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## Agency Threats

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## Essay

# AGENCY THREATS

TIM WU†

### INTRODUCTION

There are three main ways in which agencies regulate: rulemaking; adjudication; and informal tools of guidance, also called nonlegislative or interpretative rules.<sup>1</sup> Over the last two decades, agencies have increasingly favored the use of the last of these three, which can include statements of best practices, interpretative guides, private warning letters, and press releases.<sup>2</sup>

Scholars are hardly unaware of this trend. In a series of papers, writers have explored the use of informal regulation as it affects the relationship between agencies and the federal courts, asking when nonlegislative rules can be challenged as unenforceable for want of process.<sup>3</sup> This Essay concerns a different question, centered on the

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† Senior Advisor, Federal Trade Commission; Professor, Columbia Law School. The views expressed are my own and not the views of the Commission or any particular Commissioner. I thank Peter Strauss, Phil Weiser, James Speta, Christopher Yoo, and various members of the Duke Law faculty for feedback on this idea, along with Judd Schlossberg for timely research assistance.

1. See 5 U.S.C. §§ 553–554 (2006).

2. The turn to informal methods has been well documented. See, e.g., Thomas McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1393 (1992) (noting the “increasing tendency of agencies to engage in ‘nonrule rulemaking’ through relatively less formal devices such as policy statements, interpretative rules, manuals, and other informal devices”); David Zaring, *Best Practices*, 81 N.Y.U. L. REV. 294, 295 (2006) (providing quantitative evidence of a rise in the use of “best practices” as a means of informal regulation).

3. See, e.g., David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 279–80 (2010) (defending judicial refusal to follow scholars’ suggestions about how to distinguish between legislative and nonlegislative rules); Jacob E. Gersen, *Legislative Rules Revisited*, 74 U. CHI. L. REV. 1705, 1719 (2007) (“Rather than asking whether a rule is legislative to answer whether notice and comment procedures should have been used, courts should simply ask whether notice and comment procedures were used. If they were, the rule should be deemed legislative and binding if otherwise lawful. If they were not, the

relationship between the agency and the regulated industry: when might the use of such informal tools, in the form of “regulatory threats,” be desirable?

Most legal writers are implicitly or explicitly critical of the use of threats as an alternative to rulemaking or adjudication. The general presumption is that the use of threats is a kind of symptom of an underlying malady—a broken rulemaking or adjudication process. For example, Professor Lars Noah describes the use of threats as an “intractable problem,” given the difficulty of “controlling the exercise of such wide-ranging discretionary power.”<sup>4</sup> In this brief Essay, I write in defense of regulatory threats in particular contexts.

The use of threats instead of law can be a useful choice—not simply a procedural end run. My argument is that the merits of any regulative modality cannot be determined without reference to the state of the industry being regulated. Threat regimes, I suggest, are important and are best justified when the industry is undergoing rapid change—under conditions of “high uncertainty.” Highly informal regimes are most useful, that is, when the agency faces a problem in an environment in which facts are highly unclear and evolving. Examples include periods surrounding a newly invented technology or business model, or a practice about which little is known. Conversely, in mature, settled industries, use of informal procedures is much harder to justify.

Under conditions of uncertainty, absent the threat mechanism, the agency would have two options: to make law—through a rulemaking or adjudication—or to ignore the area altogether. Neither is particularly satisfying. The former forces the agencies to make law likely to last a long time based on poorly developed facts, and it invites long periods of uncertainty created by the judicial review process. The latter surrenders any public oversight or input during what may be a critical period of industry development.

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rule is nonlegislative.”); John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 928 (2004) (suggesting possible alternatives to the prevailing judicial approach to distinguishing between legislative and nonlegislative rules); Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 850 (2001) (cautioning against a judicial approach that encourages agencies to promulgate informal rules and then to accompany them with the caveat that those rules are not binding).

4. Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 WIS. L. REV. 873, 874.

