OIRA when issuing major guidance, and
- extend these OIRA functions to the independent agencies.

With regard to the second category, we are sympathetic toward, but suggest modifications to, the bill's provisions that would

- add an Advance Notice of Proposed Rulemaking step to certain rulemakings,
- address the problem of agencies' issuance of "interim" rules that are never superseded by regularly adopted rules, and
- provide some centralized oversight of agency issuance of and reliance on guidance documents.

On the other hand, the Section has serious concerns about

- the bill's lengthy list of "rulemaking considerations" that agencies would be required to take into account at each stage of the rulemaking process,

- use of the long-discredited "formal rulemaking" for some rules,
- providing for judicial review of agencies' compliance with OIRA's guidelines, and
- effectively rewriting the substantive provisions regarding standard-setting in the enabling legislation of numerous agencies through a cost-focused "supermandate." (We take no position on the substantive question of the appropriate role of costs in setting standards; we only object to resolving that question in a single, across-the-board statute that would turn the APA into the "Administrative Substance Act.")

In general, we think many of the new steps the bill would require for rulemaking are, in numerous particular cases, valuable and appropriate. However, to impose these requirements automatically and across the board will, we fear, further ossify the rulemaking process with little offsetting benefits in the form of better rules.

The following comments track the organization of the bill itself. Readers interested only in specific provisions of the bill should consult the Table of Contents, which indicates the pages not only where particular topics, but also where specific statutory provisions, are discussed.

AMERICAN BAR ASSOCIATION
SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE

COMMENTS ON H.R. 3010, THE REGULATORY ACCOUNTABILITY ACT OF 2011

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* Citations in this table are to sections of the Administrative Procedure Act as it would be amended by the bill. All of these provisions are in § 3(b) of H.R. 3010, except where noted.

The Section of Administrative Law and Regulatory Practice of the American Bar Association (ABA) respectfully submits these comments on H.R. 3010, the Regulatory Accountability Act of 2011.[1] The Section is composed of specialists in administrative law. Both politically and geographically diverse, they include private practitioners, government attorneys, judges, and law professors. Officials from all three branches of the federal government sit on its Council.

The views expressed herein are being presented on behalf of the Section. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

I. INTRODUCTION

The Administrative Procedure Act (APA)[2] has been in effect for some sixty-five years. Possible updates certainly deserve consideration. More particularly, the rulemaking process, which is a principal focus of H.R. 3010, has evolved in ways not anticipated in 1946. Important questions arise as to whether and how many of these changes should now be codified or refined.

The bill is an ambitious step in the development of APA revision legislation. As discussed below, we support some of its provisions and have suggestions for modifications in others. For example, we support codification of requirements that agencies maintain a rulemaking record and that they disclose data, studies, and other information underlying a proposed rule. We also support provisions that would recognize the consultative function of the Office of Information and Regulatory Affairs (OIRA), provide for agencies to consult OIRA when issuing major guidance, and extend these OIRA functions to the independent agencies. Furthermore, the bill addresses some issue areas as to which we could potentially support legislation, although not the specific measures proposed in the bill. This category includes the bill's provisions regarding advance notices of proposed rulemaking and agencies' issuance of "interim" rules that are never superseded by regularly adopted rules. In addition, we have some proposals of our own that could usefully be incorporated into the bill.

On the other hand, the Section has serious concerns about the bill's lengthy list of "rulemaking considerations" that agencies would be required

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1. H.R. 3010, 112th Cong. (2011) (as introduced in House of Representatives, Sept. 22, 2011), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-112hr3010ih/pdf/BILLS-112hr3010ih.pdf.

2. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C. (2006)).

to take into account during the rulemaking process. The ABA has long expressed concern that existing requirements for predicate findings already unduly impede agency rulemaking. The bill would aggravate this situation. That prospect should be troubling to both regulated persons and statutory beneficiaries, regardless of their location on the political spectrum. After all, the APA's rulemaking provisions apply to deregulation and to amendment or repeal of rules just as they do to adoption of new rules. Moreover, the case for prescribing new predicate findings in rulemaking is undercut by the recognized duty of agencies to respond to significant, relevant comments submitted during the public comment period. In this way, the rulemaking process is self-regulating.

A better approach to predicate findings would be for Congress to take on the project of refining and consolidating existing requirements for predicate findings and regulatory analysis into a single coherent and streamlined framework. Some of the considerations proposed in the bill might deserve to be included in such a framework, but a goal of this harmonization effort should be to ensure that the rulemaking process will be no more burdensome on agencies than it now is, and preferably less so.

Another area of concern is that the bill provides for regular use of the long-discredited "formal rulemaking" for high-impact rules and perhaps other major rules. This model has passed almost completely into disuse, because experience has shown that it leads to substantial delays and unproductive confrontation and because courtroom methods are not generally suited to resolution of legislative-type issues. We could support a carefully limited framework for oral proceedings where a need for cross-examination on specified narrow issues is affirmatively shown, but the bill goes far beyond that limited approach.

Finally, the bill would legislate in several areas that we believe Congress would more properly address in agencies' respective organic statutes than in the APA. These matters include evidentiary burdens and substantive decisional criteria that would override provisions in existing enabling legislation.

In connection with these and other provisions in the bill that our comments call into question, we hope that Congress will not overlook the virtues of caution and restraint. It should not undertake a sweeping revision such as this without a firm showing that there is a problem to be solved, and it should be wary of codifying minutiae in the Act. In our view, the strength of the APA derives in no small part from the fact that it confines itself to fundamentals. The general act must accommodate the government's need to tailor specific processes to the various tasks Congress assigns agencies. Solutions that work well in many or even most contexts may work poorly in others. The brevity of the APA has also permitted the

growth and modernization of the administrative process over time. That much of today's administrative law takes the form of case law, regulations, and executive orders is not necessarily a matter of regret, because those prescriptions offer useful on-the-ground flexibility and can be revised to meet changing needs more easily than can statutes.

Against this background, we turn to comments on specific provisions of the bill. Because § 3 of the bill comprises twenty-four of the bill's thirty-two pages, we will usually identify specific provisions by their proposed APA section or subsection numbers.

II. DEFINITIONS

Section 2 of the bill would amend § 551 of the APA by inserting additional definitions. In general, these are well-drafted and largely drawn from past legislation, executive orders, and case law. We have three suggestions.

First, "guidance" is (appropriately) defined in proposed § 551(17) to be identical to what the APA calls "interpretative rules [and] general statements of policy" in the current exemption from notice and comment in § 553(b)(A)[3]—yet the bill continues to use the older terminology in the exemption itself (proposed § 553(g)(1)). The bill should be revised to head off confusion over the use of two terms to mean the same thing, perhaps by eliminating the older terms altogether.

One other difficulty with the bill's definition of "guidance" is that it would apply to an agency statement "other than a regulatory action." That phrase was apparently drawn from President George W. Bush's regulatory review order,[4] but it appears nowhere in the APA, either now or under the proposed bill. This drafting error could be cured by an adaptation from the definition of "rule" in Executive Order 12,866. That definition refers to an agency statement "which the agency intends to have the force and effect of law."[5] Thus, the bill's definition of guidance could be reworded to apply to "an agency statement of general applicability that is not intended to have the force and effect of law but that sets forth a policy [etc. as in the current definition]."[6]

Second, Congress should take this opportunity to clarify the existing

3. 5 U.S.C. § 553(b)(A) (2006).

4. Exec. Order No. 13,422, § 3(g), 3 C.F.R. 191, 192 (2007).

5. Exec. Order No. 12,866, § 3(d), 3 C.F.R. 638, 641 (1993), *reprinted as amended in* 5 U.S.C. § 601 (2006).

6. The definitions of "rule" and "guidance document" in the recently adopted Model State Administrative Procedure Act draw a similar distinction. Under these definitions, the former "has the force of law" and the latter "lacks the force of law." *See* REVISED MODEL STATE ADMIN. PROCEDURE ACT §§ 102(14), (30) (2010) (HeinOnline).

definition of "rule" in § 551(4) of the APA. This poorly drafted provision has been a target of criticism ever since the APA was first enacted. Briefly, the opening words of the definition—"the whole or a part of an agency statement of general or particular applicability and future effect"—are out of keeping with the manner in which administrative lawyers actually use the word "rule." The words "or particular" and "and future effect" should be deleted from the definition. The ABA has repeatedly called for the former change[7] and has also endorsed the latter in substance.[8] Thus, with minor drafting cleanup, we propose that the definition should read as follows:

> (4) "rule" means the whole or a part of an agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

Third, a bill to modernize the APA provides an opportunity to update obsolete terminology. The bill already does this by replacing the phrase "interpretative rules" with the more compact term "interpretive rules," which virtually all administrative lawyers prefer. In a similar vein, the APA phrase "rule making" should be replaced by "rulemaking," the variant that virtually all administrative lawyers actually use.

III. RULEMAKING CONSIDERATIONS AND REQUIRED ANALYSES

Revised § 553(b) would codify a new set of "rulemaking considerations." These principles would require an agency to consider a large number of specified issues as a predicate for any new or amended rule. The considerations are summarized later in this section. The bill's requirements for the notice of proposed rulemaking (NPRM) in § 553(d) incorporate the

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7. *E.g.*, 106 A.B.A. ANN. REP. 549 & 783, at 783 (1981) [hereinafter *1981 ABA Recommendation*] (citing 5 U.S.C. § 551(4) (2006)); 95 A.B.A. ANN. REP. 548 & 1025, at 1025, 1027 (1970).

8. *See* 117 A.B.A. ANN. REP. 35–36 (1992) ("Retroactive rules are and should be subject to the notice and comment requirements of [the APA]."). For a full discussion of the reasons supporting this proposal, see Ronald M. Levin, *The Case for (Finally) Fixing the APA's Definition of "Rule"*, 56 ADMIN. L. REV. 1077 (2004). In this connection, we note that the bill's definition of "guidance" is appropriately limited to statements of "general applicability," but it is limited by its terms to statements of "future effect." This limitation would be ill-advised. Because interpretive rules theoretically clarify what the law has meant all along, courts routinely apply them to transactions that occurred prior to the issuance of the interpretation. *See, e.g.*, Reno v. Koray, 515 U.S. 50, 61 (1995); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986). This is, in fact, one reason why the "future effect" language of 5 U.S.C. § 551(4) should be removed.

§ 553(b) "considerations" by reference. Section 553(d) goes on to require the agency to discuss other matters as well. Then § 553(f) sets forth requirements for the "notice of final rulemaking" (NFRM). They include not only "a concise general statement of the rule's basis and purpose"—the traditional APA requirement—but also "reasoned final determinations" regarding the matters tentatively addressed in the NPRM.

Up to a point, the Section agrees with the bill's premise that it could be useful to codify the requisite findings for a rule in statutory form. Three decades ago, in 1981, the ABA made a specific proposal along these lines. Its resolution urged Congress to require an agency to address the following matters in a notice of proposed rulemaking:

> (i) the terms or substance of the proposed rule;
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> (ii) a description of its objectives;
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> (iii) an analysis of alternatives to accomplish those objectives seriously considered by the agency;
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> (iv) an invitation to submit proposals for alternative ways to accomplish the rule's objectives;
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> (v) a description of reporting and recordkeeping requirements and an estimate of the time and cost necessary to comply; and
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> (vi) to the extent practicable after reasonable inquiry, an identification of duplicating or conflicting or overlapping Federal laws or rules.[9]

Moreover, the resolution provided that a *final* rule should be accompanied by:

> (a) a statement of the reasons for the policy choices made in connection with the rule including a description of alternatives considered to accomplish the objectives of the rule, and a statement of the reasons for the selection of the alternative embodied in the rule and rejection of other alternatives;
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> (b) factual determinations constituting an asserted or necessary basis for any policy choice made in connection with the rule, and an explanation of how such determinations are supported by the rulemaking file; and
>
> (c) a response to each significant issue raised in the comments on the proposed rule.[10]

Some of these requirements have direct counterparts in H.R. 3010. However, the bill's list is both lengthier and more adventurous in its scope, and it gives rise to serious concerns regarding both the collective impact of its requirements and the particular thrust of certain individual components. Turning first to the collective impact, we will explain our concerns about the bill's approach. Then we will discuss a variation on that approach that

9. *1981 ABA Recommendation*, *supra* note 7, at 784.
10. *Id.* at 785.

we could, in principle, support.

A. Background Positions

For some two decades, many administrative lawyers have voiced concerns about the increasing complexity of rulemaking and have been urging Congress not to add unnecessary analytical requirements to the APA rulemaking process.

For example, in 1993 the Administrative Conference of the United States (ACUS) noted: "Informed observers generally agree that the rulemaking process has become both increasingly less effective and more time-consuming."[11] The Conference thus recommended, among other things, that "Congress should reconsider the need for continuing statutory analytical requirements that necessitate broadly applicable analyses or action to address narrowly-focused issues."[12] In a similar vein, the ABA, in a 1992 resolution sponsored by this Section, "urge[d] the President and Congress to exercise restraint in the overall number of required rulemaking impact analyses [and] assess the usefulness of existing and planned impact analyses."[13] The Section's report supporting this latter pronouncement warned:

> The steady increase in the number and types of cost-benefit or rulemaking review requirements has occurred without any apparent consideration being given to their cumulative effect on the ability of agencies to carry out their statutory obligations. . . . [The existence of multiple requirements] could have the effect of stymieing appropriate and necessary rulemaking.[14]

Since the early 1990s, when these statements were issued, the accumulation of new issues that an agency is required to address during rulemaking proceedings has actually increased, making the warnings of these two groups even timelier. The Section summed up the current picture in a 2008 report:

> Over time, both Congress and the executive have laden the process of informal rulemaking with multiple requirements for regulatory analysis. Viewed in isolation, a good case can be made for each of these requirements. Their cumulative effect, however, has been unfortunate. The addition of too many analytical requirements can detract from the seriousness with which any one is taken, deter the initiation of needed rulemaking, and induce agencies to rely on non-regulatory pronouncements that may be issued

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11. ACUS Recommendation 93-4, Improving the Environment for Agency Rulemaking, 59 Fed. Reg. 4669, 4670 (Feb. 1, 1994).

12. *Id.* at 4673, ¶ II.C.

13. 117 A.B.A. ANN. REP. 32 & 469 (1992).

14. *Id.* at 470–71.

without public comment procedures but have real-world effects.[15]

Because of these concerns, the Section has long urged that the analytical requirements that agencies must observe during the rulemaking process be *simplified*. For example, the same 2008 Section report recommended that Congress and the President should "work to replace the current patchwork of analytical requirements found in various statutes and Executive Orders with one coordinated statutory structure."[16]

B. Predicate Analyses and Their Burdens

In light of these longstanding policy positions, we would be gravely concerned about a revision of § 553 that not only failed to consolidate existing analysis requirements, but greatly augmented the analysis burdens associated with completing a rulemaking proceeding. These incremental requirements would in all likelihood significantly hamper agencies' ability to respond to congressional mandates to issue rules, or to delegations of rulemaking authority. Moreover, they would likely augment the tendency of agencies to use "underground rules" (aka "regulation by guidance") or case-by-case adjudication to formulate policy without having to surmount the additional hurdles presented by § 553.

A number of items in the bill seem insufficiently attentive to the costs of investigation. For example, under § 553(b) the agency must consider "the degree and nature of risks the problem [addressed in the rule] poses and the priority of addressing those risks compared to other matters or activities within the agency's jurisdiction" as well as "the countervailing risks that may be posed by alternatives for new agency action."[17] It must also address "[w]hether existing rules have created or contributed to the problem the agency may address with a rule," and, if so, whether they should be changed.[18] In addition, the agency must address "[a]ny reasonable alternatives for a new rule or other response identified by the agency," including "potential regional, State, local, or tribal actions" and "potential

15. ABA Section of Admin. Law & Regulatory Practice, *Improving the Administrative Process: A Report to the President-Elect of the United States*, 61 ADMIN. L. REV. 235, 239–40 (2009) [hereinafter *2008 Section Report to the President-Elect*].

16. *Id.* at 240. *See also* Letter from Warren Belmar, Chair, Section of Admin. Law & Regulatory Practice, to the Honorable Fred Thompson, Chairman, Senate Gov'tal Affairs Comm., Jan. 13, 1998, at 5 ("We urge Congress to review the collection of overlapping and potentially conflicting requirements embodied in these statutes and to consider replacing them with a single, clear set of obligations for agency rulemaking. . . . Such harmonization . . . would—in addition to simplifying the rulemaking process—enable the agencies to serve the public interest more efficiently and economically.").

17. H.R. 3010, 112th Cong. sec. 3(b) (2011) (proposed § 553(b)(3)).

18. *Id.* (proposed § 553(b)(4)).

responses that specify performance objectives [or] establish economic incentives to encourage desired behavior," "provide information upon which choices can be made by the public," or "other innovative alternatives."[19] Further, the agency must consider "the potential costs and benefits associated with [foregoing] potential alternative rules and other responses . . . including direct, indirect, and cumulative costs and benefits and estimated impacts on jobs, economic growth, innovation, and economic competitiveness."[20] Some of the considerations in this list—which is not exhaustive—would be germane to a wide variety of rules; others would have very tenuous relevance or no relevance to many and perhaps most rulemaking proceedings.

The operative subsections of the bill cover much of the same territory. Section 553(d) requires that an NPRM must summarize information known to the agency regarding the foregoing considerations. The NPRM also must discuss the foregoing alternatives and make a reasoned preliminary determination that the benefits of the rule would justify the costs to be considered under § 553(b).[21] Likewise, the agency must thereafter discuss approximately the same considerations in its notice of final rulemaking.[22]

Collectively, these requirements would be enormously burdensome. The task of deliberating on, seeking consensus on, and drafting the numerous recitals that would be added to the rulemaking process would draw heavily on agency resources—a matter that should be of special concern at the present moment, when agencies are facing and will continue to face severe budget pressures. Increasing the time needed to accomplish rulemaking would not only be costly but also would tend to leave stakeholders less able to plan effectively for the future. Not only new regulations, but also amendments or rescissions of rules could be deterred by the additional expense and complexity that would be added to the process. Thus, both affirmative regulation and deregulation may be impeded.

Of course, even great burdens may be worth bearing, if they produce great benefits. But these would not.[23] Although agencies frequently do and should consider many of these factors in significant rulemakings, many of these considerations are not relevant to most routine rulemaking. As the

19. *Id.* (proposed § 553(b)(5)).

20. *Id.* (proposed § 553(b)(6)(A)).

21. *Id.* (proposed § 553(d)(1)(F) (cross-referencing § 553(b)(6))).

22. *Id.* (proposed § 553(f)(4)(C)–(E)).

23. As current OIRA Administrator Cass Sunstein, certainly a supporter of regulatory analysis, once pointed out: "[T]he costs of investigation and inquiry are never zero; to the contrary, they are often very high. We can readily imagine that agencies could spend all their time investigating ancillary risks and never do anything else—a disaster for regulatory policy." Cass R. Sunstein, *Health-Health Tradeoffs*, 63 U. CHI. L. REV. 1533, 1552 (1996).

Section stated in the 2008 report mentioned above, when Congress and the President design regulatory analysis requirements, they

> should work to relate rulemaking requirements to the importance of a given proceeding. "Rulemaking" is not an undifferentiated process—some rules have major economic or social consequences, while many others are relatively minor in scope and impact. Thus, detailed requirements should be reserved for rules of greatest importance, and uncomplicated procedures should be used for routine matters of less public significance.[24]

The current bill accepts this principle in part, imposing more demanding procedures for "major rules" and "high-impact" rules than for other rules. But the provisions in § 553(b) imposing analysis requirements ignore the need to tailor the process to the importance and impact of the rule.

The bill's blanket approach might be justified if it were the only way to ensure agencies gave consideration to critical factors in the subset of rulemakings where doing so is appropriate. But it is not. Two other mechanisms exist and are already working well. First, Congress can specify the factors that an agency should take into account when regulating pursuant to a specific provision. Enabling legislation does this all the time, and it allows for a more precise fit between the agency task and the factors to be considered.

Second, where particular considerations are important and relevant, they will almost always emerge simply as a result of the dynamics of the rulemaking process. As noted, agencies often consider issues of the kind just mentioned on their own initiative. If they do not, those issues are frequently raised in comments by interested members of the public. Stakeholders have every incentive to raise the issues that most need attention, and rulemaking agencies have a recognized duty to respond to material and significant comments.[25] Thus, these issues will generally find their way into a rulemaking proceeding where they are directly implicated. It is excessive, however, to require agencies to touch all of these bases in

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24. *2008 Section Report to the President-Elect*, *supra* note 15, at 240.

25. *See* La. Fed. Land Bank Ass'n v. Farm Credit Admin., 336 F.3d 1075, 1080 (D.C. Cir. 2003) (quoting Am. Mining Cong. v. EPA, 907 F.2d 1179, 1188 (D.C. Cir. 1990)) (stating that an agency must articulate a response to comments "which, if true, . . . would require a change in [the] proposed rule"); City of Waukesha v. EPA, 320 F.3d 228, 257–58 (D.C. Cir. 2003) (quoting Reytblatt v. Nuclear Regulatory Comm'n, 105 F.3d 715, 722 (D.C. Cir. 1997)) (stating that an agency "need not address every comment [it receives], but it must respond in a reasoned manner to those that raise significant problems."); Safari Aviation Inc. v. Garvey, 300 F.3d 1144, 1151 (9th Cir. 2002) (quoting Am. Mining Cong. v. EPA, 965 F.2d 759, 771 (9th Cir. 1992)) (stating that an agency must respond to "significant" comments, meaning those which "raise relevant points, and which, if adopted, would require a change in the agency's proposed rule").

every rulemaking proceeding.[26] This is a fundamental point. The rulemaking process is to a large extent self-regulating. Commenters can be relied on to raise important issues. Knowing this, agencies anticipate the comments. And comments not anticipated must be grappled with.

It is true that, up to a point, the inquiries prescribed in proposed § 553(b) correspond to factors that have been codified in the initial sections of the executive orders on regulatory review issued or maintained by every President since Ronald Reagan.[27] Those provisions have served for many years as a means by which the presidents have communicated their respective regulatory philosophies to agencies that comprise arms of their administrations. Indeed, several of the considerations in § 553(b) appear to be modeled closely on the language of § 1 of Executive Order 12,866, the currently operative order. However, these executive order provisions are critically different from the proposed § 553(b). The former are essentially hortatory. The order requires no written determinations except in a small minority of cases.[28] Moreover, compliance with the order is not judicially reviewable. At most, therefore, § 1 of the order serves as a basis for discussions between rulemaking agencies and OIRA, but the two sides can decide in any given context how much weight, if any, to ascribe to any given factor, and a rule's legality does not turn on their decision to bypass one or more of them. In contrast, under the bill, an agency's failure to discuss the prescribed matters to the satisfaction of a reviewing court would expose the agency to reversal for procedural error (subject to the court's judgment as to whether the error was prejudicial). The unpredictability of such appellate review would put great pressure on agencies to err, if at all, on the side of full rather than limited discussion.[29] The burden on the

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26. A puzzling issue that the bill requires an agency to address is "whether a rule is required by statute." H.R. 3010, sec. 3 (proposed §§ 553(d)(1)(E)(ii), (f)(4)(B)); *see also* § 3(b) (proposed § 553(b)(1)). Why the bill specifically requires this determination is not apparent. If an agency concludes that its view of sound policy is at least consistent with the enabling statute, it should be able to proceed on that basis without addressing the purely hypothetical question of whether the statute would have required the same result had the agency desired otherwise.

27. Exec. Order No. 13,563, § 1, 76 Fed. Reg. 3821 (Jan. 21, 2011) (Obama); Exec. Order No. 13,422, *supra* note 4, § 1(a)(1) (G.W. Bush); Exec. Order No. 12,866, *supra* note 5, § 1 (Clinton); Exec. Order No. 12,291, § 2, 3 C.F.R. 127 (1981) (Reagan, retained by G.H.W. Bush).

28. Under Executive Order 12,866, an agency is required to provide to OIRA an "assessment of the potential costs and benefits of the regulatory action" and other factors only if the matter is identified as a "significant regulatory action." Exec. Order No. 12,866, *supra* note 5, § 6(a)(3)(B). Moreover, detailed assessments are required only for so-called "economically significant" rules, *see id.* § 6(a)(3)(C), a category similar to "major rules" as defined in § 551(15) of H.R. 3010.

29. Justice Rehnquist made a similar point effectively in the *Vermont Yankee* decision. Vt.

agencies and the resources demanded, therefore, would far exceed that of the corresponding language of the executive orders.[30] This would be particularly true under H.R. 3010, which, unlike its Senate counterpart, would make the sufficiency of an agency's compliance with these analytical obligations judicially reviewable for all rules, not just major rules and high-impact rules.[31]

These predictions are founded not only on our collective judgment as specialists in administrative procedure, but also on the lessons of experience at the state level. In 1947, California adopted APA provisions for rulemaking that were modeled on the federal APA. In 1979, however, the state adopted a much more detailed set of APA rulemaking provisions.[32] The statute calls for specialized findings and explanations and for numerous impact statements. These provisions require constant fine-tuning and have been amended on numerous occasions.

The intense regulation of regulatory agencies contained in the California APA has had a variety of adverse consequences.[33] Specialized and experienced lawyers (rather than staff non-lawyers) must supervise every step of every rulemaking process. The state's APA generates a large amount of boilerplate findings, because agencies lack resources to perform all of the required studies. The process has become slow and cumbersome and consumes large quantities of staff resources. As a result, agencies can complete work on fewer regulations, particularly in a time of declining budgets like the present. This has adverse effects on public health and safety. The detailed provisions of the state's APA also provide many opportunities for lawyers to challenge rules on judicial review because of minor procedural infirmities. The California experience suggests that a

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Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 539–40 (1978).

30. Similarly, although the criteria in proposed § 553(b) appear to be based in part on similar prescriptions in the Unfunded Mandates Reform Act, 2 U.S.C. § 1532(a)(2)–(4) (2006), the analogy is weakened by the fact that, by statute, a court cannot set aside a rule on the basis of an agency's alleged failure to analyze a proposed rule according to the requirements of that Act or the inadequacy of the analysis it did provide. *See id.* § 1571(a)(3).

31. *See* S. 1606, 112th Cong. § 6 (2011), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-112s1606is/pdf/BILLS-112s1606is.pdf.

32. *See* CAL. GOV'T CODE §§ 11340–11342 (West 2005); MICHAEL ASIMOW & MARSHA N. COHEN, CALIFORNIA ADMINISTRATIVE LAW 29–40 (2002); Herbert F. Bolz & Michael McNamer, *Agency Rules and Rulemaking, in Cal. Public Agency Practice* ch. 20 (Gregory L. Ogden ed., 1996); Linda Stockdale Brewer & Michael McNamer, *Rulemaking Procedure, in California Public Agency Practice* ch. 21 (Gregory L. Ogden ed., 1996); Michael Asimow, *California Underground Regulations*, 44 ADMIN. L. REV. 43, 48–51 (1992).

33. *See* Michael Asimow, *Speed Bumps on the Road to Administrative Law Reform in California and Pennsylvania*, 8 WIDENER J. PUB. L. 229, 285–87 (1999); Marsha N. Cohen, *Regulatory Reform: Assessing the California Plan*, 1983 DUKE L.J. 231, 260–62.

simpler statutory structure like the existing federal APA, regulated sensibly and flexibly by court decisions, is better than a minutely detailed statutory prescription of rulemaking procedure.

C. A Suggested Alternative

As indicated above, the Section is by no means opposed to any and all codification of new rulemaking requirements in the APA. We believe the proper approach is the one we recommended in 1998 and 2008: that Congress and the President should "join forces to rationalize and streamline the rulemaking process."[34] As we have said before, the ability of agencies to perform required analyses "is compromised by the complexity of the set of instructions that agencies must follow—agencies (and others) must look to so many sources to ascertain the full set of actions required in a rulemaking that they may have difficulty framing the ultimate question for decision in a coherent manner."[35] The current bill does not subtract anything from the overlapping and potentially conflicting expectations prescribed not only in the APA, but also, for example, the Regulatory Flexibility Act, Small Business Regulatory Enforcement Fairness Act, Unfunded Mandates Reform Act, Paperwork Reduction Act, and National Environmental Policy Act, as well as agency authorizing statutes and presidential directives. Its trajectory is entirely in the direction of increases. The risk of excessive, sometimes conflicting, sometimes redundant cumulative burdens is compounded by the fact that there are many other related bills also now under consideration. In the circumstances, thoughtful harmonization and streamlining would be eminently desirable.[36]

We recommend, therefore, that Congress, working with the President, rework the overall corpus of findings and analysis requirements impinging on federal agencies, with an eye toward rationalizing these requirements while also maintaining effective political oversight and promoting sound regulatory outcomes. We would be happy to work with your subcommittee in such a re-examination. A number of the principles prescribed in § 553(b) of the present bill may well be found worthy of inclusion on such a revamped list, particularly insofar as experience with some of them under

34. *2008 Section Report to the President-Elect*, *supra* note 15, at 239.

35. Letter from Warren Belmar, *supra* note 16, at 5.

36. We appreciate that congressional action to alter the requirements of executive orders would present obvious problems of interbranch relations. However, it seems reasonable to suppose that if, as we recommend here, the ultimate goal of the harmonization effort would be to produce a set of clear obligations that are no more burdensome, or less burdensome, than the status quo, the Executive Branch would be amenable to negotiations that could lead to agreed-on rescissions of presidential directives in the interest of facilitating the ability of agencies to accomplish their missions more effectively.

Executive Order 12,866, Unfunded Mandates Reform Act, etc., has been favorable. Insulation of consideration requirements from judicial review and confinement of such requirements to the most significant rulemaking proceedings would be important variables bearing on the acceptability of particular obligations. Conversely, some of the requirements that exist now, and some that we proposed in 1981, may be out of date. We note also that the Administrative Conference is currently engaged in a directly relevant project, the results of which should be known and may be the basis for an ACUS recommendation by the end of next year.

A baseline for this overall endeavor should be to produce *no net increase* in the collective burdens of required analyses and findings in rulemaking. Indeed, a net decrease would be even better, because it would respond to the overload problems that have served for too many years as impediments to the rulemaking process and incentives to agencies to rely on less transparent and participatory modes of policymaking.

D. Evidentiary Burdens

The requirement in the introductory clause of § 553(b) that a rulemaking agency "shall base its preliminary and final determinations on evidence" raises related concerns. The basic point is well-taken. The ABA proposal quoted above recognizes that a final rule should be accompanied by "factual determinations constituting an asserted or necessary basis for any policy choice made in connection with the rule, and an explanation of how such determinations are supported by the rulemaking file."[37] However, the § 553(b) version of this idea sweeps too broadly. Some rules do not purport to rest on factual assertions at all; they rest on law or pure policy determinations. At the very least, this provision should refer to "factual determinations." In addition, some factual assertions underlying a rule do not require evidentiary support, because they are legislative facts of an inherently predictive or judgmental type.[38] When Congress has

37. *See supra* note 10 and accompanying text.

38. *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 518–21 (2009). The case law was usefully summarized in Chamber of Commerce of the U.S. v. SEC, 412 F.3d 133, 142 (D.C. Cir. 2005):

> [A]lthough we recognize that an agency acting upon the basis of empirical data may more readily be able to show it has satisfied its obligations under the APA, *see Nat'l Ass'n. of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1124 (D.C. Cir. 1984) (in informal rulemaking it is "desirable" that agency "independently amass [and] verify the accuracy of" data), we are acutely aware that an agency need not—indeed cannot—base its every action upon empirical data; depending upon the nature of the problem, an agency may be "entitled to conduct . . . a general analysis based on informed conjecture." *Melcher v. FCC*, 134 F.3d 1143, 1158 (D.C. Cir. 1998); *Nat'l Ass'n of Regulatory Util. Comm'rs*, 737 F.2d at 1124 (failure to conduct independent study

incautiously appeared to require "evidence" for such conclusions, the judiciary has managed to read an implied limitation into the statute.[39] It would be preferable, however, to avoid forcing the courts to solve a problem that Congress does not need to create in the first place.[40] After all, the courts have developed a substantial and relatively nuanced body of case law addressing whether agencies have, in various circumstances, supplied adequate factual support for their rules. A vaguely stated evidentiary requirement in § 553 is at best unnecessary and may be harmful.

Elsewhere, the bill provides that an agency "shall adopt a rule only on the basis of the best reasonably obtainable scientific, technical, economic, and other evidence and information concerning the need for, consequences of, and alternatives to the rule."[41] We recognize that Executive Order 12,866 contains very similar language,[42] and that Congress has adopted comparable language in particular contexts, such as the requirement in the Endangered Species Act that a species designation be made on the basis of "the best scientific and commercial data available."[43] Where agency decisionmaking is required to rest on scientific determinations, the expectation that the science should be well-founded is certainly legitimate.[44]

Nevertheless, we question whether this notion belongs in the rulemaking language of the APA, where it could operate as an independent basis for

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not violative of APA because notice and comment procedures "permit parties to bring relevant information quickly to the agency's attention"); *see also FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 813–14 (1978) (parallel citations omitted) (FCC, in making "judgmental or predictive" factual determinations, did not need "complete factual support" because "a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency")).

Notably, the court in *Chamber of Commerce* did overturn, on grounds of factual insufficiency, a different aspect of the SEC rule challenged in that case. *Id.* at 143–44. Our point, therefore, is not that an agency's evidentiary burdens should be lenient, but rather that the nature of those burdens is too elusive to capture in a brief statutory formula.

39. *See, e.g.*, Indus. Union Dep't v. Hodgson, 499 F.2d 467, 473–75 (D.C. Cir. 1974) (construing Occupational Safety and Health Act requirement of "substantial evidence" to support a rule).

40. Section 553(b) is also ambiguous as to whether the term "evidence" refers to any and all factual material that the agency might cite, or only a narrower class of material such as facts that would satisfy the rules of evidence in a trial-type proceeding.

41. H.R. 3010, sec. 3(b) (proposed § 553(f)(2)).

42. Exec. Order No. 12,866, *supra* note 5, § 1(b)(7); *see also* Exec. Order No. 13,563, *supra* note 27, § 1 ("Our regulatory system . . . must be based on the best available science.").

43. 16 U.S.C. § 1536(a)(2) (2006); *see also* Occupational Safety and Health Act § 6(b)(5), 29 U.S.C. § 655(b)(5) (2006) (requiring OSHA to "set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health").

44. *See generally* James W. Conrad, Jr., *The Reverse Science Charade*, 33 ENVTL. L. REP. 10306 (2003).

legal attacks apart from challenges to the substance of the agency decision. Whatever its appeal in science-dominated areas, it is inapt in relation to ordinary rulemaking, in which agencies frequently must act on the basis of general knowledge, informed opinion, and experience in the field. After all, in the age of the Internet, the range of "obtainable" information that might bear upon various agency rules is virtually boundless. A statutory obligation to seek out all information that a reviewing court might consider "reasonably obtainable" could prove unmanageable, resulting in a highly unpredictable legal regime for agencies and considerable additional litigation.[45] It may be better, therefore, for Congress to impose such obligations only in substantive statutes in which the nature of the agency's mission lends itself to such a mandate. Congress can customize the obligation to the particular nature of that mission. It has done this in, for example, the Safe Drinking Water Act, which specifies that "to the degree that an Agency action is based on science, the Administrator shall use (i) the best available, peer-reviewed science and supporting studies conducted in accordance with sound and objective scientific practices."[46]

For generalized decisionmaking that may be far removed from scientific realms, however, the APA should not categorically rule out the possibility that information that appears reasonably reliable may suffice for purposes of a rule in which the stakes are small or the need for timely action is pressing, although the agency may not have engaged in a search to confirm that this information is the "best reasonably obtainable." Even in such contexts, after all, administrative law already imposes a duty to respond to material comments presented during the rulemaking proceeding—a duty that we believe should be codified in the APA.[47] Thus, if stakeholders actually provide information to an agency that casts serious doubt on its factual premises, the agency cannot ignore it.

