CHAPTER 1

The Substance of Rules and the Reasons for Rulemaking

The conspiracy that led on September 11, 2001, to the destruction of the World Trade Center and adjacent buildings in New York City, major damage to the Pentagon, the loss of an airliner in rural Pennsylvania, and the death of thousands is a signal event in American history. A strong public policy response was inevitable, and it continues to take many forms. One relates action illustrates why rulemaking is worthy of study.

The repercussions of this national trauma and several of our most fundamental freedoms converged on the rulemaking process in the fall of 2001. In an effort to prevent new terrorist attacks in America, the attorney general issued a rule on October 31 restricting communications between attorneys and certain prisoners with suspected ties to the September 11 attacks. According to the government, the rule merely extended powers already held by the Bureau of Prisons to monitor certain attorney-client contacts. Termining the rule “interim final” the attorney general also invited comment from the public, opening the possibility that the directive could be changed. Comment he got. The rule triggered massive coverage in the press, comment by pundits, and outraged reactions from professional and civil libertie organizations. To assertions that the action was essential to the protection of the public, the critics answered that the rule was an unacceptable and unjustifiable affront to the Fourth and Sixth Amendments of the United States Constitution. Many view the right to counsel, embodied in the Sixth Amendment and developed over centuries through court decisions and legislation as the seminal protection for those of us confronted by the overwhelming power of the state in criminal matters. But for our purposes, the fact that the government viewed the rule as so essential and groups of attorneys and civil libertarians saw it as so dangerous underscores, in most dramatic fashion the central importance of rules and rulemaking to our system of government and, indeed, our way of life. And if one suspects the case is idiosyncratic or atypical, consider that in the first six months following September 11, age
cies of government issued more than forty rules to enhance national security while Congress enacted a single statute, which itself requires a tremendous amount of subsequent rulemaking before its provisions will come into effect and have an impact. Rulemaking has been used in this case, and countless others, because as an instrument of government it is unmatched in its potential for speed, specificity, quality, and legitimacy. This response to a profound threat demonstrates a central feature of the American system of government.

Rulemaking is a ubiquitous presence in virtually all government programs. For a variety of reasons Congress is unwilling or unable to write laws specific enough to be implemented by government agencies and complied with by private citizens. The crucial intermediate process of rulemaking stands between the enactment of a law by Congress and the realization of the goals that both Congress and the people it represents seek to achieve by that law. Increasingly, rulemaking defines the substance of public programs. It determines, to a very large extent, the specific legal obligations we bear as a society. Rulemaking gives precise form to the benefits we enjoy under a wide range of statutes. In the process, it fixes the actual costs we incur in meeting the ambitious objectives of our many public programs.

Rulemaking is important for many reasons. The best place to begin a discussion of those reasons is with a definition of rulemaking and an explanation of why it is crucial to our system of government.

The Definition of Rulemaking

Colin Diver, former dean of the University of Pennsylvania Law School and one of the most thoughtful observers of rules and rulemaking, defines the term in a paraphrase of the great jurist Oliver Wendell Holmes: a "rule is the skin of a living policy ... it hardens an inchoate normative judgment into the frozen form of words. . . . Its issuance marks the transformation of policy from the private wish to public expectation. . . . [T]he framing of a rule is the climactic act of the policy making process." This definition underscores the pivotal role that rules play in our system of government, but more light must be shed on their key characteristics.

More than fifty years after its enactment into law, the Administrative Procedure Act of 1946 (referred to henceforth as the APA) still contains the best definition of rule. The act was written by Congress to bring regularity and predictability to the decision-making processes of government agencies, which by the mid-1940s were having a profound influence on life in this country. Rules and rulemaking were already important parts of the administrative process in 1946. Both, however, required careful definition so that the procedural requirements established in the act would be applied to the type of actions Congress intended to affect.

The APA states: "Rule means the whole or part of an agency statement of general or particular applicability and future effect designed to implement interpret, or prescribe law or policy." At first reading this statement does no appear to reveal much. On closer examination, however, it surrenders severa elements, each crucial to understanding contemporary rulemaking. Not the first element mentioned but a good place to start is a single word—agency—because it identifies the source of rules.

The Source of Rules: Agencies

We learn first from this definition that rules do not come from the major institutions created by the Constitution. They are not products of Congress or some other legislature. Rules are by-products of the deliberations and votes of our elected representatives, but they are not themselves legislation. Congress does have its own institutional rules, but they apply only to its members and committee. Under the APA definition, rules do not originate with the president, some other chief executive. As we will see, the actions of the president of the United States and chief executives at the various levels of government have profound effect on the rulemaking process. These people employ executive orders and directives in the course of their management responsibilities, but rarely, if ever, do they write rules of the type considered in this book.

Various and sundry courts may have reason to consider rules. Their actions may result in rules being changed or eliminated. But judges do not write rules in the first instance either, except, like Congress, to establish procedures for their colleagues and the operation of the courts over which the president.

Rules are products of the bureaucratic institutions to which we entrust the implementation, management, and administration of our law and public policy. We usually view bureaucracies as inferior in status to the "constitutional" branches of government—Congress, the president, and the judiciary. We do so because the authority of these agencies is derivative, patterned after and drawn from the three main branches. In one important respect, however, agencies are the same as these institutions. The rules issued by departments, agencies, or commissions are law; they carry the same weight as congressional legislation, presidential executive orders, and judicial decisions. A important and controversial feature of our system of government is the bureaucratic institutions are vested with all three government powers established in the Constitution. Through a device called delegation of authority government agencies perform legislative, executive, and judicial function.
Rulemaking occurs when agencies use the legislative authority granted them by Congress.

It is significant that agencies are the sources of rules, because it means that rulemaking is subjected to the external and internal influences that have been found to affect decision making in our public bureaucracies. Agencies behave differently from the constitutional branches of government. Their decisions cannot be explained simply by reference to the admittedly strong pressures they continually feel from Congress, the White House, the courts, interest groups, and the public at large. As one group of scholars put it, "Public agencies are major political actors in all phases of the policy process."\(^4\)

The organization, division of labor, culture, professional orientation, and work routines of bureaucracies affect the way they make decisions. So, too, do the motives of individual bureaucrats. These themes will be developed further in the final chapter. We must expect the law and policy embodied in rules written by agencies to be different from what would be developed by Congress, the president, or the courts. So the very source of rules makes them immediately distinctive from other instruments of law and public policy.

*Agency* can mean any one of a number of organizational arrangements used to carry out law and policy. Public bureaucracies have many names. There are departments, such as the Department of Transportation; commissions, such as the Federal Trade Commission (FTC); administrations, such as the Federal Aviation Administration (FAA); and agencies, such as the Environmental Protection Agency (EPA). However organized or named, most of these bodies have the authority to issue rules and use a rulemaking process to carry it out.

**The Range of Influence of Rules over Law and Policy: Implement, Interpret, Prescribe**

The definition clearly establishes an expansive relationship between rules law, and public policy. The terms *implement, interpret, and prescribe* describe the fullest range of influence that a rule could have. Rules merely *implement* when law or policy has been fully developed in a statute enacted by Congress, an executive order of the president, or a judicial decision. Hence rules need provide no additional substantive elaboration. In these cases rules give instructions to administering officials and the public in the form of procedures and interpretation of statutory provisions but add nothing else of substance to the direction already provided by Congress.

Rules *interpret* when law and policy are well established but confront unanticipated or changing circumstances. Statutory terms, clear and precise when written, may require adaptation when new business practices or technologies appear. Legislation implemented by the Federal Trade Commission for example, seeks to eliminate improper restraints on competition. This creates tasks in the present time that are very different from those created in the era of the robber barons and the trusts. Similarly, statutes mandating air or water quality clearly require agencies to be attentive and respond to industry structure and production processes that may, in turn, alter the sources and types of pollution to be regulated.

Rules *prescribe* when Congress establishes the goals of law or policy it statutes but provides few details as to how they are to be put into operation or how they are actually to be achieved. The Occupational Safety and Health Act stated its ambitious goals in this way: "to assure so far as possible every working man and woman in the Nation safe and healthy working conditions."\(^5\) Although it provided some additional guidance, it left to the administering agency, the Occupational Safety and Health Administration (OSHA), the job of defining through rules key legal terms such as *so far a possible, safe, and healthy.* And once these terms were given an authoritative, legal meaning the huge task of finding the ways that health and safety could be protected was left to the agency as well. Similarly, it was no uncommon for statutes dealing with economic regulation to set agencies of in search of "the public interest" as the criterion for their actions.\(^7\) The APA definition allows agency rulemaking to fill whatever vacuum has been left by Congress, the president, and the courts in the formation of public policy or law. The greater the demands on these institutions, the more likely the role of rules will expand.
The Range of Circumstances Affected by Rules: General and Particular Applicability

Rules affect persons or activities in the widest possible range of circumstances. The phrase "general or particular applicability" in the APA allows rules to range from those that affect large segments of the population and economy to those that produce changes in a single individual, group, firm, or government unit. Some may find this element of the definition confusing, even troubling. We tend to think of legislative action as being concerned with general issues and problems that affect groups of people and activities. The judicial process is generally thought to be better designed for dealing with individual circumstances.  

So, should not a reduction in number of activities or persons affected by a government action cause an agency to shift from a quasi-legislative process to a quasi-judicial mode of decision making? Should not an agency use other delegated authority to act in a judicial capacity? The short answer is that, although the number of persons affected might influence the specific procedures used to make a decision, this characteristic alone does not determine whether an action that is contemplated is best classified as a rule. The underlying purpose of the action is a key element in this regard and it is addressed directly in the APA definition.

The Importance of Future Effect

Rules, like legislation, attempt to structure the future. By creating new conditions, eliminating existing ones, or preventing others from coming into being, rules implement legislation that seeks to improve the quality of life. The term future effect is thus a crucial element in the definition of rules because it allows a clear contrast to situations in which agencies issue decisions, acting in their judicial capacity.  

Often, agencies are primarily concerned with determining the legal implications of current or past events and conditions. This occurs when an individual challenges an adverse regulatory decision, such as a denial of his or her petition for a benefit provided by some government program, or applies for a license. In these instances the government is being asked to issue an order: the term used when agencies are acting in a judicial capacity. An order applies existing rules to past or existing circumstances. Although an order may have a future effect, such as granting benefits to an individual or permission to operate a particular type of business, its primary purpose is not the creation of policy or law to establish new conditions. Again, although the type of procedures an agency uses to issue rules may at times resemble those used by courts, the purpose of rules is clearly distinct from that of other forms of administrative actions.

The key features of rules, then, are that they originate in agencies, articulate law and policy limited only by authorizing legislation, and have either a broad or a narrow scope but are always concerned with shaping future conditions. This tells us what rules are. Now we must examine the growth of rulemaking through time to determine why it has come to play so central a role in our system of government.

The History of Rulemaking

Rulemaking is a direct consequence of the demands the American people make on government. By persuading elected officials to improve health care, clean the environment, or protect them from deceptive business practices, the American people inexorably set in motion the rulemaking process. But it would be hard to argue that there is enthusiastic, explicit, or even conscious public support for rulemaking. There is no Association of American Rulemakers hard at work making emotional appeals for more rules in more areas or for better treatment of those who write them. Instead, the support for rulemaking is implicit in the public's seemingly insatiable appetite for new public initiatives and programs. Virtually all new laws enacted by Congress to deal with real or perceived problems bring with them the need for additional rulemaking. It has been this way since the dawn of the Republic, so the American people have had ample time to learn about this unavoidable relationship.

The evolution of rulemaking is best conceived as a by-product of the historical development of American statute law. The symbiotic relationship between legislation and rulemaking was established in the earliest days of the very first Congress. Put simply, statutes and rules depend on one another: Statutes provide the legal authority for rules and the various processes by which they are made. Rules provide the technical detail so often missing in statutes, and rulemaking brings a capacity for adaptation to changing circumstances that the letter of the law alone would lack. These two vital elements of American public policy and law have been growing and diversifying throughout our history.

The Early Sessions of Congress

In its very first sessions, Congress enacted laws that delegated to the president of the United States the authority to issue rules that would govern those who traded with Indian tribes. The law had scant content, relying instead on the
president's rules to provide the substance. Subsequent Congresses continued to delegate the power to write rules to officials of the executive branch. For the most part, these powers were confined to matters of trade and commerce. In 1796, for example, the president was given the authority to develop regulations that set duties on foreign goods. Twenty years later, these powers were expanded considerably when Congress granted sweeping rulemaking powers to the secretary of the treasury to regulate the importation of goods into the United States. This particular statute is notable because it recognizes a subordinate official of the executive branch—a cabinet officer—as the authority to whom rulemaking power is delegated. This is the norm in contemporary legislation. The vague and sweeping language used in the legislation—"to establish regulations suitable and necessary for carrying this law into effect, which regulations shall be binding"—has also become common in many modern statutes.

The Late Nineteenth and Early Twentieth Centuries:
An Expanding National Government

During the twentieth century the government of the United States experienced two periods of extraordinary growth. Each was a response to a crisis, real or perceived. The New Deal was an attempt to plan and regulate the economy out of depression during the 1930s; the 1960s saw much broader and deeper efforts to eliminate poverty, pollution, injury, and inequity. These were, indeed, pivotal periods in our political and legal history. Their legacies with regard to rulemaking are extremely important. But a careful examination of legislative activity demonstrates that, although these were extraordinary periods of expansion, government and rulemaking have been growing steadily since the late nineteenth century.

In the earliest days of the Republic, rulemaking was limited. The reach of federal government powers for much of the nineteenth century was comparatively modest. This began to change in the late nineteenth century, however, when Congress turned its attention to domestic issues and problems and sought solutions. The 1880s, for example, saw the creation of the Interstate Commerce Commission (ICC), which would serve as a model for serial interventions by the federal government into many other sectors of the economy. Programs to protect American agriculture and livestock production from contamination were authorized by legislation. Statutes designed to protect wildlife were passed in this same decade as well. These laws required varying numbers of rules to be issued by the responsible agencies to implement important provisions. By the beginning of the second decade of the twentieth century, rulemaking had become prominent enough to attract serious academic attention. Legal scholars began to study what one termed "delegated legislation." These early works did not suffer any illusions about what rulemaking was: it was, and is, lawmaking by unelected administrative officials.

From roughly 1900 to the onset of the Great Depression, Congress created public programs that affected a wide variety of previously private activities. Many were designed to protect consumers from dangerous or unfair practices. The creation of the FTC, the passage of the Clayton Act to extend its jurisdiction, enactment of legislation to ensure the quality of food and the efficacy of drugs, the creation of a federal program to inspect meat, and the establishment of the Federal Reserve System all occurred during this period. Agriculture was also a frequent target for new legislation during this time. Included among the many statutes were laws designed to ensure the purity of milk and the quality of grain, to extend existing powers of quarantine, and to regulate the operation of stockyards and packing houses. Congress ventured into the energy arena by passing the Federal Water Power Act and increased the powers of the ICC with the Hepburn Act. The nation's natural resources got considerable legislative attention as well through statutes that emphasized the importance of conserving and protecting wildlife and migratory birds and managing public lands effectively. The congressional actions undertaken during these thirty years resulted in a broader and deeper federal role in the affairs of the American people. The authority of existing laws was amended and usually extended into new areas, and wholly new types of commitments were made.

The New Deal: New Roles for Government and New Repositories for Rulemaking

The most casual student of this country's political history knows that the election of Franklin Delano Roosevelt and the coming of the New Deal brought an outpouring of legislation unprecedented in its volume and implications for the role of government. In response to an economic crisis and an aggressive presidential agenda, Congress enacted laws that greatly increased the powers and responsibilities of the federal government. The centerpiece of the New Deal was the National Industrial Recovery Act (NIRA), enacted in 1933. The act authorized the president to create bodies of rules, called "codes," that would establish fair competition in many sectors of the economy. The legislation was breathtaking in its scope—very few significant industries or economic activities were unaffected. The reliance the NIRA placed on rulemaking and other forms of administrative action was near total. Although it fell to a constitutional challenge in 1935 and was subsequently amended extensively by
later Congresses, the act stands as an important milestone in the history of rulemaking.

The New Deal is properly thought of as a period of intense economic regulation, but many forms of new public policy appeared. Agriculture, labor relations and employment conditions, assistance for the aged and disadvantaged, housing and home ownership, transportation, banking, securities, consumer protection, rural electrification, natural resources, wildlife, energy, and transportation were all profoundly affected by the statutes of the New Deal. The New Deal is properly thought of as a period of intense economic regulation, but many forms of new public policy appeared. Agriculture, labor relations and employment conditions, assistance for the aged and disadvantaged, housing and home ownership, transportation, banking, securities, consumer protection, rural electrification, natural resources, wildlife, energy, and transportation were all profoundly affected by the statutes of the New Deal.19

If we assume a direct relation between statutes and the rules needed to implement them, rulemaking had become a major government function by the height of the New Deal. But there was no way accurately to assess the volume and significance of rulemaking done by agencies. Until 1934 there was, for example, no single authoritative way to publish and make available the rules and related decisions made by federal agencies. This situation was corrected by the creation of the Federal Register. With the Register came the Code of Federal Regulations (CFR), which was organized functionally by agency and program and will be considered in more detail later. A remarkable study by a committee appointed by the attorney general at that time, Robert Jackson, inventoried rulemaking by the federal government. Completed during the closing days of the New Deal, the study reveals that all agencies were actively engaged in rulemaking but that there was considerable variation in both substance and volume.

The State of Rulemaking at the Close of the New Deal

The magnitude of delegated authority granted to agencies during the New Deal and the manner in which certain agencies used these new powers caused a great deal of concern. It was perceived that these administrative processes were not only growing at an alarming rate but were operating in violation of basic legal principles. As described by the Brownlow Committee, a group empowered by Franklin Delano Roosevelt to examine government management, they were a “headless fourth branch of government.”20 In response to mounting criticisms and calls for change, President Roosevelt created a committee to study administrative practices in force in the main agencies of the federal government. It was intended to be FDR’s answer to the Brownlow Committee.21 Called the Attorney General’s Committee on Administrative Procedure, it conducted a series of case studies that today provides us an invaluable historical record on the status of rulemaking more than fifty years ago. It demonstrates conclusively that frequent and highly significant rulemaking was occurring in most agencies and that it was often the result of legislation that predated the New Deal. The following examples from the committee’s research, published in 1941, will help put contemporary rulemaking into the proper historical perspective.

The committee found that nearly thirty administrative entities were empowered to issue rules that had significant effects on the public. Some of these agencies were delegated rulemaking authority under multiple statutes. Of all the agencies studied by the committee the one with the greatest accumulation and annual production of rules was the Department of the Interior. The committee wrote that other agency functions were “obscured” by the “momentousness” of rulemaking at the department. It was estimated that at the time of the study several thousand rules were in effect and several hundred new rules were issued each year. The rules dealt largely with the department’s responsibilities for the protection of fish, wildlife, and birds and its stewardship of the many uses of public lands. But wildlife and public lands were not the sole concern of the rulemakers. The program that regulated the coal industry had a rulemaking task that was described as “monumental.” The making of one rule alone involved the participation of 387 people, including more than 200 lawyers, and generated more than 700 supporting documents.22

The volume of rules issued by the Department of the Interior was rivaled by the various agencies that at different times were responsible for veterans’ affairs. The program had been in operation in some form since the late 1700s, so it is not surprising that a large body of rules had accumulated. In fact, rules affecting veterans filled several thousand pages, and the matters they covered ranged from minor administrative details to policies of considerable substance. The study group found them so comprehensive and specific that they left little discretion for agency administrators.23

The ICC was also heavily engaged in rulemaking under the Motor Carrier Act. It prepared “a dozen sets” of rules from one five-year period following passage of the act. In another area of its statutory responsibilities, the ICC was involved in constant rulemaking from 1908 to 1940, issuing seven full revisions of rules governing the transport of explosive materials.24 Apparently as active in a related area was the Bureau of Marine Inspection and Navigation, an agency performing functions that had been conducted under one administrative arrangement or another since the earliest days of the Republic. The bureau’s rules were described as “voluminous” and covered all aspects of vessel constitution and operation to ensure safety.25

Rulemaking, although clearly established as a crucial government function in the late 1930s, was not undertaken uniformly in all major policy areas. In some instances rulemaking was avoided; in others the agencies wrote rules but added little to what Congress had provided in legislation. Notable among the agencies that did not undertake large programs of rulemaking were the
FTC and the National Labor Relations Board (NLRB). Both agencies chose to proceed largely in a quasi-judicial manner, dealing with individual cases brought to them by individuals or groups with complaints. Their policies and law evolved through the accumulation of individual decisions.

