Duke Law Journal Online

VOLUME 64 OCTOBER 2014

WHICH INSTITUTION SHOULD DETERMINE WHETHER AN AGENCY'S EXPLANATION OF A TAX DECISION IS ADEQUATE?: A RESPONSE TO STEVE JOHNSON

RICHARD J. PIERCE, JR.†

The participants in the 2014 *Duke Law Journal* Administrative Law Symposium came to three important conclusions. First, the Internal Revenue Service (IRS) and the Department of Treasury (Treasury) have been systematically declining to act in accordance with the duties imposed on them by the Administrative Procedure Act (APA) for many decades.[1] Second, courts should require the IRS and Treasury to comply with the APA.[2] Third, the Supreme Court has signaled its intent to "take administrative law to tax"—as suggested by the title of this symposium—by requiring the IRS and Treasury to comply with the APA.[3] I agree with Professor Steve Johnson that the duty to explain why it has taken an action is one of the most important duties that the APA imposes on the IRS and Treasury.[4] I am concerned, however, that the agencies that implement tax laws lack the resources required to comply with the demands of the APA, as those demands have been interpreted, expanded, and applied by courts.

† Lyle T. Alverson Professor of Law, George Washington University.

1. *See generally* Amandeep S. Grewal, *Taking Administrative Law to Tax*, 63 DUKE L.J. 1625 (2014) (examining scholarship that discusses whether, and to what degree, the reasoned-explanation requirement of the APA should apply to the IRS and Treasury).

2. Steve R. Johnson, *Reasoned Explanation and IRS Adjudication*, 63 DUKE L.J. 1771, 1773 (2014).

3. *Id.*

4. *Id.* at 1774.

INTRODUCTION

In *Reasoned Explanation and IRS Adjudication*, Professor Johnson provides a valuable service by describing the nature of the explanations that the IRS would likely be required to provide when it issues decisions in many types of common tax disputes.[5] Professor Johnson estimates that the IRS makes between fifty thousand and fifty million decisions in informal adjudications each year.[6] If courts begin to apply the APA arbitrary-and-capricious standard to IRS decisions that resolve adjudicatory disputes, the IRS might believe that it is required to provide an explanation of the type Professor Johnson describes every time it adjudicates such tax disputes. If the IRS were to attempt to provide a statement of reasons sufficient to satisfy a reviewing court to support each of those decisions, its ability to implement our system of taxation would be severely impaired. The resources available to the IRS are nowhere near sufficient to satisfy the judicially imposed version of the duty to engage in reasoned decisionmaking in every case in which the IRS adjudicates a tax dispute. Fortunately, the IRS has other much less burdensome options it can take if courts begin to apply the APA to the IRS decisions made in adjudications.

Professor Johnson offers the key to understanding the wide range of options available to the IRS when he notes that all IRS adjudications are informal adjudications under the APA.[7] As he then discusses, § 553 to § 558 of the APA do not require an agency to use any decisionmaking procedures when it engages in informal adjudication. The Supreme Court has held that only APA § 555 applies to informal adjudications.[8] That section, appropriately titled "Ancillary Matters," does not require an agency to state reasons for its actions except in the case of a decision to deny a written petition. None of the common types of informal IRS adjudications described by Professor Johnson qualify as denials of a written petition. Thus, the IRS is not required to provide a statement of the reasons for any action it takes in an adjudication. Furthermore, no court can hold that

---

5. *Id.*

6. In response to my question during the Symposium, Professor Johnson estimated that the number of such adjudications would be between fifty thousand and fifty million. His article describes the many contexts in which the IRS engages in informal adjudication. Johnson, *supra* note 2, at 1793–1833.

7. *Id*. at 1779.

8. Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 655–56 (1990).

the IRS has committed a procedural error by refusing to provide such a statement. If a taxpayer seeks judicial review of an action the IRS has taken in an adjudication, arguing that the action is an arbitrary-and-capricious violation of APA § 706, a court can require the IRS to provide a statement of its reasons for acting as it did. As a result, the court would have a basis to apply the arbitrary-and-capricious test even if the agency did not provide a contemporaneous statement of reasons adequate to allow a court to apply the arbitrary-and-capricious test to the agency action.[9]

It follows that the IRS could pursue a range of options in adjudications. First, the IRS might provide no contemporaneous statement of reasons for any action and be prepared to provide such a statement only if the action is the subject of a review petition. Second, the IRS could provide only a brief contemporaneous statement of reasons for each action and be prepared to provide a more detailed statement if and when a review petition is filed. Finally, the IRS could provide a contemporaneous statement of reasons only for actions that it expects will be subject to a review petition, but be prepared to provide such a statement *in any other case* that is the subject of a review petition. Given the range of available options—and the relatively small number of actions taken by the IRS in adjudications likely to be subject to review petitions—I suspect that the IRS would find a way to comply with the APA in this context. This method of compliance would likely avoid stretching the IRS's scarce resources beyond the breaking point should courts begin to apply the APA to actions it takes in adjudications.

