RESPONSE

Comments on *Administrative Law, Filter Failure, and Information Capture*

by Howard A. Learner

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Professor Wagner presents a strong and provocative set of arguments on how information overload is creating barriers to public participation, obfuscating the most important information for decisionmaking, and capturing and clogging the administrative rulemaking process. The forest can, indeed, become obscured by the trees when it comes to effective, efficient, and fair administrative agency decisionmaking.

First, I generally agree with Professor Wagner's overall assessment of the information overload, filtering, and capture problems, although some tweaks should be considered. Second, I depart from some specific aspects of her framing of an administrative agency's responsibilities: the public agency's role is to affirmatively protect and advance the public's interest, not just be an umpire calling balls and strikes. Third, while some of her proposed reforms are promising for fuller exploration, some of the suggested cures might be as harmful as the diseases.

I. The "Desperately Seeking Data" Challenge: Information Overload That Deters Public Participation and Clogs and Distorts Administrative Decisionmaking

Professor Wagner hits the nail on the head: information overload and the too-often absence of filtering and separating the informational wheat from the chaff can capture and clog the process, unduly raise the price and deter public participation by less well-financed parties, and, ultimately, distort the administrative decisionmaking process. The most important, relevant and persuasive information should be highlighted and not get lost in the morass. As Professor Wagner explains:

> A number of important social policies may be adversely affected by administrative law's naïve presupposition that more information is better. Although this affinity for unbounded information may have originated in the middle of the last century when information was more scarce, in the electronic age, this undiscriminating approach to information is clearly outdated. Indeed, other institutions recognize that effective processing of information is a prerequisite to effective decisionmaking.[1]

That's right on target. The administrative law operating paradigm should shift from "more information is good" to "good information that is more persuasive." The weight of the evidence should not be principally measured by page and word count.

There's an analogy here to one of the Chicago's Neo-Futurist Theater Company's recurring productions: "Too Much Light Makes the Baby Go Blind."[2] We do need better illumination of key facts and salient issues for decisionmaking. However, that requires using better spotlights, rather than floodlights, to address what Professor Wagner identifies as "Filter Failure." Sunlight may be a powerful disinfectant, but staring into the sun for too long is not helpful.

The excessive doctrinal gobbledygook and alphabet-soup technical lingo in administrative agency proceedings likewise deters and impairs meaningful public participation. Rulemakings with tech-speak mumbo-jumbo are as inviting to public participation and engagement as are law review articles with 400 footnotes. In short, they become impenetrable mysticism except to an insiders' cabal.[3] The public entry costs for engagement are too high. As Professor Wagner explains: "Using technical terms and frames of reference that require a high level of background infor-

1. Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 Duke L.J. 1321, 1326-27 (2010).
2. *See* http://www.neofuturists.org/index.php?option=com_content&task=view&id=20&Itemid=45 (last visited July 7, 2011).
3. "Cabal"—a secret society—is often viewed as derived from Kabbalah, which are mystical interpretations of Jewish scriptures. http://en.wiktionary.org/wiki/cabal (last visited July 7, 2011).

mation and technical expertise, and relying heavily on 'particularized knowledge and specialized conventions,' these fully engaged stakeholders can deliberately hijack the proceedings."[4]

Inaccessible technical language becomes obfuscating or, at best, confusing. "Spontaneous combustion" at a nuclear plant should instead be plainly called a "fire." "Nuclear power units" become agency nomenclature for "nuclear power plants." Coal plant "emissions" are the regulatory term-of-art for what most people commonly call "pollution." The administrative agency, of course, cannot precisely specify what intervening parties and their attorneys write in their documents, but the administrative agencies can: first, speak for themselves in plainer language; and, second, provide guidance that encourages the parties to do so as well.

Professor Wagner points out: "To be a serious player in this game, a participant must enjoy convenient access to relevant information, a significant reserve of resources (mostly technical and legal), and high stakes and motivation. To win, a player need not convince his opponents of the merits of his case; he need only wear them down enough to cause them to throw in their towels and give in."[5]

That, of course, is just as true in courtroom litigation as in administrative proceedings. The entry costs are too high for most of the public's robust participation.

One countervailing force is that access to information is now much more readily accessible, cheaper and easier to obtain on the internet. For example, in many utility rate case proceedings in the 1980s and 1990s, consumer and environmental groups and governmental agency intervenors would typically file detailed discovery requests for Securities and Exchange Commission (SEC) filings by the utilities as well as other financial reports and analyst reports. Document production would often be slow and delayed, and utilities could drain intervenors' more limited resources with various objections and discovery battles. Today, much of that information is readily available on the internet, and a company's SEC 10-Q filings can be quickly obtained with a few keystrokes at the SEC's "Edgar" website.[6] This has a leveling impact on the respective abilities of parties with disparate resources to participate in administrative proceedings.