The legislative history of the statutes of the FTC indicates that Congress intended it to be a vigorous rulemaker. But this role had not developed by the late 1930s, and indeed it was not until the 1970s that political forces and significant legislative reforms forced the FTC to undertake rulemaking. The NLRB continued to eschew rulemaking, and it does so to this very day, despite frequent entreaties from those who believe more rules are badly needed.

The Social Security Administration (SSA), then called the Social Security Board, undertook a considerable amount of rulemaking after passage of amendments to the Social Security Act in 1939, but little of it was legislative, or substantive, in nature. Instead, the SSA adopted the practice of issuing interpretative rules based almost entirely on congressional hearings that preceded passage of the act. In this instance, the agency adopted rulemaking but chose to exercise little or no discretion in the process. This would change as the programs administered by the agency grew and diversified.

By the time the Code of Federal Regulations began publication, in 1938, the legislative phase of the New Deal was winding down. Organized in fifty titles, which correspond to different areas of law and public policy, the CFR of 1938 provides a summary, albeit incomplete, of the results of rulemaking up to that time. Several titles were reserved for Congress, the judiciary, the president, the Federal Register, and "government accounts." A substantial portion of the CFR was devoted to national defense and the conduct of foreign relations. Other elements of the 1938 CFR contain material that has since been superseded or subsumed by more recent legislative activity. Some programs are notable by their absence. The "Public Welfare" title contained chapters devoted to an office of education in the Department of the Interior, the Civilian Conservation Corps, the Works Progress Administration, and the National Youth Administration. There was no mention of Social Security; in 1938 the regulations mentioned earlier were still being developed. As one would expect from the previous discussion of statutory developments, there were titles devoted to agriculture and meat production, labor, banking, commerce, transportation, housing, public health, pure food and drugs, telecommunications, public lands, public resources, and wildlife. Some constituted larger bodies of rules; others were small. The rules pertaining to agriculture filled eight chapters and nearly 1,200 pages, whereas those devoted to labor could be contained in just 39 pages.

From the End of World War II to the Mid-1960s

From the end of World War II to the mid-1960s combined effects of legislation and rulemaking continued to expand the reach of the federal government. As in the past we see the amendment of existing statutes as well as the creation of new programs. The CFR grew and was periodically reorganized to reflect these changes. The count of fifty titles in the Code has remained relatively constant. Chapters and volumes rapidly expanded in numbers, reflecting the growing reach of the government. For example, what began as a publication of fifteen volumes in 1938 filled forty-seven volumes in 1949.

In the 1950s and 1960s, legislative attention focused heavily on ways to provide basic rights, benefits, and services to the American people. Statutes established national standards for unemployment insurance, aid to veterans, health care for the elderly and indigent, food stamps, support for urban mass transit systems, and programs to protect consumers from dangerous products, ineffective vaccines, food additives, and unscrupulous lenders. Laws were passed to prevent or punish discrimination based on age, race, and sex. Existing statutes to protect fisheries were extended, and new programs to preserve wilderness areas, scenic trails, and wild rivers were created. The 1950s saw the first tentative incursions by the federal government into the areas of air and water quality; and the close of the 1960s brought the landmark National Environmental Policy Act that required rulemaking in every agency whose actions directly or indirectly disturbed the ecology.

The Decade of the 1970s: Rulemaking Ascendant

By 1969 the crucial importance of rulemaking in our system of government was unmistakable. Rulemaking had developed into a major force in our legal, political, and economic lives. The volume of rules was formidable, and the range of areas covered by the rules was enormous. Why, then, is it the decade of the 1970s that is frequently characterized as the "era of rulemaking"? Although such characterizations tend to underestimate the importance of earlier periods, there are good reasons why the 1970s deserve their special reputation.

In the 1970s the content of congressional delegations of authority, and the general political environment in which they occurred, brought fundamental changes to rulemaking. The number of statutes that established major programs requiring extensive rulemaking was unprecedented. By one count, 130 laws establishing new programs of social regulation were enacted during this one decade. Proposals dealing with virtually all types of environmental
problems, health and safety hazards in most workplaces, and comprehensive consumer protection became law. Congress also enacted broad-ranging reforms in worker pensions. The rulemaking tasks created by legislation like this differed from those that accompanied earlier statutes in many ways.

To be sure, agencies operating under earlier statutes often faced formidable obstacles when writing rules. Rarely, however, did their delegations of rulemaking authority sweep so broadly across the economy in the manner that became commonplace in the regulatory legislation of the 1970s. Environmental legislation, taken as a whole, required rulemakers to identify, locate, prevent, control, or mitigate virtually every form of harmful pollutant or dangerous substance in the air, water, and ground. The health and safety of the majority of American workers, regardless of industry or occupation, and the safety of most consumer products were similarly entrusted to newly created programs and agencies.

For the most part, the rulemaking authority granted to agencies prior to the 1970s was more narrowly confined, affecting specific industries and activities. As noted above, those agencies granted broadly based powers, such as the National Labor Relations Board and the Federal Trade Commission, used their rulemaking authority quite parsimoniously. Furthermore, industry-specific programs of regulation had grown incrementally, giving the agencies an extended period of time to develop working relationships with those they regulated or served. Even when dealing with multiple constituencies, as in the areas of natural resources and employment conditions, the agencies could trade on long-term relationships and work at a pace that they largely dictated. More will be said about the relationships between such agencies and the private entities they regulated in Chapter 5, on participation in rulemaking.

The rulemaking of the 1970s afforded the affected agencies none of the luxuries seen earlier. The authorizing legislation often represented sudden and radical shifts in the federal role, creating agencies from whole cloth or through the consolidation of programs from numerous departments. These new agencies could neither avoid nor delay rulemaking; the authorizing statutes frequently mandated that rules be developed in specified areas. Often the same laws contained mandatory deadlines by which rules were to be completed. The relationships between the rulemakers and affected parties were given no time to mature. Instead, the rulemaking agencies were immediately positioned between well-organized, aggressive environmental, labor, and consumer groups on one side and threatened, equally aggressive business interests with plentiful resources on the other.

These pressures produced a period of extraordinary rule production. From 1976 to 1980, a time when we would expect to see the cumulative effect of the statutory explosion, 36,789 rules were added to the Code of Federal Regulations, and agencies of government proposed 23,784 rules. Although the number of final rules increased only 4.5 percent, proposed rules increased 27.5 percent. As the decade of the 1980s began, the government's rulemaking engines were still stoked; to reverse them would require extraordinary action.

To the volume of work, accelerated pace, and inevitable conflict contained in their delegations of rulemaking authority, the statutes of the 1970s added several layers of substantive and procedural complexity. Environmental and workplace safety programs are good examples of statutes that sent rulemaking routinely to the edge of human knowledge and technical capabilities and beyond. Agencies were expected to create information (for example, information on "safe" levels of various chemicals and substances, like benzene and asbestos, in the workplace) while simultaneously incorporating that information into a rule that could be implemented, compiled with, and enforced. Further, as we will see in the next chapter, Congress became increasingly concerned with the process by which rules were being written by agencies. It is sufficient to say that the rulemaking provisions of new statutes created more complex and difficult processes for rulemakers to use.

The breadth of the new legislation brought about the potential for conflict between new rules and those of more established programs. The responsibilities of OSHA with regard to all American workers appeared to overlap considerably with those of agencies having jurisdiction over specific industries, such as transportation, food and drug production, and even nuclear power plants. Conflict could occur within a single agency as well. Actions taken as a result of the rules put forth by one office of the EPA to protect the air could result in pollution of the water, which was the responsibility of another office. The need for coordination between agencies of the federal government was dwarfed by intergovernmental issues created by these new statutes. Many laws created partnerships between federal and state governments in which standards were set in Washington but supplemented and enforced in the fifty states. The federal legislation of the 1970s set off considerable rulemaking activity in the states as well.

The rulemaking of the 1970s was also more important than that which had come before. If we assume that Congress had properly identified real threats in the wave of protective legislation it passed in the 1970s, then to a remarkable extent the health, safety, financial well-being, and general quality of life of Americans would hinge on the success of rulemaking by agencies. These rules would also impose unprecedented costs, transfer huge amounts of wealth across our society, and affect our capacity to vie in increasingly competitive world markets.
The Reagan and Bush Administrations: The Retreat that Failed

As a period in the history of rulemaking, the 1980s are more difficult to characterize. On the one hand, much of the massive agenda for rulemaking established in legislation of the 1970s remained to be completed in the 1980s. Exacerbating this backlog of work were important amendments to existing environmental, workplace safety and health, and consumer statutes that added even more responsibilities and caused the revision of rules already in existence. In the face of these formidable pressures, however, powerful political forces were at work to eliminate some rules, to prevent others from being made, and to impose new decision-making criteria on those that remained.

The administration of Ronald Reagan introduced the most significant changes since the basic process for rulemaking was established in the Administrative Procedure Act of 1946. These changes will be discussed at length in two subsequent chapters. One of Reagan’s reforms was the institution of a review of rules by the president’s Office of Management and Budget (OMB) prior to their publication in the Federal Register. According to some evidence, this and other reforms slowed the pace of rulemaking for at least part of the 1980s. Figure 1–1 gives the number of rules reviewed by the OMB as part of President Reagan’s reform program. Since these figures are drawn exclusively from the rules reviewed by the OMB, they do not include rules exempt from review requirements. In some instances the categories of exemptions contain large numbers of rules, so the actual effect of the political reaction of the 1980s is difficult to determine from this information alone.

Fortunately, other measures are available. Table 1–1 contains information on the numbers of rulemaking documents published in the Federal Register during the 1980s. The first years of the Reagan presidency were ones of dramatic reductions in rulemaking activity, due in part to a sixty-day moratorium at the outset of his first term. The decline continued through 1986, when rulemaking eventually stabilized. There were 28 percent fewer new final rules in 1988 than at the outset of Reagan’s presidency. But numbers of rules alone do not tell the entire story. The volume and complexity of requirements established in new rules are better indications of the rulemaking impact. These dimensions of rulemaking activity are captured in Table 1–2, measured crudely by page count. For proponents of rulemaking, the final years of the administration of George H. W. Bush were a concern. Stung by critiques that he was soft on regulation, he instituted several moratoriums on rulemaking. The volume of rules issued during the Bush administration is

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**TABLE 1-1 Documents Published in the Federal Register, 1981–1988**

<table>
<thead>
<tr>
<th>Year</th>
<th>Rules</th>
<th>Proposed rules</th>
<th>Other</th>
<th>Total</th>
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<td>1981</td>
<td>6,481</td>
<td>3,862</td>
<td>30,050</td>
<td>40,433</td>
</tr>
<tr>
<td>1982</td>
<td>6,288</td>
<td>3,729</td>
<td>28,621</td>
<td>38,638</td>
</tr>
<tr>
<td>1983</td>
<td>6,049</td>
<td>3,906</td>
<td>27,580</td>
<td>37,536</td>
</tr>
<tr>
<td>1984</td>
<td>5,155</td>
<td>3,350</td>
<td>26,047</td>
<td>34,551</td>
</tr>
<tr>
<td>1985</td>
<td>4,843</td>
<td>3,381</td>
<td>22,833</td>
<td>31,057</td>
</tr>
<tr>
<td>1986</td>
<td>4,589</td>
<td>3,185</td>
<td>21,546</td>
<td>29,320</td>
</tr>
<tr>
<td>1987</td>
<td>4,581</td>
<td>3,423</td>
<td>22,052</td>
<td>30,056</td>
</tr>
<tr>
<td>1988</td>
<td>4,697</td>
<td>3,277</td>
<td>22,047</td>
<td>29,984</td>
</tr>
</tbody>
</table>

Source: Office of the Federal Register, Regulatory Information Center, United States General Services Administration.
reflected in Tables 1–3 and 1–4. Here we see a decline in the number of final rules over the term. Little change, however, is seen in proposed rules and page counts, which generally exceed the numbers in the Reagan years, even though Bush's stated policies with regard to regulation differed little from his predecessor.

By the measure of page counts, the 1980s look a bit different. Using rule length as a surrogate for volume and for complexity of requirements, we see in Table 1–2 that the page count for final rules during the Reagan years is similar to that of the first two years of the Carter administration. With regard to proposed rules for these blocks of years, the Reagan administration page counts are larger. However, the data also confirm the remarkable volume of activity in the last two years of the Carter administration and the jolt of the emergency brake pulled by Ronald Reagan in 1981.

Although these data are reasonable indicators of rulemaking activity, during those two presidencies, cumulative effect needs to be understood as well. This can be observed in the growth of the Code of Federal Regulations. In 1938 the CFR was made up of 121 chapters; in 1949, 138; in 1959, 152; in 1969, 221; in 1979, 284; and in 1989, 313. Chapters generally correspond to the programs for which rules are written. Table 1–5 shows the growth from 1938 to 2001 in the number of pages in the CFR devoted to selected areas of law and public policy.

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**TABLE 1-2** Page Count of Rules and Proposed Rules Published in the Federal Register, 1977–1988

<table>
<thead>
<tr>
<th>Year</th>
<th>Rules</th>
<th>Proposed rules</th>
</tr>
</thead>
<tbody>
<tr>
<td>1977</td>
<td>14,572</td>
<td>9,620</td>
</tr>
<tr>
<td>1978</td>
<td>15,452</td>
<td>11,885</td>
</tr>
<tr>
<td>1979</td>
<td>19,366</td>
<td>18,091</td>
</tr>
<tr>
<td>1980</td>
<td>21,092</td>
<td>16,276</td>
</tr>
<tr>
<td>1981</td>
<td>15,300</td>
<td>10,433</td>
</tr>
<tr>
<td>1982</td>
<td>15,222</td>
<td>12,130</td>
</tr>
<tr>
<td>1983</td>
<td>16,196</td>
<td>12,772</td>
</tr>
<tr>
<td>1984</td>
<td>15,473</td>
<td>11,972</td>
</tr>
<tr>
<td>1985</td>
<td>15,460</td>
<td>13,772</td>
</tr>
<tr>
<td>1986</td>
<td>13,904</td>
<td>11,816</td>
</tr>
<tr>
<td>1987</td>
<td>13,625</td>
<td>14,179</td>
</tr>
<tr>
<td>1988</td>
<td>16,033</td>
<td>13,892</td>
</tr>
</tbody>
</table>

*Source: Office of the Federal Register, Regulatory Information Center, United States General Services Administration.*

---

**TABLE 1-3** Documents Published in the Federal Register, 1989–1992

<table>
<thead>
<tr>
<th>Year</th>
<th>Rules</th>
<th>Proposed rules</th>
</tr>
</thead>
<tbody>
<tr>
<td>1989</td>
<td>4,711</td>
<td>3,193</td>
</tr>
<tr>
<td>1990</td>
<td>4,334</td>
<td>3,041</td>
</tr>
<tr>
<td>1991</td>
<td>4,413</td>
<td>3,096</td>
</tr>
<tr>
<td>1992</td>
<td>4,155</td>
<td>3,170</td>
</tr>
</tbody>
</table>

*Source: Office of the Federal Register, Regulatory Information Center, United States General Services Administration.*

The growth in CFR pages follows no set pattern; there are considerable variations by policy area. "Protection of the Environment," which did not exist in 1969, grew to more than 8,000 pages by the end of its second decade. Most of the growth in "Agriculture" occurred in the 1950s and 1960s, and the growth in "Labor" has been consistent since the 1950s. Taken together, these three areas alone accounted for nearly 25,000 pages of rules by the end of the 1980s.

Characterizing the Reagan and early Bush years as a "retreat that failed" may seem unfair given the dramatic early declines in the number of final and proposed rules and of pages in the Register. But the retreat was more than an abrupt movement of a line in the sand than a steady, consistent decline in the volume or impact of rulemaking. The pace was altered and the equilibrium that emerged remained formidable. According to Federal Register data, when Ronald Reagan left office in 1988, agencies were producing nearly 8,000 final and proposed rules, roughly the same number that were produced in the last year of his first term. Despite Reagan's strident rhetoric against regulation, the

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**TABLE 1-4** Page Count of Rules and Proposed Rules Published in the Federal Register, 1989–1992

<table>
<thead>
<tr>
<th>Year</th>
<th>Rules</th>
<th>Proposed rules</th>
</tr>
</thead>
<tbody>
<tr>
<td>1989</td>
<td>16,489</td>
<td>13,219</td>
</tr>
<tr>
<td>1990</td>
<td>14,179</td>
<td>12,694</td>
</tr>
<tr>
<td>1991</td>
<td>16,793</td>
<td>16,759</td>
</tr>
<tr>
<td>1992</td>
<td>15,921</td>
<td>15,174</td>
</tr>
</tbody>
</table>

*Source: Office of the Federal Register, Regulatory Information Center, United States General Services Administration.*
weight of government on the backs of the American people, as measured by rulemaking, was heavy indeed.

**The 1990s and the Clinton Legacy**

What did the 1990s bring? Tables 1–4 and 1–6 indicate that rulemaking activity increased during the Clinton presidency. The pattern is somewhat mixed with regard to both final and proposed rules, but 1996 saw the most new final rules in a decade. Page count in the *Federal Register* during the Clinton years is another matter. As part of his National Performance Review, President Clinton, like previous presidents, had ordered removal of unnecessary, obsolete, wrong, or otherwise flawed regulations. The effect of the program in terms of page count is felt in the *Code of Federal Regulations* rather than in the *Register*. This initiative notwithstanding, the page count in the *Code* for the Clinton era clearly suggests a new period of rulemaking growth. As we can see in Table 1–7, the average number of pages in the *Code* is larger for Clinton than for Presidents Ford, Carter, Reagan, or Bush.

![Table 1-5: Code of Federal Regulations Page Count by Selected Title, 1938, 1989, and 2001](chart)

**TABLE 1-5** *Code of Federal Regulations* Page Count by Selected Title, 1938, 1989, and 2001

<table>
<thead>
<tr>
<th>Title</th>
<th>1938</th>
<th>1989</th>
<th>2001</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agriculture</td>
<td>1,174</td>
<td>10,613</td>
<td>10,406</td>
</tr>
<tr>
<td>Labor</td>
<td>39</td>
<td>5,721</td>
<td>5,385</td>
</tr>
<tr>
<td>Environment</td>
<td>0</td>
<td>8,250</td>
<td>19,385</td>
</tr>
</tbody>
</table>


![Table 1-7: Code of Federal Regulations Page Count by Selected Presidencies](chart)

**TABLE 1-7** *Code of Federal Regulations* Page Count by Selected Presidencies

<table>
<thead>
<tr>
<th>President</th>
<th>Average annual number of pages in the <em>Code of Federal Regulations</em></th>
</tr>
</thead>
<tbody>
<tr>
<td>Ford</td>
<td>71,982</td>
</tr>
<tr>
<td>Carter</td>
<td>94,777</td>
</tr>
<tr>
<td>Reagan</td>
<td>109,599</td>
</tr>
<tr>
<td>Bush</td>
<td>125,664</td>
</tr>
<tr>
<td>Clinton</td>
<td>134,173</td>
</tr>
</tbody>
</table>


Although it is far too early to draw conclusions for the administration of George W. Bush in 2001, agencies issued 4,100 final and 2,635 proposed rules, and the page counts in the *Federal Register* were 19,643 and 14,666, respectively. Of course, 2001 must be considered an anomaly because the events on September 11 altered the priorities of dozens of agencies. More time must pass before the patterns of Bush's rulemaking volume are established and clear, but both rule and page counts were down dramatically from the last Clinton year.