I am much more concerned about the potential results of judicial applications of the APA to tax rules issued by the IRS and Treasury. In a 2007 article, Professor Kristin Hickman argued persuasively that the IRS and Treasury issue an average of thirty-two tax rules per year that the agencies fail to subject to the notice-and-comment procedure described in APA § 553.[10] I agree that the IRS should use the notice-and-comment procedure to issue those rules but also recognize that the procedure consumes a lot of time and agency resources. For instance, Professors Wendy Wagner, Katherine Barnes, and Lisa

9. *See id.* at 645–47, 653–56 (describing and explaining this process).

10. *See* Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirement*s, 82 NOTRE DAME L. REV. 1727, 1748 (2007) (finding ninety-five rulemaking projects over a three-year period that did not follow traditional APA procedures).

Peters found that the Environmental Protection Agency (EPA) required approximately 5.5 years to issue each of ninety rules implementing the Air Toxic Emission Standards.[11] Most of the rules Wagner, Barnes, and Peters studied were not economically significant rules, that is, rules that are expected to have an annual effect on the economy of at least $100 million.[12] Many other studies have found that issuance of a rule through use of the notice-and-comment process takes much longer and requires a much greater commitment of agency resources if the rule is economically significant. For instance, the National Highway Traffic Safety Administration's (NHTSA's) passive restraint rule required almost twenty years to issue and consumed such a high proportion of NHTSA's resources that the agency largely abandoned rulemaking as a means of implementing its highway safety mission.[13] Similarly, despite devoting significant resources to interstate pollution transport rulemaking for more than two decades, the EPA has still not been able to issue an interstate pollution transport rule that can satisfy the courts.[14]

The time- and resource-consuming effects of the notice-and-comment procedure are often described under the heading of rulemaking ossification.[15] Ossification has many adverse effects, including: delay in issuing important rules; failure to issue important rules; diversion of scarce agency resources from other important tasks; substitution of inferior methods of implementing a statutory mission; and failure to amend or to rescind rules for many years after

---

11. *See* Wendy Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emissions Standards*, 63 ADMIN. L. REV. 99, 143–45 (2011) (noting that the EPA begins requesting technical information an average of four years before the publication of the proposed rule and produces a final rule about 1.5 years after publication of the proposed rule).

12. *Id.* at 145; *see* Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,738 (1993), *reprinted as amended in* 5 U.S.C. § 601 app. (2012) (including in the definition of "significant regulatory action" a regulatory action that will "[h]ave an annual effect on the economy of $100 million or more"); OFFICE OF MGMT. & BUDGET, CIRCULAR A-4 (2003), http://www.whitehouse.gov/omb/circulars_a004_a-4 (classifying "significant regulatory actions as defined by section 3(f)(1)" of Executive Order 12866 as "economically significant").

13. *See* JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 207–16 (1990) (discussing NHTSA's struggles with the rulemaking process).

14. The D.C. Circuit described the lengthy history of this rulemaking in *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 24 n.18 (D.C. Cir. 2012).

15. *See* Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to* Testing the Ossification Thesis, 80 GEO. WASH. L. REV. 1493, 1493 (2012) (noting that rule ossification "mean[s] that it takes a long time and an extensive commitment of agency resources to use the notice and comment process [of the APA] to issue a rule").

they have become obsolete.[16] If the IRS and Treasury are required to use the notice-and-comment process to issue thirty-two more tax rules each year, they will experience all of the adverse effects of ossification unless Congress significantly increases the two agencies' budgets and personnel. That seems highly unlikely to happen in the foreseeable future given current budgetary and political constraints.

