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Regulating in the Era of Fake News: Anti-Vaccine Activists Respond to the CDC Quarantine Rule

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REGULATING IN THE ERA OF FAKE NEWS: ANTI-VACCINE ACTIVISTS RESPOND TO THE CDC QUARANTINE RULE

Dorit Rubinstein Reiss*

ABSTRACT

The United States Centers for Disease Control and Prevention (CDC) has authority to act to prevent spread of communicable diseases, including, in some cases, imposing quarantine. On August 15, 2016, the CDC proposed a rule to update its quarantine regulations. For the most part, the proposed regulations modernize existing quarantine rules, add due process protections, and extend the CDC's authority in screening travelers. The proposed regulations also allow the CDC to issue travel restrictions or permits for quarantined individuals. They update the language and reflect existing practices better than the current regulations. The regulations were interpreted by writers publishing to an anti-vaccine audience as providing the CDC new and extensive powers to detain people infected with any communicable disease so designated, to force vaccinate, and to impose restrictions on whole towns. Articles decried the CDC's power grab, and argued that the proposed rule violates constitutional rights. Anti-vaccine organizations have called on members and readers to mobilize against the proposed rule and submit comments. This paper compares the description of the proposed rule by anti-vaccine organizations to the actual content of the rule. It examines the effect of the call to mobilization on the comments submitted by doing a content analysis of the comments. Drawing on the literature on participation in rulemaking and symbolic politics, it examines the normative and policy implications of mobilization that draws

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on misperception of the proposed rule but may still raise issues relevant to the policy behind it and its implementation, explains the problems and suggests solutions.

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On August 15, 2016, the Centers for Disease Control and Prevention (CDC) published a Notice of Proposed Rulemaking (NRPM) on "Control of Communicable Diseases" in the Federal Register.[1] Anti-vaccine articles calling for action on the rule described it—incorrectly—as giving the CDC the power to detain or quarantine anyone and forcibly vaccinate them.[2] Calls to action went up on several anti-vaccine sites and Facebook pages.[3] Over 15,000 comments were filed on Regulations.gov, almost all after the anti-vaccine articles were published.[4] Many of the comments were concerned with forced vaccination, something the NPRM did not include or authorize.[5]

This is not the first or only time that misrepresentation of a rule has led to comments that addressed a mistaken perception, rather than the actual content, of a rule. In a 2015 example, the Environmental Protection Agency (EPA) proposed a rule to clarify the ability of the EPA to regulate water pollution under the Clean Water Act of 1972.[6] The act was subject to a campaign by (mostly conservative, rural/agricultural, and libertarian) politicians and organizations that suggested that it was too broad in scope, extending EPA's jurisdiction to include "puddles."[7] The EPA

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[1] Control of Communicable Diseases, 81 Fed. Reg. 54,230 (proposed Aug. 15, 2016) (codified at 42 C.F.R. pts. 70 & 71) [hereinafter NPRM].

[2] *CDC Proposes Rule to Apprehend and Detain Anyone, Anywhere, at Any Time, for Any Duration, Without Due Process or Right of Appeal—and Administer FORCED Vaccinations!*, REDFLAGNEWS, http://www.redflagnews.com/headlines-2016/cdc-proposes-rule-to-apprehend-and-detain-anyone-anywhere-at-any-time-for-any-duration-without-due-process-or-right-of-appeal-and-administer-forced-vaccinations [http://archive.is/xz6YB] [hereinafter *CDC Proposes Rule to Apprehend and Detain*]; Jonathan Landsman, *Warning: CDC Wants to Quarantine and Force Vaccinate Americans for Suspicion of Infectious Disease*, NATURALHEALTH365 (Sept. 8, 2016), http://www.naturalhealth365.com/cdc-quarantine-1963.html.

[3] *E.g.*, National Vaccine Information Center, *CDC Quarantine Committee Working to Force Vaccinate All Americans*, FACEBOOK (Sept. 9, 2016), https://www.facebook.com/national.vaccine.information.center/posts/10154331184262931?match=Zm9yY2UgdmFjY2luYXRl; National Vaccine Information Center, *UPDATE: Contact U.S. Legislators to STOP CDC Proposed Rule for Forced Detention, Isolation, Vaccination and Quarantine*, FACEBOOK (Nov. 15, 2016), https://www.facebook.com/notes/national-vaccine-information-center/update-contact-us-legislators-to-stop-cdc-proposed-rule-for-forced-detention-iso/10154523210682931/.

[4] *See Public Comments to* Control of Communicable Diseases, 81 Fed. Reg. 54,230 (proposed Aug. 15, 2016), https://www.regulations.gov/docket?D=CDC-2016-0068 [hereinafter *Public Comments to* CDC] (codified at 42 C.F.R. pt. 70 and 71).

[5] See Section III.B below for an analysis of the comments.

[6] *See generally* 40 C.F.R. § 230.3 (2015).

[7] Michael Bastasch, *EPA Grants Itself Power to Regulate Ponds, Ditches, Puddles*, DAILY CALLER (May 27, 2015), http://dailycaller.com/2015/05/27/epa-grants-itself-power-to-regulate-ponds-ditches-

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ended by including a provision in the final rule expressly saying that it does not cover puddles.[8] The EPA explained:

> The proposed rule did not explicitly exclude puddles because the agencies have never considered puddles to meet the minimum standard for being a "water of the United States," and it is an inexact term. A puddle is commonly considered a very small, shallow, and highly transitory pool of water that forms on pavement or uplands during or immediately after a rainstorm or similar precipitation event. However, numerous commenters asked that the agencies expressly exclude them in a rule. The final rule does so.[9]

Commenting campaigns based on a misunderstanding of a rule were certainly possible before social media. However, several things, not just the existence of social media, have changed. First is the existence of online tools that allow organizations to get members to communicate *en masse*, easily and quickly, with elected officials or government organizations—in this case through mass emails or mass comments. Second, the increased popularity of news sources that are unclear and manipulative, captured by the term "alternative facts" used by Counselor to President Trump, Kellyanne Conway.[10] These factors suggest that the problem is likely to increase, not decrease. In a reality where people who hold certain strong views, already skeptical of scientific consensus, get their information from websites and sources of dubious reliability, regulatory action can easily be misperceived. Combine that with the use of mass commenting or mass email campaigns, and agencies may face the type of situation described here. While mass commenting on rules is a rare occurrence, and the combination of mass commenting and misrepresentation of the rule should be rarer still, an agency faced with tens of thousands or hundreds of thousands of

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puddles/; Amy Sherman, *Ted Cruz says EPA Tried to Regulate Puddles and Drainage Ditches*, POLITIFACT (Mar. 31, 2016), http://www.politifact.com/florida/statements/2016/mar/31/ted-cruz/ted-cruz-says-epa-tried-regulate-puddles-and-drain/.

[8] 40 C.F.R. § 230.3(o)(2)(iv)(G) (2015); *The Clean Water Rule Fact Check*, EPA, https://archive.epa.gov/epa/sites/production/files/2015-05/documents/fact_sheet_fact_check_clean_water_rule.pdf (last visited Feb. 22, 2018).

[9] Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37054, 37,099 (June 29, 2015).

[10] Interview by Alexandra Jaffe with Kellyanne Conway, Counselor to the President of the United States (Jan. 22, 2017) (in an interview with NBC News, Mrs. Conway stated the White House press secretary gave "alternative facts" when describing the inauguration crowd as the largest ever).

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comments still has to deal, and "when it happens, impact on the agency can be immense."[11]

It is also not clear that the combination will stay rare. Once the idea of mass commenting through regulations.gov is used by organizations hostile to an agency's mission, it is likely to be used again. In the context of anti-vaccine activism, following the call to comment on the Quarantine Rule, an anti-vaccine blogger also called for (inaccurately) comments on another CDC rule.[12] That call was amplified by others and led to 356 comments (though not thousands) on a rule that would normally receive none or few.[13] Calls for comments directed at such audiences are likely to go up again, and there is a good chance they will be inaccurate in the future as well. In other words, this is something that can, and likely will, happen again.

Whether we see notice and comment as a means to improve the content of the rule, or as a way to provide for meaningful participation, this phenomenon creates several problems. One, naturally, is the cost in agency resources to read, process, and respond to numerous comments that are not, in fact, on topic.[14] If the purpose of notice and comment is to achieve better regulatory results by providing the agency with additional information and input, comments responding to what is *not actually in the rule* simply cannot do that. Worse, such off-point comments can lead the agency to ignore even relevant and important nuggets of information that are buried in distracting comments, to miss an important needle in an oversized haystack. This is an issue when dealing with a rule that directly affects civil liberties: we want agencies to carefully consider concerns about them. The reverse of ignoring can also be an issue: if the agency changes a rule because of comments that are not in fact related to the rule, the changes may either be meaningless (like stating the EPA does not regulate puddles) or, in worse cases, in unfriendly political environment, may undermine important public interests embodied in the proposed rule.

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[11] Cynthia R. Farina et al., *Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts*, 2 MICH. J. ENVTL. & ADMIN. L. 123, 131 (2012) (addressing only mass email campaigns, without the additional aspect of a rule misrepresented, but the discussion in the article covers uninformed comments, too).

[12] Ginger Taylor, *The CDC Shockingly Asks Us To Tell Them What Is Wrong with the MMR Vaccine*, ADVENTURES AUTISM (Oct. 18, 2016), http://adventuresinautism.blogspot.co.il/2016/10/the-cdc-shockingly-asks-us-to-tell-them.html.

[13] *See Public Comments to* Proposed Revised Vaccine Information Materials for MMR (Measles, Mumps, and Rubella) and MMRV (Measles, Mumps, Rubella, and Varicella) Vaccines, 81 Fed. Reg. 71735 (proposed Oct. 18, 2016), https://www.regulations.gov/docket?D= CDC-2016-0094 (codified at 42 C.F.R. pt. 70 and 71).