That offset having been recognized, Professor Wagner correctly identifies the problems and the corrosive and distorting impacts on fair administrative decisionmaking processes. Her point about courts' increasingly heavy applications of waiver, exhaustion of administrative remedies and other such access limiting doctrines rings very true: these approaches incentivize parties to paper the record and exacerbate information overload in the administrative process. Experienced litigators know that it's best to protect their clients' interests by "includ[ing] 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."[7] Woe to the intervenor party—industry or public interest—that omits a plausible legal argument in its comments before an agency, but then seeks to raise that legal issue on appeal after it has reviewed the final agency order.

II. The Administrative Agency's Responsibility to Assert and Protect the Public Interest Is Even More Fundamental When the Process Is Distorted by "Filter Failure and Information Capture"

Professor Wagner's layered views of administrative agencies' public responsibilities are partly skewed. In part, Professor Wagner argues that the agency is deterred from reaching a fair and balanced decision when the pluralism of the participating groups is undermined by barrages of information and data submittals by well-financed business interests that impose undue information cost and time burdens "caus[ing] thinly financed groups to exit for lack of resources."[8] The public's interests suffer accordingly. That's correct.

In part, however, Professor Wagner also seems to view the administrative agency as an overwhelmed *arbiter* that should be seeking to reach a result that balances among the competing parties—although made more difficult by informational overload that deters public representation. The principal role of many regulatory agencies, such as the Federal Communications Commission, Federal Energy Regulatory Commission, and Consumer Products Safety Commission, is different: protecting and advancing the public's interests, not just be an umpire calling balls and strikes. A fair and balanced approach is vital. Recognize, though, that the regulated businesses have strong economic incentives to vigorously and effectively advocate their interests. The role of the public regulatory agency is instead to protect the public's interests, especially where monopoly or oligopoly businesses are involved and the public's opportunities to vote with their wallets in more competitive markets are limited.

In addition, the agencies need not necessarily be lambs without defenses against voracious wolves with sharp "information capture" teeth. Trial courts manage litigation with pre-trial orders focusing and limiting discovery

4. Wagner, *Administrative Law*, *supra* note 1, at 1333.
5. *Id.* at 1329.
6. *See* U.S. SEC, Filings & Forms, *at* http://www.sec.gov/edgar.shtml (last visited July 8, 2011).
7. Wagner, *Administrative Law*, *supra* note 1, at 1362.
8. *Id.* at 1332.

and various case management orders and rulings designed to focus information-gathering and decisionmaking on the most relevant issues. Administrative agencies can move further in adopting best practices for managing their rulemaking proceedings. There should be more training of key agency officials on what the agency's role is and how to fairly, efficiently and effectively manage rulemaking proceedings. Different agencies have different types of expertise, experiences and capabilities. Improved case management and training can help to mitigate some of the troublesome, real-world impacts that Professor Wagner correctly points out.

III. Some Observations on Professor Wagner's Specific Reform Proposals

Professor Wagner laudably proposes a buffet of proposed reforms—some of which she actively advocates (e.g., "recalibrating judicial review"[9]) and others that she characterizes as "policy-in-the-raw" ("bypassing the pluralistic model"[10]). Some gain more traction than others. Some can be torqued to greater benefit. Some are much less persuasive.

1. Better Case Management and Training Are the Predicate Reforms: First of all, better case management practices by administrative agencies and good training for key rulemaking personnel are very important initial improvements. Experienced litigation and regulatory attorneys can identify those court cases and administrative proceedings that were run effectively by judges and agency personnel who deployed effective case management tools, and they can also moan about the opposite.

Managing rulemaking proceedings effectively *is* a skill. The "science" of case management and training programs is becoming more robust. Better implementation across the wide range of federal and state administrative agencies conducting rulemaking processes is a key starting point. These reforms warrant more emphasis than Professor Wagner's paper provides.