Ironically, whereas the procedures designated by the Administrative Procedure Act (APA)<sup>5</sup> are primarily meant to protect the regulated industry, both industry and agency may sometimes prefer unenforceable rules and a lack of judicial involvement. Both agency and industry will sometimes share an interest in an informal and flexible regime that resembles an unenforceable “letter of intent” in the world of private contracts. The costs of a slow-moving, ossified rulemaking or adjudicatory procedure, with its accompanying uncertainty and litigation costs, fall on both industry and agency.<sup>6</sup>

Meanwhile, the argument that rule by threat is a means of avoiding judicial review may be overstated. Threats are, by their nature, just that: threats to enforce or enact a rule, not binding actions in the usual sense of that word. Regulated entities that are unhappy with a *de facto* regime can and do test the threats, forcing the agency to use its more formal powers and therefore invoke judicial review. Similarly, when the industry refuses to comply with agency commands, or when the agency is unhappy with self-regulation, it must turn to formal action. As I argue, this fact serves as an important check on agency power.

It is important to encourage the responsible use of agency threats and to try to develop a sense of the difference between the proper use of threats and their abuse, a project for which the last Part of this Essay offers some potential guidelines. Borrowing from the critics of threats, I develop a list of domains in which the use of threats is presumptively abusive and ought to be avoided. Some examples include using threats to avoid explicit congressional limits on power, and instances in which the need for very specific guidance is important. By contrast, in rapidly developing industries in which rulemaking is impracticable, highly informal methods are justified.

## I. THREATS AND WHAT SCHOLARS THINK OF THEM

The regulatory threats that I am interested in encompass a wide variety of informal agency activity, similar but not identical to the

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5. Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706 (2006).

6. Ossification in this context refers to a grand slowdown in the process of issuing rules. See McGarity, *supra* note 2, at 1387–96 (providing a particularly vivid picture of agency ossification).

statutory category of “interpretative rules.”<sup>7</sup> These activities can include warning letters, official speeches, interpretations, and private meetings with regulated parties. As such, the threats I am describing are in the category of “soft law”—that is, law issued without the formalities that would make it binding.<sup>8</sup> To be sure, there are differences among the many forms of informal action, but in this Essay I will focus on what makes them similar.

One distinction is important: to be a regulatory threat, in the sense that I mean, it is essential that the action not simply express opinions or report on an issue. Rather, the action must give at least some warning of agency action related to either ongoing or planned behavior. That distinction leaves out mere policy guidelines, studies, reports, and similar materials, which can be important documents but are not the subject of this Essay. The reason I narrow the category to threats instead of interpretative rules generally is to examine the agency action most likely to directly influence behavior. In that sense, the comparison between threats and rulemaking or adjudication regimes is a comparison between different types of agency action that share the direct goal of specifying desired behavior.

Agency threats, as I have described them, come in two major forms. The first is a private threat, of which a warning letter sent to a company is the paradigmatic example. The other is a public threat, such as a public speech given by an agency chair, describing what the agency believes to be unacceptable behavior, coupled with an explicit or implicit threat of either new rulemaking or enforcement of an existing rule. Some examples may help clarify each of these categories.

In 2004, Federal Communications Commission (FCC) Chairman Michael Powell delivered a speech at a well-known telecommunications conference in Boulder, Colorado.<sup>9</sup> During the speech, after various preliminary comments, he delivered a series of warnings to broadband providers in the cable and telephone

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7. See 5 U.S.C. § 553(b)(A) (providing that the notice-and-comment requirement does not apply to “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice”).

8. Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 579 (2008).

9. Michael K. Powell, Chairman, FCC, Preserving Internet Freedom: Guiding Principles for the Industry, Remarks at the Silicon Flatirons Symposium on “The Digital Broadband Migration: Toward a Regulatory Regime for the Internet Age” (Feb. 8, 2004), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-243556A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf).

industries. In particular, Powell instructed the industry to respect four “Internet Freedoms” of every Internet user, including the rights to reach applications of their choice and to attach devices of their choosing, like then-new home Wi-Fi devices.<sup>10</sup> Soon after, the FCC brought an enforcement action against a small telephone company that was blocking an Internet application that allowed users to make inexpensive telephone calls.<sup>11</sup> Powell’s speech, with its threats and subsequent enforcement action, is an example of the kind of public threat that is the primary interest of this Essay.

In 2009, the Consumer Protection Bureau of the Federal Trade Commission issued a secret letter to various retailers and manufacturers of new “bamboo clothing.”<sup>12</sup> The Commission believed that the material sold as bamboo fiber was in fact man-made rayon fabric, not “natural” or “environmentally friendly” as its manufacturers claimed. The warning letter in question is an example of a private threat, which led, in that case, to formal enforcement against various manufacturers.<sup>13</sup>

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Administrative law scholars have spent considerable time thinking about the informal agency actions that are the subject of this Essay. These writers—incidentally, all former clerks of the D.C. Circuit Court of Appeals<sup>14</sup>—have a natural interest in how the use of informal methods affects the relationship between agencies and the federal courts.<sup>15</sup> Stated more formally, they are interested in the legal status of what they call “nonlegislative rules,” a phrase that includes the agency threats discussed here. For these writers, the central

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10. *See id.* at 5 (advocating the importance of customers having “access to their choice of legal content” and the ability to “run applications of their choice”).