[14] Stephen M. Johnson, *Beyond the Usual Suspects: ACUS, Rulemaking 2.0, and a Vision for Broader, More Informed, and More Transparent Rulemaking*, 65 ADMIN. L. REV. 77, 113–14 (2013).

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If the purpose of notice and comment is to provide for a participatory process, there may be value in allowing opinions to be heard even if they are off-topic. But if the agency ignores such comments as unrelated, legitimacy can be undermined, and participation harmed. Not only does that undermine the value of the procedure, citizens faced with lack of substantive response may become frustrated and disillusioned. This may undermine participation, rather than strengthen it.

This article tells the story of the CDC's Quarantine Rule, the response to it, and situates this in the literature on notice and comment, asking what this phenomenon teaches us about policy making in the regulatory state and the interaction between agencies and citizens.

Part I describes the literature on participation in notice and comments, with an emphasis on the value of participation and the empirical literature on commenting, to set the theoretical background for the discussion of this rule. Part II addresses the background to the rule and its content. Part III examines the articles describing the rule on anti-vaccine sites and then the comments to this rule, many responding to the depiction of the rule on anti-vaccine sites. Part IV discusses the implications and policy prescriptions from the story, explains why the issue of fake news commenting is one for regulation, and examines what can be done.

I. NOTICE AND COMMENT RULEMAKING, E-RULEMAKING, AND PARTICIPATION

Extensive literature has examined participation in rulemaking or e-rulemaking over the past decades, both theoretical and empirical.[15] Interesting aspects of this

[15] *E.g.*, Cary Coglianese et al., *Unifying Rulemaking Information: Recommendations for the New Federal Docket Management System*, 57 ADMIN. L. REV. 621 (2005); Scott R. Furlong & Cornelius M. Kerwin, *Interest Group Participation in Rule Making: A Decade of Change*, 15 J. PUB. ADMIN. RES. & THEORY 353, 355 (2005); Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727 (2007); Jeffrey S. Lubbers, *The Transformation of the U.S. Rulemaking Process—For Better or Worse*, 34 OHIO N.U. L. REV. 469 (2008); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992); David C. Nixon et al., *With Friends Like These: Rule-Making Comment Submissions to the Securities and Exchange Commission*, 12 J. PUB. ADMIN. RES. & THEORY 59 (2002); Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889 (2008); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995); Dorit Rubinstein Reiss, *Tailored Participation: Modernizing the APA Rulemaking Procedures*, 12 N.Y.U. J. LEGIS. & PUB. POL'Y 321 (2009); Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U.L. REV. 173 (1997); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L.

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literature are the multiple theoretical perspectives on the goal of participation via notice and comment.[16] Some scholars focus on the contribution of notice and comment processes to democratic legitimacy, accountability and transparency.[17] Others focus on whether this participation improves agency decision-making, including by providing information and perspectives not otherwise heard.[18] These are two different goals, and they do not necessarily align: if increased participation is a good by itself, more comments may be better, even if they do not improve the decision making process.[19] If the focus is on quality of decision, that is not the case.[20]

One of the reasons e-rulemaking generated extensive enthusiasm across different administrations was a belief that it would increase participation, and potentially deliberation (with an underlying assumption that that is a good thing).[21]

REV. 483 (1997); Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803 (2001).

[16] Ann Marie Johnson & Alexandru Roman, *Reflections on e-Rulemaking: Challenges, Limitations and Unrealistic Expectations*, 13 ELEC. J. E-GOV'T 43 (2015).

[17] Steven J. Balla & Benjamin M. Daniels, *Information Technology and Public Commenting on Agency Regulations*, 1 REG. & GOVERNANCE 46 (2007); Samuel J. Best & Brian S. Krueger, *Analyzing the Representativeness of Internet Political Participation*, 27 POL. BEHAV. 183 (2005); Stephen M. Johnson, *Beyond the Usual Suspects: ACUS, Rulemaking 2.0, and a Vision for Broader, More Informed, and More Transparent Rulemaking*, 65 ADMIN. L. REV. 77 (2013) [hereinafter Johnson, *Beyond the Usual Suspects*]; Stephen M. Johnson, *The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information Through the Internet.*, 50 ADMIN. L. REV. 277 (1998) [hereinafter Johnson, *The Internet Changes Everything*]; Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343 (2011).

[18] Farina et al., *supra* note 11, at 123; Archon Fung, *Varieties of Participation in Complex Government*, 66 PUB. ADMIN. REV. 66 (2006); Reiss, *supra* note 15, at 357; J. Woody Stanley & Christopher Weare, *The Effects of Internet Use on Political Participation*, 36 ADMIN. & SOC'Y 503 (2004).

[19] Farina et al., *supra* note 11, at 129. *But cf.* Balla & Daniels, *supra* note 17, at 47 (suggesting that these two goals do, in fact, align, in the view of some scholars, because "[s]uch democratization, it is thought, will ultimately enhance not just the process of rulemaking, but the results generated by this process as well").

[20] Fred Emery & Andrew Emery, *A Modest Proposal: Improve E-Rulemaking by Improving Comments*, 31 ADMIN. & REG. L. NEWS 8, 8 (2005).

[21] Thomas C. Bierle, *Discussing the Rules: Electronic Rulemaking And Democratic Deliberation*, RESOURCES FOR FUTURE (2003), http://www.rff.org/rff/Documents/RFF-DP-03-2.pdf; Barbara H. Brandon & Robert D. Carlitz, *Online Rulemaking and Other Tools for Strengthening our Civil Infrastructure*, 54 ADMIN. L. REV. 1422 (2002); Farina et al., *supra* note 11, at 126; Johnson & Roman, *supra* note 16, at 43; Johnson, *The Internet Changes Everything*, *supra* note 17, at 279; Reiss, *supra* note 15, at 336 (Deliberation, here, refers to the principles of deliberative democracy—"[d]eliberative democracy methods aim at engaging people who would not normally participate, . . . and at creating an

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At the same time, scholars raised concerns about the potential for the process to consume agency resources with no noticeable benefits, by increasing quantity, but not quality, of participation (especially if well-resourced, self-interested parties act to increase delays and costs).[22] Scholars were also concerned about the risk of increased litigation, if an agency faced with hundreds of thousands of comments misses an important point buried in one, or disagrees with a court on the importance of one issue.[23] Another potential problem is that agencies faced with too many comments may react by ignoring or discounting them.[24] If the process is shown to have little impact on regulation, one concern is frustration and disengagement of the citizens.[25] Indeed, one scholar expressed a concern that the process will turn simply into "notice and spam" (in part because, in her view, not enough attention is given to ideas of effective communication).[26]

Empirical literature evaluating the effect of e-rulemaking almost uniformly agrees that it did not lead to dramatic differences in the notice and comment process.[27] Generally speaking, most rules still receive very few comments,[28] and fewer still receive citizens' comments (most comments still came from the "usual suspects"—industry and interest groups).[29] Rules that receive many comments are

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informed dialogue. The goal of the dialogue may vary from achieving consensus to developing policy options, according to the issue under consideration.").

[22] Stuart Minor Benjamin, *Evaluating E-Rulemaking: Public Participation and Political Institutions*, 55 DUKE L.J. 893, 903–04 (2006).

[23] *Id.* at 913–19. Johnson & Roman, *supra* note 16, at 50–51.

[24] Johnson & Roman, *supra* note 16, at 50.

[25] Benjamin, *supra* note 22, at 921–22.

[26] Beth Simone Noveck, *The Future of Citizen Participation in the Electronic State*, 1 ISJLP 1, 6 (2005).

[27] *See, e.g.*, Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 954 (2006); Johnson, *Beyond the Usual Suspects*, *supra* note 17, at 93. Michael Herz, *E-Rulemaking's Democratic Transformation: Anticipated, Actual, and Potential*, 3 IMPROVING PUB. POL'YS DIGITAL WORLD 195 (2016), http://ojs.imodev.org/index.php/RIGO/article/view/62/154.

[28] Coglianese, *supra* note 27, at 956–58.

[29] *Id.* at 951–54, 958. Wendy E. Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 144 (2011) (Wagner noted that interest groups did participate in the notice and comment process, where they were conspicuously absent from the pre-notice stage, but industry still submitted the vast majority of comments.).

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extremely rare.[30] It does, however, happen. Cynthia R. Farina et al. explain, in relation to the last point, that:

> This "first generation" of technology-enabled rulemaking did not significantly change the breadth and nature of public participation—with one important exception. Advocacy groups became adept at using the Internet to mount massive membership "calls to action" for high profile rulemakings, variously called "mass e-mail," "e-postcard," or "astroturf" campaigns. Examples include the nearly 500,000 comments submitted during the EPA's rulemaking setting standards for airborne mercury; the 520,000 comments in the Fish and Wildlife Service's rulemaking to remove some species of the gray wolf from the endangered list and approximately 670,000 comments in its proposed rulemaking to list the polar bear as endangered; the 2.1 million comments that public interest groups reportedly sent to the EPA in support of the agency's greenhouse gas rule for new power plants; the roughly 1 million comments on the Federal Communications Commission's proposed rule to allow more consolidated media ownership; and the more than 1.2 million comments on the U.S. Forest Service's "roadless area" conservation rule.[31]

In other words, while still rare, the type of mass commenting this paper addresses is not unique to this context, though as addressed below, there are some differences between what these scholars are highlighting and this specific case.

Agencies generally discount or ignore mass email (or mass commenting) campaigns.[32] This approach may be well founded.[33] For one thing, the mass email process is vulnerable to inflating comments, for example by providing people incentives to "tell a friend,"[34] allowing people to "vote early and often," and allowing

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[30] Coglianese, *supra* note 27, at 956–58.