Some have argued that rulemaking is actually in decline as a method for making law and policy. In the next chapter we will explore the process of rulemaking and how it has developed through time. For some rules, especially those with the greatest potential effects on the economy and society, the rulemaking process can be complex, expensive, time-consuming, and risky. Several prominent scholars have concluded that these and other factors have led agencies away from rulemaking to other mechanisms for implementing programs. Rulemaking will certainly not disappear, but the avoidance of it by agencies is a serious issue that will be covered at length both in Chapter 3 and in the concluding sections of this book.

This brief review of the historical growth in rulemaking demonstrates rather clearly that rulemaking is a direct, if not always desired, consequence of legislation. More to the point, rulemaking, as a mechanism for refining law and policy, has been essential to the government's effort to assume responsibility for the range of activities demanded by the voters. It was and remains an inevitable and indispensable by-product of any significant legislative activity. As long as the American people demand new or altered public policies, and as long as Congress responds to these demands, rulemaking will remain a basic and determining element of our political and legal systems.
Categories of Rules

If nothing else is evident from this brief history of rulemaking, it should be apparent that defining or categorizing the substance of rulemaking is very difficult. All topics, issues, and activities touched by public policy are or will be the subject of a rule. Still, there are ways to categorize rules that capture certain key characteristics, if not their full richness.

Policy Area and Agency of Origin

The Code of Federal Regulations organizes rules in fifty distinct categories called titles and chapters, which correspond to distinct public programs, policies, or agencies. For example, the rules for banks and banking can be found in Title 12; those for protection of the environment, in Title 40; and the rules governing acquisition of goods and services by the federal government, in several dozen chapters of Title 48. The subject matter of rules contained in the fifty titles of the CFR is vast; any attempt at classification based on substance is not likely to improve on the categories found in it. The current index of the CFR’s titles and chapters is included in the appendix.

Functions Performed by Rules

There are alternative ways to look at the total body of rules that convey other important dimensions of their status, purpose, and effect on our society. The oldest method for classifying rules is suggested in the definition cited earlier from the Administrative Procedure Act of 1946. The first and most important category consists of “legislative” or “substantive” rules. These are instances when, by congressional mandate or authorization, agencies write what amounts to new law. In the terms of the APA definition, legislative rules “prescribe” law and policy.

A second category consists of “interpretive” rules. As suggested earlier, these occur when agencies are compelled to explain to the public how they interpret existing law and policy. Although interpretive rules may stretch law or rules to fit new or unanticipated circumstances, they do not impose new legal obligations. A good example of this type of rule is the “Uniform Guidelines on Employee Selection,” issued by the Equal Employment Opportunity Commission in conjunction with other agencies that have responsibilities for enforcing Title VII of the 1972 Civil Rights Act. Like all interpretive rules, these guidelines were intended to advise the public how the agencies interpreted their legal obligations under the act and assorted court cases that it had stimulated. The agencies issued interpretive rules in this case because civil rights was one of the few areas of statutory development in the 1960s and 1970s in which Congress failed to grant authority to write legislative rules. Because they are advisory in nature, interpretive rules can be developed in any way the agency sees fit, but they are generally published in the Federal Register.

The third category consists of “procedural” rules that define the organization and processes of agencies. Although they are often regarded as little more than bureaucratic housekeeping, they do deal with matters of importance to the public. Among other things, they inform the public how they can participate in a range of agency decision making, including rulemaking. As we will see in the next chapter, external forces have taken much of the initiative in the rulemaking process away from agencies. Nevertheless, procedural rules provide essential road maps for those attempting to find their way around the decision-making pathways of our massive and complex bureaucracies.

This way of classifying rules actually predates the APA by many years. Studies of administrative processes in federal agencies conducted in the 1930s refer repeatedly to these different types of rules and suggest that the distinctions had been commonly understood for some time. The distinctions are still important. Many agencies, for example, still use variations on interpretive rules to supplement legislative rules. These come in a variety of forms—guidelines, policy statements, technical manuals—and some suspect that agencies use them to avoid the procedural rigors of legislative rulemaking.

What and Whom Rules Affect

Another way to consider the body of rules is to classify them by the segment of our society they influence and direct. Some rules deal with private behavior. Others guide those individuals, groups, or firms that are approaching the government to obtain a payment, a service, or permission to engage in some activity. Finally, there are rules that deal with the way the government conducts its business. Most, if not all rules can be placed in one of these three categories.

Rules for Private Behavior. One good way to appreciate the scope of rules directed at the private sector is to consider how they might affect a business. Quite literally, rules govern American businesses from their very beginning to beyond their demise. Virtually every business decision of any substance is affected by rules written in government agencies. Rules can have a determining effect on the decision to go into business in the first place. Before one enters certain businesses or occupations a license is required. The granting of a license, the qualifications needed to obtain one, and the
conditions that are attached to it are determined by rules. Money is needed to start most businesses, and banks are often the providers. Banking rules determine in large part the availability of funds and the manner in which financial institutions make business loans. Assuming the owners of the business are prudent, they will want to protect their business from claims of damage arising from negligence or faulty products. Insurance regulations will determine whether they can get coverage and what it will cost.

Where a business is located is not a decision that can be made without reference to rules. Environmental and zoning rules have a significant influence on where businesses are established. Companies whose operations substantially pollute the air and water may find it difficult to locate in areas where rules set tight limits on new sources of pollution. The zoning authorities of local areas use rules to implement land-use plans that restrict, sometimes severely, where new businesses can locate.

Once the decision to go into business is made and a location is selected, rules may affect who is employed and how they are treated by the new concern. If the firm expects to do business with the federal government, it will be required, under a variety of rules, to have an affirmative action program. Those doing no government business must still take care not to discriminate in hiring. The "Uniform Guidelines on Employee Selection," mentioned above, provide direction to employers in this area. These guidelines affect virtually all employment decisions, from initial interviewing of candidates to termination of those who fail to meet expectations.

What a new business produces and how that product is made are governed by a multiplicity of rules, some designed to protect workers, others to protect consumers, and still others to protect the environment. Industrial operations are constrained by rules that are designed to ensure safety in the workplace and to prevent or minimize pollution of the air, water, and land. These rules frequently specify the types of equipment that can and cannot be used and how the machinists must be designed or operated. The service sector is similarly affected by rules that govern how it will operate. The energy, banking, insurance, securities, transportation, and even education sectors are governed by industry-specific rules that dictate finances, employee qualifications, service quality, and, even internal management.

Once the business has a product to sell, rules may determine how it will be sold, how it will get to consumers, the price that is charged for the good or service, and the company's obligations after it has been bought. The potential consumers of goods and services are protected by rules intended to prevent deceptive advertising. Other rules require that information be provided, on labels or packaging inserts, informing the public about the content, purpose, and potential hazards of consumer products. There has been an intense conflict between the Department of Agriculture and the Department of Health and Human Services about the content of food labels. Rules written to regulate airlines, railroads, trucks, telecommunications, pipelines, and electricity transmission facilities profoundly affect how and at what cost goods and services get to the hands of consumers. Some commodities and services are still affected by rate making done by agencies. Agricultural commodities and energy transmission are two major areas of the economy where rules directly or indirectly set the price that consumers will pay. Once a good is sold, rules establish the producer's obligations. Rules can require that products, such as automobiles, be recalled by the manufacturer if defects are found that threaten safety or environmental quality. Similarly, rules outline the types of information consumers should have regarding warranties provided by the manufacturer or vendor of products should the product or service they purchase fail to provide what was promised.

Rules determine under what conditions a firm can go out of business. Here two types of rules are notable. One governs the ongoing obligations that firms and businesses have to their retirees. Under the Employee Retirement Income Security Act (ERISA), rules have been developed to secure the pension rights of retirees even when a firm decides to go out of business. We need not belabor the importance of these protections in light of the devastating effects of corporate failures and corruption still unfolding. The rules written under laws governing the disposal of hazardous waste also carry obligations for companies to clean up the mess they might otherwise leave behind, and try to forget, after they cease operations.

How Rules Affect Private Behavior. When considering rules that affect private parties it is also useful to think of the kinds of requirements they contain. Although the scope of government activity is virtually limitless, the instruments at the disposal of agencies to accomplish these varied tasks are not. We can observe many common instruments in rules of agencies with profoundly different missions, clienteles, and resources.

A relatively infrequent but nonetheless significant instrument is outright prohibition of certain substances, products, or activities. The number of rules that include unconditional prohibitions is comparatively small, but these rules attract considerable attention because of the consequences to affected parties and society at large. Recall the hue and cry that accompanied the ban on cyclamates, which had been used to sweeten soft drinks, and other actions that took suspected carcinogens off the market. Agencies with responsibilities to protect the traveling public impose prohibitions on key personnel working for airlines, railroads, and interstate buses. Frightening reminders of the need for these types of rules was provided by the criminal prosecution of two
Northwest Airlines pilots charged with violating the Federal Aviation Administration’s ban on alcohol consumption during the twenty-four-hour period prior to takeoff, and a currently pending action against two America West pilots, who, suspected of being under the influence, were called back from a runway on which they were about to take off.\(^4\) There are rules prohibiting certain types of advertising, such as the ban on television ads for cigarettes. Other rules proscribe activities on wild and scenic rivers, national parks, and wilderness areas. Rules governing benefit programs prohibit recipients from engaging in certain types of activities. Various types of political action are off limits to the recipients of some federal grants and contracts.

More common than outright prohibitions are rules that place limitations on substances, products, and activities. Most of us have heard of, and have probably been revolted by, the rather disgusting forms of foreign matter that can find their way into processed meats. Hundreds of environmental regulations impose limits on the production of and exposures to toxic substances of various kinds and uses. The Occupational Safety and Health Administration has struggled since its creation to set limits on the amounts of certain types of chemicals that are potentially harmful to workers. The ordeal of setting standards for occupational exposure to the chemical benzene spanned more than a decade. The crisis in the savings and loan industry in the 1980s and the shakiness of banks focused attention on rules of various agencies that limit the high-risk investments these types of institutions can make. The Federal Aviation Administration places limits on the number of hours airplane pilots and attendants can work. The few agencies that still set prices and rates limit what can be charged for certain types of products and services, and agricultural marketing rules place close restrictions on the amounts of certain commodities that can be shipped and sold during specified time periods. Perhaps the most common form of rule is the one that sets standards for products and activities. Limits and standards are different versions of the same instrument of government control. They allow the private sector to do what it wants, but only within certain boundaries.

The importance of these boundaries was brought home by the serial revelations of massive misrepresentations of corporate earnings and profits. Enron, WorldCom, Global Crossing, and other such companies may fade from memory, but their legacy will be a new generation of rules on accounting, disclosure, and corporate governance by the Securities and Exchange Commission and other federal agencies.

A common form of rule that serves as an adjunct to regulations that prohibit, impose limits, or set standards is the one that establishes information requirements. It is increasingly common for rules to contain requirements that private individuals, groups, and firms collect, analyze, retain, and report information about their activities. Information rules provide agencies an unparalleled mechanism for monitoring the behavior of persons who fall under their programs. In some instances, programs could not be managed and requirements could not be enforced if agencies were required to develop these data on their own. Labels, package inserts, requirements to conduct tests and report the results, and rules requiring recipients of government assistance or licensees to report periodically are all forms of information rules on which the integrity and success of many government programs depend.

**Rules for Those Who Approach the Government.** Private individuals, groups, or firms approach the government for many reasons but usually to obtain a payment or service or to gain permission to conduct an activity that requires official sanctioning of some sort. The types of rules that apply in such circumstances establish the criteria for eligibility to receive the assistance or benefit offered under a government program. Social security programs of various sorts, welfare, medical care, educational assistance, housing benefits, and a host of other public programs operate on the basis of these eligibility rules.

A substantial number of activities conducted by private individuals, groups, or firms require various forms of permission from the government. Licenses and permits are required for a wide variety of activities, ranging from the operation of nuclear power plants to the flying of an airplane. When requesting licenses or permits, individuals must meet the standards set in rules. For example, the applicant for a license to operate a hydroelectric power plant must demonstrate that he or she can meet financial, engineering, and environmental standards established by the responsible agency, in this case the Federal Energy Regulatory Commission.\(^4\)

**Rules for Government.** Purely governmental activities are guided by rules as well. These are—broadly defined—the procedural rules mentioned earlier. The Code of Federal Regulations has titles devoted to the management of government accounts, administrative personnel, administration of the judicial branch, public contracts and property management, and the acquisition of goods and services. In addition, the other titles of the CFR contain procedural rules that apply to the operation of individual programs. These detail, among other things, how the agency intends to comply with laws governing public and private information, how agency hearings and other proceedings involving the public will be conducted, and who within the agency has authority to make various types of decisions.

Two statutes, the Freedom of Information Act and the Privacy Act, require agencies to issue regulations about how and why information is being used. Under the Freedom of Information Act, the agency must explain to
members of the public how they can obtain information. The Privacy Act requires the agency to describe personal information it has collected and is holding, how people can get access to records that agencies maintain on them, and how personal information is being protected from unwarranted disclosure.

We see, then, that the targets of rules include the private and public sectors. Whether regulated entities or potential beneficiaries of the federal government's largesse, individuals, groups, firms, states, and local governments must look to rules for refinements of their rights and obligations and for procedures by which the programs with which they are concerned will operate. The vast range and diversity of subject matter that rules now touch have been mentioned. It is also important to note the remarkable variations in the complexity of rules, the numbers of persons or activities they affect, and the duration of their effects.

Differences in Scope and Importance. Most rules published in the Federal Register are brief and deal with a very narrow range of activities. They may be based on complex technical or scientific information, such as regulations issued by the Federal Communications Commission to allocate radio frequency bands to individual stations and the Federal Aviation Administration rules dealing with flight paths at airports. Other rules, fewer in number, are enormously long and complex and cover vast areas. But the length of the rule is not always an accurate indicator of the rule's effects. An "airworthiness directive," the type of rule the FAA issues to correct potential safety problems on aircraft, will affect every person who flies on the affected planes. Similarly, an "agricultural marketing order" that limits the amount of a commodity that can be shipped to sellers will affect every consumer who buys the affected vegetable or fruit. Both types of rules usually take up no more than a single page in the Federal Register.

Rules, then, vary greatly in their purpose and significance. Why do we rely on them for so much law and policy?

The Reasons for Rulemaking: What It Has to Offer

However they are categorized and classified, rules accomplish most of the ambitious goals we set for ourselves as a society. Up to now we have discussed rulemaking as a constant force in our political and legal history and as an inescapable contemporary reality. But this history inevitably requires further explanation. Rulemaking has the place it does in our system of government for many reasons.

The number and diversity of rules written in this country are evidence that rulemaking is, at least, a common form of government decision making. We have not yet fully explored why rulemaking has attained so central a position in the policy process. In general, it has achieved its prominence because of the contributions it makes to the conduct of government and the benefits it provides, as described in the next sections. But it has disadvantages also.

The Substance of Rules

The Capacity of Bureaucracy and the Limits of the Legislature

If we examine the body of laws enacted by Congress, it is immediately apparent that those laws touch virtually every aspect of human life. Consequently, every known professional discipline must be drawn upon for the knowledge needed to achieve their ambitious goals. This range and depth of expertise have never been present among members of Congress or the staff that supports legislative operations. Congressional staffs are large and diverse but still limited. Many staffers are concerned with matters other than the crafting of new legislation, such as the constituency-related work that is so close to the hearts of elected officials. Committee staffs and those in the General Accounting Office are preoccupied with oversight, the importance of which is magnified by the way Congress writes law. More about this in a moment.

Since the Progressive Era, there has been faith—much diminished in recent years—in the neutral competence of a professionalized bureaucracy. The public has confidently expected bureaucrats to carry out the will of the people efficiently and effectively. This confidence, combined with the principle of separation of powers, has provided considerable justification for Congress to rely on rulemaking to supplement legislation rather than attempt to enact laws that answer all questions and anticipate all circumstances associated with a new program. In one view, since it is the task of the executive branch in our constitutional system to see that the law is carried out, bureaucracies, as instrumentality of the executive branch, can be expected to clarify what the law means and take the steps necessary to ensure that its goals are achieved. Our laws require the constant application of knowledge and expertise to varied conditions and circumstances, so it makes sense to concentrate specialists in the administrative agencies that execute them rather than in the legislature.

This view, of course, begs the fundamental constitutional question of who will write the law. We saw that under the APA definition the term rule can have many different meanings. Each has different implications for lawmaking. When a rule merely "implements" a law, there is no constitutional dilemma, because it will restate, perhaps in more functional language, what
the Congress has already enacted. When a rule "interprets" legislation, the
rulemaking activity may be more substantial, bordering on lawmaking. But
here there is no pretension of making new law. Rather, the agency is answer-
ing questions that have arisen about the law's reach and meaning in par-
cular instances. It is when a rule "prescribes" law that conflict between the
constitutional roles of the executive and the legislature is most evident.

The depth of concern about rulemaking hinges to a considerable extent
on whether agencies are agents of the legislature or the executive branch. If
bureaucracies are merely extensions of Congress, then we should be no more
alarmed by rulemaking than we are by reports that congressional staff
members play a vital role in the drafting of statutes. If, however, these agencies
are properly viewed as extensions of the president, then their exercise of sub-
stantial rulemaking powers threatens the constitutional design. But the ques-
tion of who runs the bureaucracy is by no means settled; Congress and the
president have long struggled to gain the hearts and minds of bureaucrats. 46
Both have formidable powers at their disposal to influence the course of
bureaucratic decision making. The president prepares budgets, appoints sen-
ior officials, and issues executive orders that profoundly affect how agencies
manage their work. Congress is the ultimate decision maker on budgets and
appointments, conducts oversight and investigations, and engages in cas-
ework on behalf of constituents. In the battle for influence over the bureau-
cracy, congressional powers are at least as substantial as those of the presi-
dent. Congressional power to define an agency's mission and fix its budget is
more determinative than the transitory and fragmented sources of presiden-
tial influence. Therefore, when delegating the power to interpret and prescribe
law, Congress does it in the secure knowledge that it retains sufficient power
and opportunity to redirect rulemakings that go astray. We will examine con-
trol of rulemaking through oversight in Chapter 6.

Expertise situated in a constitutionally acceptable relationship to
Congress is not the sole reason why rulemaking by agencies is beneficial. One
of the great advantages of rulemaking by agencies is their ability to respond
in a timely manner to unanticipated and changed conditions, and most espe-
cially emergencies. Agency officials who administer and enforce programs are
the first to learn that an existing program is flawed in some way. They are also
the first to observe that conditions affecting the program, or conditions that
programs are intended to affect, have changed significantly. They are most
likely to be the first government body to learn that an emergency situation
exists. As James Landis wrote in 1938, "The Administrative [process] is always
in session." 47

A good illustration of this capacity is evident in the rulemaking of the
Federal Aviation Administration. Through its inspection and regulatory
enforcement programs, the FAA regularly discovers problems in the design,
operation, or maintenance of airplanes. Some of these problems are trivial;
others pose serious threats to the flying public. The organization of the FAA
allows for swift communication from the field staff to those in the Wash-
ington headquarters that a new rule is required. For example, should a review of
maintenance records or a series of inspections reveal excessive corrosion in
the fan blades of a particular type of jet engine, the FAA technical staff can
decide how serious the problem is, the steps that must be taken to correct the
problem without endangering passengers and crew, and how quickly these
actions should be taken. The rule in this case is the "airworthiness directive,"
mentioned above, hundreds of which the FAA issues each year.

Consider the same situation without rulemaking. To establish the new
obligations borne by manufacturers or carriers for their jet engines, an amend-
ment to the existing statute would be required. For such an amendment to
come to pass, the information would have to work its way up the FAA orga-
ization and be communicated to the appropriate House and Senate subcom-
mittees; legislation would have to be drafted; hearings would have to be held;
votes would have to be taken in subcommittee, full committee, and the floors
of both houses; possibly conference committee deliberations and another
round of votes would be required; and then the president would have to sign
the legislation. If real danger existed, a tragedy could occur long before action
of this sort was completed. Those of us who are averse to risk are especially
so when we step through the doors of an aircraft being readied for takeoff.
Rulemaking to flyers like me is a godsend.