11. *See* Madison River Commc’ns, LLC, 20 FCC Rcd. 4295, 4297 & n.3 (2005) (“On February 11, 2005, the Bureau issued a Letter of Inquiry . . . to Madison River, initiating an investigation.”).

12. *See* FCC, COMPANIES RECEIVING LETTERS FROM FEDERAL TRADE COMMISSION CONCERNING LABELING AND ADVERTISING OF “BAMBOO” TEXTILES (2010), available at <http://www.ftc.gov/os/2010/02/100203company-letter-recipients.pdf> (providing a list of the recipients of the letter).

13. *See, e.g.,* Pure Bamboo, LLC, File No. 0823193 (F.T.C. Aug. 11, 2009), available at <http://www.ftc.gov/os/caselist/0823193/090811purebambooagree.pdf> (detailing suspected violations and the agreement containing a consent order).

14. David Franklin, Jacob Gersen, Donald Elliot, and John Manning were all clerks on the D.C. Circuit.

15. *See supra* note 3.

question is when a court ought to hold the use of a nonlegislative rule invalid under the Administrative Procedure Act for want of proper procedure.<sup>16</sup>

This Essay addresses a different question: if informational threats are assumed to be unenforceable, when should agencies nonetheless use such threats instead of legally binding rules? Surprisingly, there is comparatively less attention directed to this question. Instead, most of the scholarship suggests an almost reflexive distaste for rule by regulatory threat, based on the logic that, in the words of Professor Robert Anthony, they “dishonor[] our system of limited government,” and can amount to a kind of lawmaking “on the cheap or on the sly.”<sup>17</sup>

Critics like Professor Anthony argue that the absence of judicial review or APA process creates several unattractive possibilities. The first is the absence of safeguards like notice, public participation, and so on.<sup>18</sup> The second is the possibility of an agency exceeding its delegated powers or disobeying the direct instructions of Congress.<sup>19</sup> Overall, critics see the use of threats as an endangerment of the principle of open government or even as an abuse of power.

A study of the “ossification” literature gives a sense of the low regard in which informal methods are held. A series of works written in the 1990s despaired of the fact that tough judicial review was leading agencies to abandon rulemaking in favor of adjudication or, worst of all, threat regimes.<sup>20</sup> Commenting in 1992 on the trend, Professor Thomas McGarity wrote, “[N]otice-and-comment rulemaking procedures provide an element of fairness that is wholly lacking when an agency issues a guidance manual and announces that

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16. The classic example of a case that frames the problem this way is *Hector v. United States Department of Agriculture*, 82 F.3d 165, 171–72 (7th Cir. 1996), which declared unenforceable an informal rule concerning dangerous animals that was issued without notice-and-comment procedures.

17. Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1312, 1379 (1992).

18. *Id.* at 1372.

19. *Id.* at 1373–74.

20. Some of the major works decrying the ossification of rulemaking include McGarity, *supra* note 2; Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995); and Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300.

it plans to adhere to it or to some future manifestation of it in future enforcement actions.”<sup>21</sup>

A more direct critique is Professor Lars Noah’s *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*.<sup>22</sup> The phrase “arm-twisting” invites a colorful comparison between agency officials and unscrupulous professional wrestlers. As Professor Noah writes, the practice “saddles parties with more onerous regulatory burdens than Congress had authorized, accompanied by a diminished opportunity to pursue judicial challenges.”<sup>23</sup> Professor Phil Weiser, a well-known communications scholar, echoes such criticisms in the context of the FCC.<sup>24</sup> On the one hand, Professor Weiser endorses what he calls “co-regulatory strategies.”<sup>25</sup> But on the other hand, he distinguishes salutary self-regulation from threats, which, he warns, “run[] counter to democratic legitimacy and transparency values that inhere in official agency action.”<sup>26</sup>

There are a few dissenters from the scholarly attack on informal agency action. Their leader is Professor Peter Strauss, onetime general counsel of the U.S. Nuclear Regulatory Commission. “[I]nterpretative rules, statements of general policy, staff manuals, and the like,” writes Professor Strauss, “are an important element in the hierarchy of agency law.”<sup>27</sup> Interpretative rules, or “publication rules,” are, he says, “common and generally salutary forms of informal agency action in use well before the Administrative Procedure Act was enacted in 1946.”<sup>28</sup> Concurring with Professor Strauss are Professors Eric Posner and Jacob Gersen, who categorize

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21. McGarity, *supra* note 2, at 1396.