[31] Farina et al., *supra* note 11, at 127–28 (footnotes omitted).

[32] *Id.* at 131. Mendelson, *supra* note 17, at 1346.

[33] Stuart W. Shulman, *The Case Against Mass E-mails: Perverse Incentives and Low Quality Public Participation in U.S. Federal Rulemaking*, 1 POL'Y & INTERNET 23, 34 (2009) [hereinafter Shulman, *The Case Against Mass E-Mails*]; Stuart W. Shulman, *Whither Deliberation? Mass E-Mail Campaigns and U.S. Regulatory Rulemaking*, 3 J. E-GOV'T 41 (2006). *But cf.* David Karpf, *Online Political Mobilization from the Advocacy Group's Perspective: Looking Beyond Clicktivism*, 2 POL'Y & INTERNET 7 (2010) (suggesting that while the benefits of these practices may be limited, they are not a dramatic change from the past and not harmful).

[34] Shulman, *The Case Against Mass E-Mails*, *supra* note 33, at 26, 35, 37–40.

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people to submit multiple comments and emails to inflate the number.[35] Farina et al. also point out that not all participation is created equal.[36] Specifically, they suggest four types of preferences—a term they use to capture views resulting from different thought processes—reflected in comments.[37] Spontaneous preferences are those of citizens not focused on the issue, and involve low-information based thoughts about the topic at hand.[38] Group-framed preferences are

> based on information on an issue provided by a group with which the individual feels affiliation. These preferences are most likely to be formed when the issue is seen as closely related to in-group values, when the communication includes the group's specific position on the issue, and when the individual has little information about the issue from other sources.[39]

This type of preferences is common to participants in mass comments or mass email campaigns. Farina et al. suggest that agencies should give less weight to their holders (the mass commenters) than they would to commenters with informed preferences (those based on consideration of more and accurate information from a wider variety of sources), or adaptive preferences (informed preferences modified by considering the larger social-political environment and constraints on policy changes).[40]

Reinforcing these distinctions, a recent study looking at whether participation in commenting is deliberative found a real difference between people submitting form comments (comments using a form letter drafted by an interest group or other organization) and people submitting individual comments (and no major differences between those commenting online and through paper).[41] These groups differed both

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[35] *Id.* at 35–36.

[36] Farina et al., *supra* note 11, at 132–35.

[37] *Id.*

[38] *Id.* at 132–33.

[39] *Id.* at 133 (footnotes omitted) (citations omitted).

[40] *Id.* at 132–34 (citations omitted).

[41] David Schlosberg et al., *Democracy and E-Rulemaking: Web-Based Technologies, Participation, and the Potential for Deliberation*, 4 J. INFO. TECH. & POL. 37, 49–50 (2007).

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in demographics and in deliberative practices, with the form commenters being significantly less informed and less likely to consider other perspectives.[42]

How effective are comments submitted through the notice and comment process in changing agency perspective? Pre-e-rulemaking literature suggested that agencies were unlikely to make major changes during the rulemaking stage, though they did make some changes.[43] In one recent study, Stuart Shapiro examined nine rulemaking processes to see whether more comments made a difference to the rule.[44] He found in his cases that agencies were likely to make changes to a proposed rule when they received many comments, and the rule was complex.[45] He explained that by suggesting that in those situations, the agency has received a significant amount of information from the public that can help it resolve complicated issues—whereas if the number of comments is low, there is less information to act on, and when the rule is simple, the agency already thoroughly understands the issues.[46] In their separate study, Wendy Wegner et al. found that the EPA, at least, made an average of 13 changes that the agency considered "significant" to proposed rules as a result of comments—but most of these were in response to industry comments, not interest groups mass-email campaigns.[47]

In the case addressed in this paper, there was, as will be described, a call for comments based on information from specific sources. While the information did not come from trade associations, it came from sources with a specific and shared outlook—specifically, that vaccines are very, very dangerous, and that the CDC cannot be trusted—and the majority of the commenters, as will be discussed, were regular readers of these sources, and likely identified themselves as part of a group that trusted those sources. Of particular note in this case, there is not any real indication in many of the individual comments that the commenters had read the

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[42] *Id.*

[43] Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RES. & THEORY 245, 250–53 (1998); William F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 PUB. ADMIN. REV. 66, 70–71 (2004).

[44] Stuart Shapiro, *Does the Amount of Participation Matter? Public Comments, Agency Responses and the Time to Finalize a Regulation*, 41 POL'Y SCI. 33, 34 (2008).

[45] *Id.* at 43.

[46] *Id.* at 43–44.

[47] Wagner et al., *supra* note 29, at 145 (The authors also pointed out that their methodology did not allow for independent assessment of whether the changes were, in fact, significant.).

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actual text of the NPRM. This is, perhaps, not surprising when the NPRM in question consists of 88 pages of the Federal Register, each with three columns of small-font text with lengthy technical analyses; but absent reading the rule, the only bases for commenting for many of these people were the highly inaccurate articles described in the next sections.

As such, this participation fits the group-framed preferences category in Farina et al.'s typology[48] better than the informed preferences. Commenters in this class were not using a form letter or script, nor were they copying specific talking points (although some comments referred expressly to points made by another activist—some comments simply said they agree with submitted comments by leading figures like Mary Holland or NVIC, discussed in the following sections). But, although most of the comments were highly individualized and clearly reflected strong feelings held by the commenters, this class of comments was informed by articles coming from a specific point of view that did not give an accurate, or even close, picture of the rule. The comments are also, mostly, unsophisticated, with few references, short and informal, with many reading as a spontaneous preference, in the typology above, a gut reaction.

This is a situation where the agency, the literature suggests, is likely to disregard many of the comments and treat them as mass email—especially since many of the comments do not directly address any of the rule's contents. This, in turn, may lead the citizens in question to become frustrated by the agency's apparent lack of regard for their concerns. However, whether the agency's non-response would lead these citizens to either disengage, or to mobilize further, is unclear.

Note that this is a complex rule with a high volume of comments. But although Shapiro predicts that the agency is likely to make changes in this situation,[49] many of the comments are not on point.

This Article does not compare the proposed rule to the final rule. That is a very worthy project, but it is beyond the scope of the present work.[50] This Article focuses more on the problem of mass, off-topic commenting, and the potential effects it can have on rulemaking (which is a pretty large project by itself). However, the agency

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[48] Farina et al., *supra* note 11, at 133–34.

[49] Shapiro, *supra* note 44, at 43.

[50] For an article that provides such a comparison, if not a complete one, see Lawrence O. Gostin & James G. Hodge, *Reforming Federal Public Health Powers: Responding to National and Global Threats*, 317 J. A. MED. ASS'N 1211, 1211 (2017).

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did make changes, including addressing some of the issues raised in the off-point comments. The agency's response suggests that Shapiro's view stands even when the comments are off-point, though his explanation would not fit here.

II. THE NPRM IN CONTEXT

Humans constantly battle the risk of infectious diseases. Because of the nature of infectious disease, limiting it from spreading has often been done by placing limits on individual freedoms, for example, through quarantine.[51] Preventing outbreaks of infectious diseases is an acknowledged government function: part of a state's police powers.[52] In the United States, these powers are, in the first instance, held and used by the states, but the federal government has its own authority to act. Sections 361 and 362 of the Public Health Service Act of 1944 provide the Surgeon General the authority to regulate to prevent introduction and spread of communicable diseases into the United States.[53] In addition to this general power, with respect to a limited number of diseases specified in previous Executive Orders, the sections also permit detention, quarantine, and isolation of individuals (note that states have broader power to quarantine,[54] but this Article and the NRPM only discuss federal quarantine powers).[55] Quarantine powers have a long history of jurisprudence behind them.[56]

The current list of diseases includes cholera, diphtheria, tuberculosis, and Ebola, among others.[57] The Surgeon General has delegated the power to quarantine under these sections to the CDC.[58] The CDC has used those powers to a limited degree during past outbreaks, for example, putting in place reporting requirements

[51] Katye M. Jobe, Comment, *The Constitutionality of Quarantine and Isolation Orders in an Ebola Epidemic and Beyond*, 51 WAKE FOREST L. REV. 165, 166–69 (2016).

[52] Jacobson v. Massachusetts, 197 U.S. 11, 24–25 (1905).

[53] *See* 42 U.S.C. §§ 264–265 (2012).

[54] *Id.*

[55] 42 U.S.C. § 264(b) (2012).

[56] Jobe, *supra* note 51, at 172–80.

[57] Exec. Order No. 13,295, 68 Fed. Reg. 17,255, 17,255 (Apr. 4, 2003) (specifically, the order lists: "(a) Cholera; Diphtheria; infectious Tuberculosis; Plague; Smallpox; Yellow Fever; and Viral Hemorrhagic Fevers (Lassa, Marburg, Ebola, Crimean-Congo, South American, and others not yet isolated or named). (b) Severe Acute Respiratory Syndrome (SARS)").

[58] Interstate Quarantine; Delegation of Authority, 66 Fed. Reg. 49,024 (Sept. 25, 2001).

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during an outbreak of Ebola.[59] The NPRM was to a large extent codifying and modernizing practices already used by the CDC.