E. Statutory Overrides

In addition to burdening the rulemaking process with analytical requirements that appear to be out of proportion to their likely payoffs, the bill's "rulemaking considerations" are troubling because of the way in which they would, in some cases, alter the substantive law. The APA would thus become, in several respects, an "Administrative Substance Act."

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45. *Cf.* Heartwood, Inc. v. U.S. Forest Serv., 380 F.3d 428, 436 (8th Cir. 2004) (construing the above-quoted language of the Endangered Species Act to mean that agencies are required "to seek out and consider all existing scientific evidence relevant to the decision at hand. They cannot ignore existing data." (internal citations omitted)); Ecology Ctr., Inc. v. U.S. Forest Serv., 451 F.3d 1183, 1194 (10th Cir. 2006) (following *Heartwood*).

46. 42 U.S.C. § 300g-1(b)(3)(A)(i) (2006).

47. *See infra* notes 120–121 and accompanying text.

For example, the requirement in the bill to consider, in connection with any proposed rule, the "potential costs and benefits associated with potential alternative rules . . . including direct, indirect, and cumulative costs and benefits," would apply "[n]otwithstanding any other provision of law."[48] This "supermandate" would apparently displace numerous provisions in which Congress has previously prescribed rulemaking premised on a different basis, such as use of the best available technology. It would, for example, apparently override rulemaking provisions in laws such as the Occupational Safety and Health Act and the Clean Air Act, which courts have authoritatively construed as not allowing decisions to be based on cost-benefit analysis.[49] Much, perhaps most, of the safety and health legislation now on the books would seemingly be displaced.[50]

Members of our Section have widely divergent views as to the utility of cost-benefit analysis and as to the range of circumstances in which it may be fruitfully deployed. Some strongly support the technique, and others are deeply skeptical. On the whole, the Section has been supportive of cost-benefit analysis but has stated that criticisms of it in the literature should be taken seriously along with more favorable appraisals.[51] The difficulty of quantifying certain types of benefits, and the inherently speculative nature of some of the costs, are only two of the substantial criticisms. We take no position on the general policy question here, but we believe that Congress should make judgments about the utility of cost-benefit analysis in the context of particular programs and the specific problems that those programs respectively address. A government-wide edict such as the APA is too blunt an instrument to permit reliable judgments about the wisdom of cost-benefit analysis in all contexts. This is all the more true in that § 553(b) omits certain qualifying language that the presidential oversight orders do contain, such as their reminders that many relevant values are nonquantifiable. In a context in which the underlying statute does not permit actions to be based on cost-benefit comparisons, if Congress nevertheless wishes to require such an analysis (perhaps to inform itself and

48. H.R. 3010, sec. 3(b) (proposed § 553(b)(6)(A)).

49. Whitman v. Am. Trucking Ass'ns., Inc., 531 U.S. 457, 471 (2001) (Clean Air Act); Am. Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 510–12 (1981) (OSHA). The Court acknowledged these interpretations in Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 223 (2009). That case explained that the Clean Water Act contains a variety of statutory formulas for different rulemaking proceedings. The Court held that one section of that Act does permit cost-benefit analysis but recognized that other sections may not. *Id.* at 219–21, 223.

50. *See* SIDNEY A. SHAPIRO & ROBERT L. GLICKSMAN, RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH 32 (2003) (surveying 22 health, safety, and environmental laws and finding that only two contain a substantive cost–benefit mandate).

51. *2008 Section Report to the President-Elect*, *supra* note 15, at 240.

members of the public as to the consequences of its prior choice to make such considerations legally irrelevant), it should impose that requirement only in particular statutes in which it deems that purpose to be apposite.

The bill also imposes other inquiries "[n]otwithstanding any other provision of law," including consideration of means to increase "cost-effectiveness" and "incentives for innovation."[52] Those too are salutary objectives, but we do not believe that Congress should sweepingly displace all prior legislation in which earlier Congresses, carefully confronting social challenges on a much more specific level, have prescribed actions on the basis of criteria that do not include those objectives. Notably absent from § 553(b) is the disclaimer in Executive Order 12,866—and corresponding oversight orders issued by other Presidents—that the prescribed analyses apply only "to the extent permitted by law."[53]

Furthermore, the bill not only requires rulemaking agencies to consider matters that would not otherwise be relevant under their organic legislation, but also constrains them from acting except in compliance with additional criteria. To simplify a bit, § 553(f)(3) provides that an agency must choose the "least costly" rule that serves relevant statutory objectives unless a higher cost alternative would serve "interests of public health, safety or welfare that are clearly within the scope of the statutory provision authorizing the rule."

This would apparently be a substantial further departure from present law, although the extent of the departure is uncertain because of the vague and undefined terms of the operative criteria. The words "public health, safety, or welfare" are evidently meant to limit the range of acceptable rules in some way (otherwise they would be superfluous). Possibly they mean that factors such as distributional fairness, payment of society's moral debts (for example, to veterans), or avoidance of racial, ethnic, or gender disparities could be categorically excluded, at least if a rule that would further these intangible values would cost more (even slightly more) to implement than some alternative. Also, even if the phrase "public health, safety, or welfare" is interpreted broadly, the agency would have to demonstrate that those interests were "clearly" within the statute's scope. We do not understand why "clarity" should be required in this connection. Doubts about whether the statute authorizes an agency to rely on certain interests may be a prudential factor counseling against the commencement of a rulemaking that presupposes such reliance, because the litigation risks involved in such a venture might not justify the expenditure of agency

52. H.R. 3010, sec. 3(b) (proposed § 553(6)(B)–(C)).

53. *See, e.g.*, Exec. Order No. 12,866, *supra* note 5, § 1(b); *see also id.* § 9 ("Nothing in this order shall be construed as displacing the agencies' authority or responsibilities, as authorized by law.")

resources on it. However, this does not mean that the APA should require an agency to have "clear" authority for the interests on which it relies in adopting a final rule. It would be strange to empower a court to hold that, even though the interests on which an agency relies actually are within the scope of the enabling statute, the rule is invalid because such authority was uncertain prior to the court's decision.

Whatever meanings § 553(f)(3) might ultimately be held to contain, we question the proposition that cost considerations must always take priority unless the agency carries a burden of justifying a different priority. An Act that governs the entire range of federal agency rulemaking should allow greater flexibility regarding the manifold and diverse ways in which government can contribute to the general welfare. Indeed, the task of calculating or estimating *which* alternative is "least costly" could itself be difficult. Moreover, most of the laws that would be displaced were enacted after a deliberative legislative process in which affected individuals and interest groups had a meaningful opportunity to consult with Congress regarding the statute's tradeoffs among competing values. It is unlikely that these interested parties will have an equally meaningful opportunity to be heard regarding the abstract and diffuse nature of the mandates under discussion here.

Compounding the perplexities that § 553(f)(3) would generate would be the challenge of determining the "relevant statutory objectives" of a statutory scheme. The problem is that there may be no clear distinction between the "objectives" of a regulatory statute and the criteria that Congress selects to effectuate those objectives. For example, OSHA would presumably be able to rely on cost-benefit analysis if the "relevant objective" of the Occupational Safety and Health Act is interpreted as "worker safety," but not if it is interpreted as "worker safety to the extent feasible."[54]

The challenge of sorting out the ramifications of such a supermandate would be formidable and would result in substantial additional litigation. Federal judges would have much more opportunity to reshape regulatory policy according to their own judgment (and possibly their preferences). This would be especially true if Congress were to enact the bill's judicial review provision ordaining that, in the event of certain procedural omissions by the agency, a court "shall not defer" to an agency's "determination of the costs and benefits or other economic or risk assessment of the action."[55] That provision would place the courts into a

54. *Am. Textile Mfrs. Inst.*, 452 U.S. at 494, 540–541.

55. H.R. 3010, sec. 7 (proposed 5 U.S.C. § 706(b)(2)).

completely unprecedented, and constitutionally dubious,[56] position as super-regulators. However, even if that provision is not enacted, and traditional judicial review principles apply, courts would acquire broad power to ascribe meaning to phrases like "public health, safety and welfare" and "relevant statutory objectives."

Courts would also have to face questions as to how to reconcile the statutory override with the conflicting thrusts of much, or most, organic legislation. Presumably the APA override would be given *some* effect. "Notwithstanding any other provision of law" sends a strong message. Yet it is likely that courts would also pay heed to the traditional maxim that a general statute does not impliedly repeal an earlier, more specific statute.[57] Thus, the ultimate import of this legislation would not be determinable for some time.

IV. ADVANCE NOTICE OF PROPOSED RULEMAKING

Section 553(c) of the bill would require an agency to issue an advance notice of proposed rulemaking (ANPRM) as part of the rulemaking proceeding for any major rule or high-impact rule. The ANPRM would have to be issued at least 90 days prior to the NPRM, and at least a 60-day comment period would have to be provided. (The stated time periods are minimums. Presumably, a meaningful appraisal of the issues that could arise in a potential major or high-impact rulemaking, as well as of the public comments, would actually take longer.)

The Section agrees that the ANPRM and like devices can be useful tools in some rulemakings, especially those involving initial forays into a regulated area. We support explicit recognition of such procedures in the APA. Indeed, the ABA House of Delegates recommended in its 1981

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56. *See* Fed. Radio Comm'n v. Nelson Bros. Bond & Mortg. Co., 289 U.S. 266, 274–78 (1933).

57. It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum. "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." "The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all."

Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976) (internal citations omitted); *see also* Traynor v. Turnage, 485 U.S. 535, 547–48 (1988); United States v. Perry, 360 F.3d 519, 535 (6th Cir. 2004); California v. United States, 215 F.3d 1005, 1012–13 (9th Cir. 2000).

resolution that the use of consultative procedures prior to the notice of proposed rulemaking, including ANPRMs, should be encouraged. The report explained: "Lawyers in Government and private practice with experience in complicated rulemaking share the belief in extensive pre-notice exchanges of views and information to assist the agency in the development of a realistic and workable rulemaking proposal."[58]

In direct contrast to H.R. 3010, however, the ABA's 1981 resolution urged that "the decision to use or not to use [such] informal consultative procedures . . . should be within the *unreviewable discretion* of the agency."[59] The Section continues to believe that an amended APA should not make ANPRMs mandatory, even in proceedings to issue expensive rules.

The argument against such a requirement is straightforward: ANPRMs can significantly extend the time involved in rulemaking,[60] and often the costs of the delay will be greater than the benefits associated with an improved final regulation, which may be nil. For example, some rulemaking proceedings involve issues with which an agency is quite familiar because of prior proceedings or experience with the subject matter. In such situations, the agency may be able to propose a rule without any need for an ANPRM. In other proceedings, legal constraints limit the range of actions the agency may take. In such a case, the determination may be highly contested, but the relevant information, rationale, and conclusions can all be made sufficiently available for comment by the public in the notice of proposed rulemaking.

We can see no justification for the inflexible mandate of § 553(c).[61] Agencies are in the best position to be able to determine the relative benefits and burdens of utilizing ANPRMs, and the fact that agencies do indeed use them even when not legally required confirms that they often deem them valuable. At the same time, an agency's exercise of discretion not to use an ANPRM in a given instance causes no prejudice to the rights or legitimate expectations of the public. As the 1981 ABA report pointed out, "Protection against abuse of this discretion lies in [judicially enforced]

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58. *1981 ABA Recommendation*, *supra* note 7, at 789–90.

59. *Id*. at 784, 790 (emphasis added).

60. This delay would be *in addition to* the 90 days allowed to OIRA for review of a proposed significant regulatory action prior to issuance of the NPRM. *See* Exec. Order No. 12,866, *supra* note 5, § 6(b)(2)(B).

61. Delays would not be the only costs involved. Under the proposed § 553(c), in addition to requesting the public's views of the agency's potential rulemaking initiative, the ANPRM published in the Federal Register would also have to identify "preliminary information available to the agency concerning the . . . considerations specified in subsection (b)." H.R. 3010, sec. 3 (proposed § 553(c)(1)(A)(iii)). This would likely be an extensive body of materials, and it should be noted that the Federal Register charges agencies hundreds of dollars per page for each Federal Register submission.

requirements for fairness in the rulemaking procedures subsequent to notice."[62] In other words, the traditional post-NPRM comment period provides an opportunity for members of the public to try to persuade the agency to revise its position or abandon the proposed rule altogether. If public comments indicate that the agency has made a real error or is headed down the wrong path, the agency will have to hold another round of notice-and-comment, which turns the original NPRM into a de facto ANPRM. In short, the current regime is effectively self-policing.

Particularly dubious is the bill's explicit requirement that an agency must issue an ANPRM even where it has already issued an interim rule without an NPRM after determining for good cause that compliance with APA rulemaking requirements would be impracticable or contrary to the public interest.[63] Since a rule would already be on the books, the agency should have the option of using that rule as the basis of any new rulemaking proceedings by proposing it in an NPRM, making the mandatory ANPRM superfluous.

A related provision, § 553(d)(2), states that if an agency decides not to go forward with a rulemaking proceeding, it must publish a "determination of other agency course."[64] It must also place in the rulemaking docket all information it considered in making this choice, "including but not limited to" all information that it would have been obliged to describe if it had proceeded with an NPRM.

An initial problem with this provision is that it is not limited to rulemaking proceedings in which the agency had issued an ANPRM. It hardly makes sense to require an agency to explain and document its reasons for not going forward with a venture that the public never had any reason to think would be forthcoming. Also, if the requirement to publish this determination (especially in a form that is expected to set the stage for judicial review, as the provision for docketing appears to imply) applies to situations in which the agency voluntarily utilized an ANPRM, that requirement would tend to discourage agencies from employing this useful consultative device. We assume, therefore, that § 553(d)(2) is intended to apply only to proceedings in which the agency issued an ANPRM as required by § 553(c), and the language should be narrowed accordingly.

Even with respect to those proceedings, we do not see why the APA should require publication of a "determination of alternate course"—a requirement that has no foundation in current law. Probably, the agency would publish some kind of explanation on its own, because a potential

62. *1981 ABA Recommendation*, *supra* note 7, at 790.
63. *See* H.R. 3010, sec. 3(b) (proposed § 553(g)(2)) (expressly referencing § 553(c)).
64. *Id.* (proposed § 553(d)(2)(A)).

"major" or "high-impact" rule would by its nature be a matter of public interest. We would not object to requiring an agency that decides against going forward after an ANPRM to issue a brief notice to that effect, so that the public and potentially regulated entities will not remain in suspense indefinitely. But that does not mean the law should compel the agency to issue a formal notice with full documentation. Clearly, if someone *petitions* for a rule and the agency denies the petition, the agency must explain its denial, and the disappointed petitioner can seek judicial review.[65] The petition process—which is currently codified in § 553(e) of the APA[66] and would be retained without change in § 553(j) of the amended Act—directly protects private interests that might be harmed by a failure to commence rulemaking. The petition and the response frame issues effectively for judicial consideration. Given the availability of the petition route, we question the need for a formal notice in which an agency would have to explain why it declined to commence a proceeding that nobody sought in the first place, and that never progressed beyond a rudimentary stage of development.

V. NOTICE OF PROPOSED RULEMAKING

Proposed § 553(d) of the bill specifies the contents of the notice of proposed rulemaking (NPRM). This subsection contains several provisions that the Section strongly supports. For one thing, it provides that an NPRM must include "information specifically identifying all data, studies, models, and other evidence or information considered or used by the agency in connection with its determination to propose the rule."[67] In substance, this provision would codify the so-called *Portland Cement* doctrine,[68] a step that the ABA has favored for many years.[69] Disclosure of the factual basis for a proposed rule is essential to the effective use of the opportunity to comment and is a standard feature of modern administrative practice. Yet the requirement is not explicit in the current APA and is still occasionally called into question in the courts,[70] making codification highly desirable. We would suggest that the agency be further required to "provide an opportunity to respond to factual material which is critical to

65. Massachusetts v. EPA, 549 U.S. 497, 527–28 (2007); Auer v. Robbins, 519 U.S. 452, 459 (1997).

66. 5 U.S.C. § 553 (2006).

67. H.R. 3010, sec. 3(b) (proposed § 553(d)(1)(D)(iii)).

68. Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973).

69. *See 1981 ABA Recommendation*, *supra* note 7, at 785–86.

70. *See* Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 245–47 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part and dissenting in part); AARP v. EEOC, 489 F.3d 558, 567 (3d Cir. 2007).

the rule, which becomes available to the agency *after the period for comments has closed*, and on which the agency proposes to rely."[71]

Subsections 553(d)(1)(A)-(C) are almost identical to the requirements in the current APA and so do not raise difficult problems.[72] In addition, the ABA supports, in principle, a requirement that an NPRM must discuss alternatives to the proposed rule, although the Association's proposed language is narrower than that of the bill.[73]

The ABA has also long favored amendment of the APA to provide for the systematic development by the agency of a rulemaking file as a basis for agency factual determinations and a record for judicial review.[74] H.R. 3010 adopts the substance of this position in the concluding language of § 553(d)(1), read together with § 553(l). The necessity of maintaining a rulemaking record is firmly established in administrative practice, and codification would recognize this reality. We would also suggest that the bill explicitly provide that the record be available online. While that generally happens already, and is required in a qualified way by the E-Government Act, it would be worth making explicit. At present, the last sentence of § 553(d)(1) states that everything in the docket "shall be . . . made accessible to the public," but it does not say how, and the provision could be read to mean that simply having hard copies at agency headquarters suffices. We recommend that this provision, as well as § 553(l), be amended to expressly provide that the rulemaking docket be available online.[75]

In addition, § 553(d) provides that issuance of an NPRM must be

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71. *1981 ABA Recommendation*, *supra* note 7, at 785, 791 (emphasis added).

72. The current § 553(b)(3) differs slightly from the proposed § 553(d)(1)(C) in that the former allows an agency to include "the terms or substance of the proposed rule or a description of the subjects and issues involved," but the latter more restrictively requires the agency to provide "the terms of the proposed rule." We believe that it is generally good practice to provide the actual text of a proposed rule, but agencies sometimes omit that step, such as when they use an NPRM to solicit comment on a proposal made by a third party or invite comment on a few alternative proposals instead of proposing only one. Presumably, the effect of the revision would be to induce agencies to use an ANPRM for this purpose instead.

73. *See supra* note 9 and accompanying text.

74. *Id.*

75. We note in passing that the bill does not anywhere take account of electronic rulemaking. If the sponsors truly want to modernize the APA, they should consider updating the rulemaking process to reflect the impact of the Internet. The Section has been in the forefront of debates about the development of e-rulemaking. *See* ABA COMMITTEE ON THE STATUS AND FUTURE OF FEDERAL E-RULEMAKING, ACHIEVING THE POTENTIAL: THE FUTURE OF FEDERAL E-RULEMAKING (2008) (report of a blue-ribbon committee established under the auspices of the Section). We would be happy to engage in further dialogue on this topic with the committee.

preceded by consultation between the agency and OIRA. Information provided by OIRA during consultations with the agency shall, at the discretion of the President or the OIRA Administrator, be placed in the rulemaking docket. The same requirements apply to the notice accompanying adoption of a final rule (§ 553(f)(1) and the concluding sentence of § 553(f)(4)).

The main significance of the consultation requirement is that it would effectively extend a degree of OIRA oversight to rulemaking by independent agencies. To date, such agencies have always been exempted from the regulatory review provisions of the executive orders, but the APA definition of "agency" applies to executive branch and independent agencies alike. The ABA has long favored extension of the oversight orders to independent agency rulemaking,[76] and we strongly support this feature of the bill.

We do, however, have one suggestion and one objection regarding this section.

The suggestion concerns disclosure of materials received from OIRA. The ABA's position has been that a communication between a rulemaking agency and other officials in the federal government should be subject to required disclosure to the extent that it contains relevant factual material not previously placed in the rulemaking file or passes on a communication on the merits received from a source outside the federal government, but not otherwise.[77] We believe that the bill could be improved by incorporation of the affirmative aspects of that policy. Insofar as the bill contemplates broader disclosure of information than the ABA policy would require, we see no reason to object, because such disclosure would occur only at the option of the President or OIRA.

The objection is presaged by the discussion in Part III.B of these comments. For the reasons given there, we believe that a number of the predicate recitals prescribed in § 553(d) are excessive and should be reconsidered.[78]

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76. *See* 111 No. 1 A.B.A. ANN. REP. 8 (Feb. 1986); *id.* Rep. 100.

77. *1981 ABA Recommendation*, *supra* note 7, at 785, 791–92.

78. Subsections 553(d)(1)(E)–(F) require an agency to make a "reasoned preliminary determination" regarding the issues described there. We can agree that the notice of *final* rulemaking should be supported by a "reasoned final determination" of various predicates, as § 553(f) does require. *Cf.* ACUS Recommendation 93-4, *supra* note 11, ¶ IV.D, at 4674. However, although one would not want preliminary findings in the NPRM to be "unreasoned," a legal requirement in that regard seems superfluous, because the preliminary determinations will be revisited at the final rule stage before they have any operative effect. Indeed, one purpose of the comment period is to invite critiques of the agency's tentative reasoning. Moreover, this language could invite judicial invalidation of a final rule on the ground that the NPRM was inadequate because, while it put all stakeholders adequately on

VI. COMMENT PERIOD

Proposed § 553(d)(3) contains a minimum post-NPRM comment period of 90 days, or 120 days in the case of a proposed major or high-impact rule. It is not clear why such lengthy minimum periods are prescribed. Thirty years ago, the ABA proposed a 60-day minimum.[79] More recently, in a June 2011 recommendation, ACUS suggested that agencies should as a general matter allow comment periods of at least 60 days for "significant regulatory actions" (a category similar to "major rules" as defined in the current bill) and at least 30 days for all other rules.[80] President Obama's executive oversight order provides: "To the extent feasible and permitted by law," agencies should allow "a comment period that should generally be at least 60 days."[81] Clearly there is room for reasonable disagreement about the exact minimum period that should apply; but if the goal of the present bill is to codify "best practices," we believe that the figure(s) used in the bill should fall much closer to the range of possibilities suggested by the position statements just mentioned, so as to avoid unnecessarily aggravating the problem of excessive delays in the regulatory process.

In the recommendation just mentioned, ACUS went on to suggest that agencies may in appropriate circumstances set shorter comment periods but should provide an appropriate explanation when they do so. The ABA's 1981 recommendation contemplated analogous flexibility. It proposed that the APA "good cause" rulemaking exemption should be rewritten to allow an agency to comply "in part" with § 553 if it makes a written finding for good cause that "full compliance" would be "impracticable, unnecessary, or contrary to the public interest."[82] The sponsors of the bill should consider providing agencies with latitude to shorten the default statutory comment period in unusual circumstances.[83]

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notice, the agency's "preliminary determination" was insufficiently "reasoned." Perhaps courts would routinely find such errors harmless, but it would be safer just to eliminate this requirement.

79. *1981 ABA Recommendation*, *supra* note 7, ¶ 5(a), at 785.

80. ACUS Recommendation 2011-2, Rulemaking Comments, ¶ 2, 76 Fed. Reg. 48,789, 48,791, ¶ 2 (Aug. 9, 2011).

81. Exec. Order No. 13,563, *supra* note 27, §§ 1–2, at 3821–22.

82. *1981 ABA Recommendation*, *supra* note 7, at 784, 789, 790. An earlier ACUS recommendation also advocated a "good cause" finding as a predicate for a short comment period. ACUS Recommendation 93-4, *supra* note 11, ¶ IV.B, at 4674.

83. *See* Fla. Power & Light Co. v. United States, 846 F.2d 765, 772 (D.C. Cir. 1988) (upholding fifteen-day comment period where agency was facing a statutory deadline for issuance of the rule).

VII. FORMAL RULEMAKING

Subsection 553(e) of the bill would confer broad rights upon private persons to force an agency to use so-called "formal rulemaking," pursuant to §§ 556–57 of the APA.[84] The scope of these rights is unclear, due to ambiguity in the opening language of § 553(e), but at a minimum the bill appears to allow parties to invoke a trial-type hearing on any proposed "high-impact rule" (roughly speaking, a rule with a $1 billion annual cost to the economy).[85] The hearing would encompass such core issues as whether the rule is cost-justified and whether a lower-cost alternative would achieve the relevant statutory objectives—plus any other issues sought by an interested person, unless the agency determines within thirty days of the request that the hearing would be unproductive or would unreasonably delay completion of the rulemaking. The latter petitioning process would also be available in proceedings to promulgate *major* rules (unless this is a drafting error).[86]

These provisions run directly contrary to a virtual consensus in the administrative law community that the APA formal rulemaking procedure is obsolete. This broad agreement was summed up in 1993 in ACUS Recommendation 93-4: "Statutory 'on-the-record' and 'hybrid' rulemaking provisions that require adjudicative fact-finding techniques such as cross-examination . . . can be unnecessarily burdensome or confusing and should be repealed."[87] Indeed, in the more than three decades since the Supreme Court severely curtailed the prevalence of formal and "hybrid" rulemaking procedures in a pair of leading opinions by Justice Rehnquist, *Florida East Coast*[88] and *Vermont Yankee*,[89] Congress itself has ceased to enact new formal rulemaking requirements and has rescinded some of the requirements that did exist.[90] The academic community has fully supported this

84. 5 U.S.C. §§ 556–57 (2006).

85. Read literally, the opening language of § 553(e) could be interpreted as triggering formal rulemaking *either* "[f]ollowing notice of a proposed rule" *or* "before adoption of any high-impact rule." The caption of the subsection indicates, however, that the intent is to treat these conditions conjunctively, so that § 553(e) applies only to proceedings to promulgate high-impact rules. We discuss the subsection on that assumption, but the language should be revised for clarity.

86. H.R. 3010, sec. 5 (proposed § 556(g)).

87. ACUS Recommendation 93-4, *supra* note 11, at 4670, ¶ II.A.

88. United States v. Fla. E. Coast Ry., 410 U.S. 224 (1973).

89. Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 524–25 (1978).

90. Food and Drug Administration Amendments Act, Pub. L. No. 110-85, sec. 901(d)(6), 121 Stat. 823, 942 (2007) (*codified as amended at* 21 U.S.C. § 352(n)) (2006 & Supp. II 2009) (prescription drug advertisements); Nutrition Labeling and Education Act, Pub. L. No. 101-535, sec. 8, 104 Stat. 2353, 2365 (1990) (*codified as amended at* 21 U.S.C § 371(e)

development: We have not identified a single scholarly article written in the past thirty years that expresses regret about the retreat from formal rulemaking.[91]

The collective repudiation of formal rulemaking reflects widespread recognition that trial-type methods are usually unsuitable in generalized rulemaking proceedings. Cross-examination can work well in the context of adjudicative proceedings, in which sharply framed issues of fact and witness demeanor frequently loom large. It is less appropriate to administrative policymaking, which, like congressional legislation, often turns on value judgments, "legislative facts," and policy perspectives that are inherently uncertain. Even in proceedings in which potentially expensive rules are under consideration, issues can be ventilated effectively through more limited variations on the standard model of notice-and-comment rulemaking.[92] Such proceedings allow for rigorous analysis, but the participants usually join issue over scores of interconnected questions through a continuing exchange of documents over a period of weeks or months. Live confrontation is largely beside the point in such proceedings.

This is not to say that live hearings can never shed light on the issues in rulemaking proceedings. *Vermont Yankee* recognized that agencies have discretion to resort to these procedures, and sometimes they do so. Indeed, § 553(b), as currently written, provides for public participation "with or without opportunity for oral presentation." In 1981, the ABA adopted a proposal for a "carefully limited" statutory structure for live hearings in rulemaking. It recommended that, in proceedings of unusual complexity or with a potential for significant economic impact, an agency should be required to conduct an oral proceeding with cross-examination "only to the extent that it appears, after consideration of other available procedures . . . that such cross-examination is essential to resolution by the

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(2006)) (FDA food standards).

91. In Exec. Order No. 13,422, *supra* note 4, at 193, § 5(a), President Bush stated that agencies "may . . . consider" the use of formal rulemaking for the resolution of "complex determinations." This brief reference to the formal rulemaking process was far from a strong endorsement. As construed by OIRA, it did not require agencies *even to consider* the use of formal rulemaking; it was simply a reminder about an existing option. Memorandum from Rob Portman, Office of Mgmt. & Budget, Exec. Office of the President, to Heads of Exec. Dep'ts & Agencies & Indep. Regulatory Agencies, M-07-13, at 13 (April 25, 2007), *available at* http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2007/m07-13.pdf. We know of no agency that availed itself of this option during the two years in which the order was in effect.

92. A summary of devices that amplify on simple notice and comment, but fall short of trial-type hearings, is found in ACUS Recommendation 76-3, Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking, 41 Fed. Reg. 29,654, ¶ 1 (July 19, 1976).

agency of issues of specific fact critical to the rule."[93] This criterion was similar to a guideline endorsed by ACUS several years earlier.[94]

However, H.R. 3010 goes far beyond the recommendations just described. The ABA and ACUS proposals did not contemplate any reliance on formal rulemaking pursuant to §§ 556–57. Moreover, they required that any need for cross-examination be *affirmatively* shown. In contrast, the proposed § 553(e) would confer a right to oral proceedings automatically as to some issues and would put the onus on the agency to justify omission of such proceedings as to other issues (and to do so within thirty days of the request, at a time when the future direction of the proceeding might be quite speculative).

Most importantly, the ABA and ACUS positions applied solely to issues of "specific fact."[95] ACUS asserted "emphatically" that "Congress should never require trial-type procedures for resolving questions of policy or of broad or general fact,"[96] and the ABA's recommendation was consistent with that view by negative implication. Yet the issues listed in § 553(e) as *automatically* qualifying for consideration at a trial-type hearing in a high-impact rulemaking proceeding are quintessential examples of "questions of policy or of broad or general fact." They include, for example, whether the factual predicate of the rule is supported by evidence, whether any alternative to the proposed rule would achieve the statutory objectives at lower cost, and whether the proposed rule's benefits would justify a failure to adopt such a lower cost alternative.[97]

Any proposal to amend the APA in this regard must also take account of the heavy social costs that have resulted from legislation that requires agencies to use trial-type hearings to develop rules that turn on issues of "policy or broad or general fact." Studies conducted during the heyday of mandatory formal or "hybrid" rulemaking showed clearly that it slowed

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93. *1981 ABA Recommendation*, *supra* note 7, ¶ 5(b)(ii), at 785.

94. ACUS Recommendation 72-5, Procedures for the Adoption of Rules of General Applicability, 38 Fed. Reg. 19,792 (July 23, 1973). As explained by the Chairman of ACUS (Antonin Scalia), the term "issues of specific fact" referred to issues of fact that were "sufficiently narrow in focus and sufficiently material to the outcome of the proceeding to make it reasonable and useful for the agency to resort to trial-type procedure to resolve them." *See* Ass'n of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151, 1164 (D.C. Cir. 1979) (quoting Scalia).

95. *1981 ABA Recommendation*, *supra* note 7, ¶ 5(b)(ii); ACUS Recommendation 72-5, *supra* note 94, ¶¶ 3, 5, at 19,792.

96. ACUS Recommendation 72-5, *supra* note 94, ¶ (c), ¶ 3, at 19,792.

97. H.R. 3010, sec. 3(b) (proposed § 553(e)(1)–(4)). They also include whether the information on which the rule is based meets the requirements of the IQA. *Id.* sec. 3(b) (proposed § 553(e)(5)). If Congress adopts proposed § 553(d)(4), which would provide a formal hearing on exactly that question early in the proceeding, a second go-round on the same issue would be unnecessary and simply a prescription for delay.

proceedings considerably and undermined agencies' ability to fulfill their mandates expeditiously. A leading study by Professor Hamilton found: "In practice . . . the principal effect of imposing rulemaking on a record has often been the dilution of the regulatory process rather than the protection of persons from arbitrary action."[98] At the FDA, for example:

> The sixteen formal hearings that were held during the last decade vary from unnecessarily drawn out proceedings to virtual disasters. In not one instance did the agency complete a rulemaking proceeding involving a hearing in less than two years, and in two instances more than ten years elapsed between the first proposal and the final order. . . . The hearings themselves tended to be drawn out, repetitious and unproductive.[99]

Formal rulemaking also functioned in a number of instances as a bargaining chip with which regulated parties could extract concessions by threatening to insist on their right to trial-type proceedings, bogging down an agency in protracted proceedings.[100] These side effects are a large part of the reason why formal rulemaking was abandoned decades ago (except where already mandated by statute), and nothing that has occurred in the intervening years casts doubt on that judgment.

Over and above the broad policy questions they raise, the bill's formal rulemaking provisions present several difficulties involving their relationship to the rest of the APA. The bill provides that, in a formal rulemaking case triggered under the newly added provisions, the rulemaking record will consist of the trial-type hearing record *plus* the conventional § 553 rulemaking record generated through the notice-and-comment proceedings.[101] The latter record may contain memoranda, letters, emails, perhaps even tweets.[102] Yet *oral* contacts between rulemaking decisionmakers and members of the public would apparently be banned by virtue of APA § 557(d).[103] That prohibition would be difficult to justify, and it would be at odds with the sponsors' goal of transparency. The ban on

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98. Robert W. Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CAL. L. REV. 1276, 1312–13 (1972).

99. *Id*. at 1287.

100. *Id*. at 1289 (FDA would "go to almost any length to avoid" formal hearings); *id.* at 1303 (Interior Department); *id.* at 1312 (Department of Labor). A study by Professor Stephen Williams (later a distinguished D.C. Circuit judge appointed by President Reagan) also highlighted the tactical advantages to private parties of the right to invoke formal hearings. Stephen F. Williams, *"Hybrid Rulemaking" under the Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401, 433–34 (1975).

101. *See* H.R. 3010, sec. 5 (proposed § 556(e)(2)).

102. *See* Cynthia R. Farina et al., *Rulemaking in 140 Characters or Less: Social Networking and Public Participation in Rulemaking*, 31 PACE L. REV. 382 (2011).

103. 5 U.S.C. § 557(d) (2006).

external oral contacts would apparently also extend to OIRA.[104] Indeed, formal rulemaking proceedings have always been exempt from OIRA review.[105] Yet exclusion of OIRA from consultation with the agency regarding the terms of a *major rule* would be unwise and difficult to reconcile with the emphasis elsewhere in the bill on expansion of OIRA's role.

Another APA requirement is that, after the hearing in a formal rulemaking case, the administrative law judge (ALJ) or another agency employee must write a "recommended, initial, or tentative decision" that makes findings and conclusions on "all the material issues of fact, law, or discretion presented on the record," unless the agency "finds on the record that due and timely execution of its functions imperatively and unavoidably . . . requires [omission of this procedure]."[106] It is unclear whether this preliminary decision would be based on the hearing record (as has been traditional) or the broader rulemaking record. Yet either of these alternatives would be problematic—the former because it would be based on a different body of information than the ultimate rule would; and the latter because it would apparently extend even to issues that the ALJ did not consider during the formal hearing phase of the proceeding. Either way, the writing of this decision would add another time-consuming step to the rulemaking process for high-impact rules.

In short, there may be a case for legislation that would institute a "carefully limited" place for trial-type methods in rulemaking, along the lines of the 1981 ABA resolution. The proposed § 553(e), however, would institute formal rulemaking with respect to issues that influential voices in the administrative law community have "emphatically" deemed unsuitable for such methods. It should be either fundamentally reappraised or omitted from the bill.[107]

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104. *Cf.* Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534, 1550 (9th Cir. 1993) (concluding that presidential staff are "interested persons" and "outside the agency" for purposes of § 557(d)).

105. Exec. Order No. 12,866, *supra* note 5, § 3(d)(1), at 641; Exec. Order No. 12,291, *supra* note 27, § 1(a)(1), at 127.