22. Noah, *supra* note 4.

23. *Id.* at 875.

24. See Philip J. Weiser, *Institutional Design, FCC Reform, and the Hidden Side of the Administrative State*, 61 ADMIN. L. REV. 675, 708–11 (2009) (noting the flaws in the FCC’s merger review procedures).

25. See Philip J. Weiser, *The Future of Internet Regulation*, 43 U.C. DAVIS L. REV. 529, 536 (2009) (advocating “a model of co-regulation, whereby a private sector collaborative body operates under [agency] oversight”).

26. *Id.* at 559.

27. Strauss, *supra* note 3, at 804.

28. *Id.* at 805.



agency threats as a form of “soft law” to which the two ascribe some useful functions.<sup>29</sup>

Apart from Strauss and his fellow travelers, the scholarly presumption is that rulemaking or formal adjudication is an intrinsically superior process for most agency action. The use of threats is considered an abuse of power, a means of avoiding judicial review, or perhaps just good old-fashioned laziness. The point of this Essay is to challenge that general presumption. Rule by threats, I argue, is, under certain circumstances, a superior means of regulatory oversight.

## II. PROVIDING PUBLIC INPUT UNDER CONDITIONS OF UNCERTAINTY

Whether the case is stronger for threats or rulemaking depends on the state of industry. Industries can be divided into two states: stable and dynamic. In a stable industry, business models are relatively settled, and the facts relevant to regulation are therefore likely clearer. Conversely, in a dynamic industry, the agency confronts what economists call conditions of “high uncertainty.”<sup>30</sup> As expressed by economist Frank Knight, uncertainty refers to a situation in which alternative future states of the world do not occur with quantifiable probability.<sup>31</sup> More colloquially, many things could happen, and no one knows what the odds are that any one thing will occur.

What creates a dynamic industry is some kind of external shock to an existing industry. Examples include disruptive innovation (say, the invention of radio broadcasting in the 1920s), unexpected market entry (the Japanese entry into electronics in the 1970s), or the rise of a new business model (say, pizza delivery). Given such a shock, the industry’s business models begin to change, and the future shape or function of the industry may be difficult to predict. It is under such conditions that threat regimes are more justified and, indeed, attractive.

An agency facing an industry in a state of high uncertainty has three choices. First, it can make law—through rulemaking or

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29. See Gersen & Posner, *supra* note 8, at 626 (ascribing some useful functions to soft law); see also Zaring, *supra* note 2, at 294 (describing and defending the use of “best practices” by agencies as a means of regulation).

30. See generally FRANK H. KNIGHT, RISK, UNCERTAINTY AND PROFIT 197–232 (1921) (delineating economic risk and economic uncertainty).

31. See *id.*

adjudication—to deal with emerging concerns. Second, the agency can forgo any action until the industry quiets down and matters become clearer. And third, it can watch the growth of the industry and issue threats that indicate where it has concerns, and possibly which directions it hopes the industry will grow.

Of the three options, the first—making law—may be the worst alternative. What sounds attractive is the prospect of an orderly, planned approach to the future. The problem is that, with so little known about the industry, issuing specific rules based on guesses about the future runs a grave risk of creating a bad law, or at least a law that is much worse than one issued after more development. Such lawmaking suffers from all of the defects that Friedrich Hayek identified with central planning—impressive in a world of perfect information, but terrible in this world.<sup>32</sup> The history of the FCC is full of examples of premature lawmaking. A good example is the regulation of the early cable television industries, which were crippled by expansive agency rulemaking in their infancy.<sup>33</sup>

The irony is that early lawmaking, instead of creating clarity, may put the industry in a very unclear position. Given the inevitability of a judicial challenge to an important adjudication or rulemaking, the industry must try to predict which parts of the rule will survive a lengthy judicial review process that may include several remands. Further, the industry must predict the outcome of review under the arbitrary and capricious standard,<sup>34</sup> which is itself capricious and arbitrary. This lack of clarity is why, counterintuitively, regulated industries may prefer an informal process to the legal paralysis common to formal procedures.