The CDC has tried at least twice before to update the regulation implementing its quarantine authority, in 2005 and 2012, but these "failed to gain public support."[60] On August 15, 2016 the CDC published an eighty-eight-page NPRM titled *Control of Communicable Diseases*.[61] The NPRM explained the need for the new rule drawing on lessons learned from recent outbreaks of communicable diseases, including the Ebola outbreak, an outbreak of Middle East Respiratory Syndrome (MERS)—both quarantinable diseases—and repeated outbreaks of measles, a non-quarantinable disease.[62]

The NPRM proposed a number of things to improve the CDC's capacity to prevent diseases. First, to impose new requirements on operators of vehicles (airlines and other vessels) bringing people into the United States or carrying them in interstate travel.[63] These requirements updated and expanded previous requirements to report on potentially infected travelers.[64] The purpose of the expansion was to allow public health measures to be taken in response to potential infections. Second, it supplied a detailed, broad definition of what symptoms make a traveler an "ill person" that a carrier needs to report.[65] For people suspected to be ill, the CDC could undertake a risk assessment that would allow it to take prevention measures.[66] The proposed risk assessment could include non-invasive examination, and the CDC explained that:

> We define non-invasive as "procedures conducted by an authorized health worker or other individual with suitable training and includes the visual examination of the ear, nose, and mouth; temperature assessments using an ear, oral, or cutaneous or noncontact thermometer or thermal imaging; auscultation; external palpation;

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[59] 42 C.F.R. § 70.11 (2018).

[60] Gostin & Hodge, *supra* note 50, at 1211.

[61] NPRM, *supra* note 1.

[62] *Id.* at 54,230, 54,231.

[63] *Id.* at 54,231.

[64] *Id.*

[65] *See id.* at 54,239, 54,240.

[66] *Id.* at 54,242.

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> external measurement of blood pressure; and other procedures **not involving the puncture or incision of the skin or insertion of an instrument or foreign material into the body or a body cavity**, except the ear, nose, or mouth."[67]

Among other actions, the risk assessment could lead to prophylaxis being offered, but not required. What is prophylaxis? Prophylaxis is an immediate action taken following exposure to reduce the chance of developing the disease. In the case of measles, for example, giving the measles vaccine can reduce the risk of complications or a severe case or (maybe) even prevent the disease if given immediately after exposure.[68] Giving Immunoglobulin—passive antibodies—can prevent measles even later.[69]

Dr. Paul Offit, from the Children's Hospital of Philadelphia, explains why a vaccine given after exposure can do that:

> When you are exposed to measles virus, the virus enters the upper respiratory tract, replicates in the upper respiratory tract, then enters the bloodstream and spreads to skin, lungs, brain and other organs. As a consequence, the incubation period (from exposure to symptoms) is about 10-12 days.
> Vaccination, on the other hand, skips the first step. Attenuated vaccine virus is put directly under the skin, with easy access to local draining lymph nodes, allowing for an immune response in advance of natural measles virus spread to other organs.
> In other words, immune responses to the vaccine virus will predate virus replication in skin and lungs.[70]

The NPRM gives the following example:

> Among air travelers exposed to measles during flights, post-exposure prophylaxis (PEP) with measles-containing vaccine (within 72 hours) or immunoglobulin (within 6 days) can prevent onset of disease, halting outbreaks before they begin.

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[67] *Id.* at 54,240 (emphasis added).

[68] CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T HEALTH & HUMAN SERVS., EPIDEMIOLOGY AND PREVENTION OF VACCINE-PREVENTABLE DISEASES 222 (William Atkinson et al. eds., 13th ed. 2015).

[69] *Id.*

[70] Email from Paul Offit, Dr. Child. Hosp. of Philadelphia, to Dorit Rubinstein Reiss, Prof. Univ. of CA, Hastings Coll. of Law (May 24, 2017) (on file with author).

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> However, without accurate and timely contact data, it is frequently difficult to intervene within these timelines.[71]

Note that the NPRM sections discussing risk assessment and, where appropriate, offer of prophylaxis apply to all communicable diseases that can pose a public health emergency, both quarantinable diseases and those that are not quarantinable.[72] In other words, the NPRM allows the CDC, among other things, to use non-invasive means to medically examine passengers who appear ill for any relevant communicable disease, and addresses, as an example of a way to deal, prophylaxis, where applicable, to those passengers and other people exposed to the disease, as determined, for example, by seating in the airplane. The NPRM does not, however, allow the CDC to detain passengers for all these diseases—and neither does the statute. Throughout, the NPRM distinguishes between quarantinable diseases and those that are not. The provisions about medical examination with non-invasive means and offering—not requiring—prophylaxis apply to all communicable diseases. The next set of provisions does not.

A large part of the rule sets out in detail the procedures the CDC would use to "apprehend" (the term used in the NPRM to describe the initial limit of liberty), and potentially quarantine, travelers infected with quarantinable diseases and the procedural and other protections such travelers will have.[73] The CDC explained:

> Section 361(d)(2) (42 U.S.C. 264(d)(2)) imposes two main requirements on the interstate quarantine, isolation, or conditional release of individuals: (1) The qualifying-stage requirement; and (2) the requirement for an effect on interstate movement. Both of these requirements must be satisfied.
>
> . . .
>
> As provided for under section 361(b) (42 U.S.C. 264(b)), the Secretary's authority to allow for the apprehension, examination, detention, and conditional release of individuals is limited to those communicable diseases specified in an Executive Order of the President, *i.e.*, "quarantinable communicable diseases."[74]

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[71] NPRM, *supra* note 1, at 54,257.

[72] *See infra* notes 110–24 and accompanying text.

[73] NPRM, *supra* note 1, at 54,238.

[74] *Id.* at 54,233.

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In the NPRM, when a passenger is "reasonably believed to be infected" with a quarantinable disease in the qualifying stage—either communicable or close to it—an individual can be "apprehended" and examined to see if he or she is, in fact, infected.[75] The apprehension may last as long as seventy-two hours, though the CDC noted it can also be as short as an hour.[76] An individual apprehended could be, to my understanding (the language is not explicit on this), required to undergo medical examination (even if they object—at least, that is my reading of the rule)—including medical personnel taking biological samples such as blood, which would be invasive, unlike the non-invasive risk assessment.[77] Apprehension may be followed by a quarantine or isolation order. Either order will be reassessed after seventy-two hours, but may be continued, and there is not an additional required reassessment.[78] A person may request medical review after reassessment, and can use any representative or have the CDC appoint a representative, if they are indigent.[79] They can appeal a decision not to rescind the isolation or quarantine order after review from higher in the CDC's chain of command.[80] An individual under an order can also face travel restrictions.[81]

The rule included information about the criminal penalties for those violating its provisions (criminal penalties that are already in the CFR, but are now applied to this context)—for example, an individual that violates a quarantine order or an airline violating a reporting requirement.[82] Note that those criminal penalties, as the rule explained, can only be imposed after a trial using the full criminal procedure—the CDC cannot fine or jail people on its own.[83]

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[75] *Id.*

[76] *Id.* at 54,237.

[77] *Id.* at 54,240. The specific language regarding medical exemption is: "Medical examination may be authorized as part of a Federal order for quarantine, isolation, or conditional release." *Id.* This language does not clearly address whether consent is, or is not, required before the examination.

[78] *Id.*

[79] *Id.*

[80] *Id.* at 54,242.

[81] *Id.*

[82] *See id.* at 54,231, 54,249.

[83] *Id.* ("[T]hese penalties would be pursued through the courts and would not be imposed administratively.").

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The quarantine provisions can lead to severe deprivation of individual liberties, including mandatory medical examination and quarantine. However, they are limited to quarantinable infectious diseases.[84] The rule also provided guarantees of due process, including the medical review and the process for appealing reassessment.[85] There is also nothing in the rule barring judicial review.[86] While the rule does set an administrative appeal procedure, it is not clear this would bar a lawsuit before the procedure is exhausted. In *McCarthy v. Madigan*, the Supreme Court created a balancing test to assess whether exhaustion of remedies can or cannot be waived.[87] In this case, the burden on civil liberties to the individual—detention and being required to submit to medical examination—may overcome an agency's interest in exhausting internal procedures.

One problematic provision states that the CDC has the ability to enter into agreements with people to adhere to certain limits and undergo certain treatments, potentially as a less drastic measure than quarantine—but this provision is problematic, at least as applied to passengers with a quarantinable disease, since it is doubtful whether an agreement under threat of quarantine is truly voluntary.[88] It was not quite clear whether the agreement provision only applied to quarantinable diseases or to any disease—the language did not qualify the application, but the part referring to CDC's power suggested that the focus was quarantinable diseases.[89] Concerns about the coercive nature of such agreements would be, of course, much stronger for quarantinable diseases. This provision, following comments, was omitted in the final version. Note that most of the response to this provision came from other commenters than this article focuses on, not from the large mass of commenters responding to the anti-vaccine articles (though as discussed, one anti-vaccine commenter did address it).

The NPRM mostly codified existing powers, explained due process mechanisms and provided a framework for using the CDC's detention powers. The

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[84] *Id.* at 54,245 and on (making it clear that the provision applies to "any individual reasonably believed to be infected with a quarantinable communicable disease").

[85] *Id.* at 54,247, 54,248.

[86] *See id.*

[87] McCarthy v. Madigan, 503 U.S. 140, 145 (1992), *superseded by* 42 U.S.C. § 1997e *et seq.* (2012) as stated in Woodford v. Ngo, 548 U.S. 81, 84 (2006).

[88] NPRM, *supra* note 1, at 54,238, 54,239.

[89] *Id.*

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detention powers predated the rule—the CDC could already quarantine people under the statutory authority, if the situation justified it—and were only applicable to quarantinable communicable diseases—a small list of serious diseases in an Executive Order. The rule did, however, have provisions that could, and did, raise concerns about civil liberties.[90]

The final rule improved on the NPRM and provided a reasonable balance between the CDC's need to have effective mechanisms to respond to diseases and important values of due process and respect of civil liberties.[91] It is certainly possible, however, to still have very reasonable concerns about its effect on civil liberties. The rule's main provisions are summarized in Table 1.