Rulemaking supplements the legislative process in another significant
way. In subsequent chapters I will demonstrate that the revolution in public
participation that has swept through public administration since the 1960s has
affected rulemaking profoundly. It is not surprising that the proponents of
increased public involvement in the decisions of agencies would focus on a
function as crucial as the development of rules. Rulemaking adds opportuni-
ties for and dimensions to public participation that are rarely present in the
deliberations of Congress or other legislatures. It is often difficult for interest-
ed parties to determine exactly what a bill under consideration means to
them. The more vague the proposed provisions, the more difficult it is for the
public to decide whether participation is worth the effort and, if so, what posi-
tion to take.

In rulemaking the decisions regarding participation become much clear-
er because the issues are better defined, the actions the government is con-
templating are more specific, and the implications for affected parties are much
easier to predict. Positions are thus easier to formulate and articulate. And there
are many ways for the public to get involved in rulemaking and to influence
the content of rules. The cost of effective participation in rulemaking may be lower, and the chances of success in rulemaking greater than those that confront the public during legislative deliberations.

A Means of Containing Administrative Discretion

However contradictory it may at first appear, rulemaking is an important tool in limiting the power and discretion of bureaucrats. During the past fifty years the growing power of the bureaucracy has been viewed by many with considerable alarm. Armed with vast but poorly defined authority delegated to them by Congress, bureaucrats are seen as able to exercise discretionary powers that threaten the rights and security of individuals. Many critics have claimed that administrative officials with the power to deny or rescind benefits and licenses, impose regulatory requirements and sanctions, and force the reporting of all types of information do so without adequate standards to guide them and to protect the public. But rulemaking is a potential remedy for the abuse of bureaucratic discretion, at least in the opinion of some respected scholars.

Some discretion is essential if the administrative process is to operate effectively, efficiently, and fairly. In his highly influential book Discretionary Justice, Kenneth Culp Davis acknowledged this but concluded that “our . . . systems are saturated with excessive discretionary power which needs to be confined, structured and checked.” The problem, he argued, was not the then-common prescription that Congress and other legislative bodies work harder to specify limits in legislation. “Legislative bodies do about as much as they reasonably can do in specifying the limits on delegated power,” he stated. And he was quite specific about the tool in which he placed the most faith: “Altogether, the chief hope for confining discretionary power does not lie in statutory enactments but in much more extensive administrative rulemaking, and legislative bodies need to do more than they have been doing to prod the administrators.”

Whether Congress heard this plea is unclear, but it certainly acted as if it had. Professor Davis was writing at the threshold of the 1970s, the so-called “era of rulemaking.” The statutes of the 1970s, 1980s, and 1990s expressed a clear preference for rulemaking as a device for administering the programs they created. Many mandated rulemaking and more than a few imposed deadlines on agencies for completing this work. Although they are often viewed from the perspective of the private citizen or firm whose behavior is constrained, rules control agencies and bureaucrats as well. Rules set limits on the authority of public officials in all areas of their work, identifying what they can know, how they can learn it, when they must act, what they must do,

when they must do it, and actions they can take against those who fail to comply. A violation of rules puts the bureaucrat no less at risk than the private scofflaw. Fears of unfettered discretion in the hands of willful or ignorant bureaucrats are largely unfounded in a system in which citizens can trust that rulemaking will occur subsequent to any legislative enactment and set effective and reasonable limits on the use of otherwise discretionary power. Again, this is not to say that rulemaking is the font of wisdom and success for public programs. It, like most government functions, is beset with problems. But rulemaking clearly provides advantages over the legislative process, which is overloaded with demands for action but impeded by shortages of time and expertise. There are reasons other than these institutional considerations why rulemaking is so prominent and has assumed a position of such importance in our government system. It serves the interests of the most powerful players in our public policy process.

Rulemaking and Self-Interest

In all matters determined by politics the self-interest of the major participants must be scrutinized and understood. Rulemaking is certainly no exception. Its other advantages notwithstanding, rulemaking delivers clear benefits to the main actors in our political system. Consider what rulemaking provides Congress, the president, the judiciary, interest groups, state and local governments, and the bureaucracy itself.

Congress. By resorting to widespread delegation of legislative power to the rulemaking process, Congress both frees and indemnifies itself. Rather than spending all their available time in drafting, debating, and refining statutes, members of Congress are free to engage in other activities, like getting reelected. Of course, rulemaking promotes reelection in more ways than just generating free time. If we examine the statutes of the 1970s, the 1980s, and the 1990s, it is clear that members of Congress are routinely faced with the legislative equivalent of a catch-22. Squeezed by powerful and contending interests—environmentalists and industry, workers and management, program beneficiaries and taxpayers—members of Congress realize that their votes on very specific legislative proposals that clearly identify winners and losers can erode support or foster outright opposition. As others have noted, this provides powerful incentives for Congress to remain vague, leaving the specific, painful, and politically dangerous decisions to the agencies.

Congressional self-interest is served by rulemaking for reasons other than the “responsibility avoidance” that accompanies the delegation of authority. Congress remains free to intervene in ongoing rulemakings and to
review completed rules using a variety of devices that will be discussed presently. Some of these devices allow members to perform services to individual constituents, an always-popular reelection activity.

Presidents. It took a long time for presidents to learn how to make the most of it, but rulemaking provides extraordinary opportunities to influence the direction and content of American public policy. President Reagan instituted changes that gave the White House the power to review and influence all rules written by federal agencies. Viewed from one perspective, this reform gave the president a new weapon in the ongoing struggle with Congress to define public policy. In a period of divided government, presidential management of the rulemaking process is especially significant. Because it is based in the White House, it avoids some of the perennial problems presidents have had in gaining control of their own executive machinery in departments and agencies. With the power of review, even presidents who take a dim view of big government and regulation should favor expanded use of rulemaking, since it allows them to influence the full range of public policy in a manner that does not directly entail negotiations with Congress.

Judges. Although it is less common to think of the judiciary as dominated by self-interest, there is no question that some judges relish an active role in the public policy process and that most hold strong views on the proper scope and channels for government action. As an opportunity for the exercise of authority and power by the courts, rulemaking makes it much easier for judges to supervise and impose their will on the operations of bureaucracies. This is true whether judges seek to impose their personal beliefs about law and policy or are simply attempting to meet the obligations of the judicial branch in the political system.

Clearly articulated rules offer judges an efficient way to review and determine agencies’ stewardship of the law and public policy. When lawsuits challenge the results of rulemaking, judges are able to evaluate the content of a rule to determine whether it is consistent with the statutes from which they derive their sole claim to authority and legitimacy. Further, judges can review the process by which rules were developed to determine if the obligations to allow for meaningful participation and to conduct required analyses were met. Judges have developed numerous devices to correct deficiencies in the substance or development process of the rules they review. Many of these vest in the judges themselves the equivalent of supervisory power over rulemaking, giving them the potential for great influence over the ultimate content of laws and policies. Other forms of administrative action, notably case-by-case decision making, are theoretically as susceptible to judicial review but are labor intensive in the extreme. Given the limited resources of the judiciary, review of rules is by far the more cost-effective path for judges to pursue personal power and institutional influence or merely to fulfill their constitutional responsibilities.

Interest Groups. Interest groups could find few modes of government decision making better suited to their particular strengths than rulemaking. Here and throughout the book, interest group will refer to organizations of any sort, including individual companies, that attempt to influence the decisions of government. Their size, longevity, and issues of interest are not important. Because rulemaking is specialized it allows these groups to focus their attention and use their resources to influence decisions they know will affect their members. As we have already noted, rulemaking often requires a considerable amount of substantive, often technical, information. Agencies are rarely in possession of all the information or insights they require to write sound, defensible rules. Frequently, interest groups and the individuals or firms they represent have ready access to the information that agencies need. This gives such groups a considerable amount of leverage in the development of rules. Unlike legislative deliberations, in which political considerations are frequently overwhelmed or obscured operational issues and technical details, the outcome of rulemaking often hinges on the amount and quality of information available, which is a stock-in-trade for interest groups.

State and Local Governments. The explosion of rulemaking that began in the late 1960s and has continued is of great consequence to state and local governments. Not only are they affected directly, becoming, in effect, regulated parties under environmental, workplace safety, equal employment, and other programs; they also become more active rulemakers in their own right. Many statutes allow states to be the primary rulemaker as long as their rules are at least as strict as those developed by the federal agency with primary jurisdiction for the program. Thus, state and local governments cannot avoid federal rulemaking, and they must await its results before exercising their own rulemaking powers. Because of these powers, state and local governments can have considerable influence over the federal rulemaking process simply by virtue of what they might do subsequently. For example, if state agencies are selected to enforce or otherwise implement rules, federal rulemakers must be attentive to their needs and preferences. Even when states and localities do not write rules, they are often responsible for enforcing the federal ones. By successfully influencing the content of federal rules, state and local governments can ease the burdens of subsequent implementation.
**Rulemaking**

Bureaucrats. An equivocal position on rulemaking by bureaucrats would not be surprising. For many agencies, rulemaking represents a daunting workload that curtails their discretion and exposes them to scrutiny and pressure from Congress, the president, courts, and interest groups. Such a situation would seem sufficiently unattractive to put off even the most mildly self-interested bureaucrat. Although some may consider it nothing more than an unavoidable chore, rulemaking does bring certain benefits to at least some bureaucrats. Those "zealots" identified three decades ago by Anthony Downs, a scholar of bureaucratic behavior, have in rulemaking the possibility of putting their indelible mark on public policy and law. His "climbers" find rulemaking presents an excellent opportunity to advance careers in and out of the agency. The author of a major rule gets considerable visibility in an agency and may become marketable on the outside. Even Downs's "conserver," who avoids risk in favor of a more predictable existence, sees in rules the opportunity to stabilize and regularize the working environment.52

In short, rulemaking has something for every key institution and actor in our political system. For this reason alone we should expect it to be a permanent feature of the way we govern ourselves.

The objective of this first chapter was to convince the reader that rulemaking is a significant government function that has, since the start of the Republic, played an increasingly pivotal role in the definition of American public policy and law. In the hope that this case has been made, the next task is to explain how rules are written. The process of rulemaking has been evolving since the enactment of the first statute that delegated the authority to develop rules to the first president. Today it can be highly complex. The way it is conducted has important implications for the nation's well-being and the functioning of our democracy. It is to the process of rulemaking we turn next.

**Notes**

3. For discussion of these instruments of presidential power, see Phillip J. Cooper, By Order of the President: The Use and Abuse of Executive Direct Action (Lawrence: University Press of Kansas, 2002).
5. One scholar would argue that this broad definition is just an example of the APA's rulemaking provisions in which "Congress' delegation of vast lawmaking power was acknowledged and legitimated." See Martin Shapiro, "APA: Past, Present, Future," Virginia Law Review 72 (1986): 453.

10. As James O'Reilly puts it, "Rules are as old as the republic." See O'Reilly, Administrative Rulemaking (Colorado Springs, Colo.: Shepard's/McGraw-Hill, 1983), p. 4.
13. Ibid.
14. Ibid.
16. See Attorney General's Committee, p. 98, at n. 17.
17. Many sources cover the historical development of public policy in the areas mentioned in the text. Various authors consider successive "eras" of growth and diversification in public policy, regulation, and rulemaking. An accessible list of major statutes that established programs and authorities for a wide variety of agencies that issue rules can be found in the Federal Register Directory, 9th ed. (Washington, D.C.: Congressional Quarterly, 1990).
20. Phillip Cooper, Public Law and Public Administration (Palo Alto, Calif.: Mayfield, 1983), p. 75. In a subsequent chapter I will review Supreme Court decisions that invalidated much of the legislative basis for the New Deal. Although these cases hinged on perceived defects in the NIRA, the way agencies conducted rulemaking and other program functions was prominent in the Court's opinions.
21. Ibid.
23. Ibid., part 19, Veterans Affairs.
Return with me now to one of those countless times you have found yourself driving behind a large truck. A sign on its rear with a familiar diamond shape and markings triggers the recognition that you are sharing the roadway with something dangerous. As you strain to make out the message of the sign, you goose the accelerator to get a bit closer. You are attracted to those hurtling explosives, corrosives, or combustibles like a moth to a flame. Finally you can read the dire warning and it says, “Drive Gently: Have a Nice Day.”

Empty tanker trucks with their banal messages notwithstanding, the amount of hazardous cargo transported on the road and rails, by water and air, and the dangers they pose are no joke. The volume is impossible to estimate, but we know that the government has established more than twenty different classes of dangerous cargo. The substances that fill these various categories number in the thousands. And we are routinely treated to the depressing sight of overturned tractor-trailers, punctured railroad cars, or tankers with gaping holes surrounded by emergency response personnel outfitted like something out of a low-budget science fiction film. The threat is real, and for nearly a century government has been attempting to deal with it.

With passage of the Explosives and Combustibles Act of 1908, the federal government assumed regulatory authority over dangerous substances and material moving through interstate commerce. The rules written to implement this legislation and the amendments to it that followed grew in number until 1994, when they filled 1,400 pages in the Code of Federal Regulations. Known collectively as the Hazardous Materials Regulations (HMRS), these rules have developed over a long period of time. By the government’s own admission their evolution has been incremental and disjointed, as noted in Figure 2-1; by the 1970s the rules were being roundly criticized for being too long, too complex, too difficult to use, and too hard to enforce.

The work of revising the HMRS began sometime in 1981, and in April 1982 the first public notice that the Department of Transportation (DOT) was developing new regulations appeared in the Federal Register. The notice invited the public to comment on the new rules. Many supplemental public
FIGURE 2-1 Sample of the Hazardous Materials Regulations in the Federal Register

52402 Federal Register / Vol. 55, No. 246 / Friday, December 21, 1990 / Rules and Regulations

DEPARTMENT OF TRANSPORTATION
Research and Special Programs Administration

Amendments to the Hazardous Materials Regulations; Performance Oriented Packaging Standards

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Final rule.

SUMMARY: This final rule contains amendments to the Hazardous Materials Regulations (HMRS), 49 CFR Parts 171-180, that include new hazard communication, classification, and packaging requirements. The changes are based on the United Nations Recommendations on the Transport of Dangerous Goods (UN Recommendations) and RSPA's own analysis of the existing HMRS. The amendments presented in this document entail changes, both editorial and substantive, to substantial portions of the existing HMRS. In a rulemaking project of this magnitude it is inevitable that errors and omissions will come to light subsequent to publication in the Federal Register.

Details of this rulemaking and other regulatory matters are discussed in a separate document titled "Regulatory Impact Analysis for the Hazardous Materials Transportation Regulations".

This final rule is based on the analyses and comments received to date and addresses the recommendations made in the Regulatory Impact Analysis.

The Hazardous Materials Regulations (HMRS) apply to the interstate (and in a few cases, intrastate) transportation of hazardous materials in commerce. The sections involved in this rulemaking are Parts 171 through 180 from range paper bags to cargo tanks (multi-trucks). The major portion of Part 171 is devoted to non-bulk packaging (authorized capacities of 110 gallons or less) and includes approximately 100 specifications for cargo tanks, drums, barrels, boxes, cases, toils, tanks, lumber and various kinds of inside containers or receptacles designed to be enclosed by larger containers. Not included in these 100 specifications are several pressure cylinders for compressed gases and packages designed solely for radioactive or explosive materials, none of which are addressed under this final rule.

A total of 179 addresses specifications for tank cars.

The HMRS has been an evolutionary process. Regulations originally were addressed only to the most acute transportation safety hazards such as the risks of explosives and flammable materials. As new materials presenting different risks entered the transportation system, new hazard classes were added. The HMRS now address over 25 different classes of hazardous materials.

The development of the HMRS has, over the years, been a step-by-step process.

Preliminary Editions: Series of HMRS

Early HMRS

With regard to packaging flexibility, the detailed design specifications which are found in the HMRS are generally based on the basis on which were incorporated into the regulations in the 1910s and 1920s. They have been more or less copied in many respects. They are not necessarily the result of an economic analysis or a cost-benefit analysis. Therefore, the need for new packaging standards which are more consistent with the actual use of packaging and which are based on economic considerations is essential.

According to the recent report by the DOT's Office of the Inspector General, the HMRS provides some of the most comprehensive and stringent requirements for packaging in the world. However, the system is extremely complex and difficult to implement. There is a need for simplification and standardization of packaging specifications.
notices were issued during the development process, and members of the public took full advantage of each of these opportunities to influence the rulemaking. It is estimated that the last notice before the new regulations became official generated more than 2,200 written comments from interested parties. Controversy, sometimes intense, occurred often. There were disagreements in the department, disagreements between the DOT and other agencies, and opposition from those affected by the rules. During the more than ten years it took to develop the new regulations, dozens, if not hundreds, of DOT personnel were involved in some way in writing them. In the final two and one-half years of intensive work, more than twenty employees were engaged in a "core workgroup," concentrating on completing the regulations. Dozens of individual analyses and studies were conducted. The department did evaluations of the effect of the new rules on the environment, small business, federalism, paperwork, and the economy in general. Countless individual decisions were made, some large, some small, that determined the final content of the rules. The Office of Management and Budget, a staff organization serving the president, reviewed all these analyses. The rules were cleared by the OMB before they were published in both draft and final form. On December 21, 1990, the Department of Transportation announced its comprehensive revision of the HMR, dealing with packaging, classification, communication, and handling. Of more interest to us here than the specific contents of these rules is the way in which they were developed.

It would be misleading to suggest that the long, complex, and resource-intensive process by which the new HMR were developed is typical of contemporary rulemaking. Consider, for example, the response of the Federal Aviation Administration when imminent dangers to the public are discovered. The FAA’s airworthiness directives program can issue the equivalent of an emergency rule in twenty-four hours, or less. Still, the HMR, now more than a decade old, are by no means unique and continues to hold powerful lessons. We can point to more recently completed rules or ongoing rulemaking efforts that took longer to write, generated more interest and conflict, involved more studies and negotiations, and occupied the time and talent of more agency personnel. So, the HMR and similar rules have much to tell us about rulemaking and the current state of our democratic government. The process by which rules are written is a critical element in our legal and political system. The contemporary rulemaking process is the evolutionary product of forces that have been at work for many decades, and the attention it has attracted through the years confirms its status as a prime element of government decision making.

Process and Substance

Given the vast scope of rules and the importance of their content, it should not be surprising that the process used to write them attracts a great deal of attention. During the past fifty years rulemaking has been the focus of considerable professional and political controversy. The way rules are written profoundly affects what they contain, and the content of rules determines, to a very large extent, the quality of our lives.

The substance of rules and the process of rulemaking are linked in many important ways. The elements of the contemporary rulemaking process are reactions to great expansion in the substantive reach of rulemaking. We have seen that the New Deal and the 1970s and 1980s were periods of explosive growth in government programs that required massive rulemaking to meet ambitious objectives. These expansions of the subject matter of rulemaking stimulated intense interest in the manner in which rules were developed by the responsible agencies. In both periods there was concern about how agencies were making decisions about the contents of rules. What were agencies taking into account? To whom were they listening? To whom were they responsible? These concerns led to many proposals, some successful, others not, to change the way rules were written.

Rulemaking is a highly developed process, subject to a complex web of legal requirements. Nevertheless, the subject matter of a particular rule can still exert a powerful effect on how the rule is developed. The types and amount of information needed and the persons affected by a rule determine which of a large set of legal requirements will actually apply in a particular rulemaking. As important, the technical, administrative, and political dimensions of each rulemaking are determined almost entirely by the topic and scope of the rule to be written. A few simple examples highlight the differences.