Some of the adverse effects of requiring the IRS and Treasury to comply with the APA are unavoidable. However, certain adverse effects may be worth tolerating in order to obtain the advantages of the notice-and-comment procedure. One step that might reduce the costs of compliance with the APA significantly would be to create a situation in which the benefits of the notice-and-comment procedure are not overwhelmed by the costs of the procedure. For example, Congress might eliminate judicial review of the notice-and-comment process. In the tax context, that step can be accomplished easily in a manner that is consistent with existing statutes and precedents.

This article proceeds in three parts. In Part I, I describe the ways in which courts have added burdensome procedures that are not required by the APA for the notice and comment process. In Part II, I explain why the Office of Information and Regulatory Affairs (OIRA) is better than courts at reviewing the adequacy of agency reasons for issuing a rule. In Part III, I explain how courts can eliminate judicial review of the adequacy of the reasons IRS gives for issuing a rule by applying the traditional broad interpretations of the Anti-Injunction Act and the tax exception to the Declaratory Judgment Act.

I. COURTS HAVE REDEFINED THE RULEMAKING PROCESS

It is easy to trace the path that has led to ossification of the notice-and-comment rulemaking process. APA § 553 requires an agency to use a three-step process when it issues a rule.[17] It must issue a notice of proposed rulemaking, solicit comments from the public in response to the notice, and issue a final rule that incorporates a concise general statement of the basis and purpose of the rule. The APA describes the three steps in the following language:

16. Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 60–62 (1995).

17. 5 U.S.C. § 553 (2012).

> (b) General notice of proposed rulemaking shall be published in the Federal Register . . . . 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.
>
> . . . .
>
> (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.[18]

Until 1967, agencies complied with APA § 553 as that provision was written. In a typical rulemaking, the agency issued a relatively brief notice that complied with § 553(b), received and considered comments that were modest in length, and then issued a final rule that incorporated a "concise general statement of basis and purpose"[19] only a few pages long.[20]

The agency practice of compliance with APA § 553 as it was written ended as a result of a series of court opinions that were issued between 1967 and 1973. Those opinions changed the meaning of § 553 in ways that render it unrecognizable when compared with the language of § 553.

The Supreme Court's 1967 opinion in *Abbott Laboratories v. Gardner*[21] opened the door to a series of lower-court opinions that "interpreted" § 553 to mean something dramatically different from the simple and efficient decisionmaking process described in the APA. In *Abbott*, the Court announced a new test for determining whether a rule is ripe for pre-enforcement review. The Court applied for the first time a presumption of reviewability so strong that it

18. *Id.*

19. *Id.*

20. Jack M. Beerman & Gary Lawson, *Reprocessing* Vermont Yankee, 75 GEO. WASH. L. REV. 856, 892 (2007).

21. Abbott Labs. v. Gardner, 387 U.S. 136 (1967).

trumped the language of statutes.[22] Like most regulatory statutes, the statute at issue in *Abbott* explicitly provided a means through which a party could seek review of a rule—by challenging its validity in an enforcement proceeding initiated by the agency against the party. The statute did not authorize a court to engage in pre-enforcement of a rule. The Court applied the new presumption of reviewability to reverse the normal process for determining whether Congress has authorized a court to act. Instead of asking whether Congress authorized pre-enforcement review, the Court asked whether there was "clear and convincing evidence" that Congress intended to preclude pre-enforcement review.[23] The Court concluded that the presence of a statutory provision that authorized review of a rule in an enforcement proceeding and the absence of a statutory provision that authorized pre-enforcement review of a rule were not enough to satisfy the clear-and-convincing-evidence standard that the Court announced to accompany its newly announced presumption in favor of pre-enforcement review of rules. Before *Abbott*, most rules were subject to review only in enforcement proceedings. After *Abbott*, a rule is subject to pre-enforcement review if, like most rules, it presents a legal issue that is "fit for judicial resolution" and "requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance."[24]

The stark differences between the review of a rule in an enforcement proceeding authorized by Congress and the pre-enforcement review of a rule authorized by the Court became apparent within a few years after the Court issued its opinion in *Abbott*. In the context of an enforcement proceeding, a district court would be tasked with reviewing the rule based on the enforcement proceeding records. Since agencies usually only initiated enforcement proceedings when a target had engaged in conduct that was particularly egregious and obviously harmful, the record in such proceedings frequently included evidence that the rule was necessary to prevent serious harm. As a result, in cases in which the target sought review of a rule, the agency was likely to prevail. Rules were rarely challenged because a regulated firm knew that it was unlikely

22. *Id.* at 140; *see generally* Nicolas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1286–87 (2014) (discussing the tendency of the courts to invoke the presumption of judicial review when reviewing agency actions despite statutory language that appears to preclude judicial review).