Table 1: NPRM Powers and Applicability

	Provisions Applying to Any Risk to Public from All Communicable Diseases	**Provisions Applying to Any Risk to Public from Only Quarantinable Infectious Diseases**	**Things Not in the Rule**
General Prevention Measures	"Public health preventions measures to detect communicable diseases"—reporting requirements, giving contact information they have. Requirement that travelers provide basic contact information and undergo risk assessment by non-invasive means.	Potential quarantine, isolation, conditional release, and/or lesser monitoring.	

[90] Rob Stein, *New Quarantine Authority Gives CDC More Power to Stop Outbreaks*, NAT'L PUB. RADIO (Feb. 2, 2017), http://www.npr.org/2017/02/02/513104963/new-quarantine-authority-gives-cdc-more-power-to-stop-outbreaks.

[91] Gostin & Hodge, *supra* note 50, at 1211.

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	Provisions Applying to Any Risk to Public from All Communicable Diseases	**Provisions Applying to Any Risk to Public from Only Quarantinable Infectious Diseases**	**Things Not in the Rule**
Screenings and Examinations	Travelers screenings and risk-assessment at ports, including non-invasive examining.	Medical examination (possibly, though it is not explicit, even without consent), including taking samples.	
Prohibitions	Prohibit importation of animal or products that risk public health		
Apprehension and Detainment	None.	Apprehension and detainment	Detaining people that are not infected with a *quarantinable* infectious disease.
Medical Treatment		Payment for care of detained individuals.	[No authorization to] Force vaccinate (without consent)
Possible Criminal Penalties	Criminal penalties for violating the regulations, *after* criminal prosecution and trial in the courts.		
Agreements	Agreement on measures? (Unclear how broadly agreement provision applies).	Agreement on measures (But detention still only applies to quarantinable diseases).	

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	Provisions Applying to Any Risk to Public from All Communicable Diseases	Provisions Applying to Any Risk to Public from Only Quarantinable Infectious Diseases	Things Not in the Rule
Reporting Measures	Reporting of death or illness on airlines and other vessels.	Requirement of travel permit for those under an order.	
Due Process Restrictions		Mandatory reassessment of orders, medical review and representation, appeal.	

III. THE DEPICTION AND THE COMMENTS

A. The Rule Translated by Anti-Vaccine Articles

There were many anti-vaccine articles addressing the rule, with substantial similarities among them. For convenience, I only addressed a few—two of the earliest ones that captured the tone, and two by leading figures in the anti-vaccine movement. Appendix 1 lists the articles addressing the rule I found through searching the Internet.

The first article to address the rule appeared, as best as I can tell, on August 31, 2016 on a blog called PissinontheRoses.[92] It was reproduced on September 1, 2016 on a site named Redflag.[93] The title reflected the claims in the article—*CDC Proposes Rule to Apprehend and Detain anyone, anywhere, at any time, for any duration, without Due Process or Right to Appeal—and administer FORCED Vaccinations!* The article described the rule as a "totalitarian unconstitutional power grab," and as allowing the CDC to "apprehend entire cities in [sic] mass if they so desired."[94]

[92] *CDC Says: We Can Round'em Up and Throw Away the Key*, PISSIN' ON ROSES (Aug. 31, 2016), http://pissinontheroses.blogspot.com/2016/08/cdc-gives-itself-power-to-indefinitely.html.

[93] *CDC Proposes Rule to Apprehend and Detain*, *supra* note 2.

[94] *Id.*

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This article was followed, on September 2, by a just-as-understated article that included a call for action. This article was shared in several places, including a site called Air Crap,[95] and shortly after on the anti-vaccine and anti-GMO page March Against Monsanto.[96] The article states: "If you remember the movie, 'Contagion,' the CDC's power grab reads like the script. Detainment, imprisonment (indefinite), forced medical examinations, forced treatment, forced vaccination . . . for MEASLES. **The CDC is lumping *MEASLES in with Ebola.*"**[97]

To remind readers, measles is not a quarantinable disease; only the diseases listed in the Executive Order are quarantinable.[98] The detention power does not apply to other diseases, like measles. And the rule says nothing about forced vaccination. But the author of the article does not explain to her readers (and may not herself understood) the distinction between quarantinable and non-quarantinable diseases. Nor does the rule allow or require forced vaccination. It does put in place reporting requirements, to allow the CDC to track travelers and offer them prophylaxis—if they want it.[99]

The article continues:

> If this regulation passes, **entire cities could be under forced quarantine and citizens lined up and vaccinated under government force**—whenever there is a case of suspected measles identified. That means this will be happening routinely—and especially at the beginning of every school year when recently vaccinated children are spreading measles to their classmates.[100]

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[95] Marcella Piper-Terry, *Action Alert High Priority—New Fed Reg Proposal to Forcibly Vaccinate Entire Cities*, AIR CRAP (Sept. 2, 2016), http://www.aircrap.org/2016/09/02/action-alert-high-priority-new-fed-reg-proposal-forcibly-vaccine-entire-cities/.

[96] Tami Canal, *CDC Quarantine Committee Working on Law to Detain, Imprison, and Vaccinate Any American they Deem Necessary*, MARCH AGAINST MONSANTO (Sept. 4, 2016), http://www.march-against-monsanto.com/cdc-quarantine-committee-working-to-force-vaccinate-all-americans/.

[97] *Id.*

[98] NPRM, *supra* note 1, at 54,233.

[99] *See infra* notes 110–24 and accompanying text.

[100] *Id.* As a side issue, vaccination of children prevents measles outbreaks, it does not cause them. Varun K. Phadke et al., *Association Between Vaccine Refusal and Vaccine-Preventable Diseases in the United States: A Review of Measles and Pertussis*, 315 J. A. MED. ASS'N 1149 (2016).

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Then the article provides a call to action, quoted, apparently, from a woman named Melissa Sfura (there is no link to where that call was posted):

> Alright, so ***the CDC wants to Round up citizens and force vaccinate them without medical testing, just because they think they can.*** See the proposed regulation here: http://www.regulations.gov/document?D=CDC-2016-0068-0001
> Next, **submit your public comment by October 14, 2016** (CDC Rally day, interestingly enough) here: http://www.regulations.gov/comment?D=CDC-2016-0068-0001
> After that, you need to **contact YOUR representatives**. Find them here: http://www.house.gov/representatives/find/
> **Let the CDC Quarantine Oversight Committee know how you feel.** Find them here: https://energycommerce.house.gov/about-ec[101]

A large number of comments were filed immediately after these articles, with over six hundred filed on September 2, 2016. As the discussion below will show, the comments clearly reflect the articles, not the actual content of the rule.

In a video dated September 12, 2016, the influential Barbara Loe Fisher,[102] president and co-founder of the established anti-vaccine organization National Vaccine Information Center (NVIC),[103] claimed that the goal of the proposed rule was to expand federal constitutional power over international travel into the realm of state police powers to eliminate measles.[104] She said that CDC's rule would enable CDC and federally-funded state public health departments to apprehend, detain, quarantine, monitor and treat (including vaccinate) anyone for suspicion of being infected without consent ("*tag, track down*" and "inject people with *biologicals* of known and unknown toxicity").[105]

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[101] Canal, *supra* note 96.

[102] On her influence, see PAUL A. OFFIT, DEADLY CHOICES: HOW THE ANTI-VACCINE MOVEMENT THREATENS US ALL 57–77 (2010).

[103] *About National Vaccine Information Center*, NAT'L VACCINE INFO. CTR., http://www.nvic.org/about.aspx (last visited Feb. 23, 2018). On its legislative efforts, see, for example, Denise F. Lillvis et al., *Power and Persuasion in the Vaccine Debates: An Analysis of Political Efforts and Outcomes in the United States, 1998-2012*, 92 MILBANK Q. 475, 477, 503 (2014).

[104] Barbara Loe Fisher, *CDC Wants to Expand Power to Eliminate Measles What You Need to Know and Do Now*, NAT'L VACCINE INFO. CTR. (Sept. 12, 2016), http://www.nvic.org/nvic-vaccine-news/september-2016/cdc-wants-to-expand-power-to-eliminate-measles.aspx.

[105] *Id.*

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Fisher suggested that:

> if this NPRM is implemented . . . you and your children could be vulnerable to detention and quarantine if health officials decide you are or could become a transmitter of measles, or any other infections because, for example, your electronic medical records reveal you have not gotten every dose of every CDC recommended vaccine.[106]

She describes the NPRM as granting "unprecedented and expanded police powers to forcibly detain, isolate, vaccinate and quarantine us while *we travel right here* in the United States."[107]

The last example raised here was posted on October 14, 2016, the last official day to submit comments, but referenced by several of the commenters. It is a post by anti-vaccine activist Mary Holland, Director of the Graduate Legal Skills Program at New York University's School of Law,[108] posted on the site of an organization called Health Choice,[109] which, from comments on its site, can fairly be described as anti-vaccine.[110]

Holland's understanding of the rule was better than that of the previous articles in the sense that she acknowledged that measles is not currently on the list of quarantinable diseases. However, there are still parts of her comment that suggest

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[106] *Id.*

[107] *Id.*

[108] *Mary Holland Faculty Profile*, N.Y.U. SCH. L., https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.overview&personid=20675 (last visited Feb. 23, 2018).

[109] *Health Choice's Mary Holland Comments on CDC's Proposed Rule to Detain Americans and Coerce Vaccination and Treatment*, HEALTH CHOICE (Oct. 14, 2016), http://healthchoice.org/2016/10/14/health-choices-mary-holland-comments-on-cdcs-proposed-rule-to-detain-americans-and-coerce-vaccination-and-treatment/ [hereinafter *Holland Comments*].