106. 5 U.S.C. § 557(b)–(c) (2006). Under the APA, in a formal rulemaking case, the preliminary decision need not be written by the employee who presided at the hearing. *Id.* § 557(b)(1). However, the hearing must be conducted by an ALJ, unless one or more agency heads preside personally (which would be an unlikely occurrence in a high-impact rulemaking proceeding). *Id.* § 556(b). Presumably, a rulemaking agency that does not otherwise employ ALJs would need to hire one or more of them for this purpose.

107. Section 556(f) of the bill states that an agency must consider the matters listed in § 553(b) and § 553(f) when it "conducts rule making under this section and section 557 directly after concluding proceedings upon an advance notice of proposed rulemaking under section 553(c)." This may well be a drafting error, as the bill does not appear to provide for formal rulemaking "directly" after ANPRM proceedings.

VIII. INFORMATION QUALITY ACT

Proposed § 553(d)(4) of the bill would create a special procedure by which persons may challenge information upon which a proposed rule is expected to be based, if they allege that the information does not meet the requirements of the Information Quality Act (IQA). Initially, the challenger may submit a petition to exclude the information. If the petition is not immediately granted but nevertheless "presents a prima facie case," the agency must hold a trial-type hearing on the petition under § 556 of the APA, with cross-examination allowed. The hearing must be held within thirty days of the filing of the petition, and the agency must render a decision on the petition within sixty days of the initial filing, but judicial review of that decision is not available until the agency takes final action in the rulemaking proceeding.[108]

As an initial matter, the requirement to hold a trial-type hearing with cross-examination gives rise to some of the objections to formal rulemaking discussed above. It is not clear why cross-examination, which is most useful to determine the credibility of witnesses, would result in better decisions as to the reliability of specified data, an issue that frequently will turn on analysis of highly technical information. Moreover, the task of applying the open-ended terms of the IQA will not necessarily be a cut-and-dried matter. It may well implicate policy considerations and broad issues of legislative fact—the kind of issues that present the weakest case for the use of courtroom methods.

The sponsors of the bill have, to be sure, commendably sought to address potential concerns about delays by requiring any petition to be filed within 30 days of the NPRM and specifying that the hearing and decision must occur within two months of when the petition for correction is filed. However, even assuming that these deadlines hold up, the need to prepare for a live hearing will require a substantial investment of staff resources on a timetable that is not of the agency's choosing, particularly since it is easy to imagine there being multiple petitions from multiple members of the public. Suppose, as seems likely, the agency simply is unable to make a firm, final determination within the 60-day period. Then it will have two unappealing options. Either it will toss the challenged study or document, despite its possible usefulness, thus undercutting the solidity of the rulemaking record, or it will keep it in, despite its possible defects, thus potentially *also* undercutting the solidity of the rulemaking record and

108. On the other hand, the bill provides that an agency's decision to exclude information from a rulemaking proceeding, as requested in a petition, cannot be reviewed at any time. H.R. 3010, sec. 3(b) (proposed § 553(d)(4)(C)). No justification for this one-sided approach to judicial review under the IQA comes readily to mind.

running a risk of later problems on judicial review.

More fundamentally, it is not clear why the agency should be required to reach a decision on the merits of the petition immediately—within sixty days of when the petition is filed—as opposed to resolving the issue as part of the regular rulemaking process. Currently, if a member of the public believes that the information upon which the agency plans to rely is erroneous and violates the IQA, the person may so inform the agency during the comment period.[109] Under well-settled case law, the agency would need to consider those comments and rationally respond to them in the preamble to the final rule or risk judicial invalidation of the rule.

Section 553(d)(4) would entail new procedural complexity. One should not assume that this would always work to the advantage of those who favor reducing government regulation of private activity. Environmental and public interest groups have been frequent users of the Information Quality Act to oppose what they believe to be insufficient government regulation.[110] Thus, the new procedure may sometimes drive up the costs of promulgating rules that would make regulation stricter, but at other times it may have the same effect on rules that would relieve regulatory burdens.

Experience to date indicates that these burdens are unnecessary, for IQA questions are adequately—and perhaps best—dealt with through the rulemaking process. The Ninth Circuit essentially accepted the sufficiency of the existing approach in a case in which the plaintiff sought correction under the IQA of statements made by the Department of Health and Human Services regarding the efficacy of marijuana for medical purposes. The Ninth Circuit upheld the Department's refusal to act immediately on the petition, because the same issue was pending before the agency in its consideration of a rulemaking petition. The court agreed with the government that Office of Management & Budget (OMB) guidelines permitted the Department to "use existing processes that are in place to address correction requests from the public."[111] Of course, Congress can change the law to explicitly require a special procedure above and beyond the ordinary notice and comment process, but the onus should be on proponents of such legislation to explain why it is needed. Indeed, it may

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109. *See* Information Quality Guidelines: Principles and Model Language, *in* Memorandum for the President's Management Counsel from John D. Graham, Administrator, Office of Information & Regulatory Affairs (Sept. 5, 2002), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/pmcmemo.pdf.

110. *See, e.g.*, Ecology Ctr., Inc. v. U.S. Forest Serv., 451 F.3d 1183 (10th Cir. 2006).

111. Ams. for Safe Access v. HHS, 399 Fed. Appx. 314, 315 (9th Cir. 2010). *See also* Prime Time Int'l Co. v. Vilsack, 599 F.3d 678 (D.C. Cir. 2010) (upholding OIRA guidelines insofar as they exempt adjudications from their coverage).

well make more sense to allow the agency to postpone its decision on a correction request tendered during a rulemaking proceeding until it adopts the final rule. At that time, the agency may have a much clearer idea about the materiality of the allegedly incorrect information, and the manner in which it will use that information, than it could have had within the sixty days immediately following the filing of the petition for correction. Under the bill, the challenger might be able to force the agency to hold a trial-type hearing and render a decision about a factual issue that will ultimately make little or no difference to the disposition of the final rule.

In addition, § 7(2) of the bill would amend § 706(2)(A) of the APA to provide that a reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be "not in accordance with law . . . (*including the Information Quality Act*)."[112] We would be reluctant under any circumstances to see the broad language of § 706—a constitution-like statute that is invoked in thousands of court cases every year—amended to refer explicitly to an issue that has been, and probably would continue to be, litigated only rarely. More fundamentally, the chances that such an amendment would accomplish anything are, at best, highly uncertain. The weight of judicial authority indicates that the IQA creates no rights that are capable of being enforced in the first place. In *Salt Institute v. Thompson*,[113] the district court held: "Neither the IQA nor the OMB Guidelines provide judicially manageable standards that would allow meaningful judicial review to determine whether an agency properly exercised its discretion in deciding a request to correct a prior communication."[114] That ruling was upheld on appeal to the Fourth Circuit, which agreed that the IQA "does not create a legal right to access to information or to correctness."[115] Other courts have reached the same conclusion.[116] To be sure, there are also cases holding that the OMB guidelines are legally binding,[117] but those decisions did not take issue with the just-stated proposition in the *Salt Institute* cases.

This issue has not been definitively resolved. Indeed, in recent cases the Ninth and D.C. Circuits chose not to address it when they had the chance,

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112. H.R. 3010, sec. 7(2) (proposing to amend 5 U.S.C. § 706(2)(A) (2006)) (emphasis added).

113. 345 F. Supp. 2d 589 (E.D. Va. 2004).

114. *Id.* at 602.

115. Salt Inst. v. Leavitt, 440 F.3d 156, 159 (4th Cir. 2006).

116. Single Stick, Inc. v. Johanns, 601 F. Supp. 2d 307, 316 (D.D.C. 2009), *aff'd in pertinent part on other grounds sub nom*. Prime Time Int'l Co. v. Vilsack, 599 F.3d 678 (D.C. Cir. 2010); Ams. for Safe Access v. HHS, 2007 U.S. Dist. Lexis 89257 (N.D. Cal. 2007), *aff'd on other grounds*, 399 Fed. Appx. 314 (9th Cir. 2010); *In re* Operation of Mo. River Sys., 363 F. Supp. 2d 1145, 1175 (D. Minn. 2004).

117. *Ams. for Safe Access*, 399 Fed. Appx. 314; *Prime Time Int'l Co.*, 599 F.3d 678.

demonstrating that the issue remains open at the appellate level outside the Fourth Circuit. Nevertheless, it would not make sense for Congress to ignore the case law that does exist. In brief, that case law indicates that the obstacle to judicial review of agency denials of requests for correction under the IQA is not (or not solely) found in the APA; it inheres in the IQA itself. Nothing in the bill purports to change the substantive law of that Act. At some point Congress may wish to review and perhaps revise the IQA to establish substantive standards, but proposed legislation that attempts to address this issue through amendment of the APA seems misdirected.

As is well known, Congress adopted the IQA as a rider to an appropriations bill, without hearings, committee review, or floor debate. That background lends further weight to the notion that, in order to resolve questions regarding judicial review under that Act, Congress should wait until it has had an opportunity to give the IQA the full airing that the statute never received at its inception.

IX. FINAL RULES

Section 553(f) of the bill sets forth requirements for final rules.[118] We have commented above on most of its provisions, including the new findings and determinations that an agency would need to make in order to issue a final rule, the requirement of consultation with OIRA, and the prescription of a rulemaking record.[119] We will not repeat that discussion here.

We note, however, that the list of predicate conditions in § 553(f)(5) omits one requirement that should be included. In line with ABA policy, that provision should be amended to require, in substance, that a notice of final rulemaking should include "a response to each significant issue raised in the comments on the proposed rule."[120] This obligation is well recognized in the case law[121] and is essential in order to make the comment process meaningful. Proposed § 553(f)(4)(G)(i) requires that an agency's notice accompanying any major rule or high-impact rule must include

> the agency's plan for review of the rule no less than every ten years to determine whether, based upon evidence, there remains a need for the rule,

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118. A related provision, § 553(i), states that the "required publication or service" of a final rule should generally occur 30 days before it goes into effect. The "required service" language is a carryover from the current APA, which also refers to "personal service" in 5 U.S.C. § 553(b). However, since the latter language has been dropped from § 553(d) of the bill, the corresponding language of § 553(i) should also be removed.

119. *See supra* notes 9–33, 74–76 and accompanying text.

120. *See supra* note 10 and accompanying text; *see also* ACUS Recommendation 93-4, *supra* note 11, ¶ IV.D.

121. *See supra* note 25.

> whether the rule is in fact achieving statutory objectives, whether the rule's benefits continue to justify its costs, and whether the rule can be modified or rescinded to reduce costs while continuing to achieve statutory objectives.[122]

The ABA supports legislation providing for periodic review by agencies of their existing regulations. Its resolution, adopted in 1995, stated in part:

> Congress should require review programs and, in so doing, should: (a) ensure that agencies have adequate resources to conduct effective and meaningful reviews, and (b) avoid mandating detailed requirements for review programs that do not take into account differences in statutory mandates and regulatory techniques among agencies.[123]

At a general level, the proposed § 553(f)(4)(G)(i) is consistent with and would further the purposes of the ABA's policy. We also think that the substantive criteria listed in the subsection are stated with sufficient generality as to pose no conflict with the ABA's admonition against overly "detailed" requirements.

We are less convinced, however, that the agency should formulate a plan for reconsideration of a major rule when it promulgates the rule. At that time, the agency will by definition be unaware of future developments that would be relevant to such a plan, such as the manner in which the rule will have worked out in practice, whether it will prove basically successful or unsuccessful, and what other tasks the agency will be responsible for performing when the review occurs (perhaps a decade later). The "plans" for decennial review are likely to be empty boilerplate.

The usual approach to prescribing systematic reviews of existing regulations—as reflected in the ABA's resolution, a corresponding ACUS recommendation,[124] and presidential oversight orders[125]—is to ask agencies to create an *overall* plan for review of rules, separately from their promulgation of particular rules. We suggest that Congress follow this latter approach to mandating review of major rules (or a broader class of rules).

Moreover, a flat requirement that an agency must review all major rules at least once every decade will not always be a sound use of the agency's

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122. The phrase "no less than every ten years" in § 553(f)(4)(G)(i) is ambiguous. It could refer to intervals that are "ten or more years apart," or "ten or fewer years apart." This language should be clarified.

123. 120 No. 2 A.B.A. ANN. REP. 48 & 341, at 48 (1995).

124. ACUS Recommendation 95-3, Review of Existing Agency Regulations, 60 Fed. Reg. 43,109 (Aug. 18, 1995).

125. Exec. Order No. 13,563, *supra* note 27, § 6; Exec. Order No. 12,866, *supra* note 5, § 5(a). President Obama's order called for an immediate, comprehensive review of *all* "significant" agency rules, but we view that directive as a one-time measure, not intended as long-term policy.

finite resources (not only budgetary, but also time and attention of key personnel). A study by the GAO indicates that, although reviews of existing rules can be useful, mandatory reviews are far more likely to lead to a conclusion that a rule needs no change than are reviews that an agency undertakes voluntarily.[126] Thus, a better system for reexamination of existing rules may be one that requires a serious review commitment but gives agencies more flexibility to determine the frequency with which particular rules will be reviewed.[127] The agencies' plans would, of course, be available for scrutiny and guidance from their respective oversight committees of Congress.

X. INTERIM RULES AND RULEMAKING EXEMPTIONS

A. Expiration Dates

Agencies frequently adopt regulations without prior notice and comment where they find for good cause that ordinary rulemaking procedures would be "impracticable, unnecessary, or contrary to the public interest."[128] However, they often designate such regulations to be "interim rules" and call for post-promulgation public comments. In theory, they will then consider the comments and revise the interim rule into final form. In some cases, however, such rules languish indefinitely in interim form. Section 553(g)(2) of the bill would require the post-promulgation process to be completed in 270 days for most rules and 18 months for major rules and high-impact rules. If the deadline is not met, the interim rule would have to be rescinded.

Agencies do sometimes abuse the flexibility afforded by the good cause exemption. Congress should, therefore, consider amending the APA to discourage or prevent agencies from leaving interim rules on the books indefinitely without ever undergoing the discipline of the notice-and-comment process. However, the specific remedy proposed in § 553(g)(2) gives rise to several concerns.

In the first place, the bill would repeal the existing exemption entirely. Thus, agencies would be required to utilize limited-term interim rules in all situations currently covered by the exemption. This is particularly ill-advised with respect to rules that fall within the "unnecessary" language of the current APA exemption. That language has been dropped entirely in

126. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-791, REEXAMINING REGULATIONS: OPPORTUNITIES EXIST TO IMPROVE EFFECTIVENESS AND TRANSPARENCY OF RETROSPECTIVE REVIEWS 30–34 (2007).

127. *See* ACUS Recommendation 95-3, *supra* note 124 (discussing this idea in greater detail).

128. 5 U.S.C. § 553(b)(3)(B) (2006).

§ 553(g)(2), but that part of the exemption plays a vital role that should be preserved. Its purpose is to allow agencies to forgo notice and comment for technical corrections and other noncontroversial rules—not because there is any urgency about them, but rather because no one is likely to wish to contest them. Agencies make frequent use of this exemption, almost always without any controversy whatever.[129] When they invoke the "unnecessary" aspect of the good cause exemption, agencies customarily do not issue interim rules; they simply adopt the rule in final form immediately. There just is no reason to force them to seek post-promulgation comments, as ACUS has long recognized.[130] Judicial review is available to correct alleged misapplications of the "unnecessary" exemption, but if the exemption has been lawfully invoked, neither a post-promulgation comment period nor an expiration date is warranted.

With respect to rules adopted without prior notice and comment because of urgency, the deadlines written into the bill are more understandable, but we believe they are not a good idea, or, at the very least, are much too short. In its consideration of interim rules in 1995, ACUS did not recommend a uniform government-wide deadline date for finalizing the rules. We think this was the right decision.[131]

If an agency cannot meet the deadline for evaluating public comments and modifying the rule, it confronts the unpalatable choice of allowing its rule to lapse or rushing the process through to completion before the public comments have been properly analyzed and modifications to the rule have been carefully considered. Neither alternative is desirable, especially given that the rule was adopted to deal with an emergency situation.

An agency may be unable to meet the deadline for completing the post-promulgation modification process for many legitimate reasons. Often, a

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129. A scholar who examined every issue of the Federal Register published during a six-month period found that agencies expressly invoked the good cause exemption in twenty-five percent of the rules they issued (not counting many more in which they appeared to rely on it by implication). Juan J. Lavilla, *The Good Cause Exemption to Notice and Comment Rulemaking Requirements Under the Administrative Procedure Act*, 3 ADMIN. L.J. 317, 338–39, 339 n.86 (1989). Of these, about twenty percent, or five percent of the overall total, invoked the "unnecessary" exemption alone. *Id.* at 351 n.124. He added that, although these figures may sound excessive, "an examination of the actual cases where the clause is invoked does not reveal general misuse." *Id.* at 339–40.

130. ACUS Recommendation 83-2, The "Good Cause" Exemption from APA Rulemaking Requirements, 48 Fed. Reg. 31,180 (July 7, 1983); *see also* ACUS Recommendation 95-4, Procedures for Noncontroversial and Expedited Rulemaking, 60 Fed. Reg. 43,110, 43,113 n.15 (Aug. 18, 1995).

131. *See* ACUS Recommendation 95-4, *supra* note 130, at 43,113, ¶ II.B.3 (recommending that agencies consider imposing deadlines on themselves in particular cases), discussed in relevant part in Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 736–40 (1999).

large set of complex interim rules are adopted at the same time to implement a new statute; these would all expire at the same time, creating a serious time crunch on limited agency staff resources. Or the agency may confront more urgent rulemaking or enforcement priorities, so staff is simply not available to deal with an expiring interim rule. Or the leadership of an agency may change just before the rule expires, and the new agency heads need to make their own decision about how to modify the interim rule.

In any event, if Congress decides to impose a deadline, we would suggest that it be at least three years, as in the case of tax regulations.[132] Consideration should also be given to allowing the agency to extend its time limit for a defined period upon showing good cause—a showing that presumably would be judicially reviewable (as the bill could specify).[133]

B. Judicial Review

Proposed § 553(g)(2)(C) goes on to provide that, in general, an interested party may seek immediate judicial review of an agency's decision to adopt an interim rule. Proposed § 704(b) essentially repeats this provision and adds that review shall be limited to whether the agency abused its discretion in adopting the interim rule without complying with ordinary rulemaking procedure. (Inconsistently, however, § 706(b)(3) provides that the court shall not defer to the agency's determinations during such review.)

One has to wonder why § 553(g)(2)(C) (and the repeated language in § 704(b)) is thought to be needed at all. Under existing law, interim rules are already reviewable immediately upon their issuance, if other prerequisites for judicial review are satisfied. Interim rules (also commonly called interim *final* rules) are not like an interlocutory order in an adjudicated case. They are legislative rules with the force of law and immediate operative effect. As such, they fall within the usual meaning of "final agency action" and are subject to judicial review under § 704.[134] Were there a body of case law that holds otherwise, one could make a case that Congress needs to clarify this principle, but we are aware of no such

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132. *See* I.R.C. § 7805(e)(2) (2006).

133. As written, the bill provides especially tight deadlines in the case of non-major rules, but that distinction is artificial. Whether a rule is major or non-major says little or nothing about the practical difficulties of meeting the deadline, the complexity of the regulatory problem, or the number of public comments that must be analyzed.

134. Ark. Dairy Coop. Ass'n v. USDA, 573 F.3d 815, 827 (D.C. Cir. 2009); Pub. Citizen v. DOT, 316 F.3d 1002, 1019 (9th Cir. 2003), *rev'd on other grounds*, 541 U.S. 752 (2004); Career Coll. Ass'n v. Riley, 74 F.3d 1265, 1268–69 (D.C. Cir. 1996); Beverly Enters. v. Herman, 50 F. Supp. 2d 7, 17 (D.D.C. 1999) (claim was time-barred because plaintiff *failed* to seek review of interim rule when it was promulgated).

cases.

A similar point can be made about the two inconsistent standards of review. We see no reason to choose between them, because neither is needed. An agency's decision to issue an interim rule, instead of complying with ordinary rulemaking procedures, is essentially a decision to invoke an exemption to the APA. Courts already decide issues of APA compliance, such as this one,[135] without appreciable deference to agencies, because no single agency administers that Act.[136]

C. Other Exemptions

The good cause provision is not the only rulemaking exemption that Congress should consider in connection with APA revision. It should take this opportunity to rescind the broad and anachronistic exemption for rules relating to "public property, loans, grants, benefits, or contracts."[137] ACUS has repeatedly called for repeal of this language, beginning in 1969,[138] and the ABA has concurred with a minor reservation relating to public property and contracts.[139] Similarly, the APA contains a sweeping exemption for matters involving "a military or foreign affairs function of the United States."[140] Both ACUS and the ABA have for decades been on record as urging that this exemption be narrowed, so that it would only apply (as does the corresponding exemption in the Freedom of Information Act) to matters that are specifically required by executive order to be kept secret in the interest of national defense or foreign policy.[141] A requirement that rules in the subject areas of both exemptions must be issued through the normal notice-and-comment process would harmonize well with the bill's overall emphasis on promoting public participation and agency

135. Reno-Sparks Indian Colony v. EPA, 336 F.3d 899, 909 n.11 (9th Cir. 2003).

136. United States v. Fla. E. Coast Ry., 410 U.S. 224, 236 n.6 (1973); Collins v. NTSB, 351 F.3d 1246, 1252 (D.C. Cir. 2003); Am. Airlines, Inc. v. DOT, 202 F.3d 788, 796 (5th Cir. 2000).

137. 5 U.S.C. § 553(a)(2) (2006).

138. ACUS Recommendation 69-8, Elimination of Certain Exemptions from the APA Rulemaking Requirements, 38 Fed. Reg. 19,782, 19,784–85 (July 23, 1973).

139. *1981 ABA Recommendation*, *supra* note 7, at 783–84, 788. The reservation was that if rulemaking procedures are followed by an agency with overall responsibility for public property or contracts, including the Administrator for Federal Procurement Policy or the Administrator of General Services, the implementing agency should not have to repeat the process on its own; moreover, the APA should not displace any rulemaking procedures specified in the applicable organic statute. *Id.*

140. 5 U.S.C. § 553(a)(1) (2006).

141. *1981 ABA Recommendation*, *supra* note 7, at 784, 788–89; ACUS Recommendation 73-5, Elimination of the "Military or Foreign Affairs Function" Exemption from APA Rulemaking Requirements, 39 Fed. Reg. 4847 (Feb. 7, 1974).

accountability in rulemaking.

Finally, we note that § 553(g)(1) apparently seeks to carry forward without change the existing APA exemption for interpretive rules, policy statements, and procedural rules.[142] It does so imperfectly, however, because it would require an agency to take account of the § 553(b) considerations in issuing an interpretive rule or policy statement and also satisfy the requirements for final rules in § 553(f). These requirements would be excessive, not only for the reasons we have already mentioned regarding those subsections, but also because it would tend to deter agencies from issuing guidance at all. This would be detrimental to the interests of those citizens who rely on agency guidance for advice as to how they can best comply with their regulatory obligations.

XI. OIRA GUIDELINES

Section 553(k) would authorize OIRA to "establish guidelines" regarding multiple aspects of the rulemaking process. Of course, OIRA already does issue such guidelines. Insofar as the purpose of the subsection is simply to recognize and ratify this practice, we support the provision. Presumably, one consequence of codifying this authority would be to make OIRA guidelines applicable to independent agencies' rulemaking. As stated above, the ABA does support the extension of OIRA oversight to independent agencies.[143]

We assume that the "guidelines" authorized by the subsection would not be legally binding. At present, OIRA does have rulemaking authority in limited subject areas, such as the Paperwork Reduction Act and the Information Quality Act, but it has not claimed a general authority to regulate the rulemaking process. Indeed, the presidential oversight orders have all specifically disclaimed the intention to displace the authority granted by law to the respective agencies.[144] Our understanding is that the bill does not seek to alter that state of affairs. The sponsors should, however, reconsider certain language in the provision that may give rise to a contrary impression—e.g., that the guidelines would "ensure" that agencies use the best available techniques for cost-benefit analysis, "assure" that each agency avoids regulations that are inconsistent with those of other agencies, and "ensure" consistency in federal rulemaking.

Subsection 553(k) also authorizes OIRA to issue guidelines in subject matter areas that it has not heretofore addressed. The benefits of such

142. *See* 5 U.S.C. § 553(b)(3)(A) (2006).

143. *See supra* note 76 and accompanying text.

144. *See, e.g.*, Exec. Order No. 13,563, *supra* note 27, § 7(b)(i); Exec. Order No. 12,866, *supra* note 5, § 9.

pronouncements may vary according to context. For example, the case for empowering OIRA to issue binding guidelines "to promote coordination, simplification, and harmonization of agency rules" is relatively strong, because problems of incompatible or duplicative regulations as between agencies are real, yet individual agencies cannot readily solve these problems on their own. The case for guidelines to ensure that rulemaking conducted outside the APA framework "conform to the fullest extent allowed by law with the procedures set forth in section 553" is less clear, because diverse approaches among the agencies may rest on legitimate differences in their respective missions and programs. In short, the direction in which § 553(k) appears to be headed may have merit, but its proponents will need to make a careful case for individual aspects of it.

In any event, we do not support the provision in § 706(b)(2) that would deny any judicial deference to agency cost–benefit determinations or risk assessments that fail to conform to OIRA guidelines—a purpose for which those guidelines clearly were not designed. We discuss this provision in Part XIII below.

XII. AGENCY GUIDANCE

Section 4 of the bill adds to the APA a new provision, § 553a, on the subject of agency guidance. It provides that, before issuing any *major* guidance, an agency must consider certain stated issues and consult with OIRA. It also states that any guidance must be explicitly labeled as nonbinding and that OIRA may issue guidelines to agencies as to how they should use guidance documents.

Most of these provisions have counterparts in existing practice and are supportable or at least not objectionable. The factors listed in § 553a(a)(1) as threshold considerations are mostly straightforward matters that one would normally expect the agency to consider, such as whether the guidance is understandable and supported by legal authority, and whether its benefits justify its costs.[145] (However, to the extent that this subsection incorporates by reference all of the cost factors listed in § 553(b), we would object for the same reasons discussed above in relation to the latter provision.) Moreover, OIRA already consults with executive agencies about significant guidance, and OMB has already published guidelines regarding the recommended use of guidance by agencies.[146] A consequence of codification in the APA would be that the application of these oversight functions would be extended to independent agencies, but

145. The reference in § 553a(a)(1)(B) to "the rule making" should say "a rule making."

146. Office of Mgmt. & Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007).

such an extension would be consistent with ABA policy.[147]

The provision's general provision on guidance could benefit from refinement, however. First, the statement in subsection (b)(1) that agency guidance "may not be relied upon by an agency as legal grounds for agency action" could prove confusing, because interpretive rules certainly "may sometimes function as precedents."[148] Perhaps the quoted language should be rephrased as "may not be used to foreclose consideration of issues as to which the document reaches a conclusion,"[149] or should simply be deleted. Second, the requirement in subsection (b)(2) that any guidance must be labeled as not legally binding in a "plain, prominent and permanent manner" may be problematic. In the abstract, such labeling represents good administrative practice,[150] but conversion of this principle into a legal requirement may cause difficulties, particularly with respect to internal documents that technically meet the definition of "guidance" but are routine or casual statements, such as internal memoranda, that are prepared with little internal review.[151] Codification would also give rise to the question of what the consequences of breach would be. The ramifications of the principle of prejudicial error under § 706 could be difficult to sort out. Even OMB's Good Guidance Practices Bulletin treats the labeling practice as optional, although it suggests that agencies consider following it.[152] Thus, encouragement of labeling may be better left to advisory documents as opposed to the APA. Finally, subsection (b)(3), which identifies ways in which guidance shall be "made available," covers terrain that is already addressed in the Freedom of Information Act (FOIA), which is part of the APA.[153] It does not seem to add anything to what FOIA already requires, and it could create confusion. If the sponsors deem

147. *See supra* note 76 and accompanying text.

148. United States v. Mead Corp., 533 U.S. 218, 232 (2001).

149. *See* REVISED MODEL STATE ADMIN. PROCEDURE ACT § 311(b) (2010) (HeinOnline) ("An agency that proposes to rely on a guidance document to the detriment of a person in any administrative proceeding shall afford the person an adequate opportunity to contest the legality or wisdom of a position taken in the document. The agency may not use a guidance document to foreclose consideration of issues raised in the document.").

150. *See* ACUS Recommendation 92-2, Agency Policy Statements, 57 Fed. Reg. 30,103, ¶ II.A. (July 8, 1992).

151. *See* 118 No. 2 A.B.A. ANN. REP. 57, 58 (1993) (making recommendations on agency use of guidance, but with the caveat that the resolution "reaches only those agency documents respecting which public reliance or conformity is intended, reasonably to be expected, or derived from the conduct of agency officials and personnel;" as opposed to "enforcement manuals setting internal priorities or procedures rather than standards for conduct by the public").

152. Office of Mgmt. & Budget, Final Bulletin for Agency Good Guidance Practices, *supra* note 146, at 3437.

153. 5 U.S.C. §§ 552(a)(1)(D), 552(a)(2)(B) (2006).

the current requirements for making guidance available inadequate, amending that requirement seems preferable to enacting a new provision on the same subject.

XIII. JUDICIAL REVIEW

We have already discussed the bill's provisions on judicial review as they relate to interim rules and the Information Quality Act, so the following comments relate to other provisions.

A. Scope of Review

Section 7 of the bill would add a new subsection (b) to the APA's scope of review provision, § 706, stating that a reviewing court "shall not defer" to various interpretations and determinations by an agency unless the agency followed certain specified procedures in relation to that determination.

The Section believes that this subsection is unwarranted. Judicial review of agency decisionmaking today is relatively stable, combining principles of restraint with the careful scrutiny that goes by the nickname "hard look review." Since the time of such landmark decisions as *Chevron*[154] and *State Farm*[155]—and, of course, for decades prior to their issuance—courts have striven to work out principles that are intended to calibrate the extent to which they will accept, or at least give weight to, decisions by federal administrative agencies. Debate on these principles continues, but the prevailing system works reasonably well, and no need for legislative intervention to revise these principles is apparent.

In any event, the principles proposed fall well outside the range of doctrines that can find support in the case law. For example, the bill provides in § 706(b)(2) that "the court shall not defer to" an agency's "determination of the costs and benefits of a rule or economic or risk assessment of the action" if the agency failed to conform to guidelines prescribed by OIRA. This provision is unwise.

Under standard judicial review principles, such shortcomings in reasoning normally result in a *remand for reconsideration*, so that the agency can (attempt to) provide an adequate basis for its position, or, perhaps, a proper regulatory analysis. It should not result in the court making its own findings on these issues. Such judicial overrides would defeat the purposes of the enabling legislation, because they would effectively mean that the court would make policy judgments that Congress has entrusted to the judgment of an administrative agency (subject to traditional political and

154. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

155. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

judicial oversight). This development would dramatically increase the policymaking power of federal judges who do not have experience in the relevant subject area and have no political accountability to Congress or the public. Moreover, scattered judicial interventions of this kind would inevitably tend to undermine the coherence of major regulatory programs.

We would add that the innovations introduced by § 706(b)(2) would also result in substantial burdens for the courts themselves. Appellate litigation would become more complicated (and expensive for litigants), because the courts would have to make complex threshold inquiries into whether or not the agency had complied with OIRA's guidelines. These questions would not necessarily have been resolved at the agency level, because the issue of judicial deference would not have been directly germane at that level. Of course, if the reviewing court were to resolve the threshold issue adversely to the agency, it would then face even more daunting challenges, as it would be required to become a de facto administrator charged with balancing costs and benefits of a rule, assessing risks, etc., for which the judges would likely have had no training. These new judicial tasks strike us as unwarranted—and all the more so at the present time, when many of the courts are facing "judicial emergencies" because of vacancies on the bench and the pressures of heavy caseloads in criminal, immigration, and other areas.

Another troubling provision is § 706(b)(1), which provides that a court shall not defer to an agency's interpretation of a regulation unless the agency used rulemaking procedures in adopting the interpretation. Under those circumstances, however, the agency would actually be issuing a new regulation—it would not be interpreting the old one. Effectively, therefore, § 706(b)(1) would abolish all judicial deference to agencies' interpretations of their own rules. Yet many regulations are highly technical, and their relationship to an overall regulatory scheme may be difficult to discern. Surely, when construing such a rule, a court should have the prerogative of giving weight to the views of the agency that wrote the rule and administers it. A prohibition on such deference would be both unwise and unsupported by case law.[156]

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156. There is a serious debate in the cases and the law review literature as to whether an agency's interpretation of a regulation should receive *diminished* deference if the agency arrived at it without engaging in sufficient procedural formalities. *See generally* Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 GEO. WASH. L. REV. 1449 (2011); Harold J. Krent, *Judicial Review of Nonstatutory Legal Issues*, *in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 147, 151–58 (John F. Duffy & Michael Herz eds., 2005). That debate, however, has not generated substantial (if any) support for the proposition that such an interpretation should receive no judicial deference whatsoever, as § 706(b)(1) would provide.

Courts do, of course, play an indispensable role in overseeing agency action and correcting abuses. If Congress decides to reconsider the premises of that role, the Section would be very willing to work with it on proposals to refine the judicial review provisions of the APA. The principles of § 706(b), however, are in our judgment too far removed from current judicial review practice to offer a promising start in that direction.

B. Substantial Evidence

Section 8 of the bill would add a new definition of "substantial evidence" to the judicial review chapter of the APA. The definition itself is innocuous, as it is based directly on well-recognized case law.[157]

We are unconvinced, however, that the amendment is necessary or will accomplish what its sponsors expect. A press release by the sponsors indicates that the bill is intended to ensure that, "[a]s a consequence of the formal hearing [mandated by the APA as amended], high-impact rules would be reviewed under a slightly higher standard in court—substantial evidence review."[158] Apart from our objections to the formal hearings themselves, discussed above, we must question some of the premises of this statement.

As an initial matter, it is not at all clear that the bill as drafted would, indeed, subject high-impact rules to substantial evidence review. The APA provides that the substantial evidence test applies to "a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute."[159] The first prong of this trigger may not apply because rulemakings that involved a formal hearing, i.e. were "subject to sections 556 and 557," will *also* have been "subject to" notice-and-comment under § 553. The second prong may not be satisfied because

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157. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). There the Court stated:

> We [have] said that "[s]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Accordingly, it . . . must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.

Id. at 477 (internal citations and quotation marks omitted). Some cases quote only the middle of these three adjacent sentences for the meaning of "substantial evidence," and others the last one, but we know of no case that has suggested that those two formulations have different meanings.

158. Press Release, Rob Portman & Mark Pryor, U.S. Senators, and Lamar Smith & Collin Peterson, U.S. Representatives, Regulatory Accountability Act of 2011: Key Provisions (Sep. 22, 2011), *available at* http://portman.senate.gov/public/index.cfm/files/serve?File_id=472d1a09-93d5-4454-964a-54baf0d930cc.

159. 5 U.S.C. § 706(2)(E) (2006).

the bill expressly states that the record for review in a case of this nature would be the record of the formal hearing *plus* the ordinary § 553 record.[160] However, for purposes of the following discussion we will assume that the bill may be interpreted (or revised) to make the substantial evidence standard applicable.

The main problem with the apparent goal of the bill is that the case law has generally abandoned the assumption that substantial evidence review is a "slightly higher standard" than arbitrary–capricious review. The modern view, as stated in a leading D.C. Circuit opinion by then-Judge Scalia, is that "in their application to the requirement of factual support the substantial evidence test and the arbitrary or capricious test are one and the same. The former is only a specific application of the latter."[161] Other circuits have agreed.[162] With the advent of the "hard look" doctrine in arbitrary-and-capricious review, older conceptions of a disparity between the two standards of review have been seen as obsolete.[163]

If the sponsors were to rewrite the bill to make the substantial evidence test squarely applicable to review of high-impact rules, it would present the courts with a need for what Judge Scalia called a "fairly convoluted" inquiry:

160. H.R. 3010, sec. 5 (proposed § 556(e)(2)).

161. Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors of the Fed. Reserve Sys., 745 F.2d 677, 683 (D.C. Cir. 1984). The court has repeatedly reaffirmed this view. *See, e.g.*, Butte Cnty. v. Hogen, 613 F.3d 190, 194 (D.C. Cir. 2010); Consumers Union of U.S., Inc. v. FTC, 801 F.2d 417, 422 (D.C. Cir. 1986) (expressly relating this view to the "reasonable mind" definition of substantial evidence that the bill would codify).

