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**Who Should Determine Whether an Agency’s Explanation of a Tax Rule Is Adequate?**

Richard J. Pierce, Jr.<sup>1</sup>

I agree with Professor Hickman with respect to several basic propositions: (1) IRS and Treasury have been systematically declining to act in accordance with the duties imposed on those agencies by the Administrative Procedure Act (APA) for many decades; (2) courts should require IRS and Treasury to comply with the APA; and, (3) the Supreme Court has signaled its intent to “take administrative law to tax” as suggested by the title of this symposium, by requiring IRS and Treasury to comply with the APA.<sup>2</sup> I also agree with Professor Johnson that the duty to explain why it has issued a rule is one of the most important duties that the APA imposes on IRS and Treasury.<sup>3</sup>

I part company with most of the participants in this symposium, however, with respect to the important question of what institution should have the power to decide whether an agency’s explanation for a tax rule is adequate and whether an agency’s notice of proposed rulemaking involving taxation is adequate. Professors Hickman and Johnson would give that responsibility to courts, as has long been the case for rules issued by other agencies. I think that such an allocation of institutional responsibility would have disastrous effects.

Professor Hickman argues persuasively that IRS and Treasury issue an average of 32 tax rules per year that the agencies should, but do not, subject to the notice and comment procedure described in APA section 553.<sup>4</sup> I agree that IRS should use the

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<sup>1</sup> Lyle T. Alverson Professor of Law, George Washington University.

<sup>2</sup> Kristin Hickman, \_\_\_\_\_ Duke L.J. \_\_\_\_ (2014).

<sup>3</sup> Steve Johnson, \_\_\_\_\_ Duke L.J. \_\_\_\_ (2014).

<sup>4</sup> Kristin Hickman, *Coloring Outside the Lines: Examining Treasury’s (Lack Of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 *Notre Dame L.Rev.* 1727, 1748-49 (2007).

notice and comment procedure to issue those rules, but that procedure consumes a lot of time and agency resources. Thus, for instance, Wendy Wagner, Katherine Barnes, and Lisa Peters found that EPA required an average of 5.5 years to issue each of 90 rules to implement the Air Toxic Emission Standards.<sup>5</sup> Most of the rules Wagner et al. studied were not economically significant rules, i.e., a rule that is expected to have an annual effect on the economy of at least \$100,000,000.<sup>6</sup> 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. Thus, for instance, 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,<sup>7</sup> and EPA has still not been able to issue an interstate pollution transport rule that can satisfy the courts after over two decades of devoting significant resources to that rulemaking.<sup>8</sup>

The time and resource consuming effects of the notice and comment procedure are often described under the heading of rulemaking ossification.<sup>9</sup> Ossification has many adverse effects, including (1) delay in issuing important rules; (2) failure to issue important rules; (3) diversion of scarce agency resources from other important tasks; (4) substitution of inferior methods of implementing a statutory mission; and, (5) failure to

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<sup>5</sup> Wendy Wagner, et al., *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emissions Standards*, 63 *Admin. L. Rev.* 99, 143-45 (2011).

<sup>6</sup> The definition of an economically significant rule is in Executive Order 12,866, 58 *Fed. Reg.* 51735 (1993).

<sup>7</sup> Jerry Mashaw & David Harfst, *The Struggle for Auto Safety* (1990).

<sup>8</sup> The D.C. Circuit described the lengthy history of this rulemaking in *EME Homer City Generation v. EPA*, 696 F.3d 7 (D.C. Cir. 2012).

<sup>9</sup> See Richard Pierce, *Rulemaking Ossification Is Real: A Response to Testing the Ossification Hypothesis*, 80 *Geo. W. L. Rev.* 1493 (2012).

amend or to rescind rules for many years after they have become obsolete.<sup>10</sup> If IRS and Treasury are required to use the notice and comment process to issue 32 more tax rules each year, they will experience all of the adverse effects of ossification unless Congress increases significantly the budget and personnel at the two agencies. That seems highly unlikely to happen in the foreseeable future given budgetary and political constraints.

Some of the adverse effects of requiring IRS and Treasury to comply with the APA are unavoidable and some of those adverse effects may be worth tolerating in order to obtain the advantages of the notice and comment procedure. We could take one step that would reduce the costs of compliance with the APA significantly, however, and create a situation in which the benefits of the notice and comment procedure are not overwhelmed by the costs of the procedure. That step is to 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.

### **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 section 553 requires an agency to use a 3-step process when it issues a rule.<sup>11</sup> 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:

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<sup>10</sup> Richard Pierce, *Seven Ways to Deossify Agency Rulemaking*, 47 Admin. L. Rev. 59, 60-62 (1995).

<sup>11</sup> 5. U.S.C. §553.

(b) General notice of proposed rule making 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.