[110] *See, e.g.*, *Why Vaccines Should Not be Mandatory*, HEALTH CHOICE (Oct. 18, 2016), http://healthchoice.org/2016/10/18/why-vaccines-should-not-be-mandatory/ ("[W]e are living an Orwellian nightmare. The recommended vaccine schedule has exploded, with the recommended injection count in the first year of life going from 5 to a possible 25. Vaccine adverse events have skyrocketed to over 30,000 reports a year, including 200 deaths, and these reports are estimated at only 1-10% of the true injury toll . . . . Americans have lost sight of just how extreme and how bad our situation is. We have the most aggressive vaccine mandates in the world; no other country comes close. We have among the worst infant mortality rates in the developed world, worse than Cuba, Estonia and Slovakia."); *Merck's MMR Public Relations Coup*, HEALTH CHOICE (Feb. 2, 2015), http://healthchoice.org/2015/02/02/mercks-mmr-public-relations-coup/.

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that Holland did not fully understand the NPRM. For example, there is no indication she is aware of the fact that the CDC already has quarantine powers under the Public Services Act, and that the rule simply makes transparent the powers the CDC considers itself to already have, adds procedural protections, and to a large extent, for reporting, codifies practices already in use. Much of her comment seems to address the discussion of measles. She claims that:

> [t]he Proposed Rule places undue emphasis on "post-exposure prophylaxis," by which it appears to mean vaccination in most instances. Under threat of potential detention during interstate travel, the Rule places people who elect not to vaccinate against so-called vaccine-preventable illnesses, such as measles, chickenpox, and flu, under a legal cloud of potential civil and criminal liability.[111]

The rule does address prophylaxis—in discussing measures offered for measles, a non-quarantinable disease. Using the search function, I looked at all the references to "prophylaxis" in the rule. Prophylaxis is discussed in the context of the benefits from reporting requirements (which, to remind readers, apply to all diseases, and do not allow detention, apprehension, or forced invasive procedures).[112] It is mentioned again in the context of reporting requirements.[113] Prophylaxis is further mentioned when the CDC points out that making reporting voluntary would reduce its ability to offer prophylaxis in appropriate situations.[114] It is mentioned, again, in the context of the benefits of the rule—the ability to offer prophylaxis and prevent disease being a benefit.[115] The NPRM says:

> Among air travelers exposed to measles during flights, post-exposure prophylaxis (PEP) with measles-containing vaccine (within 72 hours) or immunoglobulin (within 6 days) can prevent onset of disease, 33 halting outbreaks before they begin. However, without accurate and timely contact data, it is frequently difficult to intervene within these timelines.
> And:

[111] *Holland Comments*, *supra* note 109.

[112] NPRM, *supra* note 1, at 54,231.

[113] *Id.* at 54,251, 54,252.

[114] *Id.* at 54,255.

[115] *Id.* at 54,256, 54,257.

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> In the absence of HHS/CDC efforts to retrieve and transmit contact data, public health departments would not be able [to] contact travelers to provide post-exposure prophylaxis and to self-monitor for potential measles symptoms.[116]

Chemoprophylaxis is mentioned for exposure to meningococcal and pertussis as recommended activities for prevention.[117] Vaccination is also mentioned.[118] Prophylaxis is also mentioned to explain that requests for contact information are considered non-urgent when there is no available prophylaxis or the time for using it lapsed.[119]

Prophylaxis is mentioned as a saving, again, in calculating the benefits from the rule.[120] The discussion of prophylaxis is in the context of calculating benefits if public health can offer it within a short time, preventing diseases.[121] Again, the mention of prophylaxis is in relation to calculating the benefits and the costs of the rules—the benefits from earlier notifications, and the cost of prophylaxis.[122]

These are the only mentions of prophylaxis I found in the rule. They are all in relation to the parts of the rule regarding contact information, all applied to assessing costs and benefits, and none related to detention or quarantine. There appears to be an in-built assumption in the rule that most people discovering that they were exposed to measles, if not immune, would want prophylaxis to prevent measles. This is a reasonable assumption: most people would rather not get a potentially serious disease. There is nothing in the rule connecting prophylaxis to detention—they are discussed in separate sections—and there is nothing suggesting prophylaxis will be anything but voluntary.

Holland goes on to make several incorrect assertions:

> In the event "post-exposure prophylaxis" leads to serious injury or death, as is entirely possible, it will be impossible for those so treated to sue the government

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[116] *Id.* at 54,257.

[117] *Id.* at 54,260.

[118] *Id.*

[119] *Id.* at 54,262.

[120] *Id.* at 54,272.

[121] *Id.*

[122] *Id.* at 54,277, 54,278.

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> or the manufacturers of the medical products used. The 1986 National Vaccine Injury Act and the 2011 Supreme Court decision in *Bruesewitz v. Wyeth* completely immunize industry and healthcare providers from liability. Sovereign immunity would protect government actors. Those apprehended and detained would bear all the risks of these coerced medical interventions.[123]

Even if the rule set the ground for requiring prophylaxis—and it does not—prophylaxis can come in two forms: if a person is contacted within seventy-two hours from exposure, they can receive the MMR[124] and if later, they can receive immunoglobulin within six days.[125] In the case of MMR, the National Childhood Vaccine Injury Act of 1986[126] creates a no fault compensation program in which petitioners can be compensated on conditions easier than in the courts.[127] It is therefore incorrect to claim that people harmed by the vaccine would have to bear the risks. For immunoglobulin, there are no statutory limits on suing manufacturers; however, sovereign immunity (which sometimes prevents damage suits against the government) may be a barrier to suing the CDC and proving fault and causation may be as hard to overcome as in other substance-related torts claims. Holland is also ignoring the risk from lack of prophylaxis. If the government is unable to contact people exposed to infectious disease in time to benefit from prophylaxis, and those people go on to develop disease, those people are thus forced to bear the risks of *lack* of prophylaxis. They are denied the choice of opting for prophylaxis and denied option of preventing the harm.

More on point, Holland correctly points out the element of coercion in the agreement proposed in the rule, and also claims that the rule "does not give explicit criteria for the imposition of quarantines."[128] But the rule suggests quarantine would be imposed to prevent the spread of the limited number of quarantinable diseases, on someone in the infectious stage.[129] That is fairly clear. She also asks how an

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[123] *Holland Comments*, *supra* note 109.

[124] NPRM, *supra* note 1, at 54,274.

[125] *Id.*

[126] 42 U.S.C. §§ 300aa-1–300aa-34.

[127] *See id.* at § 300aa-11; Nora Freeman Engstrom, *A Dose of Reality for Specialized Courts: Lessons from the VICP*, 163 U. PENN. L. REV. 1631 (2015).

[128] *Holland Comments*, *supra* note 109.

[129] NPRM, *supra* note 1, at 54,233.

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organization would violate quarantine[130]—but the NPRM imposes other requirements beyond quarantine, for example, reporting, and an airline, an organization, can certainly violate those.[131]

Holland's conclusion is that the rule "violates the global human rights benchmark in medicine and also violates Constitutional rights to privacy, due process and equal protection."[132] That conclusion, however, seemed to rely on a misunderstanding of much of the rule and ignored the fact that quarantine powers are not new to the CDC. The CDC already had them. The rule simply clarified their use.

Holland goes on to point out (as will be discussed more fully in the next subsection) that:

> [t]he 12,000-plus comments you have received so far are overwhelmingly negative. Indeed, I could not find a single one in the Rule's favor. It seems to have little or no public health rationale yet threatens human and civil rights. This Proposed Rule richly deserves to be abandoned on the scrap heap of history.[133]

Holland ignores the fact that many of these comments drew on the inaccurate description of the rule in the previous anti-vaccine articles. It is not clear why comments based on a misrepresentation of the rule provide good counters to it.

B. The Comments

Five research assistants, coordinating interpretation of categories with each other and myself on a periodic basis, were assigned date ranges to examine comments. So far, they have analyzed 440 comments out of the 15,800 submitted, pulled at random.[134] Even though it is a small portion, it provides some interesting insights:

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[130] *Holland Comments*, *supra* note 109.

[131] *See* NPRM, *supra* note 1, at 54,231, 54,242, 54,245.

[132] *Holland Comments*, *supra* note 109.

[133] *Id.*

[134] The comments referenced in this Section were pulled by my research assistants from the regulations .gov website. *See Public Comments to* CDC, *supra* note 4.

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Table 2: Summary of Major Issues in the Comments (out of 440 comments)

Issue	Number of Comments Raising the issue	Percentages
Rule Unconstitutional	272	61.8%
Opposing Forced Vaccination	228	51.8%
Mistrust of the CDC	192	43.6%
Opposing Lack of Informed Consent	113	25.7%
Vaccines are Unsafe	88	20%
Nazi References/Threats of Shooting	72	16.4%
Vaccines are Not Effective	38	8.6%

All the comments analyzed so far were by individuals, and almost all were informal, less than a page long, written in strong language, as the examples would show, and with no or less than three references. The comments were also not form comments. Style and content varied. Nonetheless, there were strong similarities.

A majority of the commenters claimed the NPRM was unconstitutional, though their meaning was not always clear, and the arguments were all over the map. Claims of unconstitutionality should be taken seriously, but some of these were hard to understand. For example, a comment that "this is a complete attack on constitutional rights!" does not allow the agency to identify constitutional issues. Several of the comments made references to the second amendment, without explaining how the NPRM is related to the right to bear arms. Even the more detailed comments of this variety lacked references to relevant caselaw—for example:

> The idea that any government agency can detain an American citizen, without due process (a violation of the 5th & 14th Amendments), for an indeterminate amount of time (a violation of the 8th Amendment), and without the consent of the governed, is unconstitutional on so many levels, that I hope the CDC will realize this and drop this proposed rule. Our country is a country of laws, with the Constitution the supreme law, to which all laws must conform. This does not, and should be immediately eliminated. Thank you.