If the law does survive, another problem is that any such law, once in place, is likely to remain the regulatory foundation for quite some time. In the case of rulemaking under the APA, changing a rule requires the same notice-and-comment procedures that attach to the

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32. See F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 519 (1945) (criticizing centrally planned economies on informational grounds).

33. In the 1950s, the FCC issued a series of rules for the cable industry that severely limited the industry's development. The state of the industry in 1970 was captured by Leonard Chazen & Leonard Ross, *Federal Regulation of Cable Television: The Visible Hand*, 83 HARV. L. REV. 1820, 1820 (1970). For additional history of the regulation of cable television, see Timothy Wu, *Copyright's Communications Policy*, 103 MICH. L. REV. 278, 315–21 (2005).

34. 5 U.S.C. § 706(2)(A) (2006).

issuance of a new rule,<sup>35</sup> followed by a new opportunity for challenge and judicial review. These procedures increase the incentive for an agency to let its first rule also be the last rule. Yet, as just explained, unless the agency is very lucky, a rule made early in the industry's development is likely to be deeply flawed and potentially crippling.

The second option—"wait and see"—may sound attractive because it allows the industry to develop in what might be called a natural way. This approach, however, makes a great sacrifice: the public's interest may be entirely unrepresented during the industry's formative period. The risk is that the industry's norms and business models will, effectively, be set without any public input. Waiting for the industry to settle down may result in undesirable practices that prove extremely hard to reverse or influence with rules issued later. To state the matter more colloquially, the industry may be "baked" by the time there is any real oversight or public input.

As an example, consider the over-the-counter derivatives market that developed in the 1990s and 2000s. Many commentators argue that waiting, in effect, for the industry to mature before regulating it contributed to the financial crisis of 2008.<sup>36</sup> In fact, by the 1990s, the Commodity Futures Trading Commission had begun to think that oversight of certain derivatives products might be necessary.<sup>37</sup> But Congress barred regulation based on industry arguments that, among other reasons, the rapidly changing nature of the industry made regulation ill-advised.<sup>38</sup>

This example aside, there are instances in which "wait and see" may be a good approach. First, it may precede a threat regime as facts are being gathered. Second, some industries may not need any public

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35. See, e.g., 47 C.F.R. § 1.412 (2010) (requiring notice-and-comment procedures for most FCC rule amendments); see also 49 C.F.R. § 601.22 (2010) (requiring notice-and-comment procedures for most Federal Transit Administration rule amendments).

36. See, e.g., Gary Gensler, Chairman, U.S. Commodity Futures Trading Comm'n, Testimony Before the Financial Crisis Inquiry Commission (July 1, 2010), available at <http://www.cftc.gov/pressroom/speechestestimony/opagensler-48.html> (suggesting that derivatives "played a central role in the 2008 financial crisis," and urging for greater regulation of derivatives markets).

37. See Gary Gensler, *History of Derivatives Regulation, Culprit OTCs*, COMMODITY ONLINE (last updated July 2, 2010, 15:35 IST), <http://www.commodityonline.com/news/History-of-derivatives-regulation-culprit-OTCs-29636-2-1.html>.

38. In the Commodity Futures Modernization Act of 2000, Pub. L. No. 106-554, 114 Stat. 2763 (codified as amended in scattered sections of 7, 11, 12, and 15 U.S.C.), Congress urged the Commodity Futures Trading Commission, in the context of its international activities, to be mindful that "financial services regulatory policy must be flexible to account for rapidly changing derivatives industry business practices." *Id.* § 126, 114 Stat. at 2763A-412.

input, thanks to an absence of any danger to the public or any serious threat of externalities. Consider, for example, the high fashion industry, which is a high-uncertainty business, dynamic and ever changing, but one in which the case for federal oversight seems weak. Finally, the industry might have already developed an effective system of self-regulation or best practices. In such a case, the government can wait and see whether that system fails or succeeds. A classic example of self-regulation is the familiar G, PG, PG-13, R, and NC-17 ratings for films—a system that the federal government has not sought to supplement with its own censorship regime.