162. Ace Tel. Ass'n v. Koppendrayer, 432 F.3d 876, 880 (8th Cir. 2005); Sevoian v. Ashcroft, 290 F.3d 166, 174 (3d Cir. 2002); Wileman Bros. & Elliott, Inc. v. Espy, 58 F.3d 1367, 1374–75 (9th Cir. 1995), *rev'd on other grounds*, 521 U.S. 457 (1997); Tex. World Serv. Co. v. NLRB, 928 F.2d 1426, 1430 n.3 (5th Cir. 1991); Cruz v. Brock, 778 F.2d 62, 63–64 (1st Cir. 1985). The Supreme Court has cited to the *Data Processing* reasoning and expressed no qualms about it. Dickinson v. Zurko, 527 U.S. 150, 158 (1999).

163. In *Data Processing*, Judge Scalia went on to say that the "distinctive function of paragraph (E) [substantial evidence]—what it achieves that paragraph (A) [arbitrary and capricious] does not—is to require substantial evidence to be found *within the record of closed-record proceedings* to which it exclusively applies." 745 F.2d at 684. Even this distinction would become less relevant under the amended APA, because the bill also creates a defined record for review of rules subject to arbitrary-capricious review.

> Suppose, for example, that Congress clearly intended to switch to a stricter test, but was also clearly operating on the mistaken belief that the existing test ("arbitrary or capricious") was more lenient than the "substantial evidence" standard. Should one give effect to the congressional intent to adopt a stricter standard, or rather to the congressional intent to adopt the "substantial evidence" standard (which is in fact, as we have discussed, no stricter)?[164]

The limited nature of the formal hearings contemplated by the bill could make the situation even more convoluted. Some, but not all, of the factual issues would have been litigated via the formal hearing process, for which substantial evidence review is designed. Does this mean that some factual determinations underlying a high-impact rule would be reviewed for substantiality of evidence, and others for arbitrariness? Drawing that distinction could prove confusing if not unmanageable. On the other hand, the bill may be construed to mean that the entire proceeding should be reviewed for substantiality of evidence. This reading would create what the D.C. Circuit has called an "anomalous combination" of features that gives rise to difficult questions as to "whether the determinations in [the case] are of the kind to which substantial evidence review can appropriately be applied," as well as "the adequacy of the record to permit meaningful performance of the required review."[165]

In short, we believe there is great doubt that legislation to impose a substantial evidence test for review of high-impact rules would accomplish what the sponsors intend for it, and every reason to think it would lead to confusion and complexity. As the Supreme Court has recognized, "case-specific factors, such as a finding's dependence upon agency expertise or the presence of internal agency review . . . will often prove more influential in respect to outcome than will the applicable standard of review."[166]

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Thank you in advance for your consideration of these comments. We hope they will be helpful, and we would be happy to work with the committee in its efforts to refine this bill further.

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164. *Id.* at 686.
165. Indus. Union Dep't v. Hodgson, 499 F.2d 467, 473–74 (D.C. Cir. 1974).
166. *Zurko*, 527 U.S. at 163.

COMMENT

PIERCING *GLOMAR*: USING THE FREEDOM OF INFORMATION ACT AND THE OFFICIAL ACKNOWLEDGMENT DOCTRINE TO KEEP GOVERNMENT SECRECY IN CHECK

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INTRODUCTION

On April 30, 2012, in an effort to live up to his pledge of transparency, President Barack Obama ordered White House Counterterrorism Advisor John Brennan to finally reveal one of the Administration's most secretive policies in its fight against terrorism.[1] Brennan approached the podium that day at the Woodrow Wilson International Center for Scholars in Washington, D.C. and adjusted the microphone.[2]

"So let me say it as simply as I can," Brennan said, reading carefully from a prepared script in front of a modest audience.[3] "Yes, in full accordance with the law, and in order to prevent terrorist attacks on the United States and to save American lives, the United States Government conducts targeted strikes against specific al-Qaeda terrorists, sometimes using remotely piloted aircraft, often referred to publicly as drones."[4]

Brennan characterized his remarks as an example of the Administration's openness[5] and as an opportunity to publicly acknowledge and explain the legality of a Central Intelligence Agency (CIA) drone program[6] that had previously been something of a secret weapon.[7]

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1. John O. Brennan, Assistant to the President for Homeland Sec. and Counterterrorism, The Ethics and Efficacy of the President's Counterterrorism Strategy at the Woodrow Wilson Int'l Ctr. for Scholars, (Apr. 30, 2012) [hereinafter Brennan Speech] (transcript available at http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy) (explaining that President Obama instructed representatives of the U.S. government to be more open with the American people about its counterterrorism efforts).

2. *Id.*

3. *Id.*

4. *Id.*; *see also* Jack Goldsmith, *John Brennan's Speech and the ACLU FOIA Cases*, LAWFARE (May 1, 2012, 11:12 AM), http://www.lawfareblog.com/2012/05/john-brennans-speech-and-the-aclu-foia-cases/ (noticing that Brennan was careful not to specifically mention the Central Intelligence Agency (CIA) in the speech, although "the only reasonable overall conclusion" from prior statements and context is "that the CIA is involved in the drone program").

5. Brennan Speech, *supra* note 1 ("I venture to say that the United States government has never been so open regarding its counterterrorism policies and their legal justification.").

6. Alternatively, the U.S. military operates a public drone program in active or once-active war zones, such as Iraq and Afghanistan. *See* Mark Landler, *Civilian Deaths Due to Drones Are Not Many, Obama Says*, N.Y. TIMES, Jan. 30, 2012, http://www.nytimes.com/2012/01/31/world/middleeast/civilian-deaths-due-to-drones-are-few-obama-says.html (comparing the CIA's covert drone program to the U.S. military's public drone program).

7. Brennan Speech, *supra* note 1 (noting how the practice of identifying specific members of al-Qaeda beyond "hot battlefields" and then targeting them with lethal force using drone aircraft has "captured the attention of many" and is the subject of the speech).

Brennan never directly uttered the letters "C-I-A" in his speech;[8] then again, he did not need to. For even before Brennan disclosed the government's involvement in the classified program on that day in April, his "secret" had been a secret only to those who had not picked up a newspaper, watched the news on cable television, or listened to the radio while driving to work.[9]

In the years prior to Brennan's speech, the *Washington Post* and the *New York Times* routinely wrote in detail about the Predator drones and their killing prowess, often quoting high-ranking government officials who were careful to request anonymity.[10] Brennan himself alluded to the classified program in public speeches, if only with a wink and a nod.[11] Even Leon Panetta, the former director of the CIA and current Secretary of Defense, made light of the secrecy surrounding the program's existence to a room full of sailors in Naples, Italy, joking, "Having moved from the CIA to the Pentagon, obviously I have a hell of a lot more weapons available to me in this job than I had in the CIA, although the Predators weren't bad."[12]

Yet, when the American Civil Liberties Union (ACLU) requested information about the CIA drone program last year through the Freedom of Information Act (FOIA),[13] the CIA stonewalled the request by refusing even to confirm or deny the existence of the documents.[14] Further, when

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8. *See* Goldsmith, *supra* note 4 ("The speech did not state which agencies are involved in targeted killing, and most notably did not say a word about the CIA.").

9. *See* Complaint at ¶¶ 26, 28, 35, N.Y. Times Co. v. Dep't of Justice, No. 11-civ-9336 (S.D.N.Y. Dec. 20, 2011) (highlighting the widespread publicity surrounding what is supposed to be a secret program).

10. *See, e.g.*, Karen DeYoung, *Secrecy Defines Obama's Drone War*, WASH. POST, Dec. 19, 2011, http://www.washingtonpost.com/world/national-security/secrecy-defines-obamas-drone-war/2011/10/28/gIQAPKNR5O_story.html; Scott Shane & Thom Shanker, *Strike Reflects U.S. Shift to Drones in Terror Fight*, N.Y. TIMES, Oct. 1, 2011, http://www.nytimes.com/2011/10/02/world/awlaki-strike-shows-us-shift-to-drones-in-terror-fight.html?scp=3&sq=charlie%20savage%20and%20aw-awlaki%20and%20drone%20and%20memo%20and%20legal%20counsel&st=cse.

11. John O. Brennan, Assistant to the President for Homeland Sec. and Counterterrorism, Speech at Harvard Law School—Brookings Conference 9/16/2011 (Sept. 17, 2011), *available at* http://www.youtube.com/watch?v=RruVxY2mxB4 (showing that when asked by a member of the audience whether the CIA has a drone program, Brennan suppressed a smirk and said, "If the agency did have such a program, I'm sure it would be done with the utmost care and precision . . . in accordance with the law and values. If such a program existed.").

12. Julian E. Barnes, *Panetta Makes Cracks About Not-So-Secret CIA Drone Program*, WALL ST. J. (Oct. 7, 2011, 12:32 PM), http://blogs.wsj.com/washwire/2011/10/07/panetta-makes-cracks-about-not-so-secret-cia-drone-program/ (calling the CIA's drone program possibly "the single worst kept secret in the U.S. government").

13. Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2006).

14. Letter from Delores M. Nelson, Info. & Privacy Coordinator, CIA, to Jonathan

the ACLU challenged the CIA's shadowy reply—known in FOIA litigation as the *Glomar* response[15]—its plea elicited little sympathy from the presiding United States district court judge.[16]

That the government would refuse to fulfill a FOIA request demanding properly classified information is no surprise.[17] Nor is it a shock that a federal court would defer to the U.S. government in matters of national security.[18] Most curious, however, is that the District Court for the District of Columbia could so easily allow the CIA to deny the very existence of documentation related to a program that had already been so widely publicized.

Opaque governmental secrecy is what President Barack Obama hoped to avoid when he issued a FOIA memorandum during his first month in office instructing agencies to "adopt a presumption in favor of disclosure."[19] However, almost four years into Obama's presidency and more than a decade after 9/11, FOIA plaintiffs still face insuperable roadblocks in their push for transparency.[20] The government has employed the *Glomar* response with increasing frequency since 9/11 to frustrate records requests,[21] often with good reason. The *Glomar* response has been used in

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Manes, American Civil Liberties Union (ACLU) (Mar. 9, 2010) (on file with the ACLU); *see* ACLU v. Dep't of Justice, 808 F. Supp. 2d 280, 284 (D.D.C. 2011) (clarifying that the CIA invoked FOIA Exemptions 1 and 3 as the basis for its response, and accepting its decision to issue a *Glomar* response that neither confirms nor denies the existence of any responsive record).

15. *ACLU*, 808 F. Supp. 2d at 286 (explaining that the *Glomar* response derives its name from the *Glomar Explorer*, a research vessel at issue in the case that first authorized the government to neither confirm nor deny the existence of records responsive to a FOIA request).

16. *See id.* at 284 (granting summary judgment to the CIA).

17. *See, e.g.*, Phillippi v. CIA (*Phillippi I*), 546 F.2d 1009, 1012 (D.C. Cir. 1976) (allowing the CIA to neither confirm nor deny the existence of any records pertaining to the *Glomar Explorer* vessel in the interest of national security).

18. Morley v. CIA, 508 F.3d 1108, 1124 (D.C. Cir. 2007) (finding that "little proof or explanation is required beyond a plausible assertion that information is properly classified" for the government to withhold documents under FOIA Exemption 1); *see, e.g.*, Halperin v. CIA, 629 F.2d 144, 148 (D.C. Cir. 1980) (conceding that judges lack the necessary expertise to second-guess government agencies in FOIA cases involving national security).

19. Memorandum for the Heads of Exec. Dep'ts & Agencies Concerning the Freedom of Info. Act, 74 Fed. Reg. 4683 (Jan. 26, 2009) [hereinafter Memorandum] ("The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails.").

20. *See, e.g.*, Nathan Freed Wessler, *"[We] Can Neither Confirm Nor Deny the Existence or Nonexistence of Records Responsive to Your Request": Reforming the* Glomar *Response Under FOIA*, 85 N.Y.U. L. REV. 1381, 1382 (2010) (detailing that the specific problem plaintiffs face with the *Glomar* response is that it deprives them of information essential to litigation).

21. *See* Amicus Curiae Brief of Nat'l Sec. Archive in Support of Appellants to Vacate and Remand at 9, Wilner v. Nat'l Sec. Agency, 592 F.3d 60 (2d Cir. 2009) (No. 08-4726-cv)

recent years to conceal covert operations in order to protect American lives, both at home and abroad.[22] The protection of classified information is undoubtedly a way in which our government keeps Americans safe.[23] Any breach, big or small, can jeopardize that mission.[24] But the government has also used *Glomar*ization to conceal information related to programs that no longer *feel* secret to the general public.[25]

Few considered the lasting effects of the *Glomar* response upon its inception in 1975. Now, nearly forty years later, overuse of the *Glomar* response has been well documented.[26] National security and intelligence agencies within the government must use *Glomar*ization responsibly so as not to let an exception to the FOIA undermine the Act. In turn, FOIA plaintiffs, federal courts, and Congress have a responsibility to enforce its proper use. The careful balance between secrecy and transparency can be achieved if the *Glomar* response is used only in responses to requests for information that would otherwise reveal covert operations—not to conceal information already in the public domain or "officially acknowledged."[27]

FOIA litigants for years have relied upon the "official acknowledgment" doctrine, hoping to compel the release of classified information that has reached the public domain.[28] Only recently, however, have they done so

("The *Glomar* Response has arisen in roughly 80 federal court opinions since 1976. Roughly 60 of those cases have been decided since September 11, 2001 . . . .").

22. *See* ACLU v. Dep't of Defense, 389 F. Supp. 2d 547, 564–65 (S.D.N.Y. 2005) (allowing the Government to issue a *Glomar* response when the plaintiff requested information about specific interrogation methods used by the CIA against members of al-Qaeda); Amnesty Int'l USA v. CIA, No. 07 Civ. 5435, 2010 WL 5421928, at *1 (S.D.N.Y. Dec. 21, 2010) (allowing a *Glomar* response when the plaintiff requested information about suspected terrorists detained and rendered by the United States).

23. *See* Devin S. Schindler, *Between Safety and Transparency: Prior Restraints, FOIA, and the Power of the Executive*, 38 HASTINGS CONST. L.Q. 1, 9 (2010) (suggesting that the need to protect confidential information from disclosure seems self-evident).

24. *See, e.g.*, Memorandum for the Heads of Exec. Dep'ts & Agencies from Jacob J. Lew, Dir., Office of Mgmt. & Budget (Nov. 28, 2010) (portraying the release of classified information by WikiLeaks as a significant compromise of national security).

25. *See, e.g.*, ACLU v. Dep't of Justice, 808 F. Supp. 2d 280, 294 (D.D.C. 2011), *appeal docketed sub nom.* ACLU v. CIA, No. 11-5320 (D.C. Cir. filed Nov. 9, 2011) (clarifying that the CIA director's acknowledgement that a program exists does not waive the CIA's ability to properly invoke *Glomar*).

26. Wessler, *supra* note 20, at 1397.

27. *Cf.* James X. Dempsey, *The CIA & Secrecy*, *in* A CULTURE OF SECRECY: THE GOVERNMENT VERSUS THE PEOPLE'S RIGHT TO KNOW 37, 47 (Athan G. Theoharis ed., 1998) ("*Glomar* should not apply to requests about a specific incident that is itself public in nature or to requests about noted public figures.").

28. Fitzgibbon v. CIA, 911 F.2d 755, 765 (D.C. Cir. 1990) (holding that the CIA did not waive its right to withhold documents pertaining to particular CIA station locations); Afshar v. Dep't of State, 702 F.2d 1125, 1129 (D.C. Cir. 1983) (finding that the specific information sought had not been in the public domain); *see* Pub. Citizen v. Dep't of State, 11

when also confronted with an additional layer of secrecy—the *Glomar* response.[29] One of the first plaintiffs to bring this argument to the D.C. Circuit won his case against the CIA, successfully puncturing the *Glomar* response[30] in what served as a rare and important win for purveyors of transparency. The government's *Glomar* response will again be challenged in three separate, but similar, lawsuits[31] pertaining to the drone program and the September 2011 death of al-Qaeda terrorist Anwar al-Awlaki, an American citizen reportedly killed by a CIA drone strike.[32] Whether the courts treat Brennan's drone speech as an "official acknowledgment" of the CIA's involvement will likely determine the outcome of those suits and shape future FOIA litigation in the national security context.

This Comment argues that agencies should not use a *Glomar* response to conceal the existence of documents that have already been widely acknowledged to exist. If agencies are unwilling to do so, federal courts and Congress should hold them to that standard. Part I examines the background of the FOIA and the recent strategy of attacking the *Glomar* response in court through the official acknowledgment doctrine. Part II analyzes why conflicting judicial decisions and a narrow application of the doctrine have led to inconsistent results in the *Glomar* context. Part III recommends administrative, judicial, and legislative changes to best

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F.3d 198, 199 (D.C. Cir. 1993) (holding that the State Department did not waive its right to withhold documents pertaining to a meeting between the U.S. Ambassador to Iraq and former Iraqi President Saddam Hussein).

29. Frugone v. CIA, 169 F.3d 772, 774 (D.C. Cir. 1999) (summarizing that the only issue before the court is whether the CIA may give a *Glomar* response where another Executive Branch agency has already acknowledged the existence of information pursuant to the request); *see* Wolf v. CIA (*Wolf II*), 473 F.3d 370, 378 (D.C. Cir. 2007) (mistakenly suggesting that the "official acknowledgement" standard had not been applied in the context of a *Glomar* response prior to *Wolf*).

30. *See Wolf II*, 473 F.3d at 372 (affirming the district court, except to the extent the CIA officially acknowledged the existence of records).

31. Complaint for Injunctive Relief at 1, ACLU v. Dep't of Justice, No. 12-civ-0794 (S.D.N.Y. Feb. 1, 2012) (requesting "the release of records related to the U.S. government's 'targeted killing' of U.S. citizens overseas"); Complaint at ¶ 11, N.Y. Times Co. v. Dep't of Justice, No. 11-civ-9336 (S.D.N.Y. Dec. 20, 2011) (requesting "memoranda that detail the legal analysis behind the government's use of targeted lethal force"); *see* ACLU v. Dep't of Justice, 808 F. Supp. 2d 280, 284 (D.D.C. 2011), *appeal docketed sub nom.* ACLU v. CIA, No. 11-5320 (D.C. Cir. filed Nov. 9, 2011) (requesting "records pertaining to the use of unmanned aerial vehicles ('UAVs')—commonly referred to as 'drones' and including the MQ-1 Predator and MQ-9 Reaper—by the CIA and the Armed Forces for the purpose of killing targeted individuals").

32. *See, e.g.*, *Multiple Terror Plots Linked to Anwar al-Awlaki*, CBSNEWS.COM (Sept. 30, 2011, 9:25 AM), http://www.cbsnews.com/stories/2011/09/30/501364/main20113812.shtml (describing al-Awlaki as an American-born cleric who was said to have inspired terrorist attacks against the United States for the Yemeni affiliate of al-Qaeda).

accommodate plaintiffs who wish to attack the *Glomar* response through the doctrine. Finally, this Comment concludes that, while classified information important to our national security should stay classified, using the *Glomar* response to conceal documentation that undoubtedly exists undermines not only the spirit of the FOIA but also the public's trust in the federal government.

I. BACKGROUND

Extensive government secrecy and a determined press corps in the 1960s hastened the creation of new and comprehensive legislation that emphasized a general right of access to government documents.[33] In 1966, the FOIA was born.[34] The Act, and the free flow of information that stemmed from it, have been properly described as a "check against corruption"[35] and the "bedrock of democracy."[36]

The public's right to information is not unlimited. A government agency may invoke one or more of the nine discretionary exemptions when it concludes records should not be disclosed.[37] Two such exemptions relate directly to matters of national security: Exemption 1 and Exemption 3.[38] Exemption 1 protects information that has been classified "under criteria established by an Executive order . . . in the interest of national defense or foreign policy" and properly classified pursuant to that order.[39] Executive Order 13,526, which President Obama signed less than one year into office, explicitly allows agencies to use a *Glomar* response following a request for records "whenever the fact of their existence or nonexistence is itself classified under this order or its predecessors."[40] Exemption 3 protects information that is prohibited from disclosure by other federal statutes.[41] The statute most commonly tethered to Exemption 3 in the national security realm is the National Security Act of 1947,[42] which requires the

33. *See* HERBERT N. FOERSTEL, FREEDOM OF INFORMATION & THE RIGHT TO KNOW: THE ORIGINS & APPLICATIONS OF THE FREEDOM OF INFORMATION ACT 39–40 (1999) (describing the collaboration between the news media and Congress in creating the FOIA).

34. *See id.* at 42 ("On July 4, 1966, President Lyndon Johnson signed the [FOIA] into law while vacationing at his Texas ranch.").

35. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

36. JACQUELINE KLOSEK, THE RIGHT TO KNOW xv (2009).

37. *Id.* at 16.

38. The seven remaining exemptions are less relevant to protecting classified information and will not be discussed at length in this Comment.

39. 5 U.S.C. § 552(b)(1) (2006).

40. Exec. Order No. 13,526, 75 Fed. Reg. 707, 719 (Jan. 5, 2010).

41. 5 U.S.C. § 552(b)(3).

42. Nat'l Sec. Act of 1947, Pub. L. No. 80-253, 61 Stat. 495 (codified at 50 U.S.C. § 401 (2006)).

Director of the CIA, and now the Director of National Intelligence, to protect intelligence "sources and methods."[43]

The judiciary's insistence that agencies construe exemptions narrowly means, in theory, that only the most sensitive and protected information is withheld.[44] As such, even embarrassing information and incriminating material are not beyond the FOIA's reach.[45] Since its inception, the FOIA has been used by the press to expose unlawful surveillance by the Federal Bureau of Investigation (FBI),[46] egregious waste in the Medicare system,[47] and mismanagement of government funds designated for economic recovery post-9/11.[48]

Yet, the enthusiasm with which the FOIA is followed often depends on the sitting president's ideology. For example, President Ronald Reagan significantly weakened the public's right to information through Executive Order 12,356 and several FOIA amendments adopted in the 1980s.[49] Secrecy only increased after 9/11 under President George W. Bush, whose Administration removed troves of data from government websites immediately following the attacks and encouraged agencies to "think twice before disclosing information to the public."[50]

Proponents of transparency had new reason for optimism when President Obama took office in 2009.[51] On his first full day in office, President Obama issued a FOIA Memorandum touting a "new era of open

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43. *Id.*

44. *See* Vaughn v. Rosen, 484 F.2d 820, 823 (D.C. Cir. 1973) ("This court has repeatedly stated that these exemptions from disclosure must be construed narrowly, in such a way as to provide the maximum access consonant with the overall purpose of the Act.").

45. Memorandum, *supra* note 19, at 4683 ("The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears.").

46. *See* KLOSEK, *supra* note 36, at 98 (explaining how the *San Francisco Chronicle* used the FOIA to show that the FBI conducted unlawful intelligence activities at the University of California–Berkeley).

47. *See id.* at 94 (noting how the *Washington Post* used the FOIA to show that Medicare officials knew a number of health care facilities were noncompliant with regulations and put some patients in serious risk).

48. *See id.* at 95 (mentioning that the *Associated Press* used the FOIA to show that economic recovery money intended for small businesses affected by 9/11 was mismanaged).

49. *See* FOERSTEL, *supra* note 33, at 51–53 (explaining how Executive Order 12,356 increased the ability of government agencies to withhold information under Exemption 1 and permitted officials to reclassify documents during the FOIA review process, and how subsequent FOIA amendments sought to exempt the CIA and FBI from disclosure).

50. KLOSEK, *supra* note 36, at 118–19 (citing a March 2002 memorandum from White House Chief of Staff Andrew H. Card, Jr.).

51. *Id.* at xi ("With the recent election of Barack Obama as president, there is hope for improved openness and better administration of the FOIA.").

Government."[52] This memorandum, slightly more than a page long and unmistakably clear, encouraged a "presumption of disclosure."[53] However, the Administration's implementation of the FOIA under this new policy continues to draw criticism from transparency watchdogs who claim that it has not lived up to its pledge for openness.[54] Lately, some of that criticism has stemmed from the government's tendency to neither confirm nor deny the existence of documents related to a program already widely acknowledged.[55] That potent response to a FOIA request is the subject of the following subsections. First, Subpart A will summarize the genesis of the *Glomar* response. Then, Subpart B will introduce the official acknowledgment doctrine. Finally, Subpart C will discuss the recent case law in which plaintiffs argued official acknowledgment when faced with a *Glomar* response.

A. The Glomar *Response Is Born*

The government first refused to confirm or deny the existence of documentation in response to a FOIA request in 1975, when a reporter from *Rolling Stone* magazine sought documents related to a suspected covert mission by the CIA and the Agency subsequently attempted to keep it a secret.[56] The tale is every bit the spy caper one would expect from one of the world's most secretive agencies, involving a sunken Soviet submarine, the reclusive Howard Hughes, and a submersible barge called the *Glomar Explorer*.[57]

When a Soviet submarine carrying nuclear weapons sank in the Pacific Ocean in 1968, the CIA enlisted Hughes, the troubled and eccentric billionaire, to finance an enormous platform and barge for the recovery mission.[58] The *Los Angeles Times* eventually learned of the mission and

52. Memorandum, *supra* note 19, at 4683.

53. *Id.*

54. *See, e.g.*, David Kravets, *It's Sunshine Week, But Obama's Transparency Record Is Cloudy*, WIRED.COM (Mar. 14, 2011, 4:11 PM), http://www.wired.com/threatlevel/2011/03/obama-transparency-clouded/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A%20wired27b%20%28Blog%20-%2027B%20Stroke%206%20%28Threat%20Level%29%29.

55. Glenn Greenwald, *ACLU Sues Obama Administration Over Assassination Secrecy*, SALON.COM (Feb. 2, 2012, 4:57 AM), http://www.salon.com/2012/02/02/aclu_sues_obama_administration_over_assassination_secrecy/singleton/ (detailing similar FOIA lawsuits filed by the ACLU and the *New York Times* against the United States).

56. *See* Phillippi v. CIA (*Phillippi II*), 655 F.2d 1325, 1327 (D.C. Cir. 1981) (explaining that Harriet Phillippi requested documents related to attempts by the CIA to dissuade the media from writing about the *Glomar Explorer*).

57. *See,* Dempsey, *supra* note 27, at 46 (providing the history of the *Glomar* response).

58. *Id.*

published an incomplete account of the event in 1975.[59] The CIA immediately scrambled to dissuade other media outlets from reporting the story.[60] When word of that cover-up also reached the press, the CIA received several FOIA requests seeking documents related to the suspected covert project.[61] One such request came from the Military Audit Project, a nonprofit organization tasked to investigate the expenditure of taxpayers' money on national security.[62] Another came from Harriet Phillippi, the reporter from *Rolling Stone*.[63] Each filed a lawsuit in the District Court for the District of Columbia challenging the CIA's novel reply that it could neither confirm nor deny the existence of responsive records.[64]

In *Phillippi v. CIA*[65] and *Military Audit Project v. Casey*,[66] the D.C. Circuit formally recognized the logic of the CIA's response, accepting that the existence or nonexistence of the requested records was itself a classified fact protectable by FOIA Exemptions 1 and 3.[67] Despite the extraordinary steps it took to protect the covert project, the CIA eventually relented in its secrecy and released much of the requested information relating to the *Glomar Explorer*.[68] Even so, *Glomar*ization became well-established within FOIA case law soon thereafter.[69]

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59. Wessler, *supra* note 20, at 1387.

60. Dempsey, *supra* note 27, at 46.

61. *Id.*

62. *See* Military Audit Project v. Casey, 656 F.2d 724, 730 n.11 (D.C. Cir. 1981) (describing the Military Audit Project as a nonprofit organization managed by a thirteen-member board of directors).

63. *See* Phillippi v. CIA (*Phillippi II*), 655 F.2d 1325, 1327–28 (D.C. Cir. 1981).

64. *See* Phillippi v. CIA (*Phillippi I*), 546 F.2d 1009, 1012 (D.C. Cir. 1976); *Military Audit Project*, 656 F.2d at 729–30.

65. 546 F.2d 1009 (D.C. Cir. 1976).

66. 656 F.2d 724 (D.C. Cir. 1981).

67. *See* Dempsey, *supra* note 27, at 46 ("In its rulings, the appeals court concluded that the FOIA permitted the agency to avoid having to admit or deny the existence of responsive records, in essence allowing the government to treat the mere existence of the records as classified."); *see also Phillippi I*, 546 F.2d at 1012 (recognizing the question on appeal is not whether the government may neither confirm nor deny the existence of a document but whether the government must support its position based on the public record); *Military Audit Project*, 656 F.2d at 731 (summarizing that the district court required the government to submit more information as to why it could not confirm or deny the existence of the requested documents).

68. *See* Dempsey, *supra* note 27, at 46–47 (arguing the government's changed position in releasing information about the *Glomar Explorer* "should have prompted the courts to be more skeptical of executive national security claims").

69. *See* McNamera v. Dep't of Justice, 974 F. Supp. 946, 957–58 (W.D. Tex. 1997) (allowing the FBI and INTERPOL to use a *Glomar* response in order to protect a private individual's privacy interest); Dep't of Justice, FOIA Update Vol. VII, No. 1 (1986), http://www.justice.gov/oip/foia_updates/Vol_VII_1/page3.htm (encouraging law enforcement agencies to use the *Glomar* response under Exemption 7(C) when it is

B. The Official Acknowledgment Doctrine

Federal agencies sometimes waive their right to a valid FOIA exemption when what they wish to withhold has already entered the public domain.[70] While FOIA plaintiffs may be tempted to make such arguments, official acknowledgment is actually exceptionally hard to prove in court. The D.C. Circuit, which oversees more FOIA litigation than any other circuit court,[71] developed an exacting test to determine when information has been officially acknowledged.[72] The information requested must be as specific as the information previously released, must match the information previously disclosed, and must already have been made public through an official and documented disclosure.[73]

The D.C. Circuit has taken these requirements to fashion an especially narrow sense of waiver—all in the name of national security. The Circuit is dotted with case law discouraging plaintiffs from making an official acknowledgment argument when an agency invokes Exemption 1.[74] The same is true in other circuits.[75] For instance, an acknowledgment by one

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determined that there is a cognizable privacy interest at stake and that there is insufficient public interest in disclosure to outweigh it); *see, e.g.*, Gardels v. CIA, 689 F.2d 1100, 1103 (D.C. Cir. 1982) ("We have likewise agreed that an agency may refuse to confirm or deny the existence of records where to answer the FOIA inquiry would cause harm cognizable under an FOIA exception."); *see also* Antonelli v. FBI, 721 F.2d 615, 618 (7th Cir. 1983) (approving the FBI's use of the *Glomar* response in the privacy and law enforcement context under Exemptions 6 and 7).

70. *See* Afshar v. Dep't of State, 702 F.2d 1125, 1130 (D.C. Cir. 1983) (describing the willingness of some courts to accept the argument that "publicly known information cannot be withheld under exemptions 1 and 3").

71. Lila L. Seal, Comment, *The Future of the Freedom of Information Act's Deliberative Process Exemption and Disclosure of Computerized Federal Records After* Petroleum Information Corp. v. United States Department of the Interior, 71 DENV. U. L. REV. 719, 724 (1994) ("Since the passage of FOIA, the D.C. Circuit has delivered more FOIA decisions than any other circuit."); *see* Patricia M. Wald, *". . . Doctor, Lawyer, Merchant, Chief,"* 60 GEO. WASH. L. REV. 1127, 1147 (1992) (noting that in 1990, for example, the D.C. Circuit "processed forty-one out of a national total of ninety-three FOIA appeals").

72. *See* Fitzgibbon v. CIA, 911 F.2d 755, 765 (D.C. Cir. 1990) (identifying the three criteria set forth in *Afshar).*

73. *See id.* (reversing the district court by holding the particular location of a CIA station had not been officially acknowledged).

74. Pub. Citizen v. Dep't of State, 11 F.3d 198, 203 (1993) (holding that congressional testimony from a former U.S. Ambassador to Iraq about her meeting with Iraqi President Saddam Hussein did not constitute an official acknowledgement because it was not as specific as the documents Public Citizen requested); *see, e.g.*, *Afshar*, 702 F.2d at 1133–34 (holding that books written by former CIA agents and approved by the Agency's publication review department were not an official acknowledgement).

75. *See, e.g.*, Wilner v. Nat'l Sec. Agency, 592 F.3d 60, 70 (2d Cir. 2009) (rejecting the official acknowledgement argument in reference to the government's Terrorist Surveillance

government agency that the CIA possessed responsive records did not prevent the CIA from withholding essentially the same information under Exemption 1.[76] In another instance, the D.C. Circuit allowed the CIA to invoke Exemption 1 in reply to a request for information that had already been revealed in a book written by a former CIA employee and reviewed by the Agency.[77]

The resistance of the D.C. Circuit to finding official acknowledgment even when information has entered the public domain is an indication of how firmly it defers to the federal government in matters of national security. The D.C. Circuit rarely misses an opportunity to note this deference[78] and admit its reluctance to challenge the government's "unique insights" on national security and foreign relations.[79] As a result, a FOIA requester litigating an Exemption 1 case begins at a distinct disadvantage.[80]

C. Glomar + *Official Acknowledgment* = *?*

Any time the government's *Glomar* response is challenged in court, the defendant agency must justify its response with a responsive declaration.[81] Absent a showing of bad faith in the agency declaration, one of the only remaining ways to puncture the *Glomar* response is to argue that the requested documents have already been officially acknowledged.[82] Only in the past dozen years, however, have courts given much credence to this argument.[83] The first plaintiff to win on this argument in an appellate

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Program, despite the fact the public was aware of the program's existence).

76. Frugone v. CIA, 169 F.3d 772, 774 (D.C. Cir. 1999).

77. *Afshar*, 702 F.2d at 1133.

78. King v. Dep't of Justice, 830 F.2d 210, 217 (D.C. Cir. 1987) ("[T]he court owes substantial weight to detailed agency explanations in the national security context.").

79. *See* Larson v. Dep't of State, 565 F.3d 857, 864 (D.C. Cir. 2009); *see also* Ctr. for Nat'l Sec. Studies v. Dep't of Justice, 331 F.3d 918, 926–27 (D.C. Cir. 2003) ("It is . . . well-established that the [J]udiciary owes some measure of deference to the [E]xecutive in cases implicating national security, a uniquely executive purview.").

80. *See* Jessica Fisher, Note, *An Improved Analytical Framework for the Official Acknowledgement Doctrine: A Broader Interpretation of "Through an Official and Documented Disclosure,"* 54 N.Y.L. SCH. L. REV. 303, 318 (2010) (advocating that the narrow interpretation of "official and documented disclosure" by the courts "creates the potential for censorship to become the starting point, rather than the limited exception").

81. Wilner v. Nat'l Sec. Agency, 592 F.3d 60, 68 (2d Cir. 2009).

82. *See id.* ("In evaluating an agency's *Glomar* response, a court must accord 'substantial weight' to the agency's affidavits, 'provided [that] the justifications for nondisclosure are not controverted by contrary evidence in the record or by evidence of . . . bad faith.'" (alterations in original) (quoting Minier v. CIA, 88 F.3d 796, 800 (9th Cir. 1996))).