It is certainly undesirable for an agency to discount constitutional concerns or ignore them, but without clarification of how the NPRM violates the Constitution, it is hard to address (some of the more sophisticated comments from established organizations did address these issues).

Over half of the commenters stated their opposition to forced or mandatory vaccines. This number only included those that did so expressly—omitting

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comments simply saying the rule is horrible (or "no, no, no") and veiled references to the Nuremberg codes (which were included under the rubric of informed consent). Typical comments opposing forced vaccination included: "If I were forced to have a vaccination, my health would suffer terribly. . . . I believe an individual has the right to make decisions about their own body. No government, agency, or individual has the right to make those decisions for someone else;" and "I don't think the government has any right to step foot into our lives and say what can and cannot be done with him during recovery. If anyone tries to force a vaccine on me there will be hell to pay;" or "No forced vaccinating for any reason."

Another 113 referred to informed consent, with some (though not all), by the language of the comment, having in mind forced vaccination.[135] Comments that clearly did not refer to forced vaccination included: "Should my child contract something this will give the CDC a right to hold my child somewhere against the consent of her parents." Comments that probably refer to forced vaccination included: "Your proposed power grab over people lives to detain them without warrant or due process of law, violate their bodies without consent and become criminals of the Constitution is distrubing [sic]." Comments where the intent is unclear include, for example: "There is no due process or Nuremberg human rights to informed consent."

Mistrust of the CDC was implied in nearly every comment, but 192 people, 43.6%, expressly said things such as:

> This is ridiculous, no government agency in a free country should aver [sic] have the authority to detain free citizens and force medical treatment for any reason, especially not the corrupt entity known as the CDC and especially not just because they think you might be sick or might someday be communicable. This is disgusting and it infuriates me!

Another example of this mistrust was: "The corruption of the CDC has become controlled by the major powers that has moved to manipulate and force their will,

[135] Anti-vaccine sites often use the language of informed consent to express their opposition to a variety of vaccine practices. *See, e.g.*, Laura Hayes, *A Dozen Things We Can Do Right Now to Help Stop the Vaccine Holocaust*, AGE AUTISM (May 30, 2017), http://www.ageofautism.com/2017/05/a-dozen-things-we-can-do-right-now-to-help-stop-the-vaccine-holocaust.html ("[W]e know it is not possible to give informed consent when it comes to vaccines. The necessary information is not available because the needed studies have never been done, and the studies that are cited were improperly done, inadequate, and often fraudulent.").

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intentions and long sought after agenda, directed to undermine the core our constitutional rights of Freedom of Thought, Speech & Belief: A Civil Right!"

Seventy-two people either compared this policy to Nazism, calling the CDC Nazis, or warned the CDC that if anyone comes to their house and tries to vaccinate them by force the CDC officials doing so would be shot.

And in a rule that did not focus on vaccines, eighty-eight people addressed vaccine safety, and thirty-eight addressed effectiveness. A typical comment on safety was: "Vaccines, which themselves have been demonstrated to cause the disease, and whose ingrdients [sic] have been well-documented to cause many additional diseases." A typical comment on effectiveness was: "Especially when many of those are proven to cause disease (such as whooping cough and remember that measles is now becoming the disease of the inoculated) and many vaccines are simply not effective."

In other words, most of the commenters in the comments analyzed expressed a position about the articles discussed in Section III.A, rather than the actual content of the rule. Most of them were responding to a view that the rule allowed mass detentions and forced vaccination of themselves and/or their children. Very few actually addressed specific provisions or the questions the CDC raised throughout the rules. There was a real gap between the comments and the rule.

IV. IMPLICATIONS AND POTENTIAL SOLUTIONS

A. The Problem

This rule is a clear example of commenters responding not to the rule itself, but to articles that radically misrepresented the rule. Most of the commenters responded to the first and extreme articles. The speakers were unsophisticated, their positions strongly held, and had little to do with the content of the rule—a complex, eighty-eight-page rule, that aimed to balance in careful, sometimes nuanced ways the public health and civil liberties.

Whether comments like these have value depends on our view of the role of commenting. If the goal of comments is to provide a forum for transparent participation, these people were given an opportunity to do so. However, since their effect on the rule was extremely limited, this experience may frustrate them, and in the long run, undermine participation. If we view comments as providing the agency with information and improving the rule outcome, this set of comments is of extremely limited value. It tells the CDC that this narrow set of commenters does not trust the agency. It can also deduce that many of them oppose quarantine power completely. It also teaches the CDC that the rules were misrepresented to at least some people.

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But there are two problems if the CDC wants to do anything with these insights. First, the comments are hardly from a representative population: the target audience of the inaccurate articles in question is limited and narrow. Second, the CDC is not likely to completely ignore quarantine powers, given that that power was delegated to them by statute and circumstances may justify its use. Strength of preference may provide an important signal, but it is not clear that the opinions of a narrow group of people that passionately mistrusts the CDC and does not want quarantine used are useful in improving a rule when the commenters did not express their position about the actual provisions of the rule.

The comments would inform the CDC that it needs to state that the rule is not about forced vaccinating—but that is the equivalent to the EPA announcing that its rule does not regulate puddles: it does not improve or change what the rule actually does.

Note that not all the comments were of this variety. For example, a number of institutions including the Global Health Justice Partnership at Yale Law School and the Yale School of Public Health, the ACLU, and others submitted detailed comments.[136] So did the Association for Professionals in Infection Control and Epidemiology (APIC).[137] These comments went more in-depth into the details in the rule and suggested direct changes. But a quick perusal of the comments suggests that most were of the variety discussed in this paper. The National Vaccine Information Center's comment was also more professional, detailed, and somewhat more directly addressed the rule's contents.[138]

Does it matter? Can the agency simply ignore these misguided comments and move on? There are at least three potential problems here. First, there is the heavy demand on agency resources in going through comments that are off-topic, considering and responding to them, and the additional resources if litigation is brought on a claim that a substantive issue in the comments was missed. While handling comments is part of an agency's job, spending resources to address off-topic comments, in the current age of austerity, is a poor use of those resources. Even

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[136] Glob. Health Justice P'ship at Yale Law Sch. and Yale Sch. of Pub. Health et al., Comment on the CDC Proposed Rule: Control of Communicable Diseases, Federal Register, Vol. 81, 157, REGULATIONS (Oct. 15, 2016), https://www.regulations.gov/document?D=CDC-2016-0068-13863.

[137] *Id.*

[138] *See* Nat'l Vaccine Info. Ctr., Comment on the Notice of Proposed Rule Making: Control of Communicable Diseases by the Center for Disease Control, NVIC (Oct. 14, 2016), https://www.regulations.gov/document?D=CDC-2016-0068-14884.

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if, as discussed below, most of the comments are likely to be ignored and discounted, they still need to be at least somewhat addressed—and the risk of litigation for ignoring or missing an issue also exists.[139]

Second, there is the concern that the mass of off-topic comments will lead the agency to simply discount and ignore most comments.[140] The risk is that the CDC, facing a large amount of comments from people who are not well-informed about the rule, would miss or discount a real issue hidden in these many comments, because it is surrounded by the harsh language or by comments that clearly show lack of understanding.

As already addressed, this has been what usually happened with mass commenting campaigns when they were form comments—and while these are not form comments, the similarity in error can lead the agency to treat them as such.[141] This creates two risks. One is that the agency will miss a real substantive issue[142] because of its discounting of the comments and not address a real problem. We could assume, since there are also comments in a different vein, by established organizations, that many major issues will be raised in comments the agency does not discount. However, in a rule that directly affects both individual freedoms and the public health, a concern is that the stakes are high, and missing problems that could have been caught can have high costs. Furthermore, the agency listening by the identity of submitter, rather than the substance of the content, is another concern. The literature suggests agencies already do that—and this situation increases the risk and could lead to real concerns about undue influence of some actors over others. The second risk is that the participants, seeing their comments had no effect, will become frustrated and withdraw from participation. It is not clear, however, that in this case this is a problem or an undesirable outcome. In terms of the risk, these are commenters that already have a high degree of mistrust and hostility towards the agency. Additional frustration will not necessarily lead to less participation—it might mobilize them to do more—and at any rate, this is not a situation where there is a risk of dramatic decline in trust, because the trust was never there anyway. Nor is it clear that a substantive response by the CDC would lead to more legitimacy. In addition, if participants decide not to participate, would it be a loss in this case? The participants commenting based on the extreme misrepresentation of the rule are not

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[139] Farina et al., *supra* note 11, at 131.

[140] *Id.*

[141] *Id.* at 123.

[142] *See* Benjamin, *supra* note 22, at 893.

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providing information the agency can use, and in Farina et al.'s typology, provide participation of low value.[143] There is a strong argument that losing that participation would be no loss, and it would free agency resources for other things.

Third, there is a risk that such misguided participation, especially if it gains political clout, can lead to changes in the rule that do not serve the public interest. While the risk did not materialize here, it is real enough. For example, in this context, President Donald Trump, who took office in January 2017, said things before the election that suggest that he is at least sympathetic to anti-vaccine views.[144] While he did not seem to focus on this rule, which was allowed to come into power after the end of the two-months hold the incoming administration put on all new rules,[145] if President Trump or his appointee decided to focus on this rule and the claims on anti-vaccine sites, he might have been sympathetic to the arguments for weakening the rule. While it did not happen, we could not assume that an administration that already has sympathy toward anti-vaccine claims and involves members who are not experts on the subject matter would not order changes based on comments from these groups, even those not based in facts.

Public health is critical part of our regulatory state, and the risk of a weak or wrong rule can be that civil rights are ignored, or that people are literally killed from disease. In this case, the risk did not materialize. Adding a paragraph stating that the rule is not about forced vaccination is not a major change. The clauses about agreements were omitted—but they were addressed by other commenters and, arguably, should have been omitted. But now that the precedent of such calls for action has been set, future efforts to affect the content of CDC rules based on

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[143] Farina et al., *supra* note 11, at 132–37.