The third alternative under conditions of uncertainty is to make use of some kind of threat. The comparative advantage of a threat regime is the following: First, it may bake in the public's interest and opinion during the formative years of an industry without strangling the industry with premature rules. Second, without the formality of notice and comment, public threats may lead to a useful public debate over the industry practice in question. In this case, the very avoidance of a legalized procedure may, in fact, facilitate a public debate. A threat speaks to the substance of the matter, whereas lawmaking often creates a lawyers' debate over comparatively unintelligible issues like subject-matter jurisdiction or standards of review.

The greatest advantage of a threat regime is its speed and flexibility. Unlike a rule, a threat is extant the moment it is made—its final shape, so to speak, is immediately apparent. Meanwhile, if all or part of the threat regime is perceived as unsuccessful or unnecessary, the threat can usually be retracted. Similarly, as a matter of democratic accountability, a new administration can change a threat regime as soon as it takes power, thereby reflecting, more immediately, the will of that administration.

Threats are not intended as a permanent solution, but rather as part of a longer process. If successful and widely respected, it is possible that a threat may create an industry norm, removing the need for rulemaking at all. Alternatively, a threat regime may be a pilot, as it were, for eventual lawmaking. The law created by rulemaking or adjudication will then benefit from the facts developed under the threat regime.

Counter to intuition, even if the process specified by the APA is meant to protect regulatees, the industry may, at times, prefer guidelines or threats. It may, of course, prefer no regulation, or hortatory self-regulation most of all. Agencies and industry, facing a common challenge of uncertainty, may both prefer to work with an

approach that is flexible and avoids litigation that would be expensive for both sides. There is a parallel, as Professors Posner and Gersen point out, to the use of letters of intent and other “soft” contracts to explore the benefits and workability of a given commercial relationship.<sup>39</sup> By avoiding a harder, lawyerly procedure, both sides may benefit.

Some of what I have described can be seen in the reaction to Michael Powell’s 2004 speech.<sup>40</sup> The speech set off a lengthy debate on the potential dangers of blocking and discrimination by Internet carriers—a debate that generated copious academic literature and considerable public attention.<sup>41</sup> Compared to many of the matters handled by the FCC, it cannot be said that public debate was wanting. To some degree, Powell’s speech created or reinforced an industry norm surrounding Internet blocking and similar behavior. Seven years after his speech, and after a change in administration, the FCC completed notice-and-comment rulemaking, codifying a rule still premised on the original speech, with various elaborations based on seven years of debate.<sup>42</sup>

Powell’s speech was an example of a public threat. The case for the use of private threats is even stronger. Here I have in mind, as a model, the use of warning letters by enforcement agencies like the Justice Department or Federal Trade Commission in the enforcement of various laws, such as consumer protection, fraud, or antitrust. In these cases, the uncertainty comes from a different source: the agency simply does not know the facts that bear on the enforcement decision. The warning letter is a means of factfinding. It may also simply put a stop to the activity in question, but in any case, it is a necessary prerequisite to formal action.

The argument that threats sidestep judicial review can be overstated. On the one hand, there is no denying that the speed and flexibility of a threat regime comes at some cost. Process is expensive

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39. See Gersen & Posner, *supra* note 8, at 626 (“[N]on-enforceable letters of intent . . . set the stage for negotiations that will culminate in a binding agreement, [and] non-enforceable contracts . . . provide a basis for cooperation but no appeal to the courts. Soft public law has similar desirable properties . . .”).

40. See *supra* notes 9–10 and accompanying text.

41. As of March 4, 2011, there were about 2.9 million Google search results for the term “Net Neutrality,” and in the Westlaw JLR database, which hosts law reviews, there were 559 documents featuring the phrases “net neutrality” or “network neutrality.”

42. See Preserving The Open Internet, 25 FCC Rcd. 17,905 52 Comm’n Reg. (P & F) 1, 3 (Dec. 21, 2010) (report and order).

and slow, and an advantage of a threat regime lies in avoidance of just those costs.<sup>43</sup> But it is also critical to remember that a threat, as I have described it, is not binding law. In most circumstances, a party unhappy with the substance of a threat regime can challenge the threat by ignoring it, thus forcing enforcement of some kind and opening the threat to judicial review.<sup>44</sup>