2. Effective Advocates Find Ways to Mitigate Filter Failure and Information Capture by Focusing on the Most Important Issues and Building Coalitions to "Scramble the Incentives" and Realign the Players: Smart capable attorneys find ways to advocate effectively even on an unevenly-resourced playing field. One counterstrategy to information flooding by a well-financed party is for advocates to focus their own and the agency decisionmakers' attention on the most important, determinative points. Don't get lost in the haze and maze; get focused. Experienced appellate advocates almost never attempt to make more than three points at oral argument. Trial attorneys focus religiously on the storyline and evidence leading up to their closing argument. While a multifaceted and more open-ended rulemaking proceeding may have more moving parts—and concerns about building a strong record for appeal as well as waiver problems—that does not excuse failures to focus the most attention on the most important issues, information and structures. In short, what are the advocate's best, most persuasive arguments? Don't get sucked into responding to each and every point made by an opponent; don't follow every distracting tangent.

Public interest attorneys, who typically face more financial constraints, are often forced to "go for the jugular" and focus their participation out of necessity more so than bill-by-the-hour private attorneys with deeper-pocketed business clients. For certain businesses, the legal costs may be quite cheap compared to the regulatory compliance costs, and for their attorneys, the financial rewards often come with more hours and higher billings. (In some cases, today's more constrained legal market is modifying billing practices.)

Professor Wagner's final reform suggestion—"Scrambling the Incentives of Regulated Parties through Competition-Based Regulation"—plays out differently and more optimistically as effective advocates on various sides maneuver for success.[11] The rulemaking process is often more robust and pluralistic with shifting alliances and less traditional coalitions than Professor Wagner suggests. For example, effective public interest environmental and public health advocates have forged alliances with pollution control equipment manufacturers to advocate stronger mercury pollution reduction standards for coal plants. Nuclear plant owners and the natural gas industry, which economically compete with the coal industry, are now aligning with environmental and public health organizations to advocate for the U.S. Environmental Protection Agency to issues strong greenhouse gas and other pollution reduction standards for coal plants. When it comes to natural gas "fracking" regulations, by contrast, the shoe may be on the other foot.

The railroad industry may align with environmental groups on regulations involving cleaner engines and better pollution control equipment for trucks, and, conversely, the trucking industry may see public health groups as logical allies for regulations to reduce pollution from locomotives. The Clean Air Act's technology-forcing standards ("best available control technology" and "maximum available control technology") provide incentives for businesses with the next level of sophisticated pollution control equipment to devote considerable economic resources to litigate and advocate for stronger pollution control standards that expand their product markets and profit opportunities.

The point is that effective litigators and other policy advocates must be and are skilled at building coalitions that realign and scramble the forces before administrative agencies engaging in rulemaking processes. This repositioning can foster more of the participatory system, through which Professor Wagner seeks to "generate balanced engagement from a broad range of affected parties" sharing cost burdens and countering some of the very real

9. *Id.* at 1327.
10. *Id.* at 1422-23.
11. *Id.* at 1427.

information distortions and capture that she correctly identifies, recognizes and seeks to overcome.[12] Public interest attorneys, in particular, having limited resources, must be creative in designing strategies and building coalitions to make the regulatory proceedings more multilateral than resource-imbalanced bilateral in order to overcome information capture and succeed in advancing their interests. This is a variant of the "competition-based regulation" that Professor Wagner suggests.[13]

3. "Recalibrating Judicial Review" Is a Very Long-Term Strategy: Professor Wagner states that "correcting the standards for judicial review should be a top priority."[14] She contends that courts should give more deference to an agency's decision if there was a robust, pluralistic set of participants in the rulemaking development process. "On the other hand, if one party dominates all phases of the rulemaking and then sues the agency . . . the court would have a strong presumption against the challenger."[15]

While this proposal is intriguing, its implementation is very challenging as Professor Wagner acknowledges. First, how will the courts determine whether there was a participatory imbalance before the agency and what standard should be applied? Second, as Professor Wagner recognizes, the best way to accomplish this revamping of judicial review would be for Congress to enact an amendment to the Administrative Procedure Act, "but this may be politically unrealistic."[16] Third, it's likely to take many years for this judicial review approach to be "implemented interstitially by the courts or, ideally" enacted by Congress.[17] In the meantime, other steps can and should be taken.

4. Creating Government Ombudsmen and Subsidizing Thinly Financed Groups With Intervention Funding Can Build on States' Experiences: Professor Wagner proposes reforms to "redress pluralistic imbalance [by] deploy[ing] government . . . ombudsmen, advocates . . . to stand in for significantly affected interests that might otherwise be underrepresented in rulemakings"[18] and "subsidize participation on specific rulemakings in which certain sets of interests, such as those representing the diffuse public, will otherwise be underrepresented."[19] In fact, examples of these approaches have been in operation for many years.