Until 1967, agencies complied with APA section 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” that was only a few pages long.<sup>12</sup> The agency practice of compliance with APA section 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 section 553 in ways that render it unrecognizable when compared with the language of section 553.

The Supreme Court’s 1967 opinion in *Abbott Laboratories v. Gardner*<sup>13</sup> opened the door to a series of lower court opinions that “interpreted” section 553 to mean something dramatically different from the simple efficient decision making 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 announced and applied for the first

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<sup>12</sup> Jack Beerman & Gary Lawson, *Reprocessing Vermont Yankee*, 75 *Geo. W. L. Rev.* 856 (2007).

<sup>13</sup> 387 U.S. 136 (1967).

time a presumption of reviewability so strong that it trumped the language of statutes.<sup>14</sup> 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.<sup>15</sup> 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 an enforcement proceeding. After *Abbott*, a rule was subject to pre-enforcement review if, like most rules, it presents a legal issue that is “fit for judicial resolution” and “requires an immediate change in the plaintiffs’ conduct of their affairs with serious penalties attached to noncompliance . . . .”<sup>16</sup>

The stark differences between the review of a rule in an enforcement proceeding Congress authorized and the pre-enforcement review of a rule that the Court authorized

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<sup>14</sup> Id. at 140. See generally Nicolas Bagley, *The Puzzling Presumption of Reviewability*, 127 Harv. L. Rev. (2014).

<sup>15</sup> 387 U.S. at 141.

<sup>16</sup> Id. at 153.

became apparent within a few years after the Court issued its opinion in *Abbott*. When a rule was reviewed in the context of an enforcement proceeding, it was usually reviewed by a district court that used the record of the enforcement proceeding as the basis for review. Since agencies usually exercise their prosecutorial discretion to bring an action to enforce a rule only when the target of the enforcement action has engaged in conduct that is particularly egregious and obviously harmful, the record in the enforcement proceeding typically included evidence that illustrated the need for the rule in a specific context in which violation of the rule caused serious damage. As a result, an agency was likely to prevail in an action in which the target of an enforcement action sought review of the rule. Rules were rarely challenged because a regulated firm knew that it was unlikely 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, 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 knowing that 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 the rule. 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.

In *Automotive Parts & Accessories Ass’n v. Boyd*<sup>17</sup>, 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. The court then described the conflict between the record that is created when an agency complies with APA section 553 and the kind of record the court thought that it needed to engage in pre-enforcement review of a rule. 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 section 553. In the court’s words:

[It] is appropriate for us to remind the Administrator of the ever present possibility of judicial review, and to caution against an 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.<sup>18</sup>

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

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<sup>17</sup> 407 F.2d 330 (D.C. Cir. 1968).

<sup>18</sup> *Id.* at 338.

uphold the rule because the petitioner did not file detailed and well-supported comments that criticized the rule proposed in the notice.<sup>19</sup>

The members of the D.C. Bar immediately internalized and acted on the message the D.C. Circuit sent in *Auto 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 National Highway Safety Administration proposed another rule shortly after its "victory" in *Auto Parts*, a trade association that disliked the proposed rule submitted lengthy comments that criticized in detail every aspect of the agency proposal.<sup>20</sup> 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.<sup>21</sup>

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*

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<sup>19</sup> Id. at 338-41.

<sup>20</sup> *National Tire Dealers and Retreaders Ass'n v. Brinegar*, 491 F.2d 31, 36-40 (D.C. Cir. 1974).

<sup>21</sup> Id. at 40-41.

Insurance Co.<sup>22</sup> has been widely interpreted to approve of the D.C. Circuit approach. 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 significantly 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 per cent of the rules as arbitrary and capricious because the agency did not adequately respond to one or more of the voluminous critical comments.<sup>23</sup> 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 section 553 requires an agency to issue a “general 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
- (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. . . .<sup>24</sup>

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

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<sup>22</sup> 463 U.S. 29 (1983). See generally I Richard Pierce, *Administrative Law Treatise* §7.4 (5<sup>th</sup> ed. 2010).

<sup>23</sup> Pierce, *What Do the Studies of Judicial Review of Agency Actions Mean?* 63 *Admin. L. Rev.* 77 (2011).

<sup>24</sup> 5 U.S.C. §553(b).

in APA section 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.

The post-*Abbott* judicial opinion that began the process of redefinition of the notice requirement Congress created in the APA was issued by the Third Circuit in 1972.<sup>25</sup> 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. All circuits soon adopted that demanding method of determining the adequacy of a notice. All circuits now hold that a notice is inadequate if the final rule is not a “logical outgrowth” of the notice.<sup>26</sup> 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.<sup>27</sup>

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.<sup>28</sup> All circuits quickly embraced that dramatic judicial expansion of the “general notice” requirement that Congress imposed in the APA.<sup>29</sup> All circuits now hold that “an 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”<sup>30</sup> and that the notice “must provide sufficient information to permit adversarial critique.”<sup>31</sup> The practical effect of this

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<sup>25</sup> *Wagner Electric Corp v. Volpe*, 466 F.2d 1013 (3d Cir. 1972).