23. *Abbott*, 387 U.S. at 141.

24. *Id.* at 153.

to prevail when it attempted to challenge the validity of the rule in an enforcement proceeding. The firm also knew that it was vulnerable to serious direct and indirect adverse consequences if it violated the rule or challenged the validity of the rule in an enforcement proceeding and lost.

By contrast, any firm that dislikes a rule has an incentive to seek pre-enforcement review of the rule because it will suffer no adverse effects if it loses. Within a few years, it became apparent that a regulated firm also has a much better chance of prevailing in a proceeding in which it seeks pre-enforcement review of a rule than when it challenges the validity of the same rule in a proceeding to enforce it. In most cases, pre-enforcement review takes place in a circuit court rather than a district court. The circuit court has an understandable desire to have access to some kind of record that it can use as the basis for review. It does not have access to the record of an enforcement proceeding for that purpose, so it uses a "record" that consists of the notice, the comments filed in response to the notice, and the "concise general statement" of the rule's basis and purpose that the agency is required to incorporate in the final rule.[25]

In *Automotive Parts & Accessories Ass'n v. Boyd*,[26] one of the first pre-enforcement review cases decided after the Supreme Court issued its opinion in *Abbott*, the D.C. Circuit stated that it needed access to a record sufficient to allow it to engage in pre-enforcement review of a rule.[27] The court then described the conflict between the record that is created when an agency complies with APA § 553 and the kind of record the court thought that it needed to engage in pre-enforcement review of a rule.[28] The court resolved that conflict by instructing agencies to take the actions needed to develop the kind of record the court considered necessary to allow it to engage in review rather than to comply with the requirements Congress described in APA § 553. In the court's words:

> [I]t is appropriate for us to remind the Administrator of the ever-present possibility of judicial review, and to caution against an

25. 5 U.S.C. § 553 (2012).

26. Auto. Parts & Accessories Ass'n v. Boyd, 407 F.2d 330 (D.C. Cir. 1968).

27. *See id.* at 338 ("We do expect that, if the judicial review [required by Congress] is to be meaningful, the 'concise general statement[']. . . will enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.").

28. *See id.* (discussing "differences of emphasis and approach" to the record needed for a rule making, as compared to appellate review).

> overly literal reading of the statutory terms "concise" and "general." These adjectives must be accommodated to the realities of judicial scrutiny, which do not contemplate that the court itself will, by a laborious examination of the record, formulate in the first instance the significant issues faced by the agency and articulate the rationale of their resolution. We do not expect the agency to discuss every item of fact or opinion included in the submissions made to it in informal rule making. We do expect that, if the judicial review which Congress has thought it important to provide is to be meaningful, the "concise general statement of . . . basis and purpose" mandated by section 4 will enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.[29]

The court went on to hold that the three-page "concise general statement of basis and purpose" that the agency had incorporated in the rule was sufficient to allow the court to uphold the rule because the petitioner did not file detailed and well-supported comments that criticized the rule proposed in the notice.[30]

The members of the Washington, D.C. Bar immediately internalized and acted on the message the D.C. Circuit sent in *Automotive Parts*. Lawyers for regulated firms that disliked a rule proposed by an agency began to submit lengthy and detailed comments that criticized the rule, often accompanied by consultants' reports that purported to make findings that undermined the basis for the rule. Thus, for instance, when the NHTSA proposed another rule shortly after its "victory" in *Automotive Parts*, a trade association that disliked the proposed rule submitted lengthy comments that criticized in detail every aspect of the agency proposal.[31] The comments were accompanied by the reports of studies conducted by consulting firms retained by the association that purported to find that the proposed rule was unnecessary and that its implementation would be costly and dangerous. The association prevailed in the pre-enforcement review proceeding it initiated based on the D.C. Circuit's conclusion that the final rule was arbitrary and capricious because the agency had not responded adequately to the comments filed by the association that were critical of the proposed rule.[32]

---

29. *Id.*

30. *Id.* at 338–41.

31. Nat'l Tire Dealers & Retreaders Ass'n, Inc. v. Brinegar, 491 F.2d 31, 36–40 (D.C. Cir. 1974).

32. *Id.* at 40–41.