83. Nat'l Sec. Archive v. CIA, No. 99-1160, slip op. at 11 (D.D.C. July 31, 2000) (holding that the CIA officially acknowledged the existence of requested biographies and therefore waived its FOIA exemptions); *see* Wolf v. CIA (*Wolf II*), 473 F.3d 370, 380 (D.C.

court, a writer seeking an acknowledgment that the CIA kept records on a Colombian politician, successfully defeated the CIA's *Glomar* response in 2007 as a pro se litigant.[84] In *Wolf v. CIA*,[85] the D.C. Circuit found that the CIA was not entitled to use a *Glomar* response because it had officially acknowledged the existence of records about Jorge Eliecer Gaitan during a congressional hearing in 1948.[86] The court then remanded the case to the district court to determine whether the CIA had to disclose the officially acknowledged records or whether those records could still be withheld in whole or in part pursuant to Exemptions 1 and 3.[87]

While Paul Wolf seems to be the most well-known plaintiff to successfully challenge the government's use of the *Glomar* response, he was not the first. In 2000, the National Security Archive successfully defeated the CIA's *Glomar* response in the District Court for the District of Columbia by using the official acknowledgment doctrine.[88] In an unpublished opinion, district court Judge Colleen Kollar-Kotelly ruled that the CIA waived its opportunity to use a *Glomar* response when the information had been officially made public, noting that "there is no benefit from continued denial."[89] Judge Kollar-Kotelly wrote that the CIA's revelation that it created biographies on *all* world leaders prevented the Agency from using a *Glomar* response to a FOIA request seeking the release of biographies of several former leaders of Eastern European countries.[90]

Although *Wolf* and *National Security Archive* seemingly provide a winning game plan for FOIA litigants, courts have been unsympathetic to those who use the official acknowledgment argument to challenge the government's *Glomar* response. In *Wilner v. National Security Agency*,[91] which concerned the National Security Agency's (NSA's) Terrorist Surveillance Program, the United States Court of Appeals for the Second Circuit ruled that the government "may provide a *Glomar* response to FOIA requests for information gathered under a program whose existence has been publicly revealed."[92] In distinguishing *Wilner* from *Wolf*, the court reasoned that "[a]n agency only loses its ability to provide a *Glomar* response when the existence or nonexistence of the particular records covered by the *Glomar*

Cir. 2007) (holding that the CIA officially acknowledged records pertaining to a former Colombian presidential candidate).

84. *See generally Wolf II*, 473 F.3d 370.
85. *Id.*
86. *Id.* at 379.
87. *Id.* at 380.
88. *See Nat'l Sec. Archive*, No. 99-1160, slip op. at 17.
89. *Id.* at 18.
90. *Id.* at 17.
91. 592 F.3d 60 (2d Cir. 2009).
92. *Id.* at 69.

response has been officially and publicly disclosed."[93]

Perhaps the narrowest interpretation of the official acknowledgment doctrine in the context of *Glomar*ization occurred in 1999, when the D.C. Circuit upheld the CIA's use of the *Glomar* response even when another federal agency seemed to acknowledge the information sought.[94] In *Frugone v. CIA*,[95] the court said an acknowledgment by the Office of Personnel Management (OPM) that the CIA had records responsive to the plaintiff's FOIA inquiry did nothing to prevent the CIA from invoking *Glomar* in response to a request for those records.

> [Frugone's] argument begins and ends with the proposition that the Government waives its right to invoke an otherwise applicable exemption to the FOIA when it makes an "official and documented disclosure" of the information being sought. That observation is inapplicable to the present case, however, for we do not deem "official" a disclosure made by someone other than the agency from which the information is being sought.[96]

Instead, the D.C. Circuit dismissed OPM's acknowledgment as "informal, and possibly erroneous."[97] In the court's interpretation of the official acknowledgment doctrine, only the CIA could waive its own right to invoke an exemption to the FOIA.[98] The *Frugone* holding afforded executive agencies an added layer of protection from the FOIA: whereas agencies once waived exemption protection to information "revealed by an official of the United States in a position to know of what he spoke," *Frugone* effectively limited the scope of officials who could provide official acknowledgment in the *Glomar* context.[99]

II. ANALYSIS

The *Glomar* response is appropriate when the existence or nonexistence of government records is itself a classified fact.[100] Every appellate court that

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93. *Id.* at 70.

94. *See* Frugone v. CIA, 169 F.3d 772, 774 (D.C. Cir. 1999) (declaring that an acknowledgement is not an *official* disclosure when "made by someone other than the agency from which the information is being sought").

95. 169 F.3d 772 (D.C. Cir. 1999).

96. *Id.* at 774 (citation omitted).

97. *Id.* at 775.

98. *Id.*

99. *Compare* Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1370 (4th Cir. 1975) (contrasting mere rumors and speculation by reporters with an official acknowledgment by a reliable government official), *with Frugone*, 169 F.3d at 774 ("[W]e do not deem 'official' a disclosure made by someone other than the agency from which the information is being sought."), *and* Nat'l Sec. Archive v. CIA, No. 99-1160, slip op. at 13 (D.D.C. filed July 31, 2000) ("Only an official disclosure by the CIA can waive a CIA exemption.").

100. *See, e.g.*, Wilner v. Nat'l Sec. Agency, 592 F.3d 60, 68 (2d Cir. 2009) ("The *Glomar*

has considered the issue agrees that the *Glomar* response is appropriate in the national security context—even if the FOIA does not say so directly.[101] Courts have justly permitted the government to neither confirm nor deny the existence of documents related to a specific interrogation technique[102] and the treatment of detainees in Afghanistan.[103] Courts have rightly blessed a *Glomar* response when the seeker of information wanted an acknowledgment, in the form of a FOIA response, as to whether he had been surveilled by the NSA.[104] Clearly then, the permissibility of *Glomar*ization has been an important development in the protection of properly classified information.

However, with such power to conceal comes the possibility of overuse. Scholars note that the *Glomar* response is effective only when there is integrity and consistency in its use, both when the government has records it needs to conceal and when it does not.[105] Further, the frequency with which the government uses the *Glomar* response is tangential to the long-running lament that the government over-classifies information.[106]

Such overarching secrecy is problematic—and not only for those who request information through the FOIA. For an agency to deny what is already widely known undermines our collective trust in government.[107] Thus, Part II will first explain why the government should use a *Glomar* response sparingly. Then, this Part will analyze the inconsistent judicial

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doctrine is well settled as a proper response to a FOIA request because it is the only way in which an agency may assert that a particular FOIA statutory exemption covers the 'existence or nonexistence of the requested records' in a case in which a plaintiff seeks such records."

101. *See* Wessler, *supra* note 20, at 1391; Bassiouni v. CIA, 392 F.3d 244, 246 (7th Cir. 2004).

102. Amnesty Int'l USA v. CIA, No. 07 Civ. 5435, 2010 WL 5421928, at *1–2 (S.D.N.Y. Dec. 21, 2010).

103. ACLU v. Dep't of Def., 389 F. Supp. 2d 547, 565 (S.D.N.Y. 2005).

104. Moore v. Obama, No. 09-5072, 2009 WL 2762827, at *1 (D.C. Cir. Aug. 24, 2009).

105. *See, e.g.*, Wessler, *supra* note 20, at 1396 (recognizing that a *Glomar* response is effective only when the requester believes that the government agency issues identical refusals both when it has responsive records and when it does not).

106. *See* Martin E. Halstuk, *When Secrecy Trumps Transparency: Why the OPEN Government Act of 2007 Falls Short*, 16 COMMLAW CONSPECTUS 427, 461 (2008) (discussing the history of federal agencies overusing the "classified" stamp to create "secret" documents).

107. Nat'l Sec. Archive v. CIA, No. 99-1160, slip op. at 17 (D.D.C. July 31, 2000) ("[T]he CIA has already admitted that it holds a full deck of cards . . . Now the CIA is attempting to deny that it has specific cards. To hold that the CIA has the authority to deny information that it has already admitted would violate the core principles of FOIA without providing any conceivable national security benefit. Indeed, national security can only be harmed by the lack of trust engendered by a government denial of information that it has already admitted.").

decisions in the *Glomar* context.

A. Glomar *Is an Indulgence that the Government Should Use Sparingly*

While there is merit in a FOIA response that allows the government to refuse to confirm or deny the existence of documents, government agencies have often extended the *Glomar*ization concept beyond its logical limits.[108] What began humbly as a rare government indulgence has turned into an increasingly common response since 9/11.[109] Some might even say it has become routine.[110] But it was not the intent of the D.C. Circuit—nor Congress, for that matter[111]—for the *Glomar* response to explode as it has.[112] The *Phillippi* court prescribed "carefully crafted" procedures for government agencies that withhold information through the FOIA and are unable to acknowledge whether responsive records exist.[113] An agency that uses the *Glomar* response and is challenged in court must provide a detailed public declaration explaining the basis for its claim that it can neither confirm nor deny the existence of the requested records.[114] The agency's arguments are then "subject to testing" by the plaintiff, "who should be allowed to seek appropriate discovery when necessary."[115] Finally, "[o]nly after the issues have been identified by this process" may the district court order an in camera review of a classified declaration.[116]

Such judicial supervision would not be so problematic if there were not inherent flaws in the oversight procedures. As noted, the only way that the court reviews an agency's use of the *Glomar* response is through public and,

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108. *See* Danae J. Aitchison, Comment, *Reining in the* Glomar *Response: Reducing CIA Abuse of the Freedom of Information Act*, 27 U.C. DAVIS L. REV. 219, 239 (1993) (highlighting Hunt v. CIA, 981 F.2d 1116 (9th Cir. 1992), as an example of when the CIA abused the *Glomar* response).

109. *See* Wessler, *supra* note 20, at 1388 (explaining that the *Glomar* response had not been addressed in the FOIA or contemplated by Congress when Congress passed the Act).

110. Dempsey, *supra* note 27, at 47 ("Indeed, 'Glomar' responses have become an agency routine.").

111. *See* 132 Cong. Rec. 29,621 (1986) (paraphrasing Phillippi v. CIA (*Phillippi I*), 546 F.2d 1009 (D.C. Cir. 1976) by describing the "manner in which the Federal courts . . . review agency refusals to acknowledge or deny the existence of records").

112. *See Phillippi I*, 546 F.2d at 1013 (adopting procedures consistent with the judiciary's "congressionally imposed obligation to make a *de novo* determination of the propriety" of a *Glomar* response).

113. John Y. Gotanda, Glomar *Denials Under FOIA: A Problematic Privilege and a Proposed Alternative Procedure of Review*, 56 U. PITT. L. REV. 165, 175–76 (1994) (observing that such procedures are meant to safeguard the adversarial process).

114. *Phillippi I*, 546 F.2d at 1013.

115. *Id.*

116. *See id.*

in rare circumstances, in camera declarations.[117] Yet public declarations have become increasingly boilerplate since *Phillippi*[118] and are afforded substantial weight by the courts.[119] Ultimately, courts will likely uphold an agency's *Glomar* response so long as the justifications for nondisclosure are described in "reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemptions, and show that the justifications are not controverted by contrary evidence in the record or by evidence of . . . bad faith."[120] Five circuits have already adopted the *Glomar* response as law.[121] As such, it becomes more accepted with each passing decision. The intense deference shown by courts to government agencies that use the *Glomar* response is one reason why the *Glomar* response is so frequently approved.[122]

B. Dueling Decisions

The deference afforded to the government in matters of national security has created what some have called a new "catch-all 'Tenth Exemption' for intelligence records."[123] At the very least, it has emboldened the government to use the *Glomar* response even when the existence of requested records is already quite obvious.[124] The D.C. Circuit's holding in *Frugone* may be the best such example. Eduardo Frugone said that he served the CIA as a covert employee for fifteen years.[125] In 1990, after he left the CIA, Frugone contacted the Agency asking for a clarification of his retirement status.[126] He received in return written letters from OPM confirming his status as a former CIA employee, providing details

117. *See* Gotanda, *supra* note 113, at 175–76.

118. *See* Wessler, *supra* note 20, at 1392 (suggesting that agencies limit their public affidavits because of the sensitive nature of any existing information).

119. *See* Hunt v. CIA, 981 F.2d 1116, 1119 (9th Cir. 1992).

120. *Id.*

121. *See* Martin Flumenbaum & Brad S. Karp, *Second Circuit Adopts 'Glomar' Doctrine*, 243 N.Y. L.J., Feb. 24, 2010, *available at* LEXIS (listing the First, Second, Seventh, Ninth, and D.C. Circuits as those that have accepted the legality of the *Glomar* response).

122. *See* FOERSTEL, *supra* note 33, at 175 (commenting on the great deference afforded by courts to the intelligence agencies and noting the court-created *Glomar* response is the most prominent manifestation).

123. Brief of Appellants at 4, Wilner v. Nat'l Sec. Agency, 592 F.3d 60 (2d Cir. 2009) (No. 08-4726-cv) (advocating that *Glomar* "must be narrowly construed and sparingly applied"); *see* FOERSTEL, *supra* note 33, at 175 (naming the FBI, CIA, and National Security Agency (NSA) as the biggest benefactors of this deference).

124. *See* Dempsey, *supra* note 27, at 47 (arguing that the CIA has carried its use of *Glomar* to "absurd ends").

125. Brief for Appellant at 3, Frugone v. CIA, 169 F.3d 772 (D.C. Cir. 1999) (No. 97-5199).

126. *Id.*

pertaining to his retirement, and advising him that the CIA retained all of his employment records.[127] When Frugone wrote to the CIA directly, he received a cryptic response from an otherwise-unidentified "Office of Independent Contractor Programs," which determined he was not eligible for retirement benefits.[128] The reply compelled Frugone to make a FOIA request to the CIA asking for all records about his employment with the Agency.[129] The CIA then refused to confirm or deny that it held any such records.[130]

In court, the D.C. Circuit opened its opinion by noting the modesty of Frugone's claim: "No longer does he demand all records concerning himself . . . ; he would now be satisfied with an acknowledgment that the CIA employed him at one time and that it currently has custody of his personnel file."[131] The court then rejected his appeal by ruling that an acknowledgment by OPM did not create an official disclosure.[132]

The D.C. Circuit explained its decision by recognizing the "untoward" consequences that could befall the United States if the CIA were forced to confirm or deny Frugone's employment status.[133] According to the court, an acknowledgment from the CIA could cause even greater diplomatic tension between the United States and Chile than would an acknowledgment by another agency within the government.[134] Yet, without specific discussion as to how release would endanger national security, the court's reasoning seemed to turn more on a technicality—the government agency that had disclosed the information—than any sort of realized risk.[135]

An equally rigid interpretation of the official acknowledgment doctrine in the context of *Glomar* was offered in *Wilner* in 2009.[136] In one sweeping, eighteen-page opinion, the Second Circuit managed to simultaneously adopt the *Glomar* response into its case law while limiting any chance that it

127. *Id.*

128. *Frugone*, 169 F.3d at 773.

129. *Id.*

130. *Id.* at 773–74.

131. *Id.* at 774.

132. *Id.*

133. *See id.* at 775 (relying on the CIA's affidavit that "persuasively" described the consequences of the CIA having to confirm or deny statements made by another agency).

134. *Id.*

135. *Cf.* Fisher, *supra* note 80, at 314 (criticizing the narrow interpretation of the official acknowledgment doctrine in Hudson River Sloop Clearwater, Inc. v. Dep't of Navy, 891 F.2d 414 (2d Cir. 1989) because the decision not to release information pursuant to the FOIA turned on the employment status of a military official).

136. *See* Flumenbaum & Karp, *supra* note 121 (summarizing that the Second Circuit decision sets a high bar for those attempting to obtain records relating to surveillance in matters of national security).

could be genuinely challenged.[137] The *Wilner* case involved twenty-three plaintiffs—all of whom represented detainees at Guantanamo Bay, Cuba—who sought documentation from the NSA and the Department of Justice as to whether their communications had been intercepted under the Terrorist Surveillance Program.[138] The agencies provided a *Glomar* response.[139]

The *Wilner* plaintiffs leaned heavily on the official acknowledgment doctrine throughout litigation.[140] Yet, despite the plaintiffs' claims that at least four members of the Executive Branch had officially acknowledged the existence of the program,[141] the court found the argument unpersuasive. The court explained its conclusion by stating, "The fact that the public is aware of the program's existence does not mean that the public is entitled to have information regarding the operation of the program . . . ."[142] Instead, an agency loses its ability to invoke the *Glomar* response when the existence or nonexistence of "particular records" has been "officially . . . disclosed."[143]

If *Frugone* and *Wilner* represent the narrow end of the official acknowledgment spectrum, then *Wolf* can be found on the broad end. When the D.C. Circuit found the CIA's *Glomar* response invalid in *Wolf* because of prior official acknowledgment, plaintiff Paul Wolf called it a "small victory."[144] Indeed, Wolf had some reason for a muted celebration. Of the thirteen documents the CIA officially acknowledged it possessed, he received only two.[145] Wolf, an author and attorney, thought the CIA

137. *See* Wilner v. Nat'l Sec. Agency, 592 F.3d 60, 68–69 (2d Cir. 2009) (joining its sister circuits in adopting the *Glomar* principle while holding that an agency may use *Glomar* in "response to FOIA requests for information gathered under a program whose existence has been publicly revealed").

138. *Id.* at 65.

139. *Id.* at 66–67.

140. *See* Brief of Appellants at 18–19, *Wilner*, 592 F.3d 60 (No. 08-4726-cv) (explaining the surveillance program had been officially acknowledged and discussed by all key members of the Executive Branch); Plaintiff's Memorandum in Opposition to Defendant's Partial Motion for Summary Judgment Regarding the *Glomar* Response at 19–20, Wilner v. Nat'l Sec. Agency, 2008 WL 2567765 (S.D.N.Y. 2008) (No. 07-civ-3883) (using the official acknowledgement doctrine as its third argument as to the insufficiency of NSA's *Glomar* response).

141. *See* Brief of Appellants at 18–19, *Wilner*, 592 F.3d 60 (No. 08-4726-cv) (listing President Bush, then-Attorney General Alberto Gonzales, CIA Director Michael Hayden, and then-Assistant Attorney General for the Department of Justice Office of Legislative Affairs William Moschella).

142. *Wilner*, 592 F.3d at 70.

143. *Id.*

144. E-mail from Paul Wolf, Plaintiff, Wolf v. CIA (Jan. 16, 2007, 7:26 PM), *available at* http://newsgroups.derkeiler.com/Archive/Soc/soc.culture.colombia/2007-01/msg00015.html.

145. Wolf v. CIA, 569 F. Supp. 2d 1, 5 (D.D.C. 2008), *remanded from* 473 F.3d 370 (D.C.

possessed many more documents related to his search that it did not disclose.[146] But what most troubled Wolf was that a case bearing his name would ultimately stand for the further erosion of the FOIA.[147] An e-mail to a group of supporters on the day of the decision captured his thoughts:

> This case sets the precedent that even if you can prove that documents exist, an agency (not just the CIA but any agency of government) claiming threats to national security does not have to process your Freedom of Information Act request, except to give you copies of what you already have. Thanks a lot.[148]

But Wolf did not give himself enough credit for his victory, however modest. By forcing the CIA to reveal documents that it had withheld through a *Glomar* response, Wolf became only the second FOIA plaintiff to defeat the government's *Glomar* response through the official acknowledgment doctrine in the national security context.[149] The D.C. Circuit held that the CIA waived its ability to provide a *Glomar* response as to the specific records concerning former Colombian politician Jorge Eliecer Gaitan that had already been officially acknowledged in congressional testimony.[150] The court relied on an affidavit from Wolf that alleged then-CIA Director Admiral R.K. Hillenkoetter read from such records in testimony before Congress in 1948.[151] While the district court had ruled against Wolf because it concluded that Hillenkoetter never made a specific reference in his testimony to reading from any report or other official document,[152] the appellate court disagreed.[153] The D.C. Circuit found that Hillenkoetter explicitly read from some excerpts concerning Gaitan and suggested the excerpts were CIA documents containing information typically passed onto the Department of State.[154] "Because the '*specific information at issue*' . . . is the existence *vel non* of 'records about Jorge Eliecer Gaitan,' . . . Hillenkoetter's testimony confirmed the existence

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Cir. 2007).

146. E-mail from Paul Wolf, *supra* note 144.

147. *Id.*

148. *Id.*

149. *See* Wessler, *supra* note 20, at 1394 n.82 (listing Wolf v. CIA (*Wolf II*), 473 F.3d 370 (D.C. Cir. 2007) and Nat'l Sec. Archive v. CIA, No. 99-1160, slip op. (D.D.C. filed July 31, 2000), as the successful challenges to the government's *Glomar* response).

150. *Wolf II*, 473 F.3d at 378.

151. *Id.* at 373.

152. *See* Wolf v. CIA (*Wolf I*), 357 F. Supp. 2d 112, 118 (D.D.C. 2004) ("[T]here is no indication from the transcript that the CIA director was reading from anything more than a prepared statement for the hearing.").

153. *Wolf II*, 473 F.3d at 379 (quoting *Wolf I*, 357 F. Supp. 2d at 118).

154. *Id.*

thereof."[155] Therefore, the court held, the CIA's *Glomar* response did not suffice.[156]

The broadest interpretation of the official acknowledgment doctrine in the *Glomar* context occurred in *National Security Archive*,[157] in which the District Court for the District of Columbia held that the CIA had officially acknowledged it kept biographies on specific European heads of state by admitting that it kept biographies on *all* world leaders.[158] Even so, the court took pains to reemphasize the limits of its holding and the "high hurdle" a plaintiff must overcome to successfully prove an agency has waived its FOIA exemption through official acknowledgment.[159]

The subtle interplay between freedom of information and national security, between official acknowledgment and public awareness, and between *Wilner* and *Wolf,* is no clearer to the courts than it is to scholars. Such subtlety (at best) or ambiguity (at worst) leads to incongruous results and is the reason why the ACLU learned nothing of the CIA's covert drone program,[160] while the National Security Archive succeeded in its request for biographies on European heads of state.[161] It is why Thomas E. Moore III is still unsure whether the CIA kept records on his grandfather, an Icelandic textile merchant who allegedly had ties to the Icelandic Communist Party,[162] while Paul Wolf now possesses some records concerning former Colombian politician Jorge Eliecer Gaitan.[163] This inconsistency demands inspection and resolution.

III. RECOMMENDATIONS

All three branches of the government have an opportunity to ensure the reasonable use of *Glomar*ization. Part III will discuss specific ways in which the government can realize these goals. First, Subpart A will advise how

155. *Id.* (citations omitted).

156. *Id.*

157. No. 99-1160 (D.D.C. July 31, 2000).

158. *See id.* at 16 (reasoning that if the CIA were to disclose that it kept a biography of a specific head of state, it would not be revealing any information that had not already been revealed by the acknowledgment that it kept biographies on all heads of state).

159. *Id.* at 18 (re-affirming the great deference the court shows to the CIA in national security matters).

160. *See* ACLU v. Dep't of Justice, 808 F. Supp. 2d 280, 296 (D.D.C. 2011) (rejecting the ACLU's argument that Leon Panetta officially acknowledged the CIA drone program).

161. *See Nat'l Sec. Archive*, No. 99-1160, slip op. at 17 (granting plaintiff's motion for summary judgment as to the CIA's ability to issue a *Glomar* response).

162. *See* Moore v. CIA, 666 F.3d 1330, 1331 (D.C. Cir. 2011).

163. *See* Wolf v. CIA, 569 F. Supp. 2d 1, 5 (D.D.C. 2008) (noting, on remand, that the CIA identified thirteen field reports about Gaitan referenced in Hillenkoetter's testimony and released two to Wolf).

Executive agencies can better regulate their use of this exceptional response. Then, Subpart B will explain how courts can broadly interpret the official acknowledgment doctrine to prevent overuse of the *Glomar* response. Finally, Subpart C will suggest ways in which Congress can amend the FOIA to set contours for the *Glomar* response.

A. Agencies Should Use Glomar*ization More Responsibly*

If government agencies are at all motivated to use *Glomar*ization responsibly, they can begin by limiting its use when the requested information has officially entered the public domain, either inadvertently or through purposeful disclosure. An example of an arguably inadvertent disclosure can be found in *Frugone*, where OPM stated something in response to a FOIA request that the CIA would neither confirm nor deny.[164] Federal courts have always rejected the notion that official acknowledgment could come from a reporter, an author, or another third-party source,[165] but never before had it considered an acknowledgment from another government agency. In the end, however, the D.C. Circuit treated OPM's acknowledgment as if the executive agency were just another journalist, or some former employee with "uncertain reliability," instead of an official representative of the U.S. government tasked with responding to Frugone's employment inquiries.[166]

A disclosure by the U.S. government, "revealed by an official . . . in a position to know of what he spoke,"[167] should count as an official acknowledgment in the *Glomar* context, no matter how inconvenient or inadvertent the admission. Indeed, the U.S. District Court for the District of Columbia recently held as much, albeit in a slightly different context.[168]

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164. Frugone v. CIA, 169 F.3d 772, 774 (D.C. Cir. 1999) (reminding that Frugone's sole claim on appeal was that because "OPM acknowledged the existence of his relationship with the CIA, so too must the CIA").

165. *See* Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1370 (4th Cir. 1975) ("It is one thing for a reporter or author to speculate or guess that a thing may be so or even, quoting undisclosed sources, to say that it is so; it is quite another thing for one in a position to know of it officially to say that it is so.").

166. *Compare id.* (noting how the public is used to treating reports from uncertain sources with skepticism but would not "discredit reports of sensitive information revealed by an official of the United States in a position to know of what he spoke"), *with Frugone*, 169 F.3d at 775 (calling an acknowledgement by OPM "informal, and possibly erroneous").

167. *See Knopf*, 509 F.2d at 1370 (distinguishing acknowledgements by those "in the know" from those who can only speculate).

168. *See* Memphis Publ'g Co. v. FBI, No. 10-1878, slip op. at 2–3 (D.D.C. Jan. 31, 2012) (the FBI withheld documents pursuant to FOIA Exemptions 6 and 7, in addition to using an "exclusion," which allowed it to flatly deny the existence of other requested documents).

In *Memphis Publishing Company v. FBI*,[169] the FBI sought to withhold information concerning a possible informant even though it had previously released documents that seemed to already confirm the subject's status as a confidential informant.[170] The FBI argued that the court should not find "official confirmation"[171] in an inadvertent acknowledgment.[172] The District Court disagreed, suggesting that a fact has been confirmed whether done purposefully or inadvertently.[173] Executive agencies that invoke the *Glomar* response should hold themselves to similar standards. An inadvertent acknowledgment of information is an acknowledgment nonetheless.

Agencies could further limit *Glomar*ization by no longer using the *Glomar* response in response to requests for information that has been purposefully placed in the public domain, either through strategic, anonymous leaks or other back channels. An example of a purposeful disclosure occurred soon after the targeted killing of al-Awlaki, the al-Qaeda terrorist who was reportedly killed in a CIA drone strike in September 2011.

For years, the U.S. government continually refused to officially acknowledge the CIA's covert drone program, despite the fact that most learned citizens were already aware of its existence.[174] Even the word "drone" had been considered classified, with high-ranking government employees taking pains to avoid it in conversation.[175] Indeed, any utterance of the word "drone" by government officials had almost always been made anonymously,[176] which led one skeptic to conclude that "the only consequence of pretending that it's a secret program is that the courts don't play a role in overseeing it."[177]

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169. No. 10-1878 (D.D.C. Jan. 31, 2012).

170. *Id.* at 6–7.

171. *Id.* at 9 (using an "official confirmation" standard as opposed to the official acknowledgment standard because the case involved an "exclusion" instead of an exemption such as 1 or 3).

172. *See id.* at 18–19 (making the argument that the FBI cannot provide official confirmation unless it intended to do so).

173. *Id.* at 19 ("[T]he word confirmation simply means that a fact has been established, not that it was formally or purposefully announced.").

174. *See* Scott Shane, *A Closed-Mouth Policy Even on Open Secrets*, N.Y. TIMES, Oct. 5, 2011, at A18 (noting the secrecy surrounding a program that is already "old news").

175. *Id.*

176. *See* Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES, Oct. 9, 2011, at A1, A12 (describing the legal justifications for killing an American citizen in a drone strike by interviewing, and granting anonymity, to those who read the legal memo).

177. Karen DeYoung, *After Obama's Remarks on Drones, White House Rebuffs Security Questions*, WASH. POST, Jan. 31, 2012, http://www.washingtonpost.com/world/national-security/after-obamas-remarks-on-drones-white-house-rebuffs-security-questions/2012/01/31/gIQA9s2LgQ_print.html (quoting ACLU Deputy Legal Director Jameel Jaffer).

The linguistic discipline allowed government agencies to continue to withhold information pertaining to the covert program—the legal justification for the targeted killing of al-Awlaki is one prime example—by using a *Glomar* response to neither confirm nor deny the existence of the requested records.[178] The government did just that, despite describing the legal justification for the al-Awlaki killing to *New York Times* reporter Charlie Savage, who wrote about the oft-requested justification memorandum on October 8, 2011.[179] Savage described in detail the legal justification for the targeted strike[180] and simultaneously filed a FOIA request for the document that had just been so clearly relayed to him.[181] The Department of Justice provided a *Glomar* response in return.[182] In essence, it appears "the [A]dministration invoke[d] secrecy to shield the details while simultaneously deploying a campaign of leaks to build public support" for the drone program.[183] Depending on one's viewpoint, the secrecy compulsion makes the government look either silly[184] or self-serving[185]—especially in light of Brennan's speech at the Wilson Center.[186]

The ACLU recently filed a lawsuit in the District Court for the Southern

178. *See* Complaint for Injunctive Relief ¶ 8, ACLU v. Dep't of Justice, No. 12-civ-0794 (S.D.N.Y. Feb. 1, 2012).

179. *See* Savage, *supra* note 176, at A1, 1A2 (noting that "The government has . . . resisted growing calls that it provide a detailed public explanation" of its justification to kill an American citizen).

180. *See id.* (explaining that the legal analysis concluded that "al-Awlaki could be legally killed, if it was not feasible to capture him, because intelligence agencies said he was taking part in the war between the United States and Al Qaeda").

181. *See* Complaint at ¶¶ 10, 11, N.Y. Times Co. v. Dep't of Justice, No. 11-civ-9336 (S.D.N.Y. Dec. 20, 2011) (showing Savage submitted a FOIA request to the DOJ's Office of Legal Counsel (OLC) on October 7, 2011, one day before his al-Awlaki article appeared in print).

182. *See id.* at ¶ 46 ("DOJ OLC stated that it 'neither confirms nor denies the existence of the documents described in your request'. . . .").

183. *See* Arthur S. Brisbane, *The Secrets of Government Killing*, N.Y. TIMES, Oct. 9, 2011, at A12 (positing that for newspapers to allow the government to invoke secrecy, while anonymously leaking information to further policy, gives the appearance of "manipulation"); *see also* Mark Hosenball & Phil Stewart, *Agencies Ordered to Preserve Records in Leak Probes*, REUTERS (June 26, 2012, 3:25 PM), http://www.reuters.com/article/2012/06/26/us-usa-security-leaks-idUSBRE85P1CL20120626 (noting that the Department of Justice chose not to investigate "drone leaks"—as opposed to leaks about the role of cyber-warfare against Iran and a foiled plot to blow up a U.S. airliner—because "administration officials, including Brennan and President Barack Obama, publicly talked about drone attacks, undermining the legal premise for any investigation").

184. *See* Shane, *supra* note 174 (calling it "silly" that obvious facts were excised from recent memoirs by former intelligence officials).

185. *See* Brisbane, *supra* note 183 (advocating that "the public should have documented details concerning civilian casualties of the drone strikes").

186. *See* Hosenball & Stewart, *supra* note 183.

District of New York against several government agencies, including the CIA, challenging the continued use of *Glomar* responses to its requests for the legal justification behind the al-Awlaki attack.[187] The *New York Times* filed a similar lawsuit in the same district challenging the government's reply to its FOIA requests seeking information on targeted killing. And soon the D.C. Circuit will rule on the appeal from *ACLU v. Department of Justice*[188]—*ACLU v. CIA*[189]—in which it will determine whether the CIA waived its right to issue a *Glomar* response when Brennan and others within the Executive Branch publicly discussed the drone program.[190] The ACLU, of course, believes it has.[191]

Refusing to acknowledge the existence or nonexistence of documents pursuant to a FOIA request, while simultaneously leaking information to the press in furtherance of public policy, undermines the spirit of the FOIA and possibly the rule of law.[192] As such, agencies can themselves promote the responsible use of the *Glomar* response by limiting their use of the response in similar situations.[193]

B. Courts Should Broadly Construe the Official Acknowledgment Doctrine to Prevent Glomar *Misuse*

Although courts must afford proper deference to the Executive Branch in matters of national security,[194] such deference does not discharge them of their duty to provide a meaningful de novo review.[195] Indeed, "too

187. Complaint for Injunctive Relief ¶ 38, ACLU v. Dep't of Justice, No. 12-civ-0794 (S.D.N.Y. Feb. 1, 2012).

188. 808 F. Supp. 2d 280 (D.D.C. 2011), *appeal docketed sub nom*. ACLU v. CIA, No. 11-5320 (D.C. Cir. filed Nov. 9, 2011).

189. ACLU v. CIA, No. 11-5320 (D.C. Cir. filed Nov. 9, 2011).

190. *See* Brief for Appellee at 39–40, *ACLU v. CIA*, No. 11-5320 (D.C. Cir. May 21, 2012) (contending that Brennan never officially acknowledged the CIA's involvement in the drone program because he merely acknowledged the U.S.'s involvement in drone strikes without mentioning the CIA); *see also* DeYoung, *supra* note 177 (describing an online town hall meeting sponsored by Google in which President Obama, responding to a question from "Evan in Brooklyn," twice used the word "drone").

191. Brief for Plaintiffs-Appellants at 6, *ACLU v. CIA*, No. 11-5320 (D.C. Cir. March 15, 2012) ("Indeed, upholding the CIA's *Glomar* response here would serve only to harness the Court's institutional authority to a transparent fiction.").

192. *See* Brisbane, *supra* note 183 (criticizing the Government's refusal to provide a "detailed legal justification" for the drone program by quoting Hina Shamsi, the head of the ACLU's National Security Project).

193. In addition, the Executive Branch could theoretically amend Executive Order 13,526, 75 Fed. Reg. 707 (Jan. 5, 2010) on classified national security information to provide contours for the *Glomar* response.

194. *See supra* note 79 and accompanying text.

195. *See* Patricia M. Wald, *Two Unsolved Constitutional Problems*, 49 U. PITT. L. REV. 753,

much . . . deference may be as great a danger to popular government as too little."[196] One way in which courts could curb the misuse of the *Glomar* response, without sacrificing the appropriate deference, is by lending more credence to the official acknowledgment doctrine. The D.C. Circuit has already proven willing to broadly construe the doctrine.[197] Moving forward, other circuits should recognize the doctrine as the most viable and logical check on the *Glomar* response. Designating official acknowledgment as not only a means to obtain information but also a bulwark to the *Glomar* response might compel courts to more seriously consider the doctrine.

Courts could also require a fuller public affidavit.[198] In camera affidavits are meant to be a last resort for the courts,[199] and they should not be used to entirely undercut the public record.[200] The government already holds significant advantages over document requesters in the FOIA context; more exacting oversight could serve to neutralize the playing field.[201]

C. Congress Should Amend the FOIA to Explicitly Address Glomar*ization*

Finally, if neither agencies nor courts are willing to curb *Glomar*ization, Congress could codify and establish the contours for it by explicitly authorizing it in an amendment to the FOIA. As unlikely as it now seems for agencies and courts to change their momentum on this issue, congressional action may be necessary.[202] The D.C. Circuit seemed to

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760–61 (1988) ("Probing even a little into national security matters is not an easy or a pleasant job . . . But if they honor the statutory command, judges must conscientiously make the inquiry to the best of their ability . . . .").

196. *Id.* at 761.

197. *See* Wolf v. CIA (*Wolf II*), 473 F.3d 370, 379 (D.C. Cir. 2007) (finding that the CIA's *Glomar* response did not suffice because the Director read excerpts from CIA records that seemed to officially acknowledge the existence of the requested material).