A rule that deals with important aspects of the transport of hazardous materials necessarily involves a large number of issues, some of which require major research efforts to resolve. The rule will affect large and diverse segments of the population, each interested in it for different reasons. Those who ship goods, transport them, and consume them will all be concerned with the effect of the rule on them, as will environmental groups and organizations representing the workers who come in contact with the dangerous materials. Because the rule will have a large overall effect on the economy, certain legal requirements that would otherwise not apply must be met. Similarly, the rule's potential effect on the environment and small businesses triggers other specific legal requirements. Because the provisions of the rule mandate the keeping of records and periodic reporting to the government, a law that seeks to limit
paperwork for regulated parties must also be considered. The number and diversity of interests affected by the rule alter rulemaking procedures in less formal ways also. The agency writing the rule must provide for participation by those affected, and this will be determined in part by what the law requires in this regard and in part by the agency's assessment of the political environment. Within and outside of the agency there are systems to review and approve rules before they take effect. Given the scope of the rule, the costs it will impose on regulated parties, and the inevitable controversy it will generate, it is certain that all in a position to affect its content will scrutinize it closely.

Contrast this with the making of a much less prominent and far more common rule. The Marketing Service of the Department of Agriculture issues rules that limit the amount of specified commodities that can be shipped to market during some predetermined period of time. The rule is developed by a standing committee of experts in the marketing of the commodity in question, and the decision is based on the clearly stated goal of supporting the price and quality of lemons, oranges, or the other half-dozen fruits and vegetables affected by this program. The interests most immediately and substantially affected are narrow and comparatively few in number, and the rule may remain in effect for a very short period of time. Its limited scope and impact allow the agency to avoid many of the legal requirements that apply in the writing of the rule for transportation of hazardous materials. The routine and serial nature of this form of rulemaking generates less political and administrative scrutiny. Public controversies are rare and muted, if evident at all.

Substance and process are inextricably linked in rulemaking. The missions established for agencies in authorizing legislation determine what rulemaking must accomplish. These goals, in turn, determine the types and amount of information that must be collected. The legal requirements that apply to rulemaking do so on a contingent basis, triggered by the size and type of populations or activities affected by the rule being developed. For virtually every procedural requirement imposed on rulemaking, exceptions may be granted, an acknowledgment that few elements of process make political or economic sense in all rulemaking situations. Process is so modulated for reasons of politics and efficiency.

Most actions classified as rules deal with narrowly defined subjects or affect only a small number of activities and people and are temporary in their effects. Their content may hinge entirely on technical considerations about which there is no debate. Such rules are not likely to stimulate affected parties to invest considerable time and effort to change the process by which they are written. Further, additional procedures will not improve or alter the decisions made during rulemaking sufficiently to justify the additional costs imposed on the agencies that write the rules. The substance of rules deter-

mines the extent and intensity of political attention to a given rulemaking, driving oversight by Congress, the White House, and the courts. All of these, in turn, influence the administrative and management systems that support and oversee rulemaking in the agencies. When considering the rulemaking process, we must always be aware of the leavening effects of a given rule's subject matter.

From the First Congress to the Administrative Procedure Act

Not much is known about how our early presidents actually wrote the rules they were authorized to issue under the laws enacted by the first Congresses. Clearly, George Washington and many of his successors lacked the formidable executive office and massive bureaucracies that now support rulemaking. The function of rulemaking eventually migrated from the direct control of the president to cabinet secretaries, but it was not until the latter part of the nineteenth century that sizable bureaucracies were available to put their collective expertise to the task of rulemaking. From the start of the Republic, however, presidents and cabinet secretaries issued rules, sometimes numerous and complex. Take, for example, the extensive rules governing customs duties that the president was required to issue. Washington was an accomplished man, but was he sufficiently expert to fix the level of duties on so large a number of goods?

Until the 1930s none of the main government institutions—Congress, the president, the courts—paid serious or sustained attention to rulemaking as a general public function. In particular instances, however, Congress did provide guidance on how rulemaking in specific programs should work, and in some agencies it was remarkably well developed by the time of the New Deal. Consider the rulemaking techniques used by the Wage and Hour Division of the Department of Labor under the Fair Labor Standards Act. A study conducted in the late 1930s revealed a five-step process to establish rules governing wages. An "industry committee" consisting of representatives of labor and management was appointed. The committee then engaged in an investigation, after which it recommended a minimum wage rate for the industry in question. The recommendation would be the subject of a public hearing conducted by the administrator of the Wage and Hour Division, who, upon consideration of the recommendation and the results of the public hearing, would issue his or her final determination. This whole procedure was something akin to what we would today call a permanent "regulatory negotiation" process.

Another example of 1930s rulemaking with a faintly contemporary ring involves rules written for fisheries by the Department of the Interior. The
Attorney General's Committee on Administrative Procedure found that the fishing industry's dissatisfaction with these regulations had led to a crisis of enforcement. Widespread noncompliance and evasion of rules were reported. To lessen the dissatisfaction and revive these important regulations, the Department of the Interior held a series of public meetings around the country to collect information from affected persons about the deficiencies in the existing regulations and ideas for reform. Forty years later the Carter administration relied heavily on such mechanisms for public outreach to reform what it considered an unresponsive rulemaking process. His successors took differing positions on public outreach, as we will see in this and subsequent chapters.

The Politics of Process

The process of rulemaking burst onto the political agenda during the early years of the New Deal. From its inception the New Deal was a lightning rod for critics. They decried the growth of the federal government and the intrusions into private affairs that the philosophy and individual programs of the New Deal represented. The criticism that a massive federal bureaucracy had become the "headless fourth branch of government" was certainly heard before the 1930s, but during the New Deal it became particularly focused and intense.

The most organized and persistent criticism of rulemaking came from the American Bar Association (ABA). Lawyers today are educated and trained to participate in government decision making in all its varied contexts, but the bar of the 1930s was very much identified with the judicial system. Based on the adversary model, which stressed formal rules of evidence and procedure, aggressive advocacy for both sides of a dispute, and a removed and objective tribunal with final authority to decide, the civil courts were a far cry from the bureaucratic institutions that were popping up like so many mushrooms.

David Rosenbloom, a leading public administration scholar, has observed that the rise of this "administrative state" represented far more than an irritating change in habits for the legal profession. It was instead "an especially severe challenge because it threatened the supremacy of the common law." Through their actions, administrative agencies themselves possessed the power to "contravene" the common law. The strategies open to the lawyers faced with this apparent steamroller of expanding government were essentially two. They could stand in its path and hope that the collision would arrest its progress and then reverse its course. Or they could attempt to divert its progress to a different path, one more acceptable to the core values of the profession. Ultimately, they chose the second approach.

For a brief time in the mid-1930s it appeared as if the juggernaut of government would be derailed. A series of Supreme Court decisions suggested that the mechanism on which the administrative state depended for maintenance and growth and for delegation of authority would be severely curtailed. The cases involved challenges to the National Industrial Recovery Act, which granted sweeping regulatory powers to the president and myriad boards responsible for segments of the economy. Once under way, the actions of these boards and other institutions of the New Deal came under heavy attack by critics, who had found a largely sympathetic ear in the federal courts. Stephen Breyer, now a Supreme Court justice, and Richard Stewart report that in the early years of the New Deal federal judges were frequent allies of the critics, invalidating some statutes, curtailing the powers of agencies, and reversing individual decisions.

The most dramatic confrontation between the new administrative state and the forces of the old order occurred in 1935 and 1936 in a series of cases that appeared to knock out the underpinnings of the New Deal. In *Panama Refining Co. v. Ryan*, *Schechter Poultry Corporation v. United States*, and *Carter v. Carter Coal Co.*, the Court ruled that powers granted under the New Deal statutes amounted to unconstitutional delegations of legislative authority to the president, agencies, and other regulatory officials. *Panama* involved powers granted the president in the NIRA to restrict the production of oil. *Schechter* contained a challenge to the "live poultry code" authorized under the NIRA's "fair competition" provisions. In *Carter* the Supreme Court was asked to rule on the legitimacy of a statute that empowered private groups of coal producers and their employees to set binding conditions for this segment of the economy. In both *Panama* and *Schechter* the Court ruled that the sections of the NIRA on which the so-called "hot oil" and "sick chicken" authorities were based contained no discernible standards to guide and constrain the president and his administrative agents. Thus, they were invalidated. In *Carter* the Court found a different but no less fatal flaw in the statute empowering private individuals to make binding public decisions. This too was ruled an unconstitutional delegation of authority by Congress. In these cases the Court questioned not only basic grants of authority but also how they were exercised by the various instrumentalities that arose under the NIRA. Cited were instances of rules being written with little or no advance warning, of their being written with minimal consultation with affected parties, and even of their being unpublished or otherwise unavailable to the regulated parties.

The New Deal was shaken by this judicial assault, and the question of what constituted an acceptable delegation of legislative authority was opened. Since much of the NIRA and other New Deal law was based on similarly broad grants of power, the prospects for a rapidly expanding government were very
much in doubt. The implications for rulemaking, as a general government function, were particularly ominous. Each of the cases touched some aspect of rulemaking and left a clear message. In the future, rulemaking might be much more constricted, because Congress would be required to be more specific and restrictive in its grants of authority. Further, the rulemaking that remained to be done would be scrutinized closely on both substantive and procedural grounds.

As it happened, however, the threat was short-lived. The Court's decisions triggered a firestorm of protest from the supporters of the New Deal, and Franklin Delano Roosevelt personally led the charge. Most students of American government are familiar with the constitutional crisis that ensued. President Roosevelt argued that an out-of-touch, overworked, and thoroughly unresponsive group of five of the nine Supreme Court justices was thwarting the will of the American people, and he launched an offensive to recoup what had been lost. His "Court-packing plan" would add to the Court one justice for every sitting justice over seventy, giving him an immediate ten-to-five majority. Congress, outraged at the judicial decimation of its handiwork, was not willing to countenance this wholesale manipulation of another constitutional branch of government. The Court-packing plan failed, but Roosevelt still won the day. Shifts in voting by two members of the Court changed a bare five-to-four majority against the New Deal into a vocal minority. Departures of sitting judges delivered FDR the opportunity he needed to remake the Court in his own image. He succeeded in the transformation; the New Deal and rulemaking were quickly restored to their previous states of health and influence.

The loss of their judicial ally hurt but by no means destroyed the critics of the new administrative state. On the contrary, the action shifted to the legislative arena, and the bar took the lead in attempting to recast the rulemaking process in a form more consistent with traditional lawyerly practices. In this political arena the tenor of the debate shifted from careful, scholarly arguments regarding the proper "channels" for legislative powers to politically charged and less subtle accusations that rulemaking and other administrative functions were manifestations of a creeping "socialism." The specter of unelected and essentially invisible bureaucrats writing, in near secrecy, laws that could curtail freedom and confiscate property was a compelling, if somewhat melodramatic, argument for reforming the administrative process.

The ABA's original proposals for reform focused on the elimination of independent regulatory commissions and the transfer of all adjudicatory powers from the remaining agencies to the federal courts. Further, it argued that all administrative actions that stayed with agencies be subjected to judicial review in a special federal administrative court. Rulemaking would be transformed into a quasi-judicial activity, with each proposed rule subjected to a formal public hearing. The content of rules would be determined using standards of evidence like those used in civil trials. Many of these proposals were contained in the Walter-Logan bill of 1940, which, surprisingly, passed both houses of Congress. The bill "attempted to enforce common law due process, applicable only to adjudication, to the legislative process of administrative agencies." Support for the Walter-Logan bill in the wake of the New Deal was apparently not seen by members as contradictory, perhaps because they failed to see the link between the substance of programs and the processes by which they were administered. Clearly, however, the immobilization of the administrative state was again at hand. Intended or not, the Walter-Logan bill would calcify the administrative process and render rulemaking on a large scale virtually impossible.

If Congress did not see the threat, Roosevelt most certainly did. He vetoed the bill, and the veto was not overridden by Congress. But the president knew he had a problem that would not go away. There was widespread belief, justified or not, that the administrative process needed attention. Rulemaking procedures were well developed in many agencies, but it was not uniformly so. No generally applicable procedural standards had been authoritatively established by legislation or any other means. What those standards should be was not immediately clear to FDR, but his recent experience with the Walter-Logan bill probably convinced him that Congress should not be let loose on the task. So he did what all presidents have done when they faced difficult and politically dangerous decisions. He bought time, and prayed for answers, from an advisory commission.

The extraordinary work of the Attorney General's Committee on Administrative Procedure was discussed in the previous chapter. Its case studies of the practices in force in more than two dozen agencies in the late 1930s constitute an invaluable resource for scholars. More important, its findings laid the foundation for one of the landmark statutes of the twentieth century. The report of the Attorney General's Committee, Administrative Procedures in Government Agencies, was issued in 1941, and the recommendations developed in it became the springboard for what became the Administrative Procedure Act of 1946. World War II delayed its passage, but enactment followed soon thereafter. Its enduring importance to contemporary rulemaking is debatable, but the act remains a historic statement of the principles of government for a bureaucratic age.

Martin Shapiro has characterized the APA as a "deal struck between opposing political forces" at a pivotal stage in the development of the national government. On the one hand were the New Dealers, who were not quite yet the dominant force in American political life, and on the other were
conservatives, who probably saw the handwriting on the wall but wanted to delay reading it for as long as possible. The New Dealers sought a large and active government capable of defining and refining policies quickly and able to implement them with dispatch. The conservative forces held on stubbornly to the notion that the common law and judicial processes were the best, if not the only, way to protect private property, individual rights, and capitalism itself from a rapacious public sector. The compromise struck was perfectly logical, but lopsided. In the APA the proponents of big and easy government won a great victory. But they failed to rout the enemy thoroughly, and over the next several decades they would lose the war.

Shapiro has observed that the APA divides all administrative procedure into three categories: rulemaking, which is when agencies act like legislatures; adjudication, which is when agencies act like courts; and everything else. The final category is hardly trivial, since it contains the classic bureaucratic tasks of executing, administering, and otherwise delivering programs and policies to the public. In the simplest terms, the APA requires agencies to behave like a legislature when they write rules and like courts when they adjudicate disputes. Everything else is left essentially to the discretion of the agencies. Looked at from this perspective, the New Dealers succeeded in capturing much of the making and all of the implementation of policy and law for their political philosophy. America’s historical penchant for an independent judiciary, with its distinctive and elaborate methods for making decisions, however, was preserved. Adjudication in agencies would be conducted in the manner of a civil trial presided over by a judicial officer whose objectivity would be guaranteed through his or her structural and functional separation from the other activities and personnel of the agency. The APA is vague concerning the situations in which adjudication is the required method for decision making, defining them only as “matters other than rulemaking . . . but including licensing.” For decades the struggle to define a clear and bright line between situations appropriate for rulemaking and those appropriate for adjudication has produced few hard and fast generalizations, leaving a substantial number of government actions in a procedural twilight zone. It is safe to say that adjudication is the preferred method when the rules or standards to guide decision making already exist. Hence, it is best used in situations when the status of an individual (as a petitioner, potential beneficiary, or regulated party) is in question, and the application of known rules depends on facts about that individual or his or her activities that may be in dispute or in need of elaboration.

Adjudication works best with two-sided issues. Rulemaking, as a legislative process, is designed to sort through facts from multiple sources in order to select standards that will apply generally. That said, it does not take much imagination to think of situations in which “individual fact” might have a strong influence on the rule that an agency is considering. This is especially true when a regulated or beneficiary community is very small, or when the risk to the public posed by incorrect or incomplete facts is great. The APA takes these situations into account by leaving room for Congress to require formal adjudicatory procedure on certain classes of rulemaking when it authorizes agencies to carry out programs. In reality, Congress has used this option infrequently. The key rulemaking provisions of the APA, found in section 553, are very different:

553 Rule Making
(a) This section applies, according to the provisions thereof, except to the extent that there is involved—
   (1) a military or foreign affairs function of the United States; or
   (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.
(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—
   (1) a statement of the time, place, and nature of public rule making proceedings;
   (2) reference to the legal authority under which the rule is proposed; and
   (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.
Except when notice or hearing is required by statute, this subsection does not apply—
(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.
(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.
(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
(2) interpretative rules and statements of policy; or
(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

The procedures framed in section 553 have come to be known as "notice and comment" or "informal" rulemaking. Kenneth Culp Davis, one of the most influential voices in the history of American administrative law, describes them as one of the "greatest inventions of modern government."15 What made administrative rulemaking so attractive to him was its speed, its economy, and that "it can be, when the agency so desires, a virtual duplicate of the legislative process."16 In fact, as contemplated in the APA, administrative rulemaking was considerably less encumbered than the legislative process. Rulemaking authority, safely ensconced in the bowels of agencies, was attended to by specialized staffs with narrow responsibilities and without the presence of constituencies holding the big stick of reelection in their hands. The most remarkable feature of rulemaking was the extraordinary freedom of action it appeared to grant the bureaucrat. History has shown it to be just that, an appearance. Freedom of action for bureaucrats is not rulemaking's most prominent characteristic. A grasp of the APA's original provisions is an important foundation for understanding current process, nonetheless.

The Core Elements of Rulemaking: Information, Participation, Accountability

The core elements of rulemaking as put forth in the Administrative Procedure Act can be expressed in three words: information, participation, and accountability. These are familiar principles, basic to our constitutional democracy. In the context of rulemaking, however, they assume forms and meanings different from those in other political settings.

Information

The most basic element of "information" in rulemaking is the notice provided to the public at large when a rule is being developed and when it becomes final and binding. Generally these notices appear in the Federal Register. Under the provisions of the APA the notice varied, depending on the stage of the rulemaking. For proposed rules, agencies needed only to tell the public, in general terms, what it was proposing to do and the authority under which it was taking action. The agencies had the option to serve the notice on persons individually and directly rather than using the Federal Register. For proposals, agencies could give the public either a description of what it had in mind or the actual intended language of the rule. In the absence of other statutory mandates these decisions were left unequivocally to the discretion of the rule writers. The agencies also were expected to provide information on the time and place of rulemaking, and for final rules a "concise, general statement of basis and purpose" and at least thirty days warning before their requirements took effect.

Another dimension of information is implied in the statement of basis and purpose. That is the information the agencies rely on to develop the rule. Beyond acknowledging its existence and the need to disclose it, the APA says little about what must be considered. We will see in the upcoming chapters devoted to the management of problems and the oversight of rulemaking that this aspect of information has since received a lot of attention.

An argument can be made that the information thus provided the public during rulemaking was at least the equal of what we have access to when Congress or a state legislature is considering a new law. What we learn of pending legislation comes from the selective and often superficial accounts in the media or from direct inquiries we make of our elected representatives, or from their increasingly frequent newsletters. There is no equivalent of a Federal Register notice for pending legislative votes. Still, agencies enjoyed considerable discretion when deciding how much information to disclose. All they needed to reveal was a general description of the rule they had in mind and, once it was complete, the statute that it was designed to implement and some discussion of the "basis" for the action they took. In 1946 much discretion was left to agencies when determining the quantity and quality of the information that the public would have to work with as they decided if and how they would participate in rulemaking.

Participation

Agencies enjoyed considerable freedom when structuring public participation under the provisions of the APA. The agencies were obliged to allow written comments, but participation in any other form was not a matter of right. Surprisingly, the agencies were not instructed anywhere in the act to take heed of what they learned from the public in written comments or whatever
other form of participation they allowed. Participation was included in the APA for some purpose, but from the language of the act one cannot conclude that it was for any reason other than the education of the agency. No explicit linkage was drawn, for example, between the participation provisions of the act and the requirement that agencies briefly describe the “basis” for their decisions. In like fashion the APA allowed the public to petition agencies to write a rule but provided no additional mandates or guidance to agencies on how to handle or dispose of these petitions.

