

RESEARCH SUMMARY

Rethinking Formal Rulemaking

The Administrative Procedure Act sets forth two types of rulemaking: formal and informal. Formal rulemaking includes in-person hearings, cross-examination, and burdens of proof. The Supreme Court, however, de facto ended formal rulemaking in 1973, in a case called *United States v. Florida East Coast Railway*. Since then, essentially all rulemaking has been informal. Informal rulemaking generally requires notice to the public and an opportunity for interested parties to respond with written comments, but public hearings and the like are not required.

In “[Rethinking Formal Rulemaking](#),” Aaron L. Nielson argues that formal rulemaking may merit another look. Indeed, in specific situations, it may help agencies make better policy.

KEY FINDINGS

Formal rulemaking is often dismissed out of hand as unduly cumbersome. Perhaps the emblematic example is the infamous “peanut butter rulemaking,” in which the FDA took more than 10 years to determine what percentage of peanuts a food must contain to be called peanut butter.

The study, however, makes the following points, among others:

- *Cross-examinations can be beneficial.* Cross-examination may help better identify the information necessary for important rulemakings.
- *Delay may be justified and, in any event, manageable.* The process may take longer with formal rulemaking, but for particularly important rules, avoiding error may be worth it. Likewise, tools may be available to manage unnecessary delay.
- *Formal rulemaking may increase public confidence.* Formal rulemaking may increase the legitimacy of the administrative process by making the process more transparent.
- *Formal rulemaking should not be blamed for all delay.* There are many reasons that rulemaking may be delayed that have nothing to do with formal rulemaking.
- *Formal rulemaking perhaps sometimes should be required.* Regulators may be wary of increasing their own procedural burdens, so they are unlikely to undertake formal rulemaking voluntarily. Thus, in limited circumstances, it may make sense to require formal rulemaking by statute.

CONCLUSION

Formal rulemaking, while it can be costly and time consuming, may provide substantial benefits. Rather than dismissing it altogether, the better approach is careful experimentation.