That pair of D.C. Circuit opinions created an entirely new legal environment. Every circuit has followed the lead of the D.C. Circuit in holding that an agency rule is arbitrary and capricious unless the agency responds adequately to all well-supported comments that are critical of the rule proposed by the agency, and the Supreme Court's 1983 opinion in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*[33] has been widely interpreted to approve of the D.C. Circuit approach.[34] The Supreme Court also added a seemingly open-ended duty to consider alternatives to any action an agency proposes to take in a rulemaking. Not surprisingly, those judicial opinions have created incentives for parties that dislike proposed rules to bury an agency with comments that criticize the proposed rule and suggest alternatives to the proposed rule. Comments on economically significant proposed rules routinely are tens of thousands of pages long and are regularly accompanied by consultant studies that purport to undermine the bases for the proposed rule. Agencies regularly require years to draft the several-hundred page "concise general statement of basis and purpose" that must be incorporated in a rule, and courts reject 30 percent of the rules as arbitrary and capricious because the agency did not adequately respond to one or more of the voluminous critical comments.[35] In short, the courts converted the statutory requirement for a "concise general statement of basis and purpose" into a judicial requirement for a detailed and encyclopedic document that invariably spans hundreds of pages.

Shortly after the Supreme Court issued its opinion in *Abbott*, circuit courts began a similar process of rewriting the APA notice requirement. APA § 553 requires an agency to issue a "[g]eneral notice" that consists of:

> (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

33. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43–44 (1983).

34. *See generally* RICHARD J. PIERCE, 1 ADMINISTRATIVE LAW TREATISE § 7.4 (5th ed. 2010) (discussing cases).

35. Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 83–86 (2011).

> (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.[36]

As was true of the requirement for a "concise general statement of basis and purpose," before the Court decided *Abbott*, agencies complied with the modest notice requirement in APA § 553 by publishing notices that were just a few pages long but that complied fully with the language of the APA. That changed as courts redefined the requirements of the APA.

In 1972, the Third Circuit issued the post-*Abbott* judicial opinion that began the process of redefinition of the notice requirement Congress created in the APA.[37] The court held a notice inadequate because it did not inform the public of all of the possible ways in which the agency might change the rules it proposed to amend. Other circuits soon adopted this demanding method for determining the adequacy of a notice, and all circuits now hold that a notice is inadequate if the final rule is not a "logical outgrowth" of the notice.[38] The practical effect of the logical-outgrowth test is to require agencies to attempt to identify and describe in a notice every conceivable version of the final rule the agency might adopt years later.[39]

The D.C. Circuit joined in the process of redefining the notice requirement a year later. In 1973, the D.C. Circuit rejected an agency rule because the rule was based in part on a source of data that the agency had not identified in its notice.[40] All circuits quickly embraced that dramatic judicial expansion of the "general notice" requirement that Congress imposed in the APA.[41] Circuits courts now hold that "[a]n agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary"[42] and that the notice must provide sufficient information to permit "adversarial critique."[43] The practical effect of this judicially imposed duty is to require an agency to anticipate—at the time it issues a notice—all of the sources of data and analysis that

---

36. 5 U.S.C. § 553(b) (2012).

37. Wagner Elec. Corp. v. Volpe, 466 F.2d 1013, 1019–20 (3d Cir. 1972).

38. PIERCE, *supra* note 34, § 7.3.

39. Beerman & Lawson, *supra* note 20, at 895–99.

40. Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 401–02 (D.C. Cir. 1973).

41. PIERCE, *supra* note 34, § 7.3.

42. *See* Conn. Light & Power Co. v. NRC, 673 F.2d 525, 530–31 & n.6 (D.C. Cir. 1982) (collecting cases).

43. Home Box Office, Inc. v. FCC, 567 F.2d 9, 55 (D.C. Cir. 1977).

it may want to rely on years later when it issues a final rule. The agency also must issue a supplemental notice and provide a new opportunity to comment if it decides to rely on a source of data or analysis that did not become available until after it issued its initial notice.[44] That is a routine occurrence, since a major rulemaking typically requires years to complete.

Professors Wagner, Barnes, and Peters have accurately described the results of the dramatic judicial expansions of the modest requirement to issue a "general notice" that Congress imposed in APA § 553. The pre-notice part of the rulemaking process now takes more than twice as long as the post-notice part of the process because "the courts have made it painfully clear that if a rule is to survive judicial review, it must be essentially in final form at the proposed rule stage."[45] When the judicial expansions of the congressional requirement of a "concise general statement of basis and purpose" are added to the judicial expansions of the congressional requirement of a "general notice" of proposed rulemaking, the judicial version of APA § 553 bears no relationship to the requirements imposed by the statute. Application of the judicial version of the APA's requirements to thirty-two more tax rules per year—rules issued by agencies that already confront enormous resource constraints in their efforts to implement the constantly expanding agenda Congress assigns them and that already take too long to issue important rules—would have devastating effects.