It is interesting that the framers of the APA chose to codify the least intrusive mechanisms for public participation that were already in use in rulemaking agencies. As noted above, by the time the act was passed in 1946 many agencies, clearly a majority of those writing a significant number of rules at the time, used a variety of procedures to interact with the public they were affecting. In some instances constant and intense interactions between the rulemakers and regulated parties were common. By establishing a floor, below which no agency could fall in its interactions with the public, the APA left it to existing or future legislation to add additional, general procedural requirements. Nothing in the act prevented the agencies themselves from innovating in their dealings with the public during the course of the development of regulation. On reflection, this approach is quite consistent with the views of some in the New Deal coalition that placed such great faith in the capacity of government. If agencies were up to the myriad technical tasks required to produce a better society, they were certainly capable of fashioning the proper structures and procedures for public participation within the loose constraints of the APA. Those who fashioned the legislation were comfortable with entrusting the stewardship of public participation to the agencies in which they had such faith.

Accountability

The APA’s substitute for the accountability fostered by the ballot box was the specter of judicial review. The act does not explicitly mention other, more powerful mechanisms for accountability. Congress and the president exert powerful influence over rulemaking in general and specific ways. But these influences were not treated in the APA other than by limited references to Congress. The primary vehicle for accountability in the APA was judicial review. As outlined in section 706 of the act, judicial review is paradoxical. On the one hand, the act made the courts available to those who wished to challenge rules, repudiating earlier theories of judicial review that made the courthouse threshold difficult to cross. On the other hand, the standard against which agencies’ rulemaking decisions would be judged was anything but strict. Rulemaking could be judged on both substantive and procedural dimensions, but in neither were agencies given difficult criteria to meet.

The substance of rules could not constitute an “arbitrary or capricious abuse of discretion.” According to definitions found in Webster’s New Collegiate Dictionary, arbitrary behavior and capricious behavior should be very rare and difficult to establish when they did occur. Arbitrary means “at random,” an “unreasonable act”; capricious means “impulsive,” “unpredictable.” Taken literally, few rules could be so devoid of “basis and purpose” that their contents would not pass so easy a test. The other avenue established in the APA for challenging a rulemaking was procedural. Given the rather minimal procedures outlined in the act, agencies should have had little difficulty meeting these standards as well. Of course, if Congress had increased procedural requirements for a particular program, or if the agency itself had adopted more elaborate procedures, these would have become the standards against which the rulemaking would have been judged. In this sense, the procedural basis for judicial review was potentially more formidable than the standards for review of the substantive content.

The New Dealers had reason to rejoice over their success in fashioning a rulemaking process that could serve as the vehicle for a rapidly expanding government. As noted above, however, the conservatives took firm control of agency adjudication. Based on long-standing principles of common law, and embodying the adversary model of decision making, adjudication in the provisions of the APA was structurally separated from other agency functions, including rulemaking. This was accomplished through the creation of an independent corps of hearing examiners, later to be called administrative law judges. Preserved was the principle that adjudication was special; when it was the appropriate form of government action, the full complement of administrative due process was essential to ensure the accuracy and fairness of the result.

The basic rulemaking principles of the APA have not changed since passage nearly sixty years ago, but we should not conclude that the act as written in 1946 thoroughly dominates the making of rules today. In fact, most important rulemaking is not conducted according to the minimalist model of the APA, if it ever was. Minor and routine rulemaking is also not carried out in tight accordance with the APA, but for different reasons. The fact that the principles of the APA have never been altered does not mean that Congress, the president, the courts, and the agencies themselves have not been busy changing rulemaking, including amending the APA itself.

The political coalition that produced the rulemaking provisions of the APA has long since disappeared. The seeds of change the authors planted in the original legislation are the act’s most enduring legacy. The three funda-
mental elements of rulemaking procedure contained in the APA—information, participation, and accountability—have remained dominant themes throughout the past thirty years of virtually constant change. Again, the APA allows for forms of rulemaking other than the notice-and-comment provisions of section 553. Specifically, if Congress indicated that rulemaking was to be conducted "on the record," the procedures that normally apply in adjudication would come into force. In addition, when this type of rulemaking is invoked, the standard of review shifts from the permissive "arbitrary and capricious" standard to the considerably more demanding requirement that agencies demonstrate "substantial evidence" for the decisions embodied in the rule. Formal judicialization of rulemaking, which the ABA and its conservative allies fought so hard for in the late 1930s, was not strongly promoted by this provision in the APA, nor has Congress frequently exercised this option. The fact that it was retained as an option to exercise is significant nonetheless, perhaps betraying some nagging doubt about the adequacy of the procedures in section 553.

Whether or not the equivocation in the APA was from discomfort over informal rulemaking is little more than an academic question at this point. For important rules, the events of the 1960s, 1970s, 1980s, 1990s, and 2000s have rendered the pure notice-and-comment rulemaking of 1946 a historical artifact. What happened to the rulemaking process during these years could be described as creeping judicialization. "Creeping" because many small, often uncoordinated alterations were enacted. "Judicialization" because their net effect has been to push rulemaking from a purely legislative mode of operation to one with more of the elements we have come to identify as decision making in courts. The forces pushing rulemaking in this direction are both external and internal to the agencies. Some were motivated by a profound mistrust of government regulation of private activity and the rulemaking that made it possible. Others were motivated by a concern for more rational and comprehensive decision making. Like the APA, all are united by their emphasis on information, participation, or accountability as preferred devices for changing rulemaking into a process more to the liking of reformers. Concentration on these three elements has been remarkably consistent over time.

In rulemaking, information and participation cannot be separated. Effective participation is simply impossible without accurate and complete information on what the agency intends to do, the reasons the agency has for doing it, and the likely effect a new rule will have. Through the years Congress, the president, and the courts have dramatically increased the information that may be generated and shared with the public during the course of rulemaking. They have taken a similar approach to participation. In fact, these institutions have rarely expanded information requirements without simultaneously increasing the opportunities for the public to participate in the larger rulemaking process. Every increment of information on the need and justification for, and implications of, rules under development increases the ability of interested and affected parties to consider their position and present fully informed views to the rulemaking agency. It should not be surprising, then, that the very vehicles that vastly expanded the information requirements in rulemaking also opened the process to additional involvement by the public.

Information: Increased Legal Requirements

Information is a crucial element in any rulemaking. How it is handled by an agency profoundly influences the content of the rule that is ultimately produced. Information in two general forms must be considered. The first is the information that any agency must collect, or develop, and then consider during the course of a rulemaking. The second is the information that the agency must provide to the public during and after the rulemaking. Both dimensions of rulemaking have changed dramatically since passage of the APA.

Up to 1946, authorizing statutes provided agencies the sum and substance of the direction regarding information they were expected to use when writing rules. Except for its single reference to the "basis" for a rule an agency is about to adopt, the APA provides no additional guidance to the agency on how it is to go about assembling the information on which a rule will be based. Authorizing statutes varied considerably in the direction they provided agencies, but until the 1960s, laws mandating or allowing rulemaking were usually vague as to the specific types of information to be used and the way it was to be collected.

Information that the Agency Must Consider

Authorizing Statutes. Since the late 1960s, regulatory statutes have become increasingly concerned with the type of information an agency considers when deciding whether and how to write a rule. The pattern is most evident in the statutes that establish major programs of social regulation and, to a lesser extent, those dealing with economic institutions and transactions. The section of the Occupational Safety and Health Act that grants the secretary of labor authority to promulgate rules to protect American workers is illustrative. After setting out the goals that OSHA's rules are to promote, the statute turns to the types of information that should be used during rulemaking.

Development of standards ... shall be based on research, demonstrations, experiments and such other information as may be appropriate. In addition
to the attainment of the highest degree of health and safety protection for
the employee other [information] considerations shall be the latest available
scientific data in the field, the feasibility of the standards and the experience
gained under this and other health and safety laws.19

Congress established formidable information collection and analysis
responsibilities for the Occupational Safety and Health Administration when it
writes rules. It is obliged not only to rely on what is already known about
health and safety aspects of substances and activities. There also is a clear
mandate to create and use new knowledge when what is available is insufficient.
Further, information that relates to health and safety must be supple-
mented by information about "feasibility," which means, in this instance, what
is possible technologically, operationally, and financially.

Rulemaking to control the threat posed by toxic substances in the envi-
nronment is the responsibility of the Environmental Protection Agency under
the Toxic Substances Control Act (TSCA). A key element in the TSCA scheme
is the testing of substances that may pose a risk. These tests are to be per-
formed in accordance with regulations governing testing facilities promulgat-
ed by the EPA. The information that Congress expects the agency to develop
when writing test rules includes "the relative costs of the various test pro-
cedures and methodologies which may be required under the rule and the rea-
sonably foreseeable availability of the facilities and personnel needed to per-
form the testing required under the rule."20 But the TSCA supplements these
bits of practical information with an imposing list of considerations related to
the core purpose of the statute. When writing test rules on substances, the
EPA is required to consider a range of health and environmental effects that
are produced by various characteristics of the chemical under examination.
These characteristics include its "persistence, acute toxicity, subacute toxicity,
chronic toxicity." In addition to information on these characteristics, the act
requires the EPA rulemakers to consider a range of risks posed by the chemi-
icals that are tested. Risks that testing must be attentive to are expressed in
the form of effects such as "carcinogenesis, mutagenesis, teratogenesis, behav-
ioral disorders, cumulative or synergistic effects and any other effect which
may present an unreasonable risk to health or the environment."21

The information provisions in the Occupational Safety and Health Act
and the Toxic Substances Control Act that relate to the physical well-being of
individuals are examples of a general approach to regulation known as "risk
assessment." Many other statutes explicitly or implicitly require some form of
risk assessment as a basis for rules.22 Not all statutes treat the risk assessment
issue identically. In fact, different statutes administered by the same agency
often establish different criteria for risk assessment, which require different
approaches to information collection. This inconsistency is evident in differ-
ent programs administered by the same agency: the EPA. Compare the stan-
dards set for risk assessment in the Safe Drinking Water Act; the Federal
Insecticide, Fungicide, and Rodenticide Act (FIFRA); and the Toxic Substances
Control Act. The Safe Drinking Water Act, under which the EPA writes rules
governing the quality of potable water from public water supplies, requires
establishment of "maximum contaminant levels . . . [at which] no known or
anticipated adverse effects" could happen and which allow for an "adequate
margin of safety." The pesticides law requires the agency to develop the infor-
mation needed to set standards that result in "no unreasonable adverse effect"
but that take into account the economic, social and environmental costs and
benefits. The TSCA adopts a similar approach. It calls for the control of toxic
substances to the extent that "unreasonable risk" is eliminated but using the
"least burdensome requirements" to accomplish this goal.23

By authorizing agencies to protect the public from risks in the envi-
ronment, the workplace, and consumer goods, Congress necessitated the devel-
opment or collection of other types of information. Information requirements
of the sort listed above reflect Congress's strong desire to please all affected
constituencies. By mandating that rules be based on such information,
Congress encourages, and sometimes requires, agencies to balance informa-
tion on risks to health and safety with risks to economic well-being. This sets
the stage for a rulemaking process characterized by the same types of trade-
offs and compromises that dominate congressional lawmaking.

Information Statutes. The information requirements established through
individual authorizing statutes are significant because they give structure to
the specific analytical tasks that rulemakers must perform. Rivaling this source
of collection and analytical requirements, however, is what can be termed the
information statute. This type of law does not apply to a single program or
agency. Rather, these statutes apply generally to all agencies that write rules.
The National Environmental Policy Act (NEPA), the Regulatory Flexibility Act
(RFA), and the Paperwork Reduction Act (PRA) are good examples of congres-
sional insistence that a particular type of issue be considered in all rule-
makings undertaken by the federal government.24 The vehicles to ensure ade-
quate consideration of these issues are statutory provisions that mandate the
collection or development, analysis, and use of information about the effects
of a rule on particular interests or populations.

NEPA is a landmark statute in many ways. Passed in 1969, it is often
viewed as the symbolic start of a period of environmental policymaking that
continues unabated to the present day. It has many notable provisions, but
the ones most pertinent here are those that require agencies to consider the
effect of rules on the environment. The law calls for what could be two stages of information collection and analysis on environmental issues that arise in the making of a single rule. First, there is a threshold assessment of whether the actions contemplated in the rulemaking, such as the setting aside of public lands for certain types of activities or the relaxation of emissions standards for nuclear power plants, constitute a potentially significant impact on the environment. If they do not, the agency issues a "finding of no significant impact." If the agency reaches the opposite conclusion, it must then prepare an environmental impact statement (EIS), which is a report on the likely effects of the rule and the steps the agency will take to eliminate or mitigate damage to the environment. The EIS is also prepared in two stages, draft and final, a system that is strikingly similar to that of proposed and final rules established in the Administrative Procedure Act.

The Paperwork Reduction Act and the Regulatory Flexibility Act are remnants of an ambitious but failed effort, primarily by the Senate of the United States, to overhaul the regulatory process with a single, massive statute. The originally proposed legislation, which went through many iterations, ultimately failed to attract the support needed to make a new law. These two statutes emerged in 1980 as the progeny of those efforts. The PRA requires agencies to develop information on the extent of the paperwork burdens that will accompany new rules. It also requires agencies to obtain White House permission, in advance, for all new collections of information. The legislation was intended to reduce these burdens by forcing agencies not only to analyze the information collection and reporting costs they were imposing on the private sector but also to use the studies to minimize the costs. Essentially the same approach was taken in the Regulatory Flexibility Act. Here the protected class was less global than that embraced by the Paperwork Reduction Act. The RFA sought to protect small businesses and organizations from the ravages of federal rulemaking by requiring agencies to develop and analyze information on the effect of rules on small entities. When the effects of a rule are likely to be substantial, the agency is expected to take steps that will reduce the burden. The agency can fashion devices that will scale back the actual requirements or somehow make it easier for the smaller entity to comply.

In the 1990s Congress again attempted to pass general statutes to reform the entire rulemaking process. In 1995 President Clinton vetoed the Comprehensive Regulatory Reform Act, which would have greatly expanded the use of certain analytical techniques in all rulemaking. In 1995 and 1996, respectively, Congress did amend the Paperwork Reduction Act and the Regulatory Flexibility Act, strengthening their information provisions and increasing responsibilities for agencies that write rules.

Each of these information statutes represents an effort by Congress to minimize the negative effects of rulemaking and other government activities on resources, activities, and individuals deemed worthy of special protection by Congress. Their basic designs are very much alike. Development and analysis of information is central to each statute. There is an unexpressed but obvious intent that the information will alone be a substantial force in altering the rulemaking behavior of agencies. We will see shortly, however, that Congress was not so naive as to think that information alone would be sufficient. In these and other statutes, Congress combined information with participation and accountability to ensure that the desired results were achieved.

Information Requirements by Executive Order. Congress, although it has been the major source of expanding information requirements for rulemaking, has not acted alone. Presidents since Richard Nixon have burdened agencies and departments under their direct authority with additional information requirements. With time these requirements have become broader and more rigorous. The major device that enables presidents to intervene in the rulemaking process is the executive order. More than 13,000 executive orders have been issued by our presidents since the start of the Republic. Several of these have had important effects on rulemaking; one may be the most important reform of rulemaking since passage of the Administrative Procedure Act of 1946.

President Richard Nixon started the process when he imposed a "quality of life" analysis on new rules, the meaning of which was never particularly clear. This gave way to President Gerald R. Ford's executive order requiring an analysis of a rule's impact on inflation. President Jimmy Carter wrote a more extensive set of reforms into his Executive Order 12044. Among the requirements in this executive order was a mandatory analysis of "regulatory alternatives" to force agencies to consider innovative and less restrictive and burdensome ways to achieve regulatory objectives. President Ronald Reagan followed the tradition with Executive Order 12291, arguably the most significant incursion by any president into the core processes of rulemaking. This order mandated a regulatory impact analysis for all rules whose estimated effect on the economy was $100 million or more. This amounts to full cost-benefit analysis with the additional feature that the proponents of any new rule were required to demonstrate a net gain to society prior to its promulgation. Like Carter's Executive Order 12044, Reagan's Executive Order 12291 had a reformist dimension. It was accompanied by a set of regulatory principles that exhorted agencies to adopt nonregulatory options for accomplishing public policy objectives whenever possible and to use the least intrusive and burdensome regulatory devices when government intervention was the only realistic alternative.

President Reagan did not stop with Executive Order 12291. During the course of his presidency he signed numerous other executive orders
requiring the development of specific types of information during rulemaking. In 1983 the president signed Executive Order 12498, which required agencies semiannually to assemble and send to the White House agendas of the significant rulemaking that was under way or contemplated in the near future. Executive Order 12612 required agencies to conduct a “federalism assessment” of rules under development, a requirement that was strengthened in subsequent years in Executive Order 13175. The intention here was to ensure that federal rulemaking did not interfere with the “sovereignty” of the states. In effect, this executive order forced agencies to consider whether action by the states was a legal and feasible alternative to federal action and, even when it was not, how the rule could be structured to minimize disruption to the authority and financial integrity of those governments.

The federalism initiative was followed by executive orders requiring consideration of the effects of rules on private property and on the family. These additional executive orders, like the more prominent and controversial Executive Order 12291, were manifestations of the mandate that President Reagan believed he had received from the American people in both 1980 and 1984. The types of information required to be collected and analyzed by these executive orders are predicated on a deep respect for the free market and private property, states’ rights, and the family. Is there a better summary of the domestic policies of the Reagan presidency?

President Bill Clinton followed the same tradition of influencing rulemaking through executive order. Executive Order 12866 replaces Reagan’s Executive Order 12291 but embraces many of the same information principles. It endorses cost-benefit analysis and mandates agencies to analyze regulatory circumstances to find both innovative and less burdensome ways to accomplish public objectives. President George W. Bush is operating under the Clinton executive order, but he issued several interpretations of the order’s requirements that are binding on agencies. And recent years have seen executive orders designed to protect children (Executive Order 13045) and require analysis of the effects of rules on energy (Executive Order 13211).

**Information that Agencies Must Provide the Public**

There is, of course, another side to information. The information the agency is required to produce to educate itself during the course of rulemaking is undoubtedly important, but that which it is required to disclose and to whom establishes the crucial link between information and participation and accountability. The Administrative Procedure Act requires disclosure of information about rulemaking to the public through the vehicle of notice in the *Federal Register*. To this day the *Federal Register* remains the primary, but not

the sole, official mechanism for communication with the public regarding rules under development. Today, however, the content of notices of proposed rulemaking and notices of final rules is vastly different from what was contemplated by the drafters of the APA and by those who were initially involved in its interpretation and implementation. The APA appeared to allow agencies considerable flexibility in what went into a rulemaking notice. A manual prepared by the attorney general shortly after passage of the act went so far as to advise agencies against publication of the actual text of proposed rules. The attorney general instead recommended that agencies publish general descriptions of what they were intending to do, based on the dubious proposition that the actual text might simply confuse the public.  

The content of notices has developed in a very different manner and now routinely includes material that could not have been contemplated by the drafters or early interpreters and implementers of the APA. Notices of proposed rulemaking nearly always contain not only the full text of the rule that the agency has developed to that point but a preamble as well, which is frequently as informative as the rule itself. The publication of the full rule in the notice is mandated by some statutes, such as the Federal Trade Commission Act, but is more often a matter of agency practice. Agency practice, in turn, is a result of intense pressure from the public, the White House, and the courts for rulemakers to be precise about what they are proposing to do. Preambles, in contrast, are mandated by the rules governing the *Federal Register*, which dictate a standardized format for all proposed and final rules. These rules, issued by the administrative committee of the *Federal Register*, call for a “preamble which will inform the reader who is not an expert in the subject area of the basis and purpose for the rule or proposal.”

Notices of proposed and final rules often contain a great deal of additional information arising from the statutes and executive orders discussed above. For example, agencies report in preambles the results of the reviews they are required to conduct under the Paperwork Reduction Act, the Regulatory Flexibility Act, and Executive Order 12866. Illustrations of this type of reporting can be found daily in the *Federal Register*.