198. *See* Aitchison, *supra* note 108, at 252 (arguing that a more complete public record would help plaintiffs challenge an agency's rationale for the *Glomar* response).

199. *See* Phillippi v. CIA (*Phillippi I*), 546 F.2d 1009, 1013 (D.C. Cir. 1976) (recognizing that a problem of in camera reviews is that they are undertaken without challenge from the party attempting to force disclosure); *see also* Aitchison, *supra* note 108, at 251 (urging Congress to direct courts to use in camera affidavits only as a last resort).

200. *See Phillippi I*, 546 F.2d at 1013 ("Only after the issues have been identified by this process should the District Court, if necessary, consider arguments or information which the Agency is unable to make public.").

201. *See* Robert G. Vaughn, *Administrative Alternatives and the Federal Freedom of Information Act*, 45 OHIO ST. L.J. 185, 192 (1984) (explaining that the government's control of a document and knowledge of its character in relation to the requester is an advantage in the FOIA context).

202. *See* Christina E. Wells, "*National Security" Information and the Freedom of Information Act*, 56 ADMIN. L. REV. 1195, 1221 (2004) (predicting that agency officials will inevitably withhold too much even amidst judicial oversight).

acknowledge as much in *Public Citizen v. Department of State*.[203] There, the court considered whether the State Department had waived its ability to withhold specific records concerning a meeting between then-U.S. Ambassador to Iraq April Gilaspie and Iraqi President Saddam Hussein, in light of the Ambassador's public admission that she met with Hussein.[204] The court ruled in favor of the State Department,[205] but concluded the opinion by noting its unease with the result:

> Public Citizen's contentions that it is unfair, or not in keeping with FOIA's intent, to permit State to make self-serving partial disclosures of classified information are properly addressed to Congress, not to this court. We are bound by the law of this circuit. . . If the [L]egislature believes that this outcome constitutes an abuse of the agency's power to withhold documents under exemption 1, it can so indicate by amending FOIA.[206]

Amending the FOIA to adopt *Glomar*ization would not be without precedent. In 1986, Congress amended the FOIA to include "exclusions," which provide law enforcement agencies the ability to treat certain agency records as "not subject to the requirements" of the Act.[207] Agencies such as the FBI and Drug Enforcement Administration could therefore use an exclusion to "respond to the [FOIA] request as if the . . . records did not exist."[208] The legislative history of the amendments, and a subsequent memorandum from Attorney General Edwin Meese III, suggest these law enforcement exclusions were seen as an expansion of the *Glomar* response—a way to protect certain information when *Glomar*ization is "simply . . . inadequate."[209] The Attorney General hailed the exclusions as special, yet necessary, protections.[210] Yet, in amending the FOIA to specifically codify exclusions, Congress completely bypassed the concept on which exclusions were premised: *Glomar*ization.[211]

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203. 11 F.3d 198 (D.C. Cir. 1993).

204. *Pub. Citizen v. Dep't of State*, 11 F.3d 198, 199 (D.C. Cir. 1993).

205. *Id.* at 203–04.

206. *Id.* at 204.

207. 5 U.S.C. § 552(c)(1)–(c)(3) (2006).

208. Attorney Gen.'s Memorandum on the 1986 Amendments to the Freedom of Info. Act for Exec. Dep'ts and Agencies Concerning the Law Enforcement Amendments (Dec. 1987) [hereinafter Meese Memorandum] (on file with the Dep't of Justice), *available at* http://www.justice.gov/oip/86agmemo.htm.

209. *See* 132 CONG. REC. 29,616 (1986) (statement of Rep. English) (referring to the proposed exclusions mistakenly as "*Glomar* exclusions"); *see also* Meese Memorandum, *supra* note 208.

210. Meese Memorandum, *supra* note 208 (explaining that the (c)(1) exclusion covers situations in which the mere exemption protection afforded by Exemption 7(A) is inadequate to the task).

211. *Id.* ("It is precisely because '*Glomarization*' inadequately protects against the particular harms in question that the more delicate exclusion mechanism, which affords a

Even remedial legislation could instruct agencies and prevent misuse. Congress should not hamstring executive agencies by telling them when and in what capacity they can use a *Glomar* response. Instead, it should mandate when the *Glomar* response cannot be used—the most logical situation being when information requested is already widely acknowledged, either inadvertently or purposefully.

CONCLUSION

The *Glomar* response is, and will remain, an important element of our national security. It should not be eliminated. However, it should be used responsibly and in moderation. In *ACLU v. Department of Defense*,[212] the court presciently stated, "The danger of *Glomar* responses is that they encourage an unfortunate tendency of government officials to over-classify information, frequently keeping secret that which the public already knows, or that which is more embarrassing than revelatory of intelligence sources or methods."[213] Covert programs are no longer covert when they have been leaked anonymously to the newspapers by government officials or trumpeted in press briefings. The *Glomar* response, as it stands now, allows the government to publicize its successes, to influence policy, and to kill an American citizen, all while also enjoying near-impenetrable protection from the FOIA. The government has a responsibility to keep its citizens safe. Surely it can do so without subverting their trust.

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higher level of protection, sometimes must be employed.").

212. 389 F. Supp. 2d 547 (S.D.N.Y. 2005).

213. *Id.* at 561.

RECENT DEVELOPMENTS

DISMANTLING A DUAL-HEADED SYSTEM OF GOVERNANCE: HOW A REGULATORY OVERLAP UNDERCUTS THE SECURITY OF STUDENT HEALTH INFORMATION IN PUBLIC SCHOOLS

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INTRODUCTION

State and local education programs have grown to serve nearly all Americans. As the needs of American students and families change, regulations surrounding public education develop in response. Most notably, the formation of the Department of Education (ED) in 1980, following the passage of the Department of Education Act, signaled the emergence of increased federal regulation of the education system.[1] Federal oversight of state and local education systems has not been limited to the establishment of a federal administrative agency; instead, evolving American culture and technological innovations have precipitated the adoption of various federal statutes that govern key issues in the realm of education. For example, methods for regulating and protecting the use of student health information have necessarily evolved since the reign of the Department of Health, Education, and Welfare, the predecessor of today's Department of Education. Today, when bullying and student-on-student violence are all too widespread,[2] two separate statutes—the Family Educational Rights and Privacy Act (FERPA)[3] and the Health Insurance

1. *Historical Highlights*, U.S. DEP'T OF HEALTH & HUMAN SERVS., http://www.hhs.gov/about/hhshist.html (last visited Aug. 7, 2012).

2. *See infra* Part III.C.

3. 20 U.S.C. § 1232g (2006 & Supp. IV 2011).

Portability and Accountability Act (HIPAA)[4]—govern the privacy of student health information. These overlapping statutes ultimately lead to stakeholder confusion, hindering the role that student health information should play in ensuring the safety of students, faculty, and staff at public schools.

FERPA, enacted in 1974, regulates the availability, disclosure, and use of student education records maintained by educational institutions that receive funds from the federal government.[5] In 1996, Congress adopted HIPAA to regulate the privacy and security of health information, including some student health information maintained by FERPA-covered educational institutions.[6] While ED implements FERPA, the Department of Health and Human Services (HHS) implements the HIPAA statute.[7] The implications of these statutes, and the corresponding decisions of the statutes' governing administrative agencies, are far-reaching for all stakeholders in the field of education, including parents, providers of school-based health services (such as school nurses), school administrators, and, of course, students.

Unfortunately, regulating student health information through two separate federal statutes—further monitored by two separate administrative agencies—does little to either protect the privacy of student health information or ensure that this information is used to address student medical needs. In fact, the statutes' complicated provisions and overlapping regulations lead to confusion and, ultimately, stakeholder inaction or error in decisionmaking.[8] This Article explains the inefficiencies

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4. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 42 U.S.C.).

5. *See, e.g.*, Lynn M. Daggett, *FERPA in the Twenty-First Century: Failure to Effectively Regulate Privacy for All Students*, 58 CATH. U. L. REV. 59, 61–63 (2008) (providing an overview of the key functions of the Family Educational Rights and Privacy Act (FERPA)).

6. *See* CHRISTINE R. WILLIAMS, FERPA, GLBA, & HIPAA: THE ALPHABET SOUP OF PRIVACY 9 (2007) (providing the Health Insurance Portability and Accountability Act's (HIPAA's) legislative history).

7. *See HIPAA and FERPA: An Update on Privacy Rules*, CTR. FOR HEALTH & HEALTH CARE IN SCH., http://www.healthinschools.org/en/News-Room/EJournals/Volume-6/~/link.aspx?_id=A7F32C8B766A448F8393244FBDCCA240&_z=z (last visited Aug. 7, 2012) (discussing the overlap of HIPAA and FERPA and the administrative agencies that oversee each respective statute).

8. *See* Abigail English, *The HIPAA Privacy Rule and FERPA: How Do They Work in SBHCs?*, NAT'L ASSEMBLY ON SCH.-BASED HEALTH CARE, http://ww2.nasbhc.org/RoadMap/PUBLIC/TAT_HIPPA_FERPA1.pdf (last visited Aug. 7, 2012) (describing common misunderstandings of the FERPA–HIPAA regulatory overlap); *School Health Nurse's Role in Education: Privacy Standards for Student Health Records*, NAT'L ASS'N OF SCH. NURSES (July 2004), http://www.nasn.org/Portals/0/briefs/2004briefprivacy.pdf [hereinafter *Privacy Standards for Student Health Records*] (describing the difficulty school nurses encounter when

created by this system of protecting student health information and argues that simplification of the system will have far-reaching advantages for all stakeholders in the field of public education. Among such advantages is an increase in campus safety: simplification of this dual-headed system of governance will empower education stakeholders to avoid schoolhouse tragedies such as the 2007 mass shooting at Virginia Tech, which is commonly attributed in large part to stakeholder misunderstanding of the FERPA–HIPAA regulatory overlap. To begin, Part I of this Article briefly outlines the role of education records in the modern system of American public education. Next, Part II provides background information concerning the adoption and subsequent implementation of both FERPA and HIPAA. Part III discusses the intersection and overlap of these two privacy statutes in the protection of student health information and illuminates the difficulties inherent in this dual-headed system of governance. Likewise, Part IV discusses the contemporary, troubling student–safety implications of this inefficient system of protecting student health information. Finally, Part IV recommends (A) the abandonment of the FERPA statute as it relates to student health records and (B) the subsequent strengthening of the HIPAA statute to achieve a system of protecting student health information that is efficient, purposeful, and unambiguous for all stakeholders working to ensure the success of our public education system and the welfare of our students.

I. THE ROLE OF STUDENT HEALTH RECORDS IN MODERN PUBLIC EDUCATION

Before analyzing the statutory mechanisms that federal administrative agencies use to monitor and regulate student health records maintained by public schools, it is first necessary to develop an understanding of the role these records assume in the modern-day education system. Such an understanding will highlight the deficiencies inherent in the current system and underscore the urgency with which Congress must revise this dual-headed system of governance.

Public schools across the country accumulate a wide range of information about students.[9] Understandably, some commentators defend

navigating the FERPA–HIPAA regulatory overlap); *see generally* Richard Brusca & Colin Ram, *A Failure to Communicate: Did Privacy Laws Contribute to the Virginia Tech Tragedy?*, 17 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 141 (2010) (discussing the difficulties experienced by Virginia Tech stakeholders in the interpretation of HIPAA and FERPA guidelines and the resultant procedural inaction that led to the 2007 campus shooting).

9. *See* Louis P. Nappen, *The Privacy Advantages of Homeschooling*, 9 CHAP. L. REV. 73, 73–74 (2005) (detailing the "sundry of personal information" that public schools collect and maintain about students, including "residential data, discipline reports, test scores and

the assimilation of varied student information as necessary to aid educators in their quest to push students to "their fullest educational potential."[10] Additionally, as public schools are an extension of the government, record keeping in the public education sector is sometimes viewed as an indispensible administrative task.[11]

A substantial portion of the record keeping occurring in public schools concerns student health information.[12] Student health records are frequently developed, reviewed, and disposed of by various stakeholders within the field of education, including school nurses, guidance counselors, school psychologists, and special education teachers. While some of the information contained within student health records is undoubtedly personal in nature, many experts contend that the maintenance of such records is necessary to ensure "efficient and effective school health service programs."[13] Student health records may have importance outside of the schoolhouse setting as well.[14] For example, for those students who rely on school-based medical professionals[15] for the entirety of their respective health care needs, student health records represent the only documentation of a student's personal medical history.[16] Additionally, in our increasingly

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comparative rankings, registration and classification records, medical accounts and psychological assessments").

10. Susan P. Stuart, *Lex-Praxis of Education Informational Privacy for Public Schoolchildren*, 84 NEB. L. REV. 1158, 1195 (2006).

11. *See id.* (noting that record keeping in schools is necessary to "sustain the schools' governmental function").

12. *Cf.* Gregory E. Siegler, *What Should Be the Scope of Privacy Protections for Student Health Records? A Look at Massachusetts and Federal Law*, 25 J.L. & EDUC. 237, 238 (1996) (delineating the types of student health information that schools frequently document); *School Nurse Role in Education: School Health Records*, NAT'L ASS'N OF SCH. NURSES (July 2004), http://www.nasn.org/Portals/0/briefs/2004briefrecords.pdf [hereinafter *School Nurse Role in Education*] (describing the types of student health records that school nurses commonly maintain, including "immunization records, screening records, progress notes, physician orders, physical examination records, medication and treatment logs, individualized health care plans, emergency health care plans, third party medical records, consent forms, Medicaid and other insurance billing forms, and flow charts").

13. Siegler, *supra* note 12, at 238; *accord* Stuart, *supra* note 10, at 1181 (describing the "health and safety purposes" of maintaining adequate student health records in public schools).

14. The National Association of School Nurses reports that school-based health professionals maintain student health records for a variety of purposes, including purposes related to accrediting and licensing, research, and education functions. *See School Nurse Role in Education*, *supra* note 12.

15. For the purposes of this Article, "school–based medical professionals" refers to those stakeholders working within the public education field that use and generate student health information in the completion of their duties. Such positions include, but are not limited to, school nurses, special education teachers, and guidance counselors.

16. *See* Siegler, *supra* note 12, at 237 (noting that students who do not visit medical

litigious society, school-based health professionals increasingly rely on comprehensive and complete student health documentation to protect themselves from liability in malpractice lawsuits.[17]

While student health information is valuable for a multitude of reasons both inside and outside the school setting, all stakeholders must recognize the importance of maintaining the privacy of sensitive student health information.[18] Further, professional organizations such as the National Association of School Nurses frequently advocate for increased protection of student health information.[19] Unfortunately, complicated federal statutes that fail to adequately and effectively regulate the use of student health information countermand the important privacy interests of these stakeholders and practitioners.

II. A BRIEF HISTORY—AND CRITIQUE—OF THE FERPA AND HIPAA STATUTES

A. The Family Educational Rights and Privacy Act (FERPA)

President Gerald Ford signed FERPA, sometimes referred to as the Buckley Amendment, into law in August 1974.[20] FERPA serves to protect student information contained within education records by controlling access to such records, enabling authorized individuals to amend these records, and empowering protected parties to review their own records.[21]

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professionals outside of the school setting rely on the detailed medical information contained within their respective student health records). Reliance on student health records is perhaps especially important for college students, as these students frequently attend campuses away from their hometown health care providers and, consequently, rely exclusively on services offered by school-based medical professionals.

17. *Id.* at 238 (quoting NADINE SCHWAB, NATIONAL ASSOCIATION OF SCHOOL NURSES, GUIDELINES FOR SCHOOL NURSING DOCUMENTATION: STANDARDS, ISSUES, AND MODELS 8–9 (1991)) ("Inadequate or absent documentation has been a critical factor in several cases decided against school nurses.").

18. For instance, school-based medical professionals argue that the integrity of physician–patient privilege is compromised when schools do not adequately protect student health records. Similarly, parents and students may have an interest in preventing the disclosure of sensitive student health information from public schools to other government agencies, such as U.S. Immigration and Customs Enforcement. *See* Siegler, *supra* note 12, at 241.

19. *See, e.g.*, *School Nurse Role in Education*, *supra* note 12 (recommending protective measures that school nurses should undertake to ensure the protection of student health records in an era of increasing reliance on technology).

20. *See, e.g.*, CLIFFORD A. RAMIREZ, FERPA CLEAR AND SIMPLE: THE COLLEGE PROFESSIONAL'S GUIDE TO COMPLIANCE 16 (2009) (detailing the origins and history of FERPA).

21. *See* DANIEL R. MURPHY & MIKE L. DISHMAN, EDUCATIONAL RECORDS: A

Further, as spending clause legislation, ED enforces FERPA's provisions through the disbursement or rescission of federal education funds.[22] Specifically, the Family Policy Compliance Office (FPCO) within ED is charged both with investigating and reviewing complaints of institutional noncompliance and with providing support to those educational entities seeking to achieve greater compliance with the mandates of the Act.[23] The FPCO maintains the exclusive burden of enforcing FERPA compliance, as the Supreme Court has held that individuals do not have the right to bring action under FERPA when an educational institution violates the Act's provisions.[24]

1. Defining Education Records: Ambiguity in FERPA's Provisions

The provisions of FERPA have been contested and questioned frequently since the Act's inception nearly four decades ago. Particularly, debate has recurrently focused on the meaning of "education records"[25]—

PRACTICAL GUIDE FOR LEGAL COMPLIANCE 2 (2010) (commenting that, insofar as such access to records is concerned, FERPA "remains the primary federal law governing educational records"); *see also* Daggett, *supra* note 5, at 62 (discussing the "essential requirements" of the Act).

22. By enacting FERPA pursuant to its spending power, Congress conditioned the receipt of federal education funds on an educational institution's compliance with FERPA student privacy regulations. *See* 20 U.S.C. § 1232g(f) (2006) (empowering the Secretary of the Department of Education (ED) to "terminate assistance . . . if the Secretary finds there has been a failure to comply with this [Act], and he has determined that compliance cannot be secured by voluntary means"); *see also* Robert W. Futhey, Note, *The Family Educational Rights & Privacy Act of 1974: Recommendations for Realigning Educational Privacy with Congress' Original Intent*, 41 CREIGHTON L. REV. 277, 278 (2008) (noting that Congress enacted FERPA "pursuant to its spending power under Article I of the U.S. Constitution").

23. *See* 34 C.F.R. § 99.60 (1993) (designating the Family Policy Compliance Office (FPCO) as responsible for handling complaints and providing "technical assistance to ensure compliance with the Act"); *see also* 20 U.S.C. § 1232g(g) (providing authority for the Secretary of Education to "establish . . . an office . . . for the purpose of investigating, processing, reviewing, and adjudicating violations of [FERPA]").

24. *See* Gonzaga Univ. v. Doe, 536 U.S. 273, 290 (2002) (holding that FERPA does not provide students or other interested parties a private right to sue universities for damages resulting from violations of the FERPA privacy provisions); Futhey, *supra* note 22, at 309 (noting that the only action a parent or student may take to ensure that an educational entity complies with the provisions of FERPA is to file a complaint with the FPCO, which may subsequently review and investigate the complaint).

25. Currently, FERPA defines "education records" as "those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." *See* 20 U.S.C. § 1232g(a)(1)(D)(4)(A). There are six exceptions to this definition of education records: sole possession records; law enforcement records; employment records; medical records; alumni records; and peer-graded papers before they are collected and recorded by a teacher. RAMIREZ, *supra* note 20, at 36.

the very interest that the Act purports to protect. In fact, within only six weeks of the Act's adoption, Congress amended FERPA to better identify the types of student information that constitute education records.[26] Subsequent amendments and litigation have focused on various exceptions to FERPA's amended definition of education records. Most famously, the Supreme Court in *Owasso Independent School District v. Falvo*[27] considered whether education records under FERPA included peer-graded papers.[28] Ultimately, the Court found that such papers do not constitute education records within the meaning of FERPA.[29] Additionally, the Court in *Falvo* implied that education records under FERPA should be limited to those records maintained in a central file by a "central custodian."[30] While the Court announced this interpretation of student records as mere dicta,[31] leading scholars contend that such a definition of education records is incorrect and counter to the purpose of FERPA.[32] In fact, ED has declined to accept the Court's interpretation.[33] Likewise, lower courts have not adopted the Supreme Court's dicta in any subsequent decisions.[34] Due to amendments and evolving case law, practitioners in the field of public education—and even the Justices of the Supreme Court—struggle to uniformly interpret the basic provisions of FERPA.

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26. *See* Lynn M. Daggett & Dixie Snow Huefner, *Recognizing Schools' Legitimate Educational Interests: Rethinking FERPA's Approach to the Confidentiality of Student Discipline and Classroom Records*, 51 AM. U. L. REV. 1, 13 (2001) (calling FERPA's original definition of education records a "laundry list" and noting that the amended definition remains in place today).

27. 534 U.S. 426 (2002).

28. *Id.* at 428.

29. *Id.* at 436 (holding that, when the peer-grading method is used in the classroom, "the grades on students' papers would not be covered under FERPA at least until the teacher has collected them and recorded them" in a grade book).

30. *Id.* at 435 (stating that "FERPA implies that education records are institutional records kept by a single central custodian" and differentiating such a custodian from the student graders at issue in the case).

31. Daggett, *supra* note 5, at 72.

32. *See id.* at 70, 73–75 (noting that the Court's interpretation "is not supported by, and in fact is inconsistent with, the plain language of FERPA's current definition of education records").

33. *See id.* at 74 (noting that ED has not "interpreted FERPA records to be limited to those in a central file").

34. *See, e.g.*, United States v. Miami Univ., 294 F.3d 797 (6th Cir. 2002) (holding that student discipline records, although not maintained in a central file, constitute education records under FERPA); *see also* Daggett, *supra* note 5, at 74 (reporting that "courts . . . before and after *Falvo* have [not] interpreted FERPA records to be limited to those in a central file").

2. Aligning FERPA with the Needs of a Changing Society

Legislation ensuring the privacy of student records and personal information necessarily must evolve as society and the operational needs of educational institutions change over time. Over the past several decades, FERPA has required updates and amendments in order to remain relevant in the shifting educational landscape.[35] Major events such as the launch of the War on Drugs, the terrorist attacks of September 11, 2001, and the 2007 Virginia Tech shootings have precipitated various modifications of FERPA's provisions.[36] Since its inception, the FERPA regulations have been amended at least ten times to meet the changing needs of society and students.[37] Most recently, in April 2011, ED issued yet another notice of proposed rulemaking for FERPA, highlighting the ongoing need to align FERPA's privacy protections with the needs of a changing society.[38]

B. The Health Insurance Portability and Accountability Act of 1996 (HIPAA)

The 104th Congress enacted HIPAA in August 1996.[39] The Act was adopted to serve various enumerated purposes; among these purposes, the Act seeks to combat waste and fraud in the insurance field, to improve access to health care services, to simplify the administration of health

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35. *See* RAMIREZ, *supra* note 20, at 18 (noting that "changing business and social landscape[s]" have necessitated the modification of FERPA); Megan M. Davoren, Comment, *Communication as Prevention to Tragedy: FERPA in a Society of School Violence*, 1 ST. LOUIS U. J. HEALTH L. & POL'Y 425, 455–56 (2008) (arguing that prevalent social issues within schools—here, school violence—compel the amendment of FERPA).

36. *See, e.g.*, Brusca & Ram, *supra* note 8, at 167–68 (discussing changes to FERPA regulations and guidance documents promulgated following the shootings at Virginia Tech); *see also* RAMIREZ, *supra* note 20, at 18–19 (listing various national events that precipitated changes to the text of FERPA); *cf.* Lloyd I. Sederer & Henry Chung, *So, Your Child Is Going Off to College . . . Drinking, Drugs, Depression and Dealing with Colleges and Universities*, HUFFINGTON POST (Aug. 13, 2009, 11:34 PM), http://www.huffingtonpost.com/lloyd-i-sederer-md/so-your-child-is-going-of_b_258998.html (describing the nuanced role of privacy regulations in the reporting of illegal student drug and alcohol use).

37. *See* RAMIREZ, *supra* note 20, at 19 (discussing historical modifications and revisions of the FERPA statute).

38. *See* Family Educational Rights and Privacy, 76 Fed. Reg. 75,604 (Dec. 2, 2011) (to be codified at 34 C.F.R. pt. 99). The amendments adopted by ED, following the completion of the requisite notice-and-comment period, aim to more closely align the provisions of FERPA with the America Creating Opportunities to Meaningfully Promote Excellence in Technology, Education, and Science Act (COMPETES Act) and the American Recovery and Reinvestment Act of 2009 (ARRA). *See* America COMPETES Reauthorization Act of 2010, Pub. L. No. 111-358, 124 Stat. 3982 (2011); American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

39. *See* JUNE M. SULLIVAN, HIPAA: A PRACTICAL GUIDE TO THE PRIVACY AND SECURITY OF HEALTH DATA 93 (2004) (relaying the history of HIPAA).

insurance, and to expand the continuity of health insurance coverage.[40]

To accomplish its goals, HIPAA's many provisions are separated into two independent titles.[41] Title I of HIPAA, which concerns the portability of health insurance, ensures health insurance coverage for workers and their dependent family members during periods of transition between jobs.[42] Title II of HIPAA provides administrative simplification procedures that ensure the privacy and security of health information.[43] Additionally, Title II seeks to "improve the efficiency and effectiveness of the health care system" in a period of growing reliance on electronic technology in the health care field.[44] The provisions of this title of HIPAA apply to covered entities, which fall into one of three categories: health plans, health care clearinghouses, or health care providers that transmit health information in specific categories of electronic transactions.[45] Because Title II of HIPAA concerns the privacy of health information, any remaining discussion of HIPAA in this Article will concern provisions from Title II of the Act.

At first glance, public elementary, secondary, and post-secondary schools may not appear to exhibit the traditionally perceived qualifications of health plans, health care clearinghouses, or health care providers.[46] However, ED and HHS have declared that "when a school provides health care to students in the normal course of business, such as through its health clinic," the school may qualify as a health care provider under HIPAA.[47]

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40. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996).

41. *Id.*

42. *See* SULLIVAN, *supra* note 39, at 93–95 ("Title I of HIPAA protects health insurance coverage for workers and their families when they change or lose their jobs.").

43. *See id.* at 95–96 (recounting that Congress was especially concerned with the protection of "sensitive information contained in a person's medical record" when it adopted Title II of HIPAA).

44. *HIPAA Administrative Simplification Statute and Rules*, U.S. DEP'T OF HEALTH & HUMAN SERVS., http://www.hhs.gov/ocr/privacy/hipaa/administrative/index.html (last visited Aug. 7, 2012); *see also* WILLIAMS, *supra* note 6, at 9 (detailing the increasing reliance on electronic record keeping and electronic transactions characteristic of the 1990s); Jacqueline Klosek, *Exploring the Barriers to the More Widespread Adoption of Electronic Health Records*, 25 NOTRE DAME J.L. ETHICS & PUB. POL'Y 429, 436–38 (2011) (describing various ways that electronic health information remains "vulnerable" to "unauthorized parties").

45. *See* Health Insurance Portability and Accountability Act of 1996, § 1173, 110 Stat. at 2023 (defining the applicability of the HIPAA statute); *see also id.* at 2025 (delineating the electronic transactions that render health care providers subject to the provisions of HIPAA).

46. HIPAA considers a health care provider "a provider of services . . . a provider of medical or health services . . . and any other person or organization who furnishes, bills, or is paid for health care in the normal course of business." 45 C.F.R. § 160.103 (2011).

47. U.S. DEP'T OF HEALTH & HUMAN SERVS. & U.S. DEP'T OF EDUC., JOINT GUIDANCE ON THE APPLICATION OF THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA) AND THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996

Determining whether the health care services provided at a school meet the definition of health care provider under HIPAA, however, requires an exacting, case-specific analysis.[48] As the next part of this Article discusses, when a school does, in fact, qualify as a health care provider under the provisions of HIPAA, its responsibilities related to protecting the health information of its students become increasingly fact-specific and muddled.

III. THE OVERLAP OF FERPA AND HIPAA IN THE PROTECTION OF STUDENT HEALTH INFORMATION: UNCERTAINTIES AND UNKNOWNS

As previously mentioned, educational entities including public elementary, secondary, and post-secondary schools often fall within the statutory definition of health care providers under HIPAA.[49] When performing the role of health care provider, it is easy to imagine the breadth of health records that school-based medical professionals maintain in the performance of their professional duties. This function of specialized school personnel is important, of course, as student health records are necessary to document the types of "assessments, plans, interventions, and evaluations" that have been conducted to meet a particular student's needs.[50] Furthermore, school-based medical professionals are charged not only with the maintenance of student health records but, depending on the needs of a student and his or her guardians, with the disclosure, transfer, or destruction of these records, as well.[51]

Unfortunately, the FERPA–HIPAA framework for protecting student health records is complex. Although school functions may render an educational entity a health care provider under the provisions of HIPAA, FERPA privacy standards often also govern student health records maintained by such educational entities.[52] This counterintuitive result derives from an exception within HIPAA stating that individually

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(HIPAA) TO STUDENT HEALTH RECORDS 3 (2008) [hereinafter FERPA/HIPAA JOINT GUIDANCE], *available at* http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/hipaaferpajointguide.pdf.

48. *See* April Besl & David J. Lampe, *Understanding the Privacy Rights of HIPAA & FERPA in Schools*, MARTINDALE (Dec. 29, 2010), http://www.martindale.com/health-care-law/article_Dinsmore-Shohl-LLP_1212926.htm (stating that the relevant inquiry concerns whether a school "furnishes, bills or receives payment for healthcare in the normal course of its business" or "transmits these covered transactions electronically").

49. *See supra* Part II.B.

50. Siegler, *supra* note 12, at 238.

51. *See Privacy Standards for Student Health Records*, *supra* note 8 (reporting that "[m]anagement of student health records is one of the most challenging responsibilities of school nurses").

52. *See, e.g.*, RAMIREZ, *supra* note 20, at 37–41 (describing various exceptions and exclusions created in the regulatory overlap of the HIPAA and FERPA privacy statutes).

identifiable health information contained within education records is not considered protected health information under HIPAA.[53] As such, because FERPA regulates the contents of education records, FERPA also governs individually identifiable health information contained in education records.[54] However, several provisions within HIPAA further complicate the framework by providing caveats to the Act's own education records exception. For example, when treatment records maintained by a school psychologist or counselor are disclosed to another entity that is HIPAA-covered (such as a hospital), HIPAA provisions protect the treatment records.[55] Similarly, FERPA does not protect health records maintained by school-based health clinics operating as primary-care providers because these clinics' records are not considered education records.[56]

A. Problems Inherent in the FERPA–HIPAA Overlap

Since the adoption of Title II of HIPAA in 2002, stakeholders in the field of education have expressed confusion regarding the relationship between FERPA and HIPAA in the protection and regulation of student health information.[57] In fact, a joint study conducted by three federal administrative agencies identified further confusion about the interplay of the FERPA–HIPAA framework and the "broad patchwork of state laws and regulations [that] also impact how information is shared on the state level."[58] The difficulty inherent in the FERPA–HIPAA framework leads key stakeholders to avoid making important decisions regarding the

53. 45 C.F.R. § 160.103 (2011).

54. *See id.* (defining "individually identifiable health information" as "information that is a subset of health information, including demographic information collected from an individual"); *see also* FERPA/HIPAA JOINT GUIDANCE, *supra* note 47, at 4 (explaining that, "Because student health information in education records is protected by FERPA, the HIPAA Privacy Rule excludes such information from its coverage"); WILLIAMS, *supra* note 6, at 16 (noting that once individually identifiable health information maintained within education records is shared, it is protected by FERPA).

55. *See* RAMIREZ, *supra* note 20, at 40–41 (discussing the contours of HIPAA's treatment records exception).

56. *See* Martha Dewey Bergren, *HIPAA Hoopla: Privacy and Security of Identifiable Health Information*, 17 J. SCH. NURSING 336, 337 (2001) (detailing various implications of the FERPA–HIPAA overlap in the protection of student health records).

57. *See Privacy Standards for Student Health Records*, *supra* note 8 (describing the difficulties raised by the ambiguities of the FERPA–HIPAA overlap for school nurses); s*ee generally* Brusca & Ram, *supra* note 8, at 150 (commenting that many school-based medical professionals are "left unclear [about] the circumstances under which student health records [can] be disclosed" under the current regulatory framework).

58. U.S. DEP'T OF HEALTH & HUMAN SERVS. ET AL., REPORT TO THE PRESIDENT ON ISSUES RAISED BY THE VIRGINIA TECH TRAGEDY 7 (2007) [hereinafter HHS REPORT TO THE PRESIDENT], *available at* http://www.hhs.gov/vtreport.pdf.

disclosure of student health information for fear of either incurring fines or losing federal education funds in the event of a wrongful disclosure.[59] In essence, instead of incurring penalties and public embarrassment for their respective educational institutions, many stakeholders in the field of public education choose inaction over incorrect action when faced with difficult questions concerning student privacy regulations.

B. The 2007 Massacre at Virginia Tech: A Case Study in Ineffective Regulation of Student Health Information Under FERPA and HIPAA

The regulatory overlap between FERPA and HIPAA has left many educators and other stakeholders in the field of education unclear about the scope of their responsibilities in the protection of student health information.[60] Unfortunately, this confusion has led to dramatic consequences. For instance, many commentators have blamed the 2007 school shootings at Virginia Tech—"the deadliest shooting rampage in American history"[61]—on the lack of clarity inherent in the overlap of the federal privacy statutes.[62] These scholars argue that, although the student gunman's parents, public school teachers, and college administrators individually possessed information concerning the student's fragile mental

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59. *See* Brusca & Ram, *supra* note 8, at 151–52 (noting that "school administrators [are] left to weigh the risk of loss of federal funding against releasing records in the face of unclear standards"); Katrina Chapman, Note, *A Preventable Tragedy at Virginia Tech: Why Confusion over FERPA's Provisions Prevents Schools from Addressing Student Violence*, 18 B.U. PUB. INT. L.J. 349, 367 (2009) (arguing that ambiguity in federal privacy statutes causes "many schools [to] remain overly cautious in disclosing information even where it seems clearly appropriate"); Davoren, *supra* note 35, at 429 (noting that school administrators "often find that determining what qualifies as an 'educational record' . . . [is] difficult" under the FERPA–HIPAA regulatory overlap).

60. *See supra* Part III.A.

61. Christine Hauser & Anahad O'Connor, *Virginia Tech Shooting Leaves 33 Dead*, N.Y. TIMES, Apr. 16, 2007, http://nytimes.com/2007/04/16/us/16cnd-shooting.html?pagewanted=all.

62. *See generally* Brusca & Ram, *supra* note 8 (detailing education stakeholder misunderstandings of privacy laws, including HIPAA and FERPA, at the time of the school shooting); Celina Muñoz, Note, *Privacy at the Cost of Public Safety: Reevaluating Mental Health Laws in the Wake of the Virginia Tech Shootings*, 18 S. CAL. INTERDISC. L.J. 161 (2008) (discussing the complicated overlap of federal privacy statutes and Virginia state statutes that precipitated the shootings at Virginia Tech); Matthew Alex Ward, Comment, *Reexamining Student Privacy Laws in Response to the Virginia Tech Tragedy*, 11 J. HEALTH CARE L. & POL'Y 407 (2008) (highlighting weaknesses in FERPA's safety and health emergency exceptions); Daniel Silverman, *Student Privacy Versus Campus Security: An Overstated Conflict*, 35 HUM. RTS. MAG., no. 3, 2008, *available at* http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol35_2008/human_rights_summer2008/hr_summer08_silverman.html (detailing the "direct conflict" between student privacy laws and campus security that may have precipitated the Virginia Tech shootings).

health, a breakdown in communication between these key stakeholders ultimately resulted in deadly acts of violence.[63] More specifically, commentators uniformly contend that teachers and family members of student gunman Seung-Hui Cho were aware of Cho's "emotional issues" and "mental instability" as early as elementary school.[64] However, when Cho enrolled at Virginia Tech, neither his high school nor his parents informed the university of his fragile mental health or past treatment.[65] Similarly, when Cho exhibited troubling behaviors during his first semesters of college, Virginia Tech officials failed to communicate those observations to Cho's family.[66] Even after Cho was forced to participate in an involuntary commitment hearing at a mental health facility, Virginia Tech officials did not contact the student's parents to discuss his rapidly deteriorating mental health.[67] Had these stakeholders properly understood the roles of the HIPAA and FERPA privacy statutes in the disclosure and protection of student health information, perhaps they would have shared Cho's mental health information with one another, potentially avoiding the tragedy at Virginia Tech.[68]

Misunderstandings around the scope of HIPAA and FERPA privacy laws prevented key stakeholders from sharing information about the unstable student assailant who ultimately took the lives of over thirty individuals.[69] In fact, following the Virginia Tech tragedy, a joint report[70] promulgated by both the Secretaries of ED and HHS and the Attorney General underscored this sentiment.[71] Following the publication of this

63. *See, e.g.*, Brusca & Ram, *supra* note 8, at 154–55.