<sup>26</sup> *Pierce*, supra. note 22, at §7.3.

<sup>27</sup> *Beerman & Lawson*, supra. note 12, at 895-99.

<sup>28</sup> *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973).

<sup>29</sup> *Pierce*, supra. note 22, at §7.3.

<sup>30</sup> *Connecticut Light & Power Co. v. NRC*, 673 F.3d 525, 530-31 (D.C. Cir. 1982).

<sup>31</sup> *Home Box Office v. FCC*, 567 F.2d 9, 55 (D.C. Cir. 1977).

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 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.<sup>32</sup> 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 section 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.”<sup>33</sup> 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 section 553 bears no relationship to the requirements imposed by the statute. Application of the judicial version of the requirements of the APA to 32 more tax rules per year 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.

### **OIRA Is Better than Courts at Reviewing Rules**

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<sup>32</sup> Chamber of Commerce v. SEC, 443 F.3d 890, 908 (D.C. Cir. 2006).

<sup>33</sup> Wagner et al., *supra* note 5, at 110, 144.

The Office of Information and Regulatory Affairs (OIRA) reviews all economically significant rules before they go into effect.<sup>34</sup> Many scholars have described the ways in which OIRA insures 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,<sup>35</sup> but OIRA also performs its review function in ways that improve the quality of the rulemaking process in other ways.

As Justice (then-professor) 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*, Justice Breyer described in detail why OIRA is much better suited to review of agency rules than are courts.<sup>36</sup> OIRA can apply its multi-disciplinary expertise and the virtues of bureaucracy to rationalize the agency policy making process.<sup>37</sup>

Justice Breyer also contrasted OIRA with courts by illustrating some of the many ways in which judicial precedents can have unintended adverse effects. Thus, for instance, a holding like the Supreme Court's 1983 holding in *State Farm* that rejected a rule because an agency did not adequately consider an alternative to the rule 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."<sup>38</sup>

More recently, former OIRA officials like Sally Katzen, Cass Sunstein, and Jennifer Nou have described in detail the many ways in which OIRA insures that agency

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<sup>34</sup> Executive Order 12,866.

<sup>35</sup> E.g., Jerry Ellig & Patrick McGlaughlin, Does OIRA Review Improve the Quality of Regulatory Impact Analysis? 63 Admin. L. Rev. 179 (2011).

<sup>36</sup> Stephen Breyer, *Breaking the Vicious Circle* 55-72 (1993).

<sup>37</sup> *Id.* at 61-67.

<sup>38</sup> *Id.* at 58. See also Stephen Breyer, *Judicial Review of Questions of Law & Policy*, 38 Admin/ L. Rev. 363, 393 (1986).

rules are rational and based on multi-disciplinary expertise. Former OIRA Administrator Katzen 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.<sup>39</sup> Former Administrator Sunstein 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.”<sup>40</sup> Sunstein’s assistant at OIRA, Professor Nou, 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 should pay more attention to the potential for OIRA review than to the potential for judicial review when they conduct rulemakings.<sup>41</sup>

As Breyer, 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 that 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.<sup>42</sup> 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

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<sup>39</sup> Sally Katzen, *OIRA at Thirty: Reflections and Recommendations*, 63 *Admin. L. Rev.* 103, 107-108 (2011).

<sup>40</sup> Cass Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 *Harv. L. Rev.* 1838, 1840 (2013).

<sup>41</sup> Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 *Harv. L. Rev.* 1755 (2013).

<sup>42</sup> Sunstein, *supra*. note 40, at 1847.

agency must then begin a new rulemaking process that takes many more years to complete.<sup>43</sup> Moreover, as Justice Breyer has explained, the opinion in which the court rejects the agency rule is often misunderstood by other courts and/or by agencies. Thus, for instance, the Supreme Court's famous 1983 opinion in which it rejected an agency decision in a rulemaking because the agency did not adequately consider an alternative to the action it took<sup>44</sup> 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.<sup>45</sup>

OIRA review is also far more likely than judicial review to further the values of democracy. In its landmark opinion in *Chevron v. NRDC*,<sup>46</sup> 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 policy-making 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.<sup>47</sup>

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

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<sup>43</sup> Nou, *supra*. note 41, at 1756-57.

<sup>44</sup> 463 U.S. at 46-47.

<sup>45</sup> Breyer, *supra*. note 36, at 58.

<sup>46</sup> 467 U.S. 837 (1984).