The Public Utility Regulatory Policies Act of 1978[20] requires states to either provide for consumer intervention funding support[21] or an "alternative means" of representation for consumer interests[22] in utility rate cases and other state regulatory proceedings. State public utilities regulatory commissions in Michigan and Wisconsin, for example, have long-established intervention funding programs for consumer, environmental and other civic organizations to support attorney and expert witness expenses. Some states also have statutory provisions for attorneys' fee awards for court appeals in which administrative agencies' regulations are overturned. The Illinois Citizens Utility Board and Consumers' Counsel ombudsmen in Indiana, Iowa, Ohio and Pennsylvania provide an alternative approach. The State Attorneys General also often perform consumer representation roles before state public utilities regulatory commissions.

At the federal level, the new Consumer Financial Protection Agency/Bureau created by Congress in the 2010 Dodd-Frank financial reform law will potentially perform an analogous government ombudsmen role. Likewise, as Professor Wagner recognizes, the Small Business Regulatory Enforcement Fairness Act of 1996 provides small businesses with an agency ombudsman and related advocates to help protect their interests. There are Congressional proposals to establish an Office of Consumer Advocacy to represent consumers on rate and service issues involving electric and natural gas companies before the Federal Energy Regulatory Commission, as well as various ombudsmen in other areas. On the intervention fund side, the federal Equal Access to Justice Act provides fees to parties that prevail on appeals overturning agency actions in certain circumstances.

In short, there is considerable experience at the state level to build upon in further exploring Professor Wagner's government ombudsmen and intervention funding reforms to spur more public participation. There are also federal precedents from which lessons can be learned. Professor Wagner is on the right track here with a reform that advances a more robust and balanced participatory rulemaking process.

5. Attempting to Head Off Information Capture by Providing for Early Secretive Engagement of Agency Policy Wonks Is Unwise and Impractical: Professor Wagner proposes a "policy-in-the-raw" by which an agency would somehow start with "a small team of highly regarded policy wonks from inside the agency [to] develop a preproposal . . . . in complete isolation . . . 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."[23] The only check on these mythical neutral, expert policy wonk Mandarins would be neutral peer reviewers or, "as appropriate, input from a Federal Advisory Committee (FACA) advisory group comprised of a mix of policy analysts and other specialists (but not stakeholders)."[24] The agency's policy wonk team would have complete discretion and be largely unaccountable.

12. *Id.* at 1332.
13. *Id.* at 1427.
14. *Id.* at 1406.
15. *Id.* at 1408.
16. *Id.* at 1413.
17. *Id.*
18. *Id.* at 1414.
19. *Id.* at 1416.
20. 46 U.S.C. §2601.
21. *Id.* §2632(a).
22. *Id.* §2632(b).
23. Wagner, *Administrative Law*, *supra* note 1, at 1423.
24. *Id.* at 1423-24.

Oh, come on. As "they say in Harlan County, there are no neutrals there."[25] This notion of an unaccountable, secretive, non-transparent group of supposedly neutral agency bureaucrats, advised only by some supposedly neutral "mix of [outside] policy analysts" making the key initial regulatory decisions would likely violate the Administrative Procedure Act, FACA, open government principles and common sense. For the outside policy analysts, please check who is paying their salaries, their consulting contracts and other relationships. Here, the proposed cure may well be worse than the disease. Professor Wagner's other proposed reforms have some challenges, but much more promise.

IV. Conclusion

Professor Wagner clearly identifies the severe, practical, modern-day challenges to fair and balanced administrative agency rulemaking processes that can be strategically manipulated, overwhelmed and captured by a deluge of information and filings by well-financed interests for whom the costs of extensive regulatory intervention is a mere fraction of the potential ultimate regulatory compliance costs. Moreover, this distorted process can squeeze out underfinanced public interest organizations, governmental parties and private businesses from fully participating in the proceedings. The problems are real and serious.

Agencies can deploy improved case management tools to help mitigate the problems, filter the information flow and advance better and more inclusive processes. Effective advocacy, including building coalitions that, in Professor Wagner's words, "scramble the incentives" can counter presumed dominating private interests. Some of Professor Wagner's other proposed reforms warrant further hard-nosed exploration, especially those that build on existing mechanisms. Professor Wagner is focusing attention on serious challenges to the integrity of administrative agencies' rulemaking processes, and her calls for positive solutions are well grounded.

25. *Which Side Are You On, adapted from the original* lyrics by Florence Reese, written in 1931 during a strike by the United Mine Workers of America in which her husband, Sam Reece, was an organizer in Harlan County, Kentucky.