64. *Id.* at 155.

65. *Id.* at 158.

66. *Id.* at 163–64.

67. *Id.*

68. *See* Davoren, *supra* note 35, at 450 (arguing that amending the landscape of federal privacy statutes to provide increased clarity for education stakeholders will result in more communication among stakeholders and, ultimately, "more at-risk students . . . get[ting] help before it is too late").

69. *See* Brusca & Ram, *supra* note 8, at 164 (arguing that although "[i]t is clear that federal privacy laws allowed Virginia Tech to share information internally or with Cho's family . . . the laws as they had been understood in 2005 and 2006 made non-disclosure the likelier course"); Chapman, *supra* note 59, at 350 (noting that "'information silos' among educators, health providers, and public safety officials due to misinterpretations of privacy laws prevent[ed] the necessary sharing of information" about Cho and ultimately led to the Virginia Tech shootings).

70. It is important to note that the REPORT TO THE PRESIDENT ON ISSUES RAISED BY THE VIRGINIA TECH TRAGEDY did not discuss the specifics of the events at Virginia Tech, but instead provided insight regarding the breakdown between federal privacy legislation and the stakeholders charged with enforcing the terms of the statutes. *See* HHS REPORT TO THE PRESIDENT, *supra* note 58, at 1.

71. *See id.* at 7 (citing "significant misunderstanding about the scope and application of"

joint report responding to the Virginia Tech tragedy, the Secretaries of ED and HHS again joined forces to develop guidance on the shared role of their agencies' respective federal privacy statutes in the protection of student health records.[72] This eleven-page guidance document both provides an overview of the individual FERPA and HIPAA statutes and responds to common questions about the scope of the statutes' overlapping provisions.[73] While this document has likely helped guide some stakeholders in the field of public education, commentators remain uncertain whether it provides sufficient guidance to unravel all ambiguities inherent in the FERPA–HIPAA regulatory overlap.[74] Indeed, more recent examples of violence on public school campuses further call into question the effect of this joint guidance.

C. Future Concerns About the Protection of Student Health Information

Sadly, acts of horrific school-based violence are not historically limited to post-secondary campuses;[75] in fact, such violence has occurred on elementary, secondary, and post-secondary campuses alike since the 2007 massacre at Virginia Tech.[76] Additionally, the prevalence of both student bullying and student suicide in schools has caused a sensation in the media

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HIPAA and FERPA).

72. *See* FERPA/HIPAA JOINT GUIDANCE, *supra* note 47, at 1 (declaring that the joint guidance is meant "to address apparent confusion on the part of school administrators, health care professionals, and others as to how [HIPAA and FERPA] apply to records maintained on students").

73. The guidance document details situations that school-based health professionals frequently encounter in the performance of their duties and further provides recommendations concerning the role of FERPA and HIPAA in any corresponding analysis concerning the privacy of student health records. The document's scope is fairly limited, however, and the agency authors advise school officials seeking additional clarification to contact FPCO for "technical assistance." *See* FERPA/HIPAA JOINT GUIDANCE, *supra* note 47, at 11.

74. *See* Brusca & Ram, *supra* note 8, at 168 (noting that the ultimate effect of the joint guidance document remains unclear).

75. Perhaps two of the most widely known instances of student shootings at the secondary school level are the 1999 shootings at Columbine High School in Littleton, Colorado and the shooting at an Amish school in rural Pennsylvania in 2006. *Cf.* Randy Borum et al., *What Can Be Done About School Shootings? A Review of the Evidence*, 39 EDUC. RESEARCHER 27 (2010), *available at* http://youthviolence.edschool.virginia.edu/pdf/school-shootings-article-by-borum-cornell-2010.pdf (discussing high-profile school shootings over the past several decades that have generated interest in the issue of school violence).

76. *See infra* notes 77–79 and accompanying text. *See generally Fast Facts*, NAT'L CTR. FOR EDUC. STATISTICS, http://nces.ed.gov/fastfacts/display.asp?id=49 (last visited Aug. 7, 2012) (documenting, through statistical analysis, different forms of school-based violence that occurred between 2009 and 2010 alone).

in recent years.[77] In the face of such continued violence in schools, concerns similar to those expressed following the Virginia Tech tragedy remain pertinent in the regulation of student health records on public school campuses. For example, T.J. Lane, the seventeen-year-old student assailant who fatally shot three students at his Ohio high school in February 2012, exhibited a history of violence against others.[78] Even more recently, Alexander Song, a student at the University of Maryland who posted violent threats against the campus community on a social networking website in March 2012, exhibited signs of emotional distress mere days before his arrest for threatening to "kill enough people to make it to national news."[79]

These recent occurrences illustrate both the continued threat to student safety on public school campuses and the potential role of student health information in identifying future disruptions to campus safety.[80] Further, these case studies underscore the urgency with which the FERPA–HIPAA regulatory framework protecting student health information must be amended to avoid future stakeholder confusion and, perhaps, prevent another campus tragedy. In light of such continued and contemporary concerns for the protection of student health information, reform of the FERPA–HIPAA regulatory overlap is necessary to ensure adequate regulation of student health information—and even student safety on school campuses.

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77. *See generally* John Cloud, *Prosecuting the Gay Teen Murder*, TIME Feb. 18, 2008, http://www.time.com/time/nation/article/0,8599,1714214,00.html (reporting the shooting of a gay middle school student, while the student was in his classroom, by another student); Erik Eckholm & Katie Zezima, *9 Teenagers Are Charged After Suicide of Classmate*, N.Y. TIMES, March 30, 2010, at A14; Susan Donaldson James, *Boy Assaults Gay Student as Cellphone Captures Attack*, ABC NEWS Oct. 28, 2011, http://abcnews.go.com/Health/ohio-bully-beating-gay-student-caught-cell-phone/story?id=14834057#.Tr8QlRxyyL8 (reporting the assault of a gay high school student that was captured on a cell phone video camera).

78. *See, e.g.*, Sabrina Tavernise & Jennifer Preston, *School Shooting Suspect Was Accused of Earlier Assault*, N.Y. TIMES, Feb. 29, 2012, http://www.nytimes.com/2012/03/01/us/school-shooting-suspect-was-accused-of-earlier-assault.html?_r=2&ref=schoolshootings (recounting Lane's personal and criminal history).

79. *See, e.g.*, Associated Press, *University of Maryland Student Charged in Internet Shooting Threat*, FOX NEWS, Mar. 12, 2012, http://www.foxnews.com/us/2012/03/12/university-maryland-student-charged-over-internet-shooting-threat/.

80. Arguably, had health information about these student assailants been utilized appropriately, these recent breaches of school security could have been avoided.

IV. ENSURING THE PRIVACY OF STUDENT HEALTH INFORMATION THROUGH THE ABANDONMENT OF THE DUAL-HEADED SYSTEM OF GOVERNANCE

The current system of protecting student health information through two separate statutes—which are governed by two separate administrative agencies—is inefficient and fails to serve the purpose of either HIPAA or FERPA. In fact, providing for the protection of health information of any kind through FERPA, a statute designed to protect general education records, is counterintuitive and has led to questionable results.[81] Therefore, instead of providing for a complicated system of dual-headed governance, Congress should uphold its interest in promulgating an effective education system by providing for the protection of student health records in a single, unambiguous federal statute. Specifically, the federal government should both abandon the protection of student health information under the FERPA statute and strengthen the provisions of HIPAA to ensure adequate regulation of student health information in public schools.

A. Abandoning FERPA in the Protection of Student Health Records

Providing for the regulation of student health information through two completely independent statutes—promulgated by two distinct administrative agencies—is illogical. To simplify the current system of protecting student health records, the federal government should thus abandon its current practice of protecting student health records through the provisions of FERPA. A brief comparison of the respective histories, enforcement procedures, and historical effectiveness of HIPAA and FERPA indicates the reasonableness inherent in the decision to abandon the ED-enforced statute and instead rely solely upon HIPAA and, consequently, HHS administrative oversight.

1. FERPA Was Not Designed to Protect Student Health Records

Allowing HIPAA to exclusively govern the security of student health information is logical given the original legislative purposes of the HIPAA and FERPA privacy statutes.[82] While both statutes undoubtedly address the privacy of personal information, HIPAA and FERPA are intended to protect vastly different types of private information. More specifically, while HIPAA concerns the privacy and security of personal health

81. *See* Brusca & Ram, *supra* note 8, at 149 (noting that FERPA's "success in balancing health care privacy against public safety [is], at best, mixed").

82. *See* WILLIAMS, *supra* note 6, at 18 (highlighting that "FERPA protects education records" while "HIPAA protects . . . individually identifiable health information").

information,[83] the intent of FERPA is to protect general education records.[84] Therefore, it makes sense, in light of these intended legislative purposes, to abandon FERPA in the protection of student health records and, instead, regulate this subcategory of student information through the more relevant provisions of HIPAA.[85] This contention is bolstered further by the fact that commentators frequently criticize FERPA for its ineffectiveness at protecting student health records—as evidenced in the wake of the Virginia Tech tragedy.[86]

2. FERPA's Enforcement Procedures Are Too Weak

The Supreme Court has held that there is no private remedy for students whose FERPA rights are violated.[87] Instead, the only recourse afforded aggrieved students under FERPA is the ability to file a complaint with the FPCO.[88] However, while allowing the filing of complaints with the FPCO, no provision of FERPA "require[s] that complaints be processed" or provides a timeline for investigating processed complaints.[89] In short, therefore, there is no guarantee that ED, through the FPCO, will even consider alleged violations of a student's FERPA privacy rights. Even where a complaint is processed, FPCO decisions indicate that FERPA violations are only addressed by the Office in instances of repeated, systemic noncompliance.[90]

Conversely, the enforcement provisions of HIPAA provide for both civil

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83. *See supra* Part II.B.

84. The original definition of "education records" under FERPA contained a list of examples of protected student information including attendance data, completed academic assignments, scores on standardized tests, family background information, and "verified reports of serious or recurrent behavior patterns." *See* Education Amendments of 1974, Pub. L. No. 93-380, § 513, 88 Stat. 484 (codified as amended at 20 U.S.C. § 1232g (1976)). While this "laundry list" definition did initially include "health data," subsequent amendments to the Act have provided for the exemption of "mental or physical health treatment records" from the definition of education records. *See* Daggett & Huefner, *supra* note 26, at 13–16.

85. *See* Siegler, *supra* note 12, at 259–64 (stating that "health care documentation is . . . not appropriate as part of an educational record" and, further, that "[o]nly those student health records which relate directly to a pupil's classroom experience are legitimately educational in nature").

86. *See supra* Part III.B.

87. *See supra* Part II.A.

88. *See supra* Part II.A.

89. Daggett, *supra* note 5, at 66.

90. *See id.* at 67 (stating that courts frequently find violations of FERPA only where there is a "pattern or policy of misconduct, rather than individual violations"); *cf.* Ward, *supra* note 62, at 417 n.81 (noting that ED, through the FPCO, has never rescinded federal funds from a college or university as the result of a FERPA record keeping violation).

and criminal penalties in the event of a HIPAA privacy violation.[91] The more stringent enforcement policies of HIPAA can even require the incarceration of violators.[92] Obviously, HIPAA's stricter enforcement provisions provide greater incentive for stakeholders to protect sensitive health information in accordance with federal law. Given the high stakes involved in the regulation of sensitive student information, regulating student health information exclusively through HIPAA's provisions properly serves the privacy interests of students and, as such, is more logical than the current, complicated regulatory scheme.

3. FERPA's Provisions Are Difficult for Stakeholders to Interpret

As mentioned previously, the individual provisions of FERPA, standing alone, are frequently difficult for practitioners to interpret.[93] As can be expected, such difficulty is only compounded when the often incoherent provisions of FERPA overlap with HIPAA privacy provisions to regulate the security of student health information.[94] Unfortunately, the incomprehensibility of the FERPA–HIPAA overlap leads to confusion among stakeholders and, sometimes, tragic results in schools.[95] To simplify this complicated system, Congress should abandon the FERPA regulatory framework for protecting student health information. Following removal of the FERPA statute from the regulatory framework, stakeholders faced with difficult decisions concerning the disclosure of student health records will be more likely to understand the legal protections afforded to student health information and, consequently, act both in accordance with the law and in the best interest of students. Furthermore, because time is often of the utmost importance in issues involving student-on-student violence and school security, simplification of the regulatory framework will lessen the time education stakeholders spend engaging in complicated analysis to determine the appropriate handling of student health records.

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91. *See* WILLIAMS, *supra* note 6, at 18 (contrasting the penalties afforded complainants under the FERPA and HIPAA statutes).

92. *See id.* (discussing the criminal penalties imposed upon violators of HIPAA, "includ[ing] jail sentences and significant monetary fines").

93. *See supra* Part II.A.1; s*ee also* Chapman, *supra* note 59, at 363–64 (calling a "lack of guidance in FERPA's text and [ED's] regulations . . . a primary reason" that education stakeholders fail to use the relevant provisions of FERPA effectively); Stuart, *supra* note 10, at 1164 (describing FERPA as "an incoherent maze of legislative double-talk" and explaining the difficulty inherent in attempts to interpret the Act); MURPHY & DISHMAN, *supra* note 21, at 2 (implying that the complicated and intricate provisions of FERPA make it "difficult for schools not to violate FERPA" in the performance of educational duties).

94. *See supra* Part III.A.

95. *See supra* Part III.B.

B. Strengthening HIPAA's Provisions to Ensure the Protection of Student Health Information

Abandoning the complicated dual-headed system of governance that results from the FERPA–HIPAA statutory overlap will simplify federal efforts to protect and regulate student health information.[96] To achieve such simplification, it is imperative that Congress eliminates FERPA from this regulatory scheme and, instead, ensures the protection of student health information solely through the HIPAA privacy provisions. Relying on the HIPAA statute in its current form, however, would not serve to regulate the use of student health information to the fullest extent necessary. As demonstrated, ambiguity in privacy statutes leads to inefficiency and inaction on the part of key stakeholders across educational institutions.[97] As such, the amended HIPAA statute should include definite, explicit provisions for the maintenance, protection, and use of student health records.

First, the amended HIPAA provisions should include a stipulation that encourages both state and local governments to supplement the baseline HIPAA protections to more completely address the specific needs of their local school systems, students, and school-based health care providers.[98] Further, incentives should be built into the revised HIPAA statute to encourage local and state decisionmakers to legislate specific privacy provisions for student health records that extend beyond those provided for general education records. As HIPAA privacy regulations will protect student records in more than 13,000 school districts across the country,[99] allowing for differentiation in this way will empower state governments to protect and prescribe the use of sensitive student health information in a manner that is responsive to the realities of their local public school systems.

Second, although eliminating FERPA from the regulation of student health information will greatly streamline the regulatory framework for practitioners, it will remain important to provide support to stakeholders

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96. *See supra* Part IV.A.

97. *See supra* Part III.A.

98. Currently, HIPAA permits state laws to offer privacy protections that serve to enhance those protections provided by the federal statute as long as the state law is not contrary to the HIPAA Privacy Rule. See *Health Information Privacy, Frequently Asked Questions*, U.S. DEP'T OF HEALTH & HUMAN SERVS., http://www.hhs.gov/ocr/privacy/hipaa/faq/preemption_of_state_law/405.html (last updated Dec. 11, 2006).

99. *See Numbers and Types of Public Elementary and Secondary Local Education Agencies from the Common Core of Data: School Year 2009–10*, NAT'L CTR. FOR EDUC. STATISTICS, http://nces.ed.gov/pubs2011/pesagencies09/tables/table_01.asp (last visited Aug. 7, 2012) (displaying statistics regarding the number and type of local education agencies across the United States).

that clearly and effectively explains the amended HIPAA privacy provisions. In the past, to the detriment of student privacy, little guidance has been offered to school-based health professionals and other stakeholders about their responsibilities under the federal framework for protecting sensitive student information.[100] Moving forward, it is imperative to educate these important stakeholders about relevant procedures, responsibilities, and guidelines in the protection and use of student health records.[101] Additionally, the HIPAA statute should provide for some form of continued certification or education for school-based medical professionals whose daily responsibilities concern the maintenance, distribution, and destruction of student health documents.[102]

Finally, as mentioned above, privacy statutes must be responsive to evolving societal needs and values.[103] As such, the amended HIPAA regulation should provide for the periodic re-evaluation of the privacy provisions regulating student health information in public schools. By mandating such re-evaluation, the standards and provisions of HIPAA will remain responsive to changing societal needs.[104] By removing FERPA from the regulatory framework and augmenting the provisions of HIPAA in these delineated ways, Congress will greatly improve the regulatory framework used to protect student health information.

CONCLUSION

HIPAA and FERPA both regulate the privacy of student health information through a complicated, ambiguous, and unwieldy system of exceptions and overlapping provisions. The shortcomings of this dual-headed system have been demonstrated in dramatic ways, perhaps most

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100. *See, e.g.*, Stuart, *supra* note 10, at 1161 (stating that, historically, "local educational agencies, who must implement the protections, are left to their own devices to untangle the incoherency of the statutory privacy [regulations]"); *see also supra* Part III.A.

101. *See* Muñoz, *supra* note 62, at 187 (recommending that "clarification about the limits and boundaries of current federal . . . privacy laws needs to be provided to those involved in the educational system").

102. Such requirements should arguably mirror the types of "continuing education credits" required of other medical professionals, such as those laws that require doctors to complete a designated number of hours of education in a given field of medicine in order to retain certification to practice. *See* Philip M. Rosoff & Doriane Lambelet Coleman, *The Case for Legal Regulation of Physicians' Off-Label Prescribing*, 86 NOTRE DAME L. REV. 649, 665 (2011).

103. *See supra* Part II.A.2.

104. Further, in the event of another catastrophe similar to the 2007 school shooting at Virginia Tech, such amendment of HIPAA will ensure that the Department of Health and Human Services has the infrastructure in place to both promptly investigate the breakdown of the regulatory scheme and augment the provisions of HIPAA in a responsive manner.

famously in the aftermath of the Virginia Tech shootings of 2007.[105] As attempts by both ED and HHS to mitigate these shortcomings for practitioners have proven ineffective, Congress must reform the current, dual-headed system of governance to avoid further mistakes and to ensure the safety and integrity of school campuses.

HIPAA regulatory provisions should exclusively protect student health records. Additionally, Congress should strengthen HIPAA's provisions to ensure the effectiveness of the streamlined regulatory framework. The implementation of this new system ensures that stakeholders in the field of public education will be better positioned to navigate federal privacy regulations, helping to ensure both that sensitive student health information is protected and that future tragedies like the 2007 shooting at Virginia Tech do not recur in schoolhouses across America.

105. *See supra* Part III.B.

PARTIAL VALUATION IN COST–BENEFIT ANALYSIS

ARDEN ROWELL*

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INTRODUCTION

The National Highway Traffic Safety Administration (NHTSA) is considering promulgating a rule to increase rearview visibility in vehicles—a rule intended to reduce "backover crashes," which occur when a vehicle moving in reverse strikes a pedestrian or a cyclist, and which kill hundreds and injure thousands of people a year. In performing a cost–benefit analysis of the proposed rule, NHTSA has refused to monetize many of the most emotional impacts of the rule, such as the large number of backover crash victims who are small children. Without including these impacts, the monetized costs of the rule far exceed the monetized benefits.

This Article argues that treating these effects of the rearview rule as non-monetizable assumes that people are not willing to pay any money to secure those effects, and is likely to lead to significant undervaluation of the amount of money people are actually willing to pay for a regulation. Regulators are often averse to attempting to monetize the nonmonetary

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effects of regulations, particularly when those effects are deeply emotional, as they are whenever regulation touches upon the deaths of small children. Insofar as this hesitation to monetize stems from concern about the incommensurability of money and other goods, it should cease immediately. Incommensurability does not necessarily preclude partial valuation, or the partial expression of a good's value in terms of another good. Even something as horrific and emotionally laden as the death of a child can therefore be partially valued in monetary terms—so long as people are willing to pay money to prevent the event from occurring. Emotional goods like these are difficult to think about, and even more difficult to monetize, but refusing to monetize them at all is not a reasonable solution.

I. NON-QUANTIFIABLE BENEFITS AND NHTSA'S PENDING REARVIEW RULE

What role should non-quantifiable benefits play in regulatory cost–benefit analysis? President Barack Obama's recent order on Regulatory Planning and Review, Executive Order 13,563, directs agencies to "propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify)."[1] In a separate provision, it also explicitly permits agencies to "consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts."[2]

Regulatory practice therefore reserves space for consideration of non-quantifiable effects of regulation, including those which agencies believe cannot be monetized.[3] But how are those non-quantifiable effects to be incorporated into a cost–benefit analysis, if benefits must still justify costs?

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1. Exec. Order No. 13,563, 76 Fed. Reg. 3821, 3821 (Jan. 21, 2011); *see also* Exec. Order No. 12,866, 3 C.F.R. 638, 639 (1994).

2. *See* Exec. Order No. 13,563, 76 Fed. Reg. at 3821.

3. Circular A-4, which provides the cornerstone guidance for agencies performing regulatory impact analyses, splits the effects of regulation into three buckets: those that can be monetized, those that can be quantified but not monetized, and those that cannot be quantified. *See* OFFICE OF MGMT. & BUDGET, CIRCULAR A-4 (2003), *available at* http://www.whitehouse.gov/omb/circulars_a004_a-4/ [hereinafter Circular A-4]; OFFICE OF MGMT. & BUDGET, OFFICE OF INFO. & REGULATORY AFFAIRS, REGULATORY IMPACT ANALYSIS: A PRIMER 7 (2011), *available at* http://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/circular-a-4_regulatory-impact-analysis-a-primer.pdf. Thus, current guidance assumes that all monetizable effects are quantifiable, and that if something is non-quantifiable, it is also non-monetizable. For the purposes of this Article, I adopt this typology, although it is interesting to ponder whether there might be anything important in the missing cell (i.e., "monetizable but not quantifiable").

Or more concretely: If an agency is considering a rule for which the monetized costs exceed the monetized benefits, can the consideration of non-quantifiable benefits tip the balance?

NHTSA is facing exactly this question as it considers a rule to expand rearview visibility in cars,[4] and the Office of Information and Regulatory Affairs as it reviews that rule.[5]

The rule was proposed to reduce backover crashes, which occur when a reversing vehicle strikes someone outside the vehicle.[6] NHTSA estimates that there are 292 fatalities and 18,000 injuries from backover crashes every year.[7] Children under five represent 44% of the fatalities; gruesomely, many of these fatalities "involve parents (or caregivers) accidentally backing over children."[8] In 2007, Congress responded to one of these tragic incidents, in which a father accidentally killed his toddler by backing over him with the family SUV,[9] by passing the Cameron Gulbransen Kids

4. *See* Federal Motor Vehicle Safety Standard, Rearview Mirrors; Federal Motor Vehicle Safety Standard, Low-Speed Vehicles Phase-In Reporting Requirements, 75 Fed. Reg. 76,186, 76187 (Dec. 7, 2010) (to be codified at 49 C.F.R. pts. 571, 585) [hereinafter Federal Motor Vehicle Safety Standard]; *see also* Preliminary Regulatory Impact Analysis, Backover Crash Avoidance Technologies, NPRM FMVSS No. 111 (Nov. 2010) [hereinafter Regulatory Impact Analysis].

5. The Office of Information and Regulatory Affairs (OIRA) is responsible for reviewing draft regulations and for determining whether those regulations comply with the President's guidelines for policy analyses, particularly as set forth in Executive Orders 12,866 and 13,563. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, MEMORANDUM FOR THE HEADS AND ACTING HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES (2009); Exec. Order No. 12,866, 3 C.F.R. 642–43, 645 (1993); Exec. Order No. 13,563, 76 Fed. Reg. at 3822. OIRA in its current role is a relatively new office; it was created by Congress in 1980 by the Paperwork Reduction Act, but its role changed significantly in 1993 with the issuance of Executive Order 12,866, which gave OIRA the responsibility to review draft regulations. President George W. Bush left Executive Order 12,866 in place, but amended it significantly with additional orders. President Obama revoked the Bush amendments in Executive Order 13,497. *See* Exec. Order No. 13,497, 3 C.F.R. 218 (2010). President Obama subsequently issued Executive Order 13,563 supplementing the guidance in Executive Order 12,866. *See* Exec. Order No. 13,563, 76 Fed. Reg. 3821.

6. *See* Federal Motor Vehicle Safety Standard, *supra* note 4, at 76,187 (defining backover crashes as incidents "in which a non-occupant of a vehicle (most commonly, a pedestrian, but it could also be a cyclist) is struck by a vehicle moving in reverse").

7. *Id.* at 76,187. Most of these (228 fatalities and 17,000 injuries) are attributable to backover incidents involving light vehicles (which include passenger cars and light trucks weighing 10,000 pounds or less). *Id.*

8. *Id.*

9. *See* Tatiana Morales, *Call to Eliminate SUV Blind Spots*, CBS NEWS (Dec. 5, 2007, 3:15 PM), http://www.cbsnews.com/2100-500202_162-633815.html (explaining how Congress reacted to the accidental backover killing of two-year-old Cameron Gulbransen.

Transportation Safety Act of 2007.[10] Among other requirements, the law directs NHTSA to initiate rulemaking to "expand the required field of view to enable the driver of a motor vehicle to detect areas behind the motor vehicle to reduce death and injury resulting from backing incidents."[11]

NHTSA spent several years researching various strategies for reducing backover crashes, including the possibility of requiring additional mirrors, sensors, and cameras.[12] After some delay, the agency concluded that the most effective method for reducing backovers would be to require all new cars to have rearview capabilities prior to sale.[13] Currently, rearview cameras—the most expensive of the alternatives considered by

10. Cameron Gulbransen Kids Transportation Safety Act of 2007, Pub. L. No. 110-189, 122 Stat. 639 (codified as amended at 49 U.S.C. § 30111 (Supp. IV 2011)).

11. *See id.* § 2(b). More specifically, the statute directs the Secretary of Transportation to initiate a rulemaking "to expand the required field of view to enable the driver of a motor vehicle to detect areas behind the motor vehicle to reduce death and injury resulting from backing incidents, particularly incidents involving small children and disabled persons." *Id.* The Act explicitly reserves to the Secretary the authority to meet the standard through a variety of means: the "standard may be met by the provision of additional mirrors, sensors, cameras, or other technology to expand the driver's field of view." *Id.* The Act also gives the Secretary a deadline to "prescribe final standards pursuant to this subsection not later than 36 months after the enactment of this Act," which was February 28, 2008. *Id.* If the Secretary does not meet the (now–passed) deadline, the Secretary is required to "establish new deadlines" and to "notify the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate of the new deadlines and describe the reasons the deadlines specified under this Act could not be met." *Id.* at § 4(1), (2). One interesting question—not (yet?) addressed by the National Highway Traffic Safety Administration (NHTSA)—is whether the Agency could claim that the Act releases it from the general executive requirement to perform cost–benefit analyses. NHTSA was probably wise to assume that this argument would fail for two reasons. Courts now appear to apply a strong default assumption that Congress intends to permit cost–benefit analyses, except where they are explicitly barred. *See* Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 226 (2009) (holding that the Environmental Protection Agency (EPA) permissibly relied on cost–benefit analysis in setting national performance standards for water intake structures, where the relevant provision of the Clean Water Act is silent as to cost–benefit analysis); *see also infra* note 17 and accompanying text. Additionally, the standard required by the Act could be met through the inclusion of a variety of means, some of which might well pass a cost–benefit analysis. *See* Cameron Gulbransen Kids Transportation Safety Act of 2007, § 2(b) (permitting the standard to be met by prescribing "different requirements for different types of motor vehicles," among other things); *cf.* Regulatory Impact Analysis, *supra* note 4, at V-14 (finding that most of the estimated life-savings are for non-passenger cars).

12. *See generally* Federal Motor Vehicle Safety Standard, *supra* note 4. The Act explicitly delegates the choice of means to meet the standard to the Secretary of Transportation. *See* Cameron Gulbransen Kids Transportation Safety Act of 2007, § 2(b) ("Such standard may be met by the provision of additional mirrors, sensors, cameras, or other technology to expand the driver's field of view.").

13. *See* Federal Motor Vehicle Safety Standard, *supra* note 4, at 76,239.

NHTSA[14]—provide the only technology capable of meeting this performance standard.[15]

As part of its regulatory impact analysis, NHTSA performed a cost–benefit analysis of the rearview rule.[16] To move forward with the rearview rule, NHTSA had to make "a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify)."[17]

Based on the record that NHTSA presented, do the benefits of the rearview rule justify its costs? Not if the costs must be justified by monetized benefits. In fact, on the basis of its calculations, NHTSA has conceded that the regulation is not cost-effective.[18] Yet, it contends that the benefits of the regulation nevertheless justify the costs because "the quantitative [i.e., monetized] analysis does not offer a complete accounting."[19]

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14. *See* Regulatory Impact Analysis, *supra* note 4, at ii. Rearview camera systems "are estimated to cost consumers between $159 and $203 per vehicle." *Id.* In contrast, rear object sensor systems would cost $52–$92, and "[i]nterior look-down mirrors" would cost about $40 per vehicle. *Id.*

15. *See* Federal Motor Vehicle Safety Standard, *supra* note 4, at 76,239.

16. *See id.* at 76,237 (summarizing costs and benefits); Regulatory Impact Analysis, *supra* note 4, at iv.

17. *See* Exec. Order No. 13,563 § 1(b), 76 Fed. Reg. 3821, 3821 (Jan. 18, 2011) (requiring agencies considering significant rules to perform a cost–benefit analysis whenever it is permitted by law for them to do so). When considering significant rules, agencies are required to perform a cost–benefit analysis whenever it is permitted by law for them to do so. Exec. Order 12,866 § 1(b) (requiring various "[p]rinciples of [r]egulation," including implementation of cost–benefit analysis, "to the extent permitted by law and where applicable"); *see also* Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (codified as amended in scattered sections of 2 U.S.C.) (requiring agencies to prepare written assessments of costs, benefits, and other effects of proposed or final rules that are expected to result in more than $100 million in annual costs). The Kid's Transportation Safety Act is silent as to cost considerations. *See generally* 49 U.S.C. § 30111 (2006). Recent Supreme Court precedent suggests that this silence should be interpreted as permitting the implementing agency to perform cost–benefit analysis. *See* Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 226, 240–41 (2009) (holding that "the EPA permissibly relied on cost–benefit analysis in setting the national performance standards" for water intake structures, where the relevant provision of the Clean Water Act directs the EPA Administrator to set standards using the "best technology available" to "minimize the adverse environmental impact," and is silent as to cost–benefit analysis). For a nuanced treatment of *Entergy* and a general discussion of whether statutory silence is (or should be) treated as permitting cost–benefit analysis, see Jonathan Cannon, *The Sounds of Silence: Cost–Benefit Canons in* Entergy Corp. v. Riverkeeper, Inc., 34 HARV. ENVTL. L. REV. 425 (2010).

18. *See* Federal Motor Vehicle Safety Standard, *supra* note 4, at 76,237 ("According to our present model, none of the systems are cost effective based on our comprehensive cost estimate of the value of a statistical life of $6.1 million.").

19. *Id*. at 76,238.

To understand NHTSA's argument, one must examine how it calculated the costs and the benefits of the regulation. To monetize the benefits of the rule, NHTSA relied upon a typical technique in regulatory cost–benefit analysis, which is to monetize benefits by looking at studies that evaluate how much money people are generally willing to pay for those benefits.[20] Consider NHTSA's calculation that the rule can be expected to save between 95 and 112 lives annually.[21] To monetize this impact, NHTSA relied on studies that elicit people's willingness to pay to reduce small mortality risks.[22]

NHTSA estimates that the new regulation will cost between $1.9 and $2.7 billion annually, primarily as a result of the increased cost of vehicles having rearview cameras installed prior to sale.[23] This level of cost makes the rule one of the most expensive currently pending.[24]

On the basis of this information, NHTSA determined that people's willingness to pay for protection against mortality risks justifies an

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20. *See* Circular A-4, *supra* note 3, at 13 (treating "willingness to pay" as the keystone method for monetization). For a discussion of the methods agencies use to monetize mortality risks, see Arden Rowell, *The Cost of Time: Haphazard Discounting and the Undervaluation of Regulatory Benefits*, 85 NOTRE DAME L. REV. 1505, 1517–24 (2010).

21. *See* Federal Motor Vehicle Safety Standard, *supra* note 4, at 76,240 (noting that the rule would also reduce injuries by 7,072 to 8,374 per year).

22. *Cf. id.* at 76,238, 76,238 n.96 (utilizing the Department of Transportation's (DOT's) "value of a statistical life" (VSL) of $5.8 million, which is meant to represent the amount of money that people are willing to pay to avert small mortality risks that would lead us to expect, on average, a single death).

23. *See* Federal Motor Vehicle Safety Standard, *supra* note 4, at 76,189; Regulatory Impact Analysis, *supra* note 4, at ii–iii (noting that, in addition to the cost of installing the cameras, NHTSA "also estimated the net property damage effects to consumers from using a camera or sensor system to avoid backing into fixed objects, along with the additional costs when a vehicle is struck in the rear and the camera or sensor is destroyed").