The early radio industry provides a classic instance of this mechanism. Through the 1920s, Secretary of Commerce Herbert Hoover oversaw the nascent radio industry in a fairly informal manner. He encouraged self-regulation of the industry but promoted certain codes of conduct and assigned spectrum bands based on an implied threat of enforcement. Eventually, by the mid-1920s, the broadcast industry grew tired of Hoover's informal regime. In 1925, Zenith Corporation deliberately flouted Hoover's rules and began using frequencies reserved for Canadians, provoking a potential fight with the British Empire.<sup>45</sup> Hoover ordered it to stop, but Zenith refused. A federal district court held that the Radio Act of 1912 had not delegated to the Secretary the power to criminalize a broadcaster's failure to adhere to the terms of its license.<sup>46</sup>

Zenith's challenge to Hoover is a classic example of how the industry can demand a judicial check on the power of mere threats. It is also important to point out that agencies may often reach a point of dissatisfaction with mere threats. One reason is that industry compliance with a threat may often be partially or entirely dissatisfactory. To claim compliance with the threat, for example, an industry may create a self-regulatory program that is very weak. Second, an agency may want to bind later administrations in a more lasting way—and may therefore turn to its power to make law. For these and many other reasons, the agency will often have its own reasons to turn to formal legal procedures under the APA.

This is the case for the use of threats. I do not consider the case conclusive. As the reader has already noticed, the use of threats relies on faith that agencies will be good proxies for the public's interest. To

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43. Cf. Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 400 (1973) (advocating the use of economic theory in addressing the costs of legal proceedings).

44. Cf. E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1491 (1992) (describing how judicial review affects an agency's choice to use more or less formal means of regulation).

45. HUGH R. SLOTTEN, *BROADCAST TECHNOLOGY IN THE UNITED STATES* 37 (2000).

46. *United States v. Zenith Radio Corp.*, 12 F.2d 614, 618 (N.D. Ill. 1926).

be sure, threats can be abused, and are. But that the action can be abused does not mean that it lacks merit, if used properly.

### III. THE ABUSE OF THREATS

To say that a threat regime is useful in some circumstances is not to say it is useful in all circumstances, or that threats cannot sometimes be abused. As a general rule, conditions of uncertainty are likely the strongest justification for the use of threats. Alternatively, the use of informal means as a direct substitute for rules or adjudications in settled and mature industries must be viewed with some suspicion.

This point can be well understood from the famous case of *Hector v. United States Department of Agriculture*.<sup>47</sup> The U.S. Department of Agriculture had issued what it considered a mere interpretative rule, specifying that fences meant to contain dangerous animals must be eight feet tall.<sup>48</sup> Judge Richard Posner invalidated an enforcement action because the rule had failed to comply with the notice-and-comment requirements of the APA.<sup>49</sup> As a policy matter, there was little justification in that case for *not* using the notice-and-comment procedure.<sup>50</sup> The big cats—tigers, lions, and hybrids—at issue in the case have been a well-known threat to humans for thousands of years. Moreover, the agency had previously issued notice-and-comment rules for dog and monkey fences.<sup>51</sup> *Hector*, therefore, is a good example of a case in which the agency had little reason to circumvent notice-and-comment procedures.

Beyond this basic division, several other areas can be identified in which threats may constitute an abuse, as opposed to a useful tool. The first is when an agency uses threats to take actions that Congress has specifically barred, or to accomplish objectives for which it would otherwise lack delegated authority. Professor Noah provides a number of instances of federal agencies securing from private actors “voluntary concessions” beyond what the agencies could seek pursuant to their congressionally granted authority.<sup>52</sup>

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47. *Hector v. U.S. Dep't of Agric.*, 82 F.3d 165 (7th Cir. 1996).

48. *Id.* at 168.

49. *Id.* at 171.

50. *Id.*

51. *Id.*

52. See Noah, *supra* note 4, at 876–903.

The Food and Drug Administration (FDA), for example, is explicitly barred, “except in extraordinary circumstances,” from requiring the preclearance of drug advertising.<sup>53</sup> Nonetheless, the agency has used the carrot of faster approval procedures to convince firms to agree to preclearance that the agency would be banned from mandating directly.<sup>54</sup> Another area of concern is that agency threats may sometimes violate the doctrine of unconstitutional conditions by enticing private actors to give up constitutional rights in exchange for discretionary benefits.<sup>55</sup>

The second area of potential abuse lies in threats issued for onetime approvals. An agency often faces a regulated entity that needs agency approval for some matter vital to its business, such as approval of a merger by the FCC or approval of a drug by the FDA. In such onetime approvals, the agency has an enormous potential power that may be effectively unreviewable. The reason is that approval is such a pressing matter that a prolonged challenge to the settlement may be unfeasible. Moreover, because the desired approval usually relates to industry settlements that are entirely voluntary, it may be unclear exactly what agency action the regulated industry is challenging.