Beyond the disclosure of information of this sort in proposed and final rules, agencies are required to summarize the “basis” for their decisions. This requires, in the preambles of rules, explanations of the information, data, and analyses the agency relied on when developing the regulation. As noted above, the information, data, and analyses that are given depend on what the authorizing statutes require and are either in the form of specified studies or the objectives they are expected to achieve. These sections can be quite extensive. Preambles are frequently longer than the rules they precede, and those for major rules can be several hundred pages long.
Although the preambles of rules can be lengthy and detailed, they do not contain every bit of information that the agency reviewed and relied on during its deliberations. For this purpose agencies maintain "dockets" or "records" into which all material pertinent to a rulemaking is placed. In some instances the docket or record is mandated by an agency's authorizing legislation. Such requirements can be found in legislation establishing environmental regulation, notably clean air and toxic substances regulations, and consumer protection programs. Much of the widespread maintenance of records and dockets in other programs arises from the fear of litigation, during which agencies would be expected to document their actions. The rulemaking docket or record, like the information it contains, is a vital element in participation and accountability, and new technologies have diversified their accessibility.

We know from the records of the period that the writers of the Administrative Procedure Act consciously decided to leave to the discretion of agencies decisions about the type, quantity, and means of disclosure of information on which their rules were based. As Kenneth Culp Davis observed: "In making rules of general applicability agencies were generally free, in the absence of a special statute, to develop factual materials or not to develop them as they saw fit... Such freedom for the agencies was understood at the time of enactment in 1946. Nothing in the APA changed that presumption."

What we have experienced since 1946 is a repudiation of this approach to information collection and use in rulemaking through the enactment of many special statutes, the imposition of numerous executive orders, and the adoption of a defensive posture by agencies because of the possibility of litigation. Now agencies engaged in significant rulemaking do not enjoy anything near the discretion Davis alludes to; a high threshold for information collection, use, and disclosure is now set for rulemakers by these actions of Congress, the president, and the courts. The agencies are free to exceed these requirements if they wish. The laws, executive orders, and judicial decisions constitute a floor below which the agencies cannot fall unless specifically exempted from their legal requirements. As we will see, however, such exemptions are not rare.

Participation: Expanded Opportunities
Mandated by Law

The opportunity to participate in the development of rules lends the process an element of democracy not present in other forms of lawmaker. Later we will examine actual patterns of participation in rulemakings, the perceptions of those involved as to the effectiveness of various forms of participation, and the relationships that exist between public participants and the agencies that write rules. We also will take up the troublesome but crucial question of the efficacy of participation from the perspectives of the agencies and the external participants. In this chapter we deal with participation in rulemaking solely as a legal requirement. The objective here is to demonstrate how the opportunities for participation have grown and diversified since passage of the Administrative Procedure Act.

The story of participation in rulemaking begins long before the passage of the APA. The Attorney General's Committee that studied administrative practices in agencies in the late 1930s discovered that significant and apparently highly effective programs of public participation supported rulemaking in many agencies. The Department of Labor, which administered the wage and hour laws, used an especially interesting form of such participation. A "conference" of affected parties, including representatives from both business and labor, met regularly with the agency to set and adjust rules governing wages and hours. This conference approach, both formal and informal, was not uncommon among the agencies that wrote rules. These and many other early mechanisms for participation are discussed Chapter 5. But when the drafters of the APA decided on the form public participation would take, they chose instead a much less direct and substantial approach. Except for those rare circumstances when formal, trial-type proceedings were mandated by authorizing statutes, agencies could limit public participation to written comments in response to notices of proposed rulemaking.

The legislative history of the APA reveals at least some concern for the adequacy of written comment as a means for rulemaking agencies to educate themselves and for the public to be able fully to articulate its concerns or opinions. The record shows that the framers of the APA expected agencies to reach out to the public in different ways when issues of great importance or difficulty were under consideration. They did not, however, define those circumstances in the act, nor did they mandate the use of more elaborate forms of participation. They were satisfied to leave it to the informed discretion of agencies or to subsequent Congresses to add to the basic framework. Later Congresses, as well as presidents and courts, accepted the implicit invitation in the APA with considerable enthusiasm.

Contemporary authorizing statutes, particularly those creating or amending regulatory programs, are replete with examples of the conscious and aggressive expansion by Congress of opportunities for public participation to accompany new information requirements. The practice became so commonplace that by the 1970s academic and professional journals were acknowledging and generally endorsing the rise of a "hybrid" form of rulemaking. This new form displays a variety of options for public participation located somewhere between the minimal model of notice-and-comment
rulemaking and the full-blown trial procedures of "formal" rulemaking. Indeed, diversity in modes of participation became the norm in laws establishing new programs. Some authorizing statutes built on the APA by specifying the amount of time that the public would have to comment on proposed rules. Invariably, the allowed time in these statutes was more generous than what had become the norm of thirty days among the agencies. The amount of time given the public to respond to a proposed rule can be crucial for several reasons. It takes time to assemble the essential information needed to evaluate and then respond to what can be highly technical and complex rules. As important in the contemporary political environment, time allows people to get organized, build coalitions, and orchestrate a response to the agency’s proposals.

An interesting and highly significant question is what the agency does with the comments it receives from the public. On this the APA is essentially silent, except for the required statement of basis and purpose that must accompany the final rule. Obviously, Congress would not have required agencies to, at minimum, solicit written comments if they expected the rule writers to ignore what the public had to say. If public comments raise significant issues related to statutory objectives or requirements, the agency can ignore them only at its peril. Reviewing courts are responsive to arguments from the public that a matter of central importance to a rule was missed or mishandled by the responsible agency. In a subsequent chapter we will discuss this form of judicial review. Agencies include a discussion of public comments in the preambles of rules. Not only are the nature and number of public comments reviewed, the actions the agency has taken, or chosen not to take, in response to them are detailed. The amount of attention paid to comments depends on the volume and seriousness of the comments received, but in many instances they dominate the preamble. There is little question that agencies take public comments seriously.

Other statutes sought to diversify participation by mandating that agencies give the public different types of opportunities to express its views during rulemaking. Perhaps the most common of these means is the "legislative hearing," during which witnesses present testimony orally to those responsible for the rulemaking in much the same manner as congressional committees do their work. This allows for a give-and-take not possible through written comments. The legislative hearing was required in rulemakings authorized or mandated in statutes dealing with occupational safety and health, safe drinking water, toxic substances, clean air and water, endangered species, consumer products, energy conservation, and trade practices. Some statutes went even further, virtually to the edge of formal trial-type proceedings, by allowing for either rebuttal comments or actual cross-examination of agency per-sonnel. The former is an option in rulemakings dealing with toxic substances and drinking water; the latter also occurs in rulemakings for toxic substances and in that for certain trade practices regulated by the FTC.

Many laws allow for or require a more institutionalized form of participation through the use of advisory committees. The role of advisory committees in rulemaking can vary considerably. In some instances the committee may be nothing more than a sounding board for agency ideas; in others it may help the agency set the rulemaking agenda; and in a few instances, such as the Safe Drinking Water Act, consultation with advisory groups is mandatory. Although the use of advisory committees is widespread and highly varied, several features of their operations are standard. The Federal Advisory Committee Act of 1972 (FACA) established strict requirements that agencies must meet when using these types of groups during rulemaking. The provisions of the FACA govern the composition of advisory committees by requiring that they be "chartered" in the Federal Register to inform the public of their functions and activities. Further, agencies must ensure that the committees are balanced in regard to the interests that will be affected by their rules, and the meetings of the committees must be open to the public.

Some have commented that the FACA has had a chilling effect on the use of advisory committees. But it is important to acknowledge that one of the primary intentions behind the statute was to ensure that principles of public participation were observed in the operation of these highly influential groups. The model established in the FACA was essentially duplicated in the Negotiated Rulemaking Act of 1990, a statute that establishes the basic procedural requirements that agencies must use when they develop rules using this distinctive technique. Negotiated rulemaking is an important development of the rulemaking process and will be discussed in Chapter 5.

Other general statutes promote participation in rulemaking by expanding it in certain subject areas. The National Environmental Policy Act and the Paperwork Reduction Act are prominent examples of how this indirect approach to participatory rulemaking works. NEPA requires public input at two critical stages in the development of environmental impact statements. At the outset the agency preparing the EIS is required to conduct a "scoping session," at which plans for the study are discussed with the public. The public has the opportunity to help set the agenda for the research and analysis by identifying those environmental resources and values that might be significantly affected by the rule being written. The agency then prepares a draft EIS, which is made available for public comment. At this stage the public comments on the adequacy and accuracy of the agency's plans for avoiding or mitigating the potential environmental damage associated with the rule. The comments must be addressed in the final EIS that accompanies the final rule.
In this sense, public comments on a draft EIS are treated in a manner quite similar to the public comments made on a draft rule.

Participation fostered by the PRA is different. In this case the public has no role in the preparation of the paperwork analysis or in the review conducted by the Office of Management and Budget. But where pertinent and required, the agency's assessment of the paperwork burden is contained in the notice of proposed rulemaking, as is information on the availability of the analysis on which the estimates are based. The public is then free to review the agency's studies and conclusions, consider the estimated burdens, and comment on both along with the draft rule.

In general, executive orders promote participation as an important by-product of the information they require agencies to develop and disclose. The regulatory impact analysis required by Executive Order 12866 is available to the public. So, too, are the results of the OMB's review of the rule. These pieces of information can facilitate informed comment and other forms of participation by the public in a rulemaking that is under way. Other executive orders provide different types of aids to participation or other forms altogether. Executive Order 12372 required consultation with the states when agencies undertake actions that affect the management of intergovernmental fiscal affairs. Executive Order 12866 requires agencies to develop and publish a planning document that outlines their future regulatory actions, most of which require rules. This assists participation by giving the public an advance look at what is in store for them and allowing them time to plan for effective participation in those rules that carry a high priority. All this presumes, of course, that critical information is accessible and used by those with an interest in participation.

Judicial review of rulemaking can promote participation as well. When an aggrieved party convinces a court that an agency has failed to take into account important information during the course of a rulemaking, the judge(s) may order several remedies. One is to require the agency, in effect, to work with the successful plaintiff to correct the deficiencies in the rule. A court's finding that a rule is defective and its agreement with the plaintiffs as to the reasons why will compel an agency to be quite attentive to the parties that brought the lawsuit when it returns to the rulemaking to try again. The patterns we observe in participation are essentially the same as those that emerge in the information dimension of rulemaking. The actions of Congress, the president, and the courts have increased and diversified the opportunities for participation. Information and participation are linked inextricably. Information has no practical significance unless it is used by those who wish to contribute to and influence the course of rulemaking, whether it is before the rule is issued or after, as in litigation and oversight. Participation cannot be effective unless people have the information that is needed to determine if, how, and to what extent a rule under development will affect their lives.

We will see in Chapters 5 and 6, however, that there are other sources of information and paths of influence that are less formal and more numerous than those discussed above. Taken together, the formal and informal dimensions mean that the development of important roles is open, rich in information sources, and replete with opportunities to influence the outcomes.

Mechanisms of Accountability

A strong case can be made that the elements of information and participation outlined above would be of questionable significance if they stood alone with no mechanisms to hold agencies accountable for the rules they ultimately write. Like participation, these mechanisms of accountability are so crucial to contemporary rulemaking that an entire chapter of this book is devoted to them. At this point, however, it is important to establish the main forms of accountability. Like information and participation, they too have grown and diversified since passage of the Administrative Procedure Act.

Rulemakers are accountable to three external sources of authority. These are the primary institutions created in the Constitution. The actual mechanisms of accountability used by Congress, the president, and the courts take many forms. Some are direct and explicit; others are indirect and subtle. At times the line between participation and accountability blurs, as members of the institutions to whom rulemakers answer become active players in the development of rules. What is clear, however, is that the Congress, the president, and the courts review and routinely pass judgment on the products of the rulemaking processes. The institutions are quite different from one another, however, in the criteria they employ, which creates a situation in which an agency in attempting to respond to the wishes of one may run afoul of another. In days of divided government the stresses placed on rulemakers attempting to respond to their squabbling sovereigns can be substantial.

Two fundamental aspects of this accountability network are worthy of note here. First, those who write rules are expected to be responsive to multiple superior authorities, each of which wields considerable power over the agency. Second, the priorities and objectives of each of these authorities differ. Congress is driven by the interests of constituents and expects those who write rules to be responsive to them as well. The power exerted by Congress is fragmented and incoherent as many members of the House and Senate jockey for influence in the rulemaking process. House and Senate jurisdictions, drawn as they are, can result in agencies' reporting to multiple committees and subcommittees. The president is driven by what he perceives to be
his mandate from the entire electorate or at least those segments who supported him. His priorities are more focused, as are the mechanisms he uses to ensure responsiveness. Judges have no constituents as such. Their purpose is to see that the law is observed and to resolve disputes accordingly. But in their behavior judges resemble Congress more than the president because of the varied backgrounds and judicial philosophies they bring to the bench. Although presidents like Reagan have put their clear stamp on the judiciary through the appointment process, there is never any guarantee of consistency or predictability in a federal court system as diverse as ours.34

How the APA Model Has Changed

It is evident from this review of contemporary developments in the process of rulemaking that the model established in the Administrative Procedure Act has been altered profoundly. The changes have been observed and documented more fully by other scholars.35 It is true that virtually all the requirements outlined above have exceptions, when the rulemaking agency is freer to act. Every case of rulemaking is different, and many instances are sufficiently minor and routine that the speed and flexibility contemplated by the APA actually characterize the process used by the agency. But there is no mistaking the general direction in procedural requirements for those rules that are not considered routine or minor, or for the comparatively rare instances of emergency action: Congress, the president, and the courts have come to prefer a more elaborate and procedurally encumbered model for rulemaking than that which was outlined in the APA.

It is striking how far we have moved from the model outlined in the APA, particularly in the category of information. One could argue that the net effect of the various legal developments related to information is the creation of a legislative equivalent of “open discovery”—when litigants can learn about the facts in each other’s possession—and the deposition processes so familiar in civil litigation. As noted, numerous statutes and executive orders require the agency to produce information and documents on a range of standard questions, just as the attorney for the plaintiff might do during a deposition. This information, once developed, is placed with all the other information the agency considered during the course of a rulemaking into a formal record, or docket, which is then completely open for review by the public. The docket and the records it contains must, on examination, explain the decisions that led to the rule.36 While critical features found in trial proceedings are missing, information requirements and the intensity provided by public participation, particularly when information in the record is challenged and agency witnesses are cross-examined, have gone so far as to transform some rulemakings into quasi-judicial proceedings.

We can see from these decades of legal developments that the coalition that embraced the simple and flexible requirements of section 553 of the APA soon lost its salience. The rulemaking process simply became too crucial, visible, and potentially dangerous. The political coalition that had advocated big government was able, for a time, to dominate both the substantive and the procedural dimensions of the debate. In order to extend the reach of government farther, as occurred in the 1960s and 1970s, an implicit trade-off of substance for process was made. The advocates of more government got new laws and programs; those who opposed these initiatives or feared their negative consequences got new procedural requirements for rulemaking, which they could use to constrain, channel, and delay this crucial stage in the policy process. As James O’Reilly notes, these “procedural victories took the sting out of substantive regulation.”37

Exceptions, Exemptions, and Evasions

At this stage the reader may feel as though he or she is sitting at a railroad crossing waiting for a freight train with no end in sight to pass. But before reaching what would be the eminently reasonable conclusion that contemporary rulemaking is hopelessly encumbered by massive and stultifying legal requirements, one must remember, there are no absolutes in government. Not all rulemakings entail every one of the legal requirements outlined above. In fact, only a minority do. Although the rulemaking process has become generally more complex than the minimum standards outlined in the APA, most rules can be developed without attention to all the analyses, reviews, and opportunities for public involvement mentioned earlier.

There are three ways that some or most of the legal requirements outlined can be suspended. First, some types of rules were exempted when some of these requirements were first enacted. Second, the subject matter of some rules makes certain legal requirements irrelevant. Third, if they are so inclined, agencies can evade certain requirements by engaging in pro forma compliance or by finding a way to characterize their actions so that the requirements do not apply.

Exemptions and exceptions have been written into many of the statutes that established the requirements now associated with rulemaking. The practice began with the Administrative Procedure Act itself. Provisions of the APA allow agencies to develop procedural and interpretive rules without prior public notice or participation. When, in the opinion of the agency, there is a compelling public interest, these same requirements, which are the core of the APA’s rulemaking provisions, can be suspended for legislative rules as well.38 The National Environmental Policy Act has been interpreted to allow for “programmatic exemptions” when a given type of frequent or routine
agency action can be shown to carry no significant environmental effects. Rulemaking apparently qualifies broadly for such exemptions, because one can read final rules published in the Federal Register for many days without once encountering a reference to NEPA. The Paperwork Reduction Act also allows exemptions for certain types of frequent, minor, and routine rulemakings.

Executive orders also exempt certain types of rules from their analysis and review requirements. Executive Order 12866 specifically exempts regulations dealing with "emergency situation(s)" and regulations where OMB involvement would interfere with the ability of the agency to meet statutory or judicially imposed deadlines. Executive Order 12866 also allows for exemptions of entire classes of rules, a privilege that is extended to several programs administered by the Environmental Protection Agency, the Department of Agriculture, the Federal Aviation Administration, and others.

As noted earlier, the subject matter of a rule can effectively eliminate many legal requirements. If a rule has no environmental effects, has no serious implications for smaller entities, has no effect on state and local government powers and prerogatives, or involves no new collections of information, then the procedural obligations that would otherwise apply have no bearing on the rulemaking process. Of course, each of these conditions involves some degree of interpretation. What constitutes a significant effect on state and local government or smaller entities is a matter of judgment. Agencies applying a liberal threshold for what constitutes "significant" will find themselves burdened with additional work; those with a more restrictive view will find the rulemaking task substantially eased.

The effects of evasion through interpretation can be seen in the case of the intended regulatory impact analysis requirements put forth in Executive Order 12291. The order required an analysis only if the costs of complying with a rule equaled or exceeded $100 million or if compliance had "major" or "significant" effects on other levels of government or on various aspects of the economy. In fact, regulatory impact analyses were done infrequently by rulewriting agencies. Ostensibly, this was because they estimated that the rules they wrote would not have effects of the magnitude set out in the executive order. Although there was no hard evidence to suggest that agencies were engaging in minimal or pro forma compliance, it is true that economic impact, federalism, and small entities are frequently dealt with in the preambles of rules with language that can only be described as boilerplate. Those who would evade these types of analytical requirements faced a tougher task under Clinton's Executive Order 12866. Under his order OMB review was more selective; ostensibly it allowed the president's staff to scrutinize regulatory analyses more closely in order to ensure that they were done and done well.

Another form of evasion is the avoidance of rulemaking altogether. Because of the difficulties agencies face in rulemaking, some have resorted to the use of "guidelines," "interpretations," and technical manuals and other vehicles to state or refine policy. In the next chapter we will consider the controversy that has resulted from the use of these devices, which can be issued without benefit of any of the procedures outlined above, in lieu of rulemaking. Suffice it to say that the frequency of their use is testimony to the formidable task that rulemaking has become because of multiple procedural requirements.

The variable applicability of the procedural obligations that have accumulated since passage of the Administrative Procedure Act should underscore for us some important points about the state of contemporary rulemaking. First, rulemaking is an enormously diverse form of government action; no single set of procedures is appropriate or even feasible in all circumstances. Although we are correct to be concerned about the right to participate in a crucial legislative process, most of us also acknowledge that in some circumstances even that cherished value must give way to the need for prompt action to preserve life or property. Second, we must acknowledge that bureaucratic routines and the sheer magnitude of the rulemaking process require attention to enforcement if procedural requirements are to be consistently observed. The pressures on rulemaking agencies are considerable, especially when powerful external or internal constituencies are clamoring for regulations. In Chapter 6 we will explore how the review of rules and other forms of oversight by the White House, the courts, Congress, and even other agencies contribute to compliance with procedural requirements.

Even if most procedural requirements ultimately do not apply in a given instance, an agency must have the capacity to examine the rulemaking it is about to undertake to determine which of the obligations must be met and how to meet them. This requires that rulemaking agencies have systems not only to make these determinations but to ensure that, once established, these laws are observed to the letter. The best way to illustrate the decisions and steps that are commonly associated with rulemaking is to leave this discussion of formal legal requirements and take a more practical look at how a substantial rulemaking might proceed from inception to conclusion.