24. *See* Letter from Barack Obama, President of the United States, to John Boehner, Speaker of the House of Representatives (Aug. 30, 2011) *available at* http://www.politico.com/static/PPM169_110830_boehner.html (listing only seven then-pending regulations with an expected cost exceeding $1 billion). According to the President's letter, only three rules, all at the EPA, were expected to exceed the cost of NHTSA's rearview rule: the extremely costly reconsideration of the 2008 Ozone National Ambient Air Quality Standards ($19–$90 billion expected cost), and two rules setting National Emission Standards for Hazardous Air Pollutants—one for Coal-and-Oil-Fired Electric Utility Steam Generating Units ($10 billion expected cost), and the other for Major Source Industrial, Commercial, and Institutional Boilers and Process Heaters ($3 billion expected cost). *Id.* By way of comparison, the standard for boilers and process heaters is expected to produce at least $20 billion of monetized benefits. *See* 76 Fed. Reg. at 15,608, 15,611 (Mar. 21, 2011) (codified at 40 C.F.R. pt. 63) (identifying the total monetized benefits of the final rule as $22–$54 billion with a 3% discount rate, and $20–$49 billion with a 7% discount rate and identifying the expected costs of the final rule as $1.5 billion).

expenditure of $6.1 million per life saved.[25] Under NHTSA's calculations, and taking into account the monetized value of other benefits, this would mean that the regulation would cost either $11.8 million or $19.7 million per life saved.[26]

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25. Federal Motor Vehicle Safety Standard, *supra* note 4, at 76,238. Although the bulk of the $6.1 million is made up by the $5.8 million monetization of mortality risk, NHTSA also included additional costs, including estimates of "medical care, emergency services, legal costs, insurance administrative costs, workplace costs, property damage and the taxed portion of lost market productivity (the untaxed portion is assumed to be inherently included in the VSL)." *Id.* at 76,238 n.96. Even the $6.1 million number probably under-represents people's willingness to pay to reduce mortality risks. For example, NHTSA also does not account for the effect of income growth over time in its calculation of VSLs; this will tend to reduce the valuations because the effects of the regulation are spread across many years. *See* Cass R. Sunstein & Arden Rowell, *On Discounting Regulatory Benefits: Risk, Money, and Intergenerational Equity*, 74 U. CHI. L. REV. 171, 186–87 (2007) (arguing that one way in which agencies' VSLs can underestimate people's willingness to pay is where they fail to account for the effect of income growth over time); Melissa Luttrell, *The Case for Differential Discounting: How a Small Rate Change Could Help Agencies Save More Lives and Make More Sense*, 3 WM. & MARY POL'Y REV. 80, 126–27 (2011) (arguing that agencies should respond to this argument by adjusting their VSLs). *See generally* Ben Trachtenberg, *Tinkering with the Machinery of Life*, 59 UCLA L. REV. DISC. 128, 129 (2012) (noting that some agencies have now adopted this framework); Memorandum from Polly Trottenberg, Assistant Sec'y for Transp. Policy, & Robert S. Rivkin, General Counsel, U.S. Dep't of Transp., to Secretarial Officers & Model Administrators, Treatment of the Economic Value of a Statistical Life in Departmental Analysis (July 29, 2011), *available at* http://regs.DOT.gov/docs/Value_of_Life_July_29_2011.pdf (noting "adopt[ion of] three changes in methodology in addition to the current interim VSL adjustment" based on the finding that "changes in prices and incomes over the last two years imply an increased VSL of $6.2 million for analyses prepared in 2011"). DOT directs analysts to "augment the base-year VSL by 0.877 percent per year to estimate VSL of any future year in base-year dollars before discounting to present value." *Id.* at 2. This latter guidance only came out after NHTSA performed its analysis in the rearview camera rule, however, and that analysis did not include adjustments for future income growth. *See* Federal Motor Vehicle Safety Standard, *supra* note 4, at 76,238 n.96 (noting that the analysis relies on the 2007 Departmental value of $5.8 million—a number that was updated to $6.2 million in the 2011 Memorandum on the Treatment of the Economic Value of a Statistical Life—and listing a number of adjustment factors, none of which include future income growth). Other potential under-valuations stem from NHTSA not adjusting its VSLs for time indeterminacy in the initial calculations. For an example, *see* Rowell, *supra* note 20, at 1534 (suggesting ways in which regulators can improve time-determinacy so that they do not inadvertently double-discount mortality valuations). *See also* Eric A. Posner & Cass R. Sunstein, *Dollars and Death*, 72 U. CHI. L. REV. 537, 539–40 (2005) (noting that valuation may be further diminished by not counting third-party valuations).

26. *See* Federal Motor Vehicle Safety Standard, *supra* note 4, at 76,238. The difference in the two estimates is based upon the discount rate that NHTSA chooses to apply. Since money has a time value—it can be invested and made to grow—agencies have to apply discount rates to future benefits to make them comparable to immediate costs. Sunstein & Rowell, *supra* note 25, at 173 (arguing that discounting regulatory benefits is theoretically

In addition to these monetized costs and benefits, NHTSA also identifies four kinds of benefits to the rule that it says "cannot be monetized," though "they could be significant."[27] These are: the preservation of additional life-years when children, as opposed to adults, are protected from mortality risks;[28] the value that people may attach to children's lives, over and above the value they attach to preserving adult lives;[29] reduction of "a qualitatively distinct risk, which is that of directly causing the death or injury of one's own child;"[30] and "equity."[31]

As we have seen, Executive Order 13,563 explicitly permits agencies to "consider" non-quantifiable effects in their analyses of regulatory impacts.[32] In fact, "equity" is listed as the kind of quality that may be "difficult or impossible to quantify."[33] But this provision is structurally separate from the requirement that the benefits of a regulation justify its costs[34]—the

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justified because the calculation of those benefits is based on people's willingness to pay for those benefits). The discount rate is typically expressed in percentage terms, and indicates the percent of a dollar's value that is lost for each year of delay. Discounting policy has enormous impacts on regulatory decision making. *See* Rowell, *supra* note 20, at 1509 (describing the impact of discounting, and warning that agencies' current discounting policies may be leading to "double" discounting and significant undervaluation of regulatory benefits). For this regulation, NHTSA identifies $11.8 million as the cost per life saved at a 3% discount rate, and $19.7 million per life saved at a 7% discount rate. *See* Federal Motor Vehicle Safety Standard, *supra* note 4, at 76,240. The significant difference between the two arises from the fact that the safety benefits the camera offers are likely to be spread out over a number of years.

27. *Id.* at 76,238. Note that I have chosen to focus my discussion of NHTSA's analysis on its Federal Motor Vehicle Safety Standard. NHTSA also presents an analysis of the benefits and costs of the rule in its Regulatory Impact Analysis. *See supra* note 4. That analysis differs slightly from the explanation in the Federal Register; for example, under "non-quantified" benefits, it identifies "a certain convenience/comfort factor in being able to see directly behind the vehicle while backing up," the fact that installing a screen on the dash may be useful for other reasons, and "[t]he emotional well-being of the extended family members, friends, and other associates of the injured," that arguably "the emotional distress of the driver should be counted, especially in cases where the driver injures a child, and even more so when the child is their own." *Id.* at V-15–V-16.

28. Federal Motor Vehicle Safety Standard, *supra* note 4, at 76,238 (noting that "well over 40 percent of the victims of backover crashes are very young children (under the age of five), with nearly their entire life ahead of them").

29. *Id.* at 76,239 (citing James K. Hammitt & Kevin Haninger, *Valuing Fatal Risks to Children and Adults: Effects of Disease, Latency, and Risk Aversion*, 40 J. RISK & UNCERTAINTY 57, 57–83 (2010)).

30. *Id.* at 76,238.

31. *Id.* NHTSA does not explain what these equity concerns may be. *See infra* notes 61–63 and accompanying discussion.

32. *See* Exec. Order No. 13,563 § 1(c), 76 Fed. Reg. 3821, 3821 (Jan. 18, 2011).. See also Circular A-4, *supra* note 3, which also addresses these effects.

33. Exec. Order No. 13563 § 1(c).

34. *Id.* § 1(a), (c).

puzzle with which this Article began.

Let us assume, for the moment, that NHTSA is right to treat these latter benefits of the rule as non-monetizable. What role should they play in the analysis—required by Executive Order 13,563—of whether benefits justify costs? The answer to this question will determine whether the rule can continue because the monetized cost–benefit analysis alone (at least as NHTSA has calculated it) cannot justify the expenditure the rule requires. Thus, the question of whether non-monetizable benefits should affect the result of a cost–benefit analysis appears to be determinative of whether NHTSA's rearview rule should be promulgated or not.

What was NHTSA's conclusion in the face of this dilemma? The agency concluded that non-monetizable benefits *can* justify the rule, even where the monetized costs exceed monetized benefits: "Taking all of the foregoing points alongside the quantifiable figures and the safety issue at hand, the agency tentatively concludes that the benefits do justify the costs."[35]

Was NHTSA's conclusion—that non-monetizable benefits can justify monetizable costs—the right one? I think we can gain traction on this question by taking seriously a contention that has arisen from literature on commensurability: that not all things can be completely expressed in monetary terms. This assumption is often taken as a critique of practices that require monetization, and I take it to provide the strongest basis for concluding that some regulatory impacts are impossible to monetize.[36]

With that assumption in hand, this Article sketches two points that I hope help further analysis of the question of how non-quantifiable (and particularly non-monetizable) regulatory impacts should affect regulatory analyses like the one NHTSA must perform for the rearview rule.

The first of these points is that regulators must be careful to distinguish between commensurability and monetizability. People are often willing to pay money to secure the effects of regulation, even when those effects are incommensurable with money. When regulators treat those effects as non-monetizable, they undervalue them in comparison to the amount people would actually pay to secure them. These partial valuations may not represent the holistic value of the good being monetized, but even partial guides can usefully inform policy questions about resource allocation.

The second point of the Article builds upon the first. It argues that non-monetizable benefits have no role to play within monetized cost–benefit analyses. The reason for this is not because non-monetizable benefits are worthless; it is because monetary cost–benefit analyses deal with money,

35. Federal Motor Vehicle Safety Standard, *supra* note 4, at 76,238.

36. *See* Exec. Order No. 13,563 § 1(c), 76 Fed. Reg. at 3821 (referring to the possibility of qualities that are "impossible" to quantify, as opposed to merely "difficult").

and non-monetizable benefits, by definition, have no value that can be expressed in dollars. Any importance that non-monetizable benefits may have to regulatory decision–making must therefore accrue outside the ledgers of monetized cost–benefit analyses.

II. DISTINGUISHING COMMENSURABILITY AND MONETIZABILITY

In categorizing regulatory effects as monetizable or non-monetizable, we should be careful not to confuse commensurability with monetizability.[37] Commensurability is a problem of expression: good A is incommensurable with money if A cannot be completely expressed in terms of money.[38] But monetizability—at least as currently practiced—does not require commensurability. In monetizing regulatory effects, regulators ask how much money people are willing to exchange for those effects—or how much they value the regulatory effects in terms of money.[39] For something to be monetizable for the purposes of current regulatory practice, it is unnecessary for the complete value of a good to be expressed in monetary terms. It is only necessary that people be willing to pay some amount of money for the good.

People value different things in different ways.[40] Often, asking people for their subjective valuation of a good in terms of money is likely to give an incomplete picture of everything anyone might value about that good.[41]

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37. In fact, we should be careful to distinguish (in)commensurability and questions of valuation in general. *See generally* Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779 (1994) (arguing that questions of commensurability and valuation are segregable).

38. For an application and discussion of this approach to commensurability, see Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L. J. 56 (1993) (addressing commensurability as an "equation"). Incommensurability is also commonly described as a lack of a common metric—a definition that assumes a lack of equivalence. *See, e.g.*, Sunstein, *supra* note 37, at 796, 799–801 (presenting a "working definition" of incommensurability, "designed especially for the legal context," that "[i]ncommensurability occurs when the relevant goods cannot be aligned along a single metric without doing violence to our considered judgments about how these goods are best characterized," and comparing alternative formulations of incommensurability); *see also* Matthew Adler, *Incommensurability and Cost–Benefit Analysis*, 146 U. PA. L. REV. 1371, 1383 (1998) ("'Incommensurability,' in one sense, means the absence of a scale or metric" and providing a defense of cost–benefit analysis in light of incommensurability). The literature on (in)commensurability is extraordinarily rich; for a useful essay summarizing diverse views, see Nien-he Hsieh, *Incommensurable Values*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY, Edward N. Zalta, ed., (2007), *available at* http://plato.stanford.edu/entries/value-incommensurable/.

39. For a discussion of the foundation of regulatory practices of monetization as being built upon willingness to pay, see Sunstein & Rowell, *supra* note 25, at 173. *See also* Circular A-4, *supra* note 3.

40. *See* Sunstein, *supra* note 37, at 782–794 (discussing different types of valuation).

41. *See id.* at 785–790.

This means that monetization can provide only a partial expression of the total value of goods that are incommensurable with money—what I will call a partial valuation. This is a problem for the enterprise of trying to completely express various goods in terms of money.[42] But it is not a problem insofar as we are engaged in the very different enterprise of trying to determine how much money to exchange for various goods. For that purpose, knowing how much money people are willing to exchange for those goods is highly informative.

This distinction between commensurability (which is a question, at least as I have framed it, of completeness of expression) and monetizability (which is a question of people's willingness to spend money) matters to regulatory practice because it is important that regulators not mistake incommensurability with money for non-monetizability. Many of the effects of a regulation may be incommensurable with money, but when those effects are important—as, for example, with the preservation of the life of a child—people are often willing to pay money to secure them.[43] It is a mistake to treat these goods as non-monetizable—and it is a mistake that can lead to significant undervaluations (in monetary terms) of the amount people are willing to pay for a regulation with those effects.

To see more concretely how this distinction might work, consider an example of something that seems intuitively incommensurable with money: the value of listening to birdsong outside one's bedroom window. It would be a sad and flat world where we believed that waking up to birdsong was in all ways identical to any amount of money. Nevertheless, a person who values birdsong might be willing to pay some amount of money—say $5—

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42. *See* Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost–Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1553–56 (2002) (assuming that regulatory cost–benefit analysis is engaged in the project of equating diverse goods, including lives, with money, and arguing that this approach is doomed because of incommensurability between money and other goods)*; see also* Radin, *supra* note 38 (arguing that bodily integrity cannot be completely expressed in terms of money).

43. Past attempts to elicit people's willingness to pay to protect children have led to significant anger where it has been taken as equating dollars with children's lives. *See, e.g.*, Ackerman & Heinzerling, *supra* note 42, at 1555–56 (referring to attempts to monetize improvements in child health and reductions in child mortality as "absurd") (discussing Paul S. Carlin & Robert Sandy, *Estimating the Implicit Value of a Young Child's Life*, 58 S. ECON. J. 186 (1991), among others). The point of this Article is that monetization based on willingness to pay does not require equation of money with the good being valued. It simply requires willingness to pay money for the good. In this sense, I would tend to side with Joseph Raz over James Griffin on the question of whether the act of exchange should be taken as a sign that money and the regulatory effect are "actually" commensurable. *See* Radin, *supra* note 38, at 65–68 (discussing James Griffin and Joseph Raz's approaches to the question of whether we can infer commensurability between choices "to the extent the actor actually does choose one value over the other").

to secure the ability to listen to it.

Note that the fact that money and birdsong might be exchanged for one another (as through environmental policies that support healthy bird populations) does not mean that the goods are necessarily *equal* to one another. To see this, suppose that the value of "waking up to birdsong" is expressed as "*w*." Suppose further that the willingness to pay for *w* is $5. If the two goods are substantively different from one another, there is no reason to believe that (*w* - $5) = 0. Rather, because the two goods are not the same, there is likely to be some remainder—call it w_r—that represents just that portion of the value of birdsong that was not expressed in the monetized valuation of $5. We might reasonably say that w_r is non-monetizable, or non-quantifiable , insofar as it is the portion of "waking up to birdsong" that is valued, but not expressable in terms of this person's willingness to pay in dollars. So a portion of the value of waking up to birdsong is monetizable, because someone is willing to pay money for it. But some portion of the value of waking up to birdsong is also *not* monetizable. It would be a mistake to confuse either of these parts for the whole, either by concluding that waking up to birdsong is entirely commensurable with money simply because the two were exchanged (thereby ignoring the existence of w_r); or that waking up to birdsong (*w*) is completely non-monetizable because some portion of it (w_r) is non-monetizable.

Rather, we should think of the $5 as a distinctive kind of valuation: a partial valuation. This partial valuation describes how "waking up to birdsong" can be expressed in monetary terms. The fact that this is only a partial valuation means that it tells us only a portion of the total value of birdsong. But that does not make the monetization worthless. Insofar as policy addresses questions of resource allocation, which can be informed by willingness to pay, it can still importantly inform decision making.[44] If this argument is right, it means that partial valuations can be used to express the monetary value of goods—like birdsong—that are incommensurable with money.[45]

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44. For another example of how partial valuations can be helpful to policy, see Rowell, *supra* note 20, at 1510–12.

45. It is not to say that all goods can be partially valued in terms of money. It may be that there are things that are valuable but for which people are willing to pay no money whatsoever. One likely set of candidates for this category is goods for which there is a social stigma attached to monetization or commodification, such as where the good is defined by reference to its lack of susceptibility to exchange. For discussion of the impact of commodification, see MARGARET JANE RADIN, CONTESTED COMMODITIES 115–22 (1996). These might include goods like gifts—which lose their gift-like status if they are exchanged (at least directly) for money. And it might also include goods like human dignity, *see* Exec. Order 13,563 § 1(c), 76 Fed. Reg. 3821, 3821 (Jan. 18, 2011), which could arguably lose its

How can this help regulators faced with managing diverse regulatory effects? By clarifying that, even where an effect of a regulation seems importantly inexpressible in monetary terms, it may still be at least partially valuable in monetary terms. This account supports the existing use of monetization for valuing things—like mortality risks—that seem importantly incommensurable with money. To see how this argument can affect analyses, let us delve further into NHTSA's treatment of the benefits of the rearview rule, focusing particularly on the benefits it claims "cannot be monetized."

Consider first NHTSA's claim that those affected by the rearview camera regulation are often children, who have many expected life-years ahead of them.[46] NHTSA does not explain why it thinks this value is non-monetizable.[47] From a commensurability perspective, however, it seems understandable that NHTSA would worry that the life-years of children are meaningfully different than money, such that they cannot be completely expressed in dollar terms. But while that intuition might suggest that life-years and dollars are incommensurable, as we have just seen, it does not tell us that life-years cannot be monetized. And indeed, there are large and robust methodologies that have grown up for just this purpose.[48] The Environmental Protection Agency (EPA) even experimented with using one of them, called the "Value of Statistical Life-years" (VSLY),[49] in lieu of the more familiar "Value of a Statistical Life" (VSL), which attaches the same monetized value per life saved regardless of how many life-years are expected.[50] There was enormous political fallout: the move was bitterly resisted by the American Association of Retired Persons, among others, and was popularly dubbed the "senior death discount," on the grounds that it would tend to encourage spending less money to protect the elderly.[51] In contrast, critics of the current approach—using VSL instead of VSLY—

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value if it is exchanged for money.

46. Federal Motor Vehicle Safety Standard, *supra* note 4, at 76,238.

47. *Cf.* Circular A-4, *supra* note 3 (directing agencies to explain any decisions to treat benefits as non-monetizable).

48. For a discussion of two methodologies used by agencies, see Lisa A. Robinson, *How US Government Agencies Value Mortality Risk Reductions*, 1 REV. ENVTL. ECON. & POL'Y. 283 (2007), which describes agencies' use of the Value of a Statistical Life Year (VSLY) approach and the Quality-Adjusted Life Year approach.

49. *See id.* at 284–85

50. *Id.* at 285.

51. *See* Robert Hahn & Scott Wallsten, *Whose Life is Worth More? (And Why is it Horrible to Ask?)*, WASH. POST, June 1, 2003, at B3; Katharine Q. Seelye & John Tierney, *E.P.A. Drops Age-Based Cost Studies*, N.Y. TIMES, May 8, 2003, http://www.nytimes.com/2003/05/08/us/epa-drops-age-based-cost-studies.html?pagewanted=all&src=pm (discussing the political tensions surrounding EPA's policy of conducting age-adjusted analysis in cost–benefit analysis).

might just as easily dub the VSL a "child death discount."[52]

Must regulators choose between senior death discounts and child death discounts—between valuing lives equally and recognizing the value of life-years? Although agencies considering mortality valuation techniques have traditionally assumed that VSL and VSLY are substitutes for one another—perhaps in part because VSLY has traditionally been derived from VSL[53]—there is no logical reason that the two approaches must be mutually exclusive.[54] It could be that people are willing to pay some amount to prevent any death, and that they are also willing to pay a premium for life extension. If that is the case, then it is appropriate for regulators to spend up to the VSL to prevent any death, and to pay a supplemental amount of money per life year extended—per VSLY.

NHTSA does not engage with these questions. It merely assumes that extending children's lives is non-monetizable. If the agency is right to claim that mere VSL does not capture important aspects of the loss of life-years borne with loss of a child, it seems very unlikely that it is also right to treat this value as if it "cannot be monetized"—as if people are willing to spend no money at all to extend children's lives. NHTSA would do better to attempt a partial monetization to express the amount people are willing to pay in money per life-year extended.

NHTSA also refuses to monetize a related effect of the regulation: the distinctive harm of the death of a child.[55] NHTSA again assumes that this value is entirely non-monetizable. Again, however, this effect is only unable to be monetized if we assume that the only way to monetize is if money is used as a complete measure of a good. But for policy purposes, where we are trying to determine how much money to pay for a regulatory effect, the appropriate question is: are people willing to pay any money for

52. An interesting question here, given that many of the non-child victims of backover crashes are elderly, is whether these valuations would tend to "even out" if VSL is used as the only method for calculating the loss. *See* Federal Motor Vehicle Safety Standard, *supra* note 4, at 76,239 n.100 (noting that 33% of the fatalities are persons seventy years or older). Without a life-years analysis, however, it is impossible to know if this would be the case.

53. VSLY is typically "derived by dividing the VSL by the discounted expected number of life-years remaining." Robinson, *supra* note 48, at 284 (providing a useful and readable summary of various valuation practices).

54. Academic commentators have generally split about whether VSL or VSLY is preferable. *Compare, e.g.*, Cass R. Sunstein, *Lives, Life-Years, and Willingness to Pay*, 104 COLUM. L. REV. 205, 206 (2004) ("[I]t is sensible to think that government should consider not simply the number of lives at stake, or the VSL; it should concern itself also or instead with the number of life-years at stake, or the value of statistical life-years (VSLY).") *with* RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST–BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH 146 (2008) (advocating for VSL over VSLY).

55. Federal Motor Vehicle Safety Standard, *supra* note 4, at 76,238–39.

this effect, to either prevent or secure it? And in this case, the answer to the question appears to be that people are indeed willing to pay significant amounts of money to prevent the death of a child, over and above what they are willing to pay to reduce mortality risks to other adults or to themselves.[56] NHTSA itself cites to an article by James Hammitt and Kevin Haninger that cautiously finds that people are willing to pay $12–$15 million for children, even where they will only pay $6–$10 million for adults;[57] yet the agency chooses not to incorporate this information into its analysis.[58]

NHTSA also claims that there is a qualitative difference between a general death and death resulting from a parent accidentally killing her own child.[59] NHTSA describes this benefit as non-monetizable as well.[60] This effect also seems deeply incommensurable with money: there is no way to conceive of killing one's child as equivalent to any amount of money. But, as we have seen, the incommensurability of these two things should not lead NHTSA to the conclusion that no portion of this effect can be monetized. So long as people are willing to pay some amount of money to avert this type of tragedy, the effect can be at least partially valued in monetary terms.

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56. *See* James K. Hammitt & Kevin Haninger, *Valuing Fatal Risks to Children and Adults: Effects of Disease, Latency, and Risk Aversion*, 40 J. RISK & UNCERTAINTY 57, 72 (2010) (performing a stated preference study comparing people's willingness to pay to preserve the lives of adults and their willingness to pay to preserve children's lives).

57. *See id.* at 57, 72; Federal Motor Vehicle Safety Standard, *supra* note 4, at 76,239 n.99 (citing Hammitt & Haninger, *supra* note 56). Note that it is not clear that Hammitt and Haninger's study can effectively disaggregate any value attached to the status of childhood from extensions of life-years—the first two benefits NHTSA identifies as non-monetizable. A thorough monetization would address both of these, but might determine that the figures identified by Hammitt and Haninger should be understood to incorporate both the premium for life-year extensions and any special amount people are willing to pay for protecting children as a group.

58. To the extent that NHTSA explains this decision, it does so by emphasizing that this literature is still in its infancy. *See id.* It is a fair and difficult point that it can be hard for agencies to know when to incorporate early empirical findings into their analyses. Generally, agencies are required to use "the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible." Exec. Order No. 13,563 § 1(c), 76 Fed. Reg. 3821, 3821 (Jan. 21, 2011). I think this exhortation should be understood against the relevant baseline, which here appears to be the highly implausible assumption that people are willing to pay no supplemental amount of money to prevent the death of a child. On this view, it seems highly implausible that as between that assumption and the use of a literature in its infancy that the "best available technique" would be to assume zero willingness to pay.

59. *See* Federal Motor Vehicle Safety Standard, *supra* note 4, at 76,238–39 (citation omitted).

60. *Id.* (citation omitted).

Finally, it is worth addressing NHTSA's treatment of equity, which it also describes as non-monetizable.[61] This portion of the analysis reads a bit mysteriously: in defining the term and the problem, the NHTSA report explains briskly that "Executive Order 12866 also refers explicitly to considerations of equity. '[I]n choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including . . . equity),[']and there are strong reasons, grounded in those considerations, to prevent the deaths at issue here."[62]

This section of the analysis raises two distinct issues: whether this rule actually implicates equity concerns, and whether equity concerns (when they do exist) really are entirely non-monetizable, such that people are not willing to pay any money to secure more equitable policies.

On the first question, NHTSA's analysis is not very helpful. It articulates none of the "strong reasons" "grounded" in equity for "prevent[ing] the deaths at issue here."[63] Nor are these reasons obvious, at least to this author. Even recognizing that it can be difficult to address equity concerns in a principled way,[64] the analysis in this portion of NHTSA's report looks troublingly vague. It is questionable whether this kind of generic gesturing should play any role in a regulatory analysis. If NHTSA has actual concerns about equity stemming from this rule, it should articulate those concerns.[65] If it does not, then using this kind of generic claim of "non-quantifiable" benefits seems at best disingenuous and at worst misleading.[66]

Even setting that concern aside, however, we might still wonder whether even so qualitative a value as equity is completely non-monetizable. It may be impossible to fully express equity concerns in monetary terms, but this is an objection of commensurability. To determine that equity cannot be monetized at all, we must ask the separate question of whether people are willing to pay any amount of money to secure equity. It is true that this question is difficult to answer, as are many questions of monetization where the relevant good is not directly traded in any marketplace.[67] But it is not

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61. *See id.* at 76,238.

62. *Id.* (alterations in original).

63. *See generally id*. Equity is not even mentioned in the Regulatory Impact Analysis. *See supra* note 4.

64. Difficult, but not impossible. *See generally* MATTHEW D. ADLER, WELL-BEING AND FAIR DISTRIBUTION: BEYOND COST–BENEFIT ANALYSIS (2011) (presenting a careful method for measuring fairness concerns and for integrating those concerns with a social welfare function).

65. *See* Circular A-4, *supra* note 3.

66. Note that Executive Order 13,563 explicitly lists "equity" as an example of something that it may be "difficult or impossible to quantify." Exec. Order No. 13,563 § 1(c), 76 Fed. Reg. 3821, 3821 (Jan. 21, 2011).

67. But agencies routinely handle this concern through a variety of mechanisms. *See*

clear that this difficulty makes it plausible to assume—as NHTSA implicitly does here—that people are not willing to pay any amount of money to secure equity. For example, is there no portion of the cost of our judicial system attributable to people's willingness to pay for equity? Perhaps not, or perhaps that kind of equity is not the kind of equity that NHTSA means to address in this regulation. But it is by no means obvious that even equity is entirely inimical to monetization, at least insofar as monetization is understood to represent only a partial valuation of underlying goods.

III. THE ROLE OF NON-MONETIZABLE EFFECTS IN COST–BENEFIT ANALYSIS

As we have seen, in its analysis of the rearview rule, NHTSA chose to use what were questionably "non-monetizable" benefits to justify monetized costs. One objection to that approach is that NHTSA failed to monetize portions of those benefits that could have been at least partially valued in money. Another concern, however, is whether—even if we accept categorizations of some benefits as non-monetizable—those benefits should affect the outcome of a cost–benefit analysis.

Perhaps this complex issue can be illuminated by considering a simplified decision context. Let us imagine that a child's parents determine that, given all of their resource constraints, they are willing to spend $25 to enter their high-strung but intelligent child in a science fair. They are also willing to spend significant time helping the child with research and getting the child to relevant events, and they are willing to bear the likelihood of emotional drama as the child manages the stress of the event. Let us assume that time and frustration are incommensurable with money in some way, such that even when the parents have monetized all portions of the time and frustration that they can, there is still some remainder of those goods left that they are unable to express further in monetary terms.

Suppose now that the entrance fee for the science fair is $50. Should the parents pay to allow their child to enter? Not if their willingness to pay—in money—is only $25. If they have done a thorough job monetizing—if they have counted everything that *can* be counted in monetary terms—then $50 is too much for them to pay. No matter how much time and frustration they would have been willing to invest, it is still too much of one resource: money.

Consider this in simple algebraic terms. Suppose that we determine that a group of people is willing to pay 25 of resource a to gain outcome x. (This is like the family who is willing to spend $25 to enter their child in the science fair.) Suppose that they are also willing to pay 40 of resource b and

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Circular A-4, *supra* note 3, at 26–29.

15 of resource *c*. (These might be hours of time to be invested in the project, and some measure of emotional investment.) This means that their willingness to pay for outcome *x* is $25a + 40b + 15c$, such that they expect to be benefited at least that much by outcome *x*.

Now suppose that we learn something about the cost of gaining outcome *x*. If we learn that the cost is $50a$, then we know that the cost in *a* is greater than the family's willingness to pay in *a*. So we know that this is not a good choice for them; the outcome costs more than they are willing to pay for it. And—so long as no portions of *b* or *c* can be expressed in *a*—we can determine that this is not a good choice even without any further information about further costs. It does not matter if it would actually cost nothing in *b* or *c*—significantly less than the parents are willing to spend in those metrics. It is still a bad bargain.

Does this mean that *b* and *c* do nothing in the analysis? No. They perform the same function *a* does, such that they should guide the decision wherever the cost (in that resource) outweighs the benefits (in that resource).

Nor do we have to be wedded to the notion that they are forever discrete from *a*. Suppose, for instance, that the parents are given the option to decrease the entry fee to the science fair to $20—below their willingness to pay in dollars—if one of them is willing to act as the chair on the science fair committee. This makes the cost of entering the science fair higher in time, but lower in dollars. In algebraic terms, it might now be $20a + 100b + 10c$. If the parents' willingness to pay is still only $25a + 40b + 15c$, then this is still not a good choice for them. That is because the cost—in *b*, or in this case, time—is greater than they are willing to pay in that resource.

Now consider how this approach applies to NHTSA's calculations. NHTSA has told us that it believes society is willing to pay $6.1 million per life saved by the rearview camera rule.[68] In addition, for each life saved, the regulation would give benefits of what we will call *b* (saving additional life-years over the average life saved), *c* (the extra value that people attach to children's lives over adult lives), *d* (reducing the risk that people will inadvertently cause the death of their own child), and *e* (the equitable benefit NHTSA sees to adopting the rule). If we accept NHTSA's claim that these benefits "cannot be monetized," even a little bit, the benefits of the rule are $6.1 million + $b + c + d + e$. But the costs are (at least) $11.8 million.[69] Since this exceeds the $6.1 million people are willing to pay for the benefit, this regulation cannot be justified by reference to a cost–benefit analysis. This is true regardless of how important we believe *b*, *c*, *d*, and *e* to be. So long as *b*, *c*, *d*, and *e* are non-monetizable, they can justify $0 of

68. *See* Federal Motor Vehicle Safety Standard, *supra* note 4, at 76,237–38.

69. *See id.* at 76,240.

additional expenditure. Thus, regardless of the side of the equation they appear on, nonmonetary costs and benefits can have zero impact on the final determination of whether the policy passes a cost–benefit test.

Recognizing this point highlights the danger of haphazardly identifying large categories of benefits as non-monetizable, as NHTSA has arguably done here. Confusing whether something is monetizable with whether it can be completely expressed in monetary terms can lead to undervaluing the amount that people are willing to pay for a regulation. It is for this reason that regulators should be careful to distinguish monetizability and commensurability, and to practice partial valuation wherever possible.

Once we have firmly identified a set of benefits as non-monetizable, however, either because we believe they are of value, even if people will pay no money for them, or because we have already monetized everything that can be monetized, there is no room to allow non-monetizable benefits to affect the outcome of a monetary cost–benefit analysis.

Any value in non-monetizable benefits—however great—by definition cannot be captured in monetary terms, which means it cannot be captured in a monetary cost–benefit analysis. Does this suggest that it is pointless to engage in analysis of non-monetizable effects? No. It is by no means obvious that cost–benefit analysis should be the sole determinant of legal policy, and identifying and discussing non-monetizable effects may give us critical clues about how to manage other decisionmaking structures.[70] And even a proponent of the extreme position that cost–benefit analysis should be the sole decision rule used to determine final regulatory decisions should recognize that there are transparency benefits to identifying what has been categorized as non-monetizable.[71] In NHTSA's case, for example, the fact

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70. *See, e.g.*, Adler, *supra* note 38, at 1381–83 (discussing cost–benefit analysis as a welfarist decision procedure). That said, this analysis does imply that the willingness-to-pay approach to monetization may have critical implications for cost–benefit analysis that have yet to be analyzed in the literature. As we have seen, the nonmonetary effects of regulations are monetized on the basis of people's willingness to pay for those effects. If we take this practice seriously, it points to a reason not to regulate when costs exceed benefits: because in those cases, the costs of the regulation exceed what people are willing to pay for it. Regulating where costs exceed willingness to pay may implicate autonomy concerns about respecting people's preferences, and it may also implicate democratic concerns about the appropriate role of agencies as agents for the public. These concerns may be separable from the typical welfarist arguments offered in favor of cost–benefit analysis as a decision tool. If they are, this would be a reason to refuse to regulate when costs exceed willingness to pay, even if willingness to pay operates as a poor proxy for welfare, as many analysts have argued it does. *See, e.g.*, *id.* at 1381.

71. On the value of disclosure and generally transparent decisionmaking systems, see Cass R. Sunstein, *Empirically Informed Regulation*, 78 U. CHI. L. REV. 1349 (2009). *See also* Exec. Order No. 13,563 § 1, 76 Fed. Reg. 3821 (Jan. 18, 2011). (laying out the values underlying the regulatory system, including that it "allow for public participation and an

that NHTSA explicitly identified the goods it was treating as non-monetizable allows evaluation of whether its decisionmaking was appropriate.

CONCLUSION

In sum, it seems plausible that many of the effects of the proposed rearview camera rule cannot be completely expressed in monetary terms—that, for salient example, there can be no dollar equivalent to the experience of accidentally killing one's child. But this should not be taken—as NHTSA appears to take it—to mean that people are willing to pay no money whatsoever to prevent any of these effects from occurring. If people are willing to pay any amount of money to prevent any of the serious harms NHTSA identifies as "non-monetizable," then NHTSA has failed to thoroughly monetize the effects of the regulation. If NHTSA revisits its monetization policies to account for the possibility of partial monetization, which counts people's willingness to pay money for goods whether or not the goods are completely expressible in terms of dollars, it is likely to find that the monetizable benefits of this regulation are significantly higher than its current calculations.[72]

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open exchange of ideas," and that it "promote predictability and reduce uncertainty"); OFFICE OF MGMT. & BUDGET, OFFICE OF INFO. & REGULATORY AFFAIRS, REGULATORY IMPACT ANALYSIS: A PRIMER 2 (2011), *available at* http://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/circular-a-4_regulatory-impact-analysis-a-primer.pdf (interpreting Executive Orders 13,563 and 12,866 as requiring "a careful and transparent analysis of the anticipated consequences of economically significant regulatory actions"); Memorandum on Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 26, 2009) (calling for the establishment of "a system of transparency, public participation, and collaboration").

72. For an opposing view on valuation and the rear-camera rule, see Melissa Luttrell, *Bentham at the OMB: A Response to Professor Rowell*, 64 ADMIN. L. REV. (forthcoming 2012). In her response, Luttrell argues that the question of whether any executive order requires regulations, like the rear-camera rule, to pass a monetary cost–benefit analysis is actually a well-settled one, and the answer is that no executive order currently in effect establishes such a completely utilitarian decision rule. Luttrell agrees that many regulatory goods that agency economists deem "incommensurable" with money are goods that—in theory—are at least partially monetizable, in the sense that there does exist some willingness to pay for these goods. However, she argues, the benefit of acquiring ad hoc valuation estimates for such incommensurable goods, goods that often cannot be even partially monetized without significant new research, in many cases will not justify the delay and expense such an expanded monetization process would require. In addition, unavoidable uncertainty regarding risk and exposure will make it impossible for agencies to defensibly monetize many valuable public health, safety, and environmental protections. Thus, she argues, it is very important that the quest for more perfect monetization not become yet another obstacle to timely and effective regulation.