What constitutes abuse in these situations can be a hard question. An agency like the FCC or FDA is tasked with general duties like the protection of the public interest or public health, and the conditions on approval may represent the agency’s sense of its statutory duties. In the case of the FCC, the agency is tasked to ensure that any transfer of a broadcast license lies in “the public interest, convenience and necessity,”<sup>56</sup> making imposed conditions the execution of congressional will.

A third area is less a matter of abuse than a matter of inappropriateness. Facts may reach a point at which a precise, static rule is necessary so that the industry knows exactly what it may and may not do. A good example is the body of regulations governing passenger safety on airplanes. The industry is stable and has mature business models. Airlines need to know exactly which rules they should adhere to so as to ensure passenger safety in flight—“move your seat back to the upright position” and so on. Threats, guidelines,

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53. 21 U.S.C. § 352(n)(3)(A) (2006).

54. Noah, *supra* note 4, at 931.

55. *Id.* at 913.

56. 47 U.S.C. § 309(a) (2006).



policy statements, and the like may simply be too hard to find or too unclear in such circumstances.

Professor McGarity writes on this problem in the context of trying to identify Environmental Protection Agency (EPA) rules. Here is how he describes one such effort:

[I]f one writes to EPA and requests a copy of SW-846, EPA will send "Final Update I" to the Third Edition of SW-846, which was published in November 1990. . . . If the generator makes its request very clear, EPA will send Updates I and II of the Second Edition, which is legally binding to the extent that specific methods are incorporated by reference in the regulations, but superseded by the Third Edition for "guidance purposes." The document that EPA sends, however, will contain the following warning:

*Attention*

As noted in the NTIS [National Technical Information Service] announcement, portions of this Report are not legible. However, it is the best reproduction available from the copy sent to NTIS.<sup>57</sup>

This example makes obvious a situation in which an informal guideline is a poor substitute for a published rule.

Fourth, in the context of threatened enforcement actions against individual firms, the publicity surrounding a threat may constitute the punishment itself. This is a power that is easily abused. The news that a federal agency is even investigating the regulatee may do as much, if not more, damage as any actual fine or punishment. But when the facts remain genuinely unknown, the punishment may be unwarranted. This is the problem of conviction by press release.

Although originally a matter of state, not federal, action, the famous settlement of many of the world's largest investment banks with several state attorneys general and the Securities and Exchange Commission at the beginning of the 2000s can illuminate the coercive effects of publicized suspicion. In 2002, then-New York Attorney General Eliot Spitzer held a press conference announcing an investigation into whether Merrill Lynch was manipulating its analytics to make certain stocks look more attractive to potential investors. The public threat of prosecution was enough to incite Merrill Lynch to settle—without, of course, admitting any wrongdoing. Ultimately, as the investigation expanded to other firms,

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57. McGarity, *supra* note 2, at 1394–95 (second alteration in original).

the banks involved agreed to pay “a total of about \$1.4 billion in fines and other penalties.”<sup>58</sup>

Conviction by press release requires an enormous certainty on the part of the agency that it is actually correct about the misbehavior in question. Thus, it can be preferable not to publicize warnings or investigations unless the party reveals the investigation, or the agency takes formal action.

#### CONCLUSION

In *The Godfather*,<sup>59</sup> Don Vito Corleone pursued most of his regulatory goals using threats. Some were delivered in formats that would be considered unusual by administrative law standards but did not want for clarity. Don Corleone resorted to actual enforcement actions only when absolutely necessary and did not seem to make use of notice-and-comment procedures.<sup>60</sup>

The comparison shows why threats have a bad name, suggesting why agencies prefer terms like “guidelines” or “interpretative rules.” Nonetheless, whatever the nomenclature, I believe that regulatory threats are an important tool for agencies dealing with certain types of problems. As opposed to always trying to encourage the use of lawmaking procedures, agency watchers and scholars should instead argue that the power to make threats ought to be used responsibly. This Essay has proposed a few guidelines toward that end.

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58. Adi Ignatius, *Wall Street's Top Cop*, TIME, Dec. 30, 2002, at 64, 70.

59. THE GODFATHER (Paramount Pictures 1972).

60. *Id.*