II. OIRA IS BETTER THAN COURTS AT REVIEWING RULES

The Office of Information and Regulatory Affairs (OIRA) reviews all economically significant rules before they go into effect.[46] Many scholars have described the ways in which OIRA ensures that agencies do not overstep the boundaries of their authority and harm the economy by engaging in regulation that imposes costs that exceed their benefits,[47] but OIRA also performs its review function in ways that improve the quality of the rulemaking process in other ways.

---

44. Chamber of Commerce v. SEC, 443 F.3d 890, 908 (D.C. Cir. 2006).

45. Wendy Wagner et al., *supra* note 11, at 110.

46. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993), *reprinted as amended in* 5 U.S.C. § 601 app. (2012).

47. *E.g.*, Patrick A. McGlaughlin & Jerry Ellig, *Does OIRA Review Improve the Quality of Regulatory Impact Analysis?*, 63 ADMIN. L. REV. 179, 183–91 (2011).

As then-professor Justice Breyer explained twenty years ago, OIRA has major advantages over courts in performing tasks of this type. In his 1993 book, *Breaking the Vicious Circle: Toward Effective Risk Regulation*, Justice Breyer described in detail why OIRA is much better suited to review agency rules than are courts.[48] OIRA can apply its multidisciplinary expertise and the virtues of bureaucracy to rationalize the agency policymaking process.[49]

Justice Breyer also contrasted OIRA with courts by illustrating some of the many ways in which judicial precedents can have unintended adverse effects. For instance, the Supreme Court's holding in *State Farm*—in which it rejected a rule because an agency did not adequately consider an alternative to the rule[50]—is likely to be interpreted and applied to require agencies to waste time and resources by engaging in the futile task of attempting "to establish procedures to consider thoroughly *all* alternatives in *every* case."[51]

More recently, Professors Sally Katzen, Cass Sunstein, and Jennifer Nou, all of whom are former OIRA officials, have described in detail the many ways in which OIRA ensures that agency rules are rational and based on multidisciplinary expertise. Professor Katzen, a former OIRA administrator, has described some of her many successful efforts to use the OIRA power to review rules as a point of entry to allow OIRA to work with agencies to improve the rules they issue.[52] Professor Sunstein, also a former OIRA administrator, has explained that "OIRA helps to collect widely dispersed information—information that is held throughout the executive branch and by the public as a whole."[53] Professor Nou, formerly a legal policy analyst at OIRA, has used her detailed description of the many ways in which OIRA improves the rulemaking process as part of the basis for her well-supported argument that agencies conducting

48. STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 55–72 (1993).

49. *Id.* at 61–67.

50. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 48 (1983).

51. BREYER, *supra* note 48, at 58; *see* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 393 (1986) (noting the tension between an agency's ability to respond to every comment and the ability of appellate courts to address any argument raised at the trial court level).

52. Sally Katzen, *OIRA at Thirty: Reflections and Recommendations*, 63 ADMIN. L. REV. 103, 107–08 (2011).

53. Cass Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1840 (2013).

rulemakings should pay more attention to the potential for OIRA review than to the potential for judicial review.[54]

As Justice Breyer, and Professors Katzen, Sunstein, and Nou have explained in detail, the contrast between OIRA review of rules and court review of rules is stark. OIRA applies a multidisciplinary approach that draws on numerous sources of expertise to engage in an intense and continuous process of communication with an agency. Additionally, the approach is designed to identify flaws in an agency rule and to assist the agency in identifying and implementing beneficial changes to the rule before it is published. In most cases, that review process is completed within ninety days.[55] By contrast, a reviewing court has no access to relevant expertise beyond its law clerks, it engages in a review process that requires over a year to complete, and it has extremely limited means of communicating with an agency. If the reviewing court identifies a flaw in an agency rule, it remands the rule. In many cases, the agency must then begin a new rulemaking process that takes many more years to complete.[56] Moreover, as Justice Breyer has explained, the opinion in which the court rejects the agency rule is often misunderstood by other courts and by agencies. For instance, the Supreme Court's famous opinion in *State Farm*—in which it rejected an agency decision in a rulemaking because the agency did not adequately consider an alternative to the action it took[57]—has been widely interpreted to require *every* agency to engage in exhaustive discussion of *every* alternative to *every* action it considers in *every* rulemaking, thereby adding to the high cost and delay of the rulemaking process.[58]

OIRA review is also far more likely than judicial review to further the values of democracy. In its landmark opinion in *Chevron*

54. *See generally* Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755 (2013) (discussing the implications of presidential review for executive agencies during the rulemaking process).

