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Administrative Law, Filter Failure, and Information Capture

by Wendy E. Wagner

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

This Article is excerpted from the Duke Law Journal, 59 Duke L.J. 1321 *(2010), and is reprinted with permission.*

Editors' Note: Thomas Milch, Chair, Arnold & Porter, LLP, commented on this Article at the annual Environmental Law and Policy Annual Review conference in Washington, DC, on April 15, 2011. His comments can be heard on the audio recording of the conference at http://www.eli.org/Program_Areas/environmental_law_policy_review_conference.cfm.

I. The Basics of Information Capture and Filter Failure

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

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

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

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

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

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

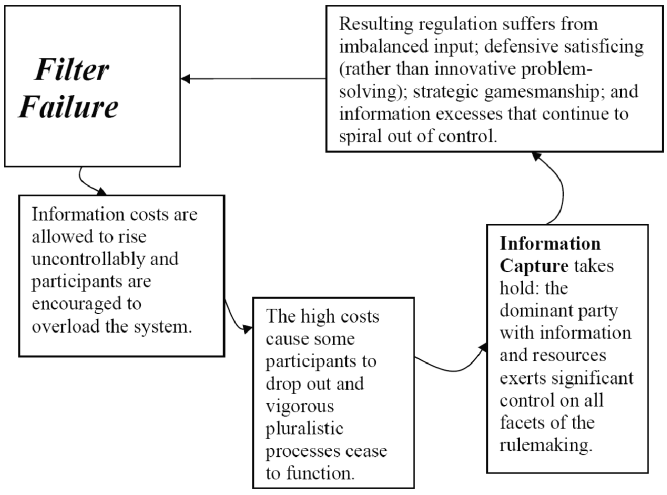
The root cause of information capture is not administrative law's commitment to open government and transparency, but rather its failure to require participants to self-process the information they load into the system, termed "filter failure" here.[3] In most social and legal settings, participants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

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

Yet without filters, parties have little reason to economize on the information they submit to agencies. Participants are not held to any limits on the information they file, nor must they assume any of the costs the agency incurs in processing their voluminous filings.[6] Indeed, a variety of court rulings actually encourage regulatory participants to err on the side of providing far too much information, rather than too little. But as information costs rise, so do the costs of participation and this can affect the ability of some groups to continue to participate in the process and ultimately may cause thinly financed groups to exit for lack of resources.

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

Figure 1: A Flowchart of Filter Failure and Information Capture



2. James M. Landis, Report on Regulatory Agencies to the President-Elect 51 (1960).
3. Clay Shirky coined the term "filter failure" at the September 2008 Web 2.0 Expo New York in his speech, *It's Not Information Overload. It's Filter Failure*, *available at* http://web2expo.blip.tv/file/1277460/.
4. *See, e.g.*, Fed. R. Evid. 403 (permitting exclusion of relevant evidence if its value is substantially outweighed by other dangers).
5. *See, e.g.*, Sheila Jasanoff, *Transparency in Public Science: Purposes, Reasons, Limits*, 69 Law & Contemp. Probs. 21, 21-22 (2006) (discussing the commitment to and gradual expansion of the public's right to access information underlying agency decisions).
6. The Freedom of Information Act is an exception to this general rule; it allows the agency to ask the requester to reimburse it for reasonable expenses incurred in responding to the information request. 5 U.S.C. §552, *available in* ELR Stat. Admin. Proc.

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

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

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

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

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

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

II. How Administrative Law Enables Information Capture

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

7. *See, e.g.*, Wendy E. Wagner et al., Air Toxics in the Boardroom: An Empirical Study of EPA's Hazardous Air Pollutants Rules 19-22 (Nov. 13, 2009) (unpublished manuscript, on file with the *Duke Law Journal*).
8. For examples of these informationally overloaded regulations, see Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 Duke L.J. 1321, 1347-51, 1378-96 (2010).
9. *See, e.g.*, Neil K. Komesar, Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy 8 (1994).
10. *See, e.g.*, Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. Econ. & Org. 167, 178 (1990) ("'Capture' is the adoption by the regulator for self-regarding (private) reasons, such as enhancing electoral support or postregulatory compensation, of a policy which would not be ratified by an informed polity free of organization costs.").
11. Administrative Procedure Act, 5 U.S.C. §§551–559.

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

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

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

The courts' first unhelpful contribution to administrative process is to relegate to obscurity the one provision Congress did make for requiring agencies to filter information. In the APA, the agency is required to provide a "*concise general statement* of their basis and purpose [for the rule]."[13] Despite the intent of the provision, courts hold an agency in violation of the "concise general statement" requirement only when the agency fails to provide enough information, not when it provides too much.[14] From this case law, Prof. Richard Pierce concludes that "[t]he courts have replaced the statutory adjectives, 'concise' and 'general' with the judicial adjectives 'detailed' and 'encyclopedic.'"[15]

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

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

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

12. *Cf.* Jerry L. Mashaw, Greed, Chaos, and Governance: Using Public Choice to Improve Public Law 126 (1999) ("It seems virtually undeniable that the major procedural developments in American administrative law from the Administrative Procedure Act to the present have been the work largely of the courts or of the chief executive.").
13. 5 U.S.C. §553(c) (emphasis added).
14. *See, e.g.*, Indep. U.S. Tanker Owners Comm. v. Dole, 809 F.2d 847, 854–55 (D.C. Cir. 1987) (holding that the Secretary of Transportation's statement of basis and purpose failed to provide an adequate account of how the rule served the Merchant Marine Act's objectives, and thus vacating the rule).
15. 1 Richard J. Pierce Jr., Administrative Law Treatise §7.4, at 596 (5th ed. 2010).
16. *Id.* at 593.
17. *See, e.g.,* Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 614, 10 ELR 20489 (1980).
18. Andrea Bear Field & Kathy E.B. Robb, *EPA Rulemakings: Views From Inside and Outside*, 5 Nat. Resources & Env't, Summer 1990, at 5, 9-10 (collecting the most important advice from the top attorneys interviewed for their report).
19. *See generally* McKart v. United States, 395 U.S. 185 (1969) (setting out the reasons for exhausting remedies first within the agency before raising the issue with the court).

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

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

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

III. Reform

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

A. Reforms to Reinvigorate Pluralistic Engagement

1. Recalibrating Judicial Review

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

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

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

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

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

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

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

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

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

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

2. Government Ombudsmen

A more comprehensive, but also more costly, method to redress pluralistic imbalance would deploy government intermediaries—agency-selected ombudsmen, advocates, advisory groups or even administrative law judges (ALJs)—to stand in for significantly affected interests that might otherwise be underrepresented in rulemakings. Agency ombudsmen or advocates could scrutinize all rulemakings to ensure, for example, that the agency is considering not just the economic costs of standards but also the public health benefits, particularly with regard to vulnerable populations. If the interests of unrepresented groups (e.g., the diffuse public) are not adequately considered in the proposed rule stage, the advocate would be required to file comments and build a record for review that could be used by other regulatory participants in the course of judicial review. The concept of formal, government-provided advocates in these types of settings is not new. In fact, the proposal has some of the flavor of the Small Business Reform Act, which institutes a rather elaborate network to ensure that the interests of small businesses are adequately considered.[25]

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

3. Subsidizing Thinly Financed Groups

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

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

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

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

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

4. Adding Information Filters

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

B Bypassing the Pluralistic Model

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

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

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

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

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

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

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

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

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

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

IV. Conclusion

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

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