<sup>47</sup> *Id.* at 865-66.

with the President. OIRA review reflects “the incumbent administration’s views of wise policy to inform its decisions.” Former Administrator Katzen has described the relationship between OIRA review and the President with a colorful metaphor.<sup>48</sup> She notes that the office of the OIRA Administrator is only a stone’s throw from the office of the President. She says she can prove that by showing anyone who is interested the bruise on her head from the time when she misunderstood the preferences of her boss, President Clinton.

Most federal agencies are mission-oriented. Thus, for instance, EPA is staffed by people who are 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 EPA has yielded a rule that incorporates important considerations beyond those a special purpose agency is likely to consider. The example I regularly use to make this point to my students is the decision of EPA during the Carter Administration to set the emissions limit applicable to sulfur dioxide at a level that disappointed many of the environmental advocacy groups that are EPA’s most reliable supporters.<sup>49</sup> EPA’s decision was influenced by meetings between the EPA Administrator and the President’s Council of Economic Advisors, the Secretary of Energy, the majority leader of the Senate, and the President.<sup>50</sup> Those meetings insured that the EPA decision incorporated consideration of factors like the effects of the potential alternative decisions on national security, international relations, inflation,

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<sup>48</sup> I have heard former Administrator Katzen use this metaphor many times but I am not aware of any occasion on which she has put it in print.

<sup>49</sup> *Sierra Club v. Costle*, 657 F. 2d 298 (D.C. Cir. 1981).

<sup>50</sup> *Id.* at 400-411.

employment, and economic growth. D.C. Circuit Judge Wald wisely rejected claims that the meetings were inappropriate and unlawful. She concluded instead that meetings between agency decision makers and their political superiors are essential to the democratic legitimacy of the agency rulemaking process.<sup>51</sup>

## **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/or overturn the many precedents in which courts have dramatically expanded the requirements of APA section 553.<sup>52</sup> 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 provides that “no suit 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.”<sup>53</sup> The purpose of the Act 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

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<sup>51</sup> Id. at 405-408.

<sup>52</sup> See text and cases cited supra. at notes 15-32.

<sup>53</sup> 26 U.S.C. §7421(a).

refund.”<sup>54</sup> The second statute that is relevant to this issue is the Declaratory Judgment Act. That Act authorizes courts to issue declaratory judgments, but it exempts from its scope suits “with respect to Federal taxes.”<sup>55</sup> Courts interpret the Anti-Injunction Act and the exemption in the Declaratory Judgment Act to have the same purpose and scope.<sup>56</sup>

The Court attached great significance to the Declaratory Judgment Act 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.”<sup>57</sup> The Court referred to the Declaratory Judgment Act 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.<sup>58</sup>

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 Anti-Injunction Act and the tax exemption in the Declaratory Judgment Act qualify as “statutory bars” to such suits. The en banc D.C. Circuit reaffirmed that interpretation of the two Acts in a 2011 opinion in which it held that an IRS rule was subject to pre-enforcement review because it was not a rule with

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<sup>54</sup> *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1,7 (1962).

<sup>55</sup> 28 U.S.C. §2201(a).

<sup>56</sup> *Cohen v. United States*, 650 F.3d 717, 727-28 (D.C. Cir. en banc 2011).

<sup>57</sup> 387 U.S. at 152.

<sup>58</sup> *Id.* at 153.

respect to federal taxes.<sup>59</sup> 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.”<sup>60</sup> [emphasis added].

Similarly, the Supreme Court recognized that the Anti-Injunction Act bars pre-enforcement review of rules that relate to “assessment or collection of any *tax*” in its 2012 opinion in *National Federation of Independent Business v. Sebelius*.<sup>61</sup> The Court held that a court 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.<sup>62</sup>

### **Conclusion**

My goal is simple. I want to keep courts out of the process of determining whether an IRS or Treasury Department 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 need to do to further my goal is to adhere to a long line of precedents that are based on the plain language of two statutes.

I agree with the other participants in this symposium that the courts should “take administrative law to tax” by holding that IRS and Treasury must comply with the notice and comment requirements of APA when they issue tax rules. I differ with the other participants by disagreeing with the view that the courts should apply to such rules the

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<sup>59</sup> *Cohen v. United States*, 650 F.3d 717.

<sup>60</sup> *Id.* at 733.

<sup>61</sup> 132 S.Ct. 2566, 2582-84 (2012).

<sup>62</sup> *Id.* at 2584.

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 other than tax. We simply cannot afford to allow courts to delay interminably the process of issuing tax rules, thereby to so “interrupt the flow of revenues as to jeopardize the Nation’s fiscal stability” in violation of the Anti-Injunction Act and the Declaratory Judgment Act.<sup>63</sup>

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<sup>63</sup> Alexander v. Americans United, 416 U.S. 752,769 (1974).