55. Sunstein, *supra* note 53, at 1847.

56. *See* Nou, *supra* note 54, at 1756–57 (emphasizing the exhaustive nature of the agency rulemaking process and the fact that most rules result from years of initial research).

57. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 46–48 (1983) (finding that the most apparent reason an agency decision was arbitrary and capricious was that agency's failure to provide a cogent explanation for its exercise of rulemaking discretion).

58. *See* BREYER, *supra* note 48, at 58 (indicating that judicial decisions that require consideration of policy alternatives can lead to the development of agency procedures that require consideration of "*all* alternatives in *every* case").

U.S.A. Inc. v. Natural Resources Defense Council, Inc.,[59] the Court held that reviewing courts must uphold any reasonable agency interpretation of ambiguous language in an agency administered statute. The Court explained why courts must defer to agencies in the policy making process:

> Judges are not experts in the field, and are not part of either political branch of the Government . . . . In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.[60]

That reasoning also supports substitution of OIRA review of rules for judicial review of rules. The Administrator of OIRA invariably is someone who communicates regularly with the President. OIRA review reflects "the incumbent administration's views of wise policy to inform its judgments."[61] Katzen has often observed in her writings that the head of OIRA does what the President requires.

Most federal agencies are mission-oriented. For instance, the EPA's staff is primarily dedicated to improving air and water quality. That is an institutional characteristic that has many good effects, but it can also have adverse effects. Agencies tend to make decisions with tunnel vision. There are many examples of circumstances in which Presidential involvement in a rulemaking process at the EPA has yielded a rule that incorporates important considerations beyond those a special purpose agency is likely to consider. A particularly illustrative example is the EPA's decision during the Carter Administration to set the sulfur dioxide emissions limit at a level that disappointed many of the environmental advocacy groups that

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

60. *Id.* at 865–66.

61. *Id.* at 865.

comprise the EPA's most reliable supporters.[62] The EPA's decision was influenced by meetings between its administrator and the President's Council of Economic Advisors, the Secretary of Energy, the majority leader of the Senate, and the President.[63] Those meetings ensured that the EPA decision incorporated consideration of factors like the effects of the potential alternative decisions on national security, international relations, inflation, employment, and economic growth. D.C. Circuit Judge Wald wisely rejected environmental groups' claims that the meetings were inappropriate and unlawful. She concluded instead that meetings between agency decisionmakers and their political superiors are essential to the democratic legitimacy of the agency rulemaking process.[64]

III. COURTS CAN AND SHOULD REFUSE TO REVIEW THE ADEQUACY OF AGENCY EXPLANATIONS FOR TAX RULES

My arguments to substitute OIRA review for judicial review of rules apply to all rules issued by all agencies. I recognize, however, that I am unlikely to be successful in persuading courts to stop engaging in pre-enforcement review of most rules issued by most agencies. That would require the Supreme Court to issue opinions that reduce the strength of the presumption in favor of pre-enforcement review and overturn the many precedents in which courts have dramatically expanded the requirements of APA § 553.[65] I hope the Supreme Court takes those actions, but it is unlikely to do so in the near future.

Fortunately, it is easy for the courts to create the kind of legal environment I prefer in the tax context. Courts need merely to apply existing precedents. Tax rules have always differed from all other rules because of two statutes: the Anti-Injunction Act[66] (AIA) and the Declaratory Judgment Act (DJA).[67] The AIA provides that "no suit

62. *See* Sierra Club v. Costle, 657 F.2d 298, 312 (D.C. Cir. 1981) (noting that the parties in this case include both the Sierra Club and the Environmental Defense Fund).

63. *See id*. at 387–91 (discussing the extensive meetings between the EPA and the high-level government officials following the close of the official comments period for the EPA's proposed regulatory change).

64. *See id*. at 405–08 (finding that "the authority of the President to control and supervise executive policymaking is derived from the Constitution; the desirability of such control is demonstrable from the practical realities of administrative rulemaking").