The Stages of Rulemaking

Having established the legal dimension of the rulemaking process we can now take a more practical, operational look at how rules come into being. The rulemaking process is easier to understand by conceiving of it as a sequence of activities, each of which is affected by ones that precede it.
Fortunately, James O'Reilly developed this way of examining the rulemaking process (Table 2.1).

**Stage 1: Origin of Rulemaking Activity**

Although not part of the actual rulemaking process, the writing of law by Congress is the true origin of rulemaking. No rule is valid unless it is authorized by law and is promoting a statutory purpose of some kind. Key features of such legislation are the substantive mission it establishes for rulemaking, the number and timing of rules the agency will be required to write, the degree of discretion the agency enjoys in determining the content of rules, and the procedural requirements imposed on the agency.

**Stage 2: Origin of Individual Rulemaking**

Although all rules can ultimately be traced to statutes, specific rules often have more proximate origins. Statutes vary considerably in the degree to which they mandate that particular rules be written. Laws may be very explicit and specific. They may also contain deadlines and provisions that will take effect if the agency fails to meet the schedule. These provisions are called *banners* and will be discussed further in Chapter 6. When rules are not explicitly mandated, the potential sources of ideas for new rules are many. Some are internal to the agency; others are external. The political leadership of the agency may bring with it policy agendas that can be implemented only through rulemaking. Advisory committees attached to an agency can also be the source of ideas for rules, although their authority in this area varies markedly. Those closest to program operations in an agency are in the best position to spot the need for new or revised rules. Many agencies have well-developed systems for analyzing new legislation or amendments to existing statutory authorities in order to determine what rules will be required to carry out the new provisions.

A good example of this is the work done by a task force within the Environmental Protection Agency in advance of passage of the Clean Air Act Amendments of 1990. Months before the bill was signed by President George H. W. Bush, the EPA had in hand a detailed plan that contained information on the number, content, and scheduling of the rules by the new legislation. Similar planning was undertaken by the Federal Communications Commission to implement the complex and numerous provisions of the historic Telecommunications Act of 1996. Efforts like these are usually led by a team of agency lawyers and technical staff in the affected program areas. Finally, the agency officials in the field actually implement, administer, and enforce rules and come into direct and constant contact with regulated or benefiting communities and representatives from other agencies and levels of government. They are a likely source of ideas for new or revised rules to improve program operations.

There are many potentially important external sources for ideas for rules as well. The most visible is the White House. The Vice President's Task Force on Regulatory Relief, which functioned during the Reagan administration, was a frequent source of ideas for elimination of rules and alterations in others to make them less burdensome to the private sector. This body took a new form in 1991 and was called the Council on Competitiveness. It was abolished by President Clinton early in 1993. He replaced it with the Regulatory Working Group (RWG), composed of representatives of the major departments and agencies, and chaired by the director of the OMB's Office of Information and Regulatory Affairs. Clinton also directed the focus to regulatory issues that cut across the government. President George W. Bush has not established a new body but has created a mechanism by which new ideas for rules can be communicated to agencies by the OMB. Both he and President Clinton were aggressive in identifying rules in need of change or elimination.

In addition to the White House, federal agencies can be a source of ideas, and pressure, for new rules. For many years the Federal Energy Regulatory Commission (FERC) failed to develop regulations that established its approach to complying with the National Environmental Policy Act. In this it was virtually alone among the major agencies of the federal government whose work had environmental consequences. In time, pressure on FERC from numerous federal and state environmental and natural resource agencies mounted. FERC conceded and in 1988 implemented its first comprehensive rule outlining how it intended to comply with the NEPA.

External sources of ideas for rules need not be confined to the public sector. The Administrative Procedure Act allows anyone to petition an agency to make a rule. There is scant empirical evidence on the number of petitions received and how they are ultimately disposed of. It is safe to assume, however, that they vary considerably in quality and seriousness. Agencies are required only to acknowledge the petition and consider the request. The attention these requests are given must certainly depend on the importance of the issue presented, the evidence provided with the request for a new rule, and the support for and source of the petition.

**Stage 3: Authorization to Proceed with Rulemaking**

Given the multiplicity of sources and large number of potential rulemaking projects that most agencies could undertake, mechanisms may be in place to
TABLE 2-1 An Outline of Rulemaking Activity

Stage 1 Origin of Rulemaking Activity: Rules Mandated or Authorized by Law
Degree of agency discretion
Procedural requirements
Volume and frequency of rules to be produced

Stage 2 Origin of Individual Rulemaking
Content of legislation
Deadlines
"Hammer provisions"
Internal sources
Political leadership
Senior career service
Advisory committees
Program office staff
Office of general counsel
Field staff
Enforcement officials
"Advance Notice of Proposed Rulemaking"
External sources
White House
Congress (other than legislation)
Other agencies
Public petitions

Stage 3 Authorization to Proceed with Rulemaking
Priority-setting system
Agency approval process

Stage 4 Planning the Rulemaking
Goals of the rule
Legal requirements
Information requirements—technical and political
Participation plan
Internal agency constituencies
Affected groups, firms, and individuals
Securing necessary resources
Assigning staff

Stage 5 Developing the Draft Rule
Collection of information
Analysis of information
Impact studies (paperwork, small business, environmental, etc.)
Internal consultations
External consultations (informal)
Draft language of preamble and rule
Implementation plan

Stage 6 Internal Review of the Draft Rule
"Horizontal" review
Other program offices

TABLE 2-1 (continued)

Stage 7 External Review of the Draft Rule
Office of Management and Budget
Congress (informal)
Interest groups
Other agencies
Notice of Proposed Rulemaking transmitted to Federal Register

Stage 8 Revision and Publication of a Draft Rule
Receipt of written comment
Conduct of hearings or public meeting
Review and analysis of public input
Draft responses to public input

Stage 9 Public Participation

Stage 10 Action on the Draft Rule
Choice of alternatives
(a) Prepare final rule with no change
(b) Prepare final rule with minor change
(c) Another round of public participation
(d) Prepare final rule with major change
(e) Abandon rulemaking and start over
(f) Abandon rulemaking altogether
If (f), prepare appropriate notice for Federal Register
If (c), return to Stage 3
If (d), return to Stage 5
If (e), return to Stage 8
If (b), draft revisions, repeat Stages 6 and 7 with formal congressional review; prepare Notice of Final Rulemaking for Federal Register, and transmit
If (a), repeat Stage 7 with formal congressional review, and prepare and transmit Notice of Final Rulemaking for Federal Register
(See a reproduction of an actual rule in Figure 2-1)

Stage 11 Post-Rulemaking Activities
Staff interpretations
Technical corrections
Respond to petitions for reconsideration
Prepare for litigation

Source: Adapted from James O'Reilly, Administrative Rulemaking: Structuring, Opposing, and Defending Federal Agency Regulations (Colorado Springs, Colo.: Shepard's/McGraw-Hill, 1983), with the permission of West Group.
authorize the start of work on a new rule. Because the investment by an agency in the development of a rule can be substantial, senior management may want to be sure that available resources, which are always limited, are put to work on those projects of greatest importance. The priority-setting process for rulemaking in federal agencies is discussed at length in Chapter 4. For now it is enough to note that the mechanisms to authorize rulemaking vary dramatically. Some are highly structured and rigid, allowing only a fixed number of high-priority rules to be undertaken at any one time. Others are quite permissive, with authority delegated to relatively low levels of the agency. And there are many intermediate systems. Whatever the mechanism, this stage marks the transition in a rulemaking from ideas to action.

Stage 4: Planning the Rulemaking

Some type of planning is needed for all rules, regardless of their scope or complexity. Whether it is done consciously or unconsciously, formally or informally, planning for rulemaking forces agencies to confront important questions. The first order of business is to determine who in the agency will be responsible for developing the rule. Assigning responsibility for a particular rulemaking is determined by a variety of methods in government agencies. Usually the responsibility is shared by several components of an agency. The importance of rules, the variety of issues that must be resolved during rulemaking, and the variety of perspectives within an agency affected by the results will determine whether the rule is written by a single individual or small group from a single office or whether it will be a collective exercise involving many people from throughout the entire agency. Whatever the form, these staff members must be found and assigned to the task. The selection of individuals is obviously based on their expertise and areas of responsibility, but the availability of key people at any point in time may be an issue. Conflicting demands on available expertise is a chronic problem, so agencies must have some method for assigning people to rulemaking projects.

Once personnel are selected and assigned, the task itself becomes the focus of planning. What is the objective of the rule being written? To answer this question, the agency must review the statutory language and, perhaps, the legislative history to determine what Congress sought to accomplish with the legislation. Then the agency must determine which of the numerous potential procedural requirements apply to this particular rulemaking. By sorting out the objectives of the rule and the legal requirements that must be satisfied during its development, the agency can begin to comprehend the information needed to complete the rulemaking. Knowing what information is required, the agency can then consider where and how to obtain it. This may well raise new resource issues. This review may lead the agency to conclude that internal staff and information resources are insufficient to complete the rule and that additional information must be collected. For this the agency may choose to use contractors. Sufficient monies must be available and the agency must set about to structure a separate process to meet the formidable legal requirements that apply when the government procures services from the private sector.

This stage is not too early to begin thinking about how the public will be involved. Each form of public participation requires different support. If the agency opts for written comments only, it must establish a system for docketing what it receives. If it intends to use an advisory group not already formed, the requirements of the PACA, discussed earlier, must be considered and arrangements made for the conduct of the group's meetings. Similarly, public hearings require considerable advance work. Sites and formats for the meeting must be determined, arrangements must be made to secure transcripts of the proceedings, and travel plans need to be worked out.

At this planning stage of the rulemaking process, the responsible staff may also receive guidance from senior officials and political leaders in the agency. Although it may be confined to only the most important rules, policy guidance from the agency's leadership can establish both the substantive and procedural direction for the rulemaking. If such guidance occurs early enough, it can foreclose certain options and prevent investments of time and effort on alternative approaches to a rule that would be unacceptable to those in the agency with ultimate authority.

Clearly, this is an important stage in the rulemaking. Although the content of the rule may not be determined with any degree of specificity, the quality of work done at this point influences the ease and speed with which the rulemaking is conducted. Advance planning of this sort, especially in determining major policy issues, obtaining guidance from senior officials, and clarifying how essential information can be obtained can prevent delays later.

Stage 5: Developing the Draft Rule

The content of a rule is determined during this stage. So, too, is the agency's compliance with many of the procedural requirements we have already discussed. There is a simple sequence that must be followed during this stage, since those working on the rule must determine to some extent what the rule will contain. Until some general idea of the content is formed, one cannot fully determine which of the myriad potential legal requirements will apply. Will the rule have an effect on the physical environment? Will it have a disproportionate impact on small businesses and other entities? Does it curtail in
any way the normal legal prerogatives of state and local governments? Will it necessitate the collection and reporting of additional information? The answers to these basic questions, and many others, determine whether particular types of analyses and external reviews will be needed. In any event, the work to determine the content of the rule and to meet the legal requirements that apply is done during this stage.

This is a period of intense activity for those engaged in writing the rule. Extensive internal and external consultations are likely to occur for at least two important reasons. First, those responsible are combing known sources for the expertise and information needed to complete a draft of the rule. At the same time they are attempting to keep key constituencies informed of the direction and progress of the rule. Even though formal requirements for public participation usually do not take effect until a draft rule is completed, there is evidence of substantial contact between the agency and interested or affected parties well before this point in the process. Informal contacts of this sort will be explored at length in Chapter 5.

At the end of this stage the agency will have completed work on drafts of key elements of the rule. It will have a draft rule that contains the actual language it is proposing. It will also have completed the studies and reports needed to satisfy whatever other legal requirements apply. Finally, it will have a draft preamble to the draft rule that is a narrative explanation of the rule and its compliance with applicable procedural requirements. At this stage, although the rule may not be formalized, the agency has also considered how it will be implemented, administered, and enforced. In some cases the agency expends considerable effort attempting to assist those affected by the rules in their efforts to comply. A regular feature of the EPA’s rulemaking process is the preparation of a draft “communications strategy” that outlines how the regulated community will be informed of its new responsibilities. Amendments to the Regulatory Flexibility Act of 1996 require certain agencies to develop “compliance assistance” materials to aid small businesses. The Nuclear Regulatory Commission routinely prepares a technical assistance manual to help the operators of regulated facilities to comply with new regulations. These documents would be prepared in draft form during this stage as well.

Stage 5: Internal Review of the Draft Rule

The ease or difficulty of conducting internal reviews depends quite heavily on how Stage 5 was conducted. Internal reviews of draft rules occur horizontally and vertically. Horizontal review takes place across the agency, allowing the various offices to determine if the rule has any effect on the areas under their jurisdiction and, if so, whether they agree with (or at least can accept) what is being proposed. The role of offices in an agency during this internal review varies considerably, in no small part because of the relative power each enjoys in the bureaucratic pecking order. The office of the general counsel, or its equivalent, usually plays a major role, since its lawyers are charged with ensuring that everything the agency does is legally permissible. What other offices will be involved depends entirely on the scope of the rule and the issues raised during its development.

Vertical review involves supervisors and senior officials. Since rules are usually developed at a relatively low level of the agency, this review is conducted to ensure that what is being proposed is consistent with overall program operations and general agency policy. The number of levels of vertical review varies considerably across agencies. The number depends entirely on where in the agency responsibility for developing the rule lies and on the way in which an agency is organized.

The use of a team approach in developing a rule can expedite both horizontal and vertical reviews. If all the offices affected by a proposed rule are involved in its development and if their representatives reflect the views of their superiors, then the review process should be pro forma. This is especially true if the rule represents the consensus of the team. The role of these agency rulemaking teams is important and will be explored at greater length later in the book.

Stage 7: External Review of the Draft Rule

A wide variety of agencies may be asked to review a draft rule, and those especially affected by its contents may have been consulted extensively during its development. In certain instances an agency may have a special role to play for a particular aspect of the rulemaking. This is the case for the reviews by the Council on Environmental Quality of environmental impact statements and the role of the Small Business Administration in the Regulatory Flexibility Act. It is widely agreed, however, that the most consistently important external review of draft rules is conducted by the Office of Management and Budget under the authorities granted it by the Paperwork Reduction Act and a variety of executive orders.

The OMB affects both the substance and process of rules. All the reviews take time, the amount varying according to the size of the rule and the policy issues it raises. The OMB has the authority to return rules that do not meet the administration's standards to the agencies involved. At this stage, Congress is consulted.
Stage 8: Revision and Publication of a Draft Rule

The revision and publication of a draft rule may appear to be a routine matter, but in fact the Federal Register is particular about the format and content of the proposed rules it publishes. Its guidelines are quite stringent, and agencies must frequently revise their original submissions to meet the specifications in the Register.50

Stage 9: Public Participation

As mentioned earlier, the views of the public can be received in a variety of ways. The agency can call for written public comments or decide to conduct some form of public meeting or hearing or embrace some combination that involves all these options. Authorizing legislation may require a particular form of participation. When it does not, decisions with regard to the form and management of public participation depend heavily on the amount and intensity of interest the proposed rule is likely to generate. There is little reason to structure elaborate opportunities for public participation when a rule has little effect on the public or is essentially noncontroversial. The choice between written comment and the conduct of public hearings often has more to do with politics and public relations than it does the quality of the input anticipated. In instances of complex or highly controversial rules, the public hearing may be selected because it allows agency personnel to go to the field and explain what they are doing to affected parties and make a case for it. At other times the opposition may be so intractable, and predictable, that public meetings would serve little purpose other than catharsis.

It is at this stage that the agency must actually manage the receipt of comments, ensuring that those that are submitted are retained and made available in a location accessible to the public. The content of public input must be reviewed and analyzed. The agency often prepares summaries, and it develops responses to the comments, which will ultimately appear in the rule’s preamble. If the comments are limited in number and call only for clarification or further refinement of what is already in the rule, the task is relatively simple. The task grows more complex and difficult when numerous substantive issues are raised by commentators who are seriously involved or when this type of input comes from particularly influential or important constituencies.

Stage 10: Action on the Draft Rule

This is obviously a crucial stage. All essential information—technical and political—has been collected, and all constituencies—internal and external—have been heard from. The still-unfinished rule has several alternative paths it might take:

(a) When no changes are needed, the agency has succeeded in producing a draft that can stand as is. All that remains is the preparation of the appropriate notice for the Federal Register and final clearance by the OMB and Congress (see Figure 2-1). We have already discussed OMB review. The Regulatory Flexibility Act was amended in 1996 to allow for congressional review. That statute requires agencies to submit all final rules to both houses of Congress and the General Accounting Office. If the rule is considered “major,” it cannot become legally binding for at least sixty days, during which time Congress may take action through legislation to repeal the rule.51

(b) When only minor revisions are needed, those drafting the rule may circulate it for another round of internal and external reviews. If the revisions are truly minor, they will be made as a matter of form. Review of the final rule by the OMB and Congress is required, however.

(c) Another round of participation is pursued only when comments by the public are unclear or raise issues that cannot be resolved within the rulemaking agency. Normally, the notice that is issued will ask the public to respond to a specific set of questions.

(d) When major revisions are needed the agency will, in effect, reproduce the process starting with Stage 5, because the changes constitute a new proposed rule.

(e) Abandoning the rulemaking and starting over is a more extreme version of option (d). Here the agency is convinced that all of its work was for naught and begins anew.

(f) A rulemaking is abandoned altogether if the agency is convinced that its decision to write a rule was wrong. Through a notice in the Federal Register, it will notify the public that no rule will be issued.

Stage 11: Post-Rulemaking Activities

If rulemaking works smoothly, this stage is not necessary. If it is flawed, however, once the rule is published in the Federal Register in final form the process of attempting to undo or revise it can take place almost immediately. The actions take a number of forms. The most dramatic is a lawsuit filed against the agency claiming that in issuing the rule it has somehow acted illegally. The potential grounds for such lawsuits are numerous.

Many post-rulemaking revisions are less dramatic. Staff may be called on to interpret key provisions of the rule that are vague or unclear. Petitions for
reconsideration may be filed by parties affected by a new rule who want some element of it changed or clarified. These are treated in a manner that most closely approximates petitions for rulemaking. Frequently, the agency itself will issue technical corrections or amendments to rules when it discovers shortcomings arising from omission or commission. Suffice it to say that it is unwise to consider rulemaking as a process that has a definite start and finish. Elements of rules can be challenged and changed at any time.

Variations in the Sequence of Activities

Rulemaking does not always occur in the sequence presented here. Some stages may be undertaken simultaneously, others reversed in order. The model captures the decisions and tasks that confront rulemakers; not all apply in all cases. In fact, the majority of rules are developed without one or more of the stages or sub-elements present. Very minor or routine rules are exempt from many if not most of the requirements. The content of others obviates the need for the steps related to planning, staffing, and public participation. Sull, O'Reilly's basic design, as amended, provides an accurate and full description of a significant rulemaking.

Rulemaking may be relatively simple or highly complex, depending on the issues involved and the parties affected. Rulemaking during the past thirty years has become increasingly encumbered with requirements arising from concerns of the three branches of government, which in turn reflect a more active and sophisticated citizenry. The analyses, reviews, and opportunities for public participation that now characterize the rulemaking process resulted from a growing recognition that what goes on during and emerges from rulemaking is at least equal in importance to any other element of our public policy process. Concerns expressed in the larger political system, be they about the quality of the environment, the burden of government regulation, the vitality of state government, or the integrity of the family, find their way sooner or later to the rulemaking process.

What can be surmised about the larger political system from the current state of the rulemaking process? The lesson is as plain as it is perplexing. We, as a people, are apparently willing to accept the growing reach of government as expressed in the thousands of rules and regulations issued annually by agencies of government. But the process that manufactures these agents of government expansion—rulemaking—is designed to be difficult and slow, at least for the most important rules that agencies issue. However consistent this is with the plan for government established in the Constitution, our inconsistent approach to rules and rulemaking is bound to raise issues. It is to these issues and the contradictions that we now turn.