65. *See supra* notes 21–44 and accompanying text.

66. The Anti-Injunction Act, 26 U.S.C. § 7421 (2012).

67. The Declaratory Judgment Act, 28 U.S.C. § 2201 (2012).

for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."[68] The purpose of the AIA is "to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums to be determined in a suit for refund."[69] The DJA, on the other hand, authorizes courts to issue declaratory judgments, but it exempts from its scope suits "with respect to Federal taxes."[70] Courts interpret the AIA and the exemption in the DJA to have the same purpose and scope.[71]

The Court attached great significance to the DJA when it created and applied its presumption in favor of pre-enforcement review of rules in *Abbott*. The Court justified its new presumption with the assertion that the promulgation of a rule that requires petitioners to change their behavior "puts petitioners in a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate."[72] The Court referred to the DJA again when it announced the holding of the case:

> Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure Act and the Declaratory Judgment Act must be permitted, absent a statutory bar or some other unusual circumstance, neither of which appears here.[73]

Consistent with the language and reasoning in *Abbott*, courts have long held that rules "with respect to Federal taxes" are not subject to the pre-enforcement review authorized in *Abbott* because the AIA and the tax exemption in the DJA qualify as "statutory bars" to such suits. Sitting en banc, the D.C. Circuit reaffirmed that interpretation of the two acts in a 2011 opinion in which it held that pre-enforcement review *was* available because the IRS rule was not a

68. 26 U.S.C. § 7421(a).

69. Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7 (1962).

70. 28 U.S.C. § 2201(a).

71. *See* Cohen v. United States, 650 F.3d 717, 727–28 (D.C. Cir. 2011) (en banc) (finding that precedent interprets the AIA and the DJA as coterminous).

72. Abbott Labs. v. Gardner, 387 U.S. 136, 152 (1967).

73. *Id.* at 153.

rule "with respect to Federal taxes."[74] The court emphasized the narrowness of its holding and the breadth of the prohibition on pre-enforcement review of tax rules: "in the tax context, the *only* APA suits subject to review would be those cases pertaining to final agency action *unrelated* to tax assessment and collection."[75]

Similarly, in its 2012 opinion in *National Federation of Independent Business v. Sebelius*,[76] the Supreme Court recognized that the AIA bars pre-enforcement review of rules that relate to "assessment or collection of any *tax.*"[77] Nonetheless, the Court held that courts could engage in pre-enforcement review of the individual mandate in the Affordable Care Act because Congress had explicitly characterized the only sanction available to enforce the mandate as a "penalty" rather than a tax.[78]

CONCLUSION

My goal is simple. I want to keep courts out of the process of determining whether an IRS or Treasury explanation of a tax rule is sufficient to comply with the APA requirement of a "concise general statement of basis and purpose" for a tax rule and the process of determining whether an IRS Notice of Proposed Rulemaking is adequate. Fortunately, all the courts must do to further this goal is adhere to a long line of precedents that are based on the plain language of two statutes.

I agree with the other participants in the 2014 Administrative Law Symposium that the courts should "take administrative law to tax" by holding that the IRS and Treasury must comply with the notice-and-comment requirements of APA when they issue tax rules. Yet I differ with the other participants by disagreeing with the view that the courts should apply to such rules the judicial interpretations of "notice" and "concise general statement of basis and purpose" that have had the effect of introducing massive time and resource-consuming inefficiencies into the rulemaking process in contexts

74. *See Cohen*, 650 F.3d at 730, 736 ("This suit is not about the excise tax, its assessment, or its illegal collection. Nor is it about the money owed to taxpayers. . . . As a result, we have federal question jurisdiction, and neither the AIA nor the DJA provide a limitation.").

75. *Id.* at 733 (emphasis added).

76. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

77. *See id*. at 2582 (emphasis added) (finding that the AIA ordinarily allows taxes to be challenged only after they have been collected).

78. *See id.* at 2584 (holding that because the penalty for failure to comply with the individual mandate is not treated as a tax, the AIA does not apply).

other than tax. The nation simply cannot afford to allow courts to delay interminably the process of issuing tax rules, thereby to so "interrupt the free flow of revenues as to jeopardize the Nation's fiscal stability" in violation of the Anti-Injunction Act and the Declaratory Judgment Act.[79]

79. Alexander v. "Americans United" Inc., 416 U.S. 752, 769 (1974).