[144] Orac, *The long sordid antivaccine history of Donald Trump*, RESPECTFUL INSOLENCE (Sept. 15, 2015), https://respectfulinsolence.com/2015/09/15/the-long-sordid-antivaccine-history-of-donald-trump/. Shortly after the election President Trump caused concern among public health advocates by meeting with anti-vaccine activist Robert F. Kennedy Jr. and, according to the latter, suggesting he head a commission to address vaccine safety. *See* Tara Haelle, *Why Trump's Meeting With RFK Jr. Has Scientists Worried*, POLITICO (Jan. 12, 2017), https://www.politico.com/magazine/story/2017/01/trump-robert-kennedy-jr-vaccines-meeting-autism-214626; Sheila Kaplan & Dylan Scott, *Vaccine Critic Robert F. Kennedy Jr. Says He Will Chair Trump's Vaccine Safety Panel*, STAT NEWS (Jan. 12, 2017), https://www.statnews.com/2017/01/10/trump-vaccine-critic-robert-f-kennedy-jr/. Nothing has so far come out of it, and President Trump's appointees to HHS, FDA, the Surgeon General and the CDC Director were all, apparently, pro-vaccine. But during the early days, there was reason to be concerned.

[145] Reince Priebus, *Memorandum for the Heads of Executive Departments and Agencies*, WHITEHOUSE (Jan. 20, 2017), https://www.whitehouse.gov/the-press-office/2017/01/20/memorandum-heads-executive-departments-and-agencies.

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misrepresentations and "alternative facts," if accompanied by outreach to the President, can lead to weakening of our public health prevention apparatus. In other contexts, too, the risk of misrepresentation-based changes of important rules is real. For example, comments against EPA policy that resonate with its new Administrator. With the right political context—for example, a set of comments like this that also resonate with policy makers or the administration—there could be pressure to make changes that would undermine important rules because of incorrect claims.

It would then be left to the courts to sort those out—and it is not clear whether that could happen. Under the jurisprudence interpreting the arbitrary and capricious standard,[146] rules based on incorrect facts, assuming someone has standing to appeal them, should be struck down.[147] In the Quarantine Rule case, it is not quite clear who, if anyone, would have that standing to challenge changes weakening it.[148] People quarantined clearly have standing to challenge that, but who can challenge removal of quarantine powers? In most circumstances, the risks would be speculative—and when they're not, harm would already be done. States may be able to challenge it as increasing public health costs.[149]

Further, if the agency is challenged, the result would depend on the framing, explanation, and content of the changes—and agencies are experienced and sophisticated in navigating the legal framework, and while they can and do lose in court, often do not.[150]

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[146] 5 U.S.C. § 706(2)(A) (2012).

[147] *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 30, 43 (1983); Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 527 (1997).

[148] This jurisprudence is mostly in the context of environmental law, but the same problems that make it hard for specific plaintiffs to establish standing in an environmental case likely make it hard for a specific plaintiff to bring a generalized public health claim, with no direct risk. *See* Patrick Gallagher, *Environmental Law,* Clapper v. Amnesty International USA, *and the Vagaries of Injury-in-Fact: "Certainly Impending" Harm, "Reasonable Concern," and "Geographic Nexus,"* 32 UCLA J. ENV. L. & POL'Y 1, 8–15 (2014); Niran Somasundaram, *State Courts Solutions: Finding Standing for Private Climate Change Plaintiffs in the Wake of Washington Environmental Council v. Bellon Annual Review of Environmental and Natural Resources Law*, 32 ECOLOGY L.Q. 491, 497–503 (2015).

[149] Disease outbreaks clearly impose costs on public health agencies. Charlotte A. Moser et al., *Funding the Costs of Disease Outbreaks Caused by Non Vaccination*, Fall 2015 J. LAW, MED. & ETHICS 633, 634–35 and tbl.1 (2015).

[150] *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO L.J. 1083, 1100 (2008); William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly*

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B. Solutions?

Starting with what is not an appropriate or feasible solution, the Administrative Procedures Act does not provide good mechanisms to limit participation to those that have read a correct description of the rule (or the rule itself). While adding deliberative mechanisms can help make sure people understand the rule, not every rulemaking is worth the effort or suitable to that.[151] Limiting the ability to comment of those responding to specific articles like here is not legally feasible, and likely not desirable, since it can lead to limiting dissenting voices.

It might be worth considering, however, implementing mechanisms to increase awareness of the rule's content by commenters or potential commenters. I have two mechanisms in mind, and both involve the agency preparing a one-page summary of the rule and a list of question the agency wants addressed. While it is not always easy to boil down a complex rule, and while it would necessarily involve simplifying, such a summary could help in several ways.

One way is that agencies conducting potentially controversial rulemakings (and the CDC, which had to withdraw rules on this subject twice, knew this would likely be controversial) should proactively monitor articles on the subject, and be ready with the one-page introduction to the rule and a list of questions—and have it as the first part of the rule, before the more complex summary. It is very easy to set up three or four Google alerts covering different possible mentions of the rule. If articles suggest that there is going to be a mass comment campaign, having a short and accessible "facts and questions to address" handout that can be sent to such articles or groups can be a way to at least try and correct misrepresentation of the rule. It might not convince groups with high mistrust—but it might help, and is worth trying.

Another, and likely a more useful, way to use such a page is to include in regulations.gov, when commenting, a box with a one-page description of the rule and list of questions that opens before someone can comment, and requires marking that the reader "read" it before commenting. It does not mean people would actually read—just as people do not always read agreements for updating software or installing it on the Internet—but it increases the chances a person commenting will, especially if it is in fact short and visually appealing, and it should be feasible to add to Regulations.gov. This might decrease the incidence of off-topic comments as here. Or at least give pause to some potential commenters.

Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?, 94 NW. U. L. REV. 393, 396 (2000).

[151] Reiss, *supra* note 15, at 321.

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Another potential solution is the use of artificial intelligence to sift through such comments, but that is an area beyond my expertise.

CONCLUSION

As more groups that are outside mainstream channels of access discover the possibility of commenting through regulations.gov, mass commenting based on shared misconceptions may happen more often. The combination of misunderstanding of the rule and mass commenting can place a burden on the agency and create challenges for following the notice and comment process. Even if it does not become a regular occurrence, we can expect it to be an occasional one. Anti-vaccine activists have already mobilized and put out calls to use regulation.gov for two rules and can be expected to do it again.

It is therefore important to consider how this affects the regulatory process, and what can be done to minimize potential harms from the phenomenon.

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Appendix 1:

Table 3: Responses to CDC rule by date August 15, 2016–October 14, 2016

N	Date	What / Title	Where
1	Aug. 15, 2016	NPRM published	Federal Register
2	Aug. 16, 2016	"New Proposed CDC Rule Signals A Shift Toward Transparency"	University of Maryland Center for Health and Homeland Security blog http://www.mdchhs.com/new-proposed-cdc-rule-signals-a-shift-toward-transparency/
3	Aug. 31, 2016	"CDC Gives Itself The Power to Indefinitely Detain Healthy People En Masse Without Appeal"	Pissin' on the Roses Blog http://pissinontheroses.blogspot.com/2016/08/cdc-gives-itself-power-to-indefinitely.html
4	Aug. 31, 2016	"CDC Claims It Can Indefinitely Detain Healthy People Without Appeal"	YouTube Channel https://www.youtube.com/watch?v=HlS7-5snZF8

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N	Date	What / Title	Where
5	Sept. 1, 2016	"CDC Proposes Rule to Apprehend and Detain anyone, anywhere, at any time, for any duration, without Due Process or right of Appeal—and administer FORCED Vaccinations!"	Red Flag, "a 100% independent news-aggregation website"—reprint of Pissin' on the Roses post? http://archive.is/xz6YB#selection-985.0-985.86
6	Sept. 2, 2016	Prisoners of MMR An alarmist rumor misleadingly claimed the CDC was planning to apprehend and detain Americans to administer forced vaccinations.	Snopes http://www.snopes.com/cdc-forced-vaccinations/
7	Sept. 2, 2016	Federal Register | Control of Communicable Diseases (CDC Quarantine rule changes)	Free Republic message board http://www.freerepublic.com/focus/news/3465339/posts
8	Sept. 2, 2016	HHS/CDC Release Proposal for "Control of Communicable Diseases"	Vaxxed the Movie Website http://vaxxedthemovie.com/hhscdc-release-proposal-control-communicable-diseases/

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N	Date	What / Title	Where
9	Sept. 2, 2016	CDC Quarantine Committee Working On Law To Detain, Imprison, and Vaccinate Any American They Deem Necessary	March Against Monsanto website http://www.march-against-monsanto.com/cdc-quarantine-committee-working-to-force-vaccinate-all-americans/
10	Sept. 3, 2016	Andrew Wakefield on CDC Rule Change	Vaxxed the Movie Facebook Page https://www.facebook.com/vaxxedthemovie/videos/643801159130924/
11	Sept. 3, 2016	UPDATE: CDC Proposes Rule to Apprehend and Detain anyone, anywhere, at any time, for any duration, without Due Process or right of Appeal—and administer forced vaccine	Health Nut News http://www.healthnutnews.com/cdc-proposes-rule-to-apprehend-and-detain-anyone/
12	Sept. 3, 2016	ALERT: U.S. CDC Giving Itself Unconstitutional POWERS To Round Up And Detain Citizens En Masse Anytime, Anywhere And Throw Away The Key	Activist Post http://www.activistpost.com/2016/09/alert-u-s-cdc-giving-unconstitutional-powers-round-detain-citizens-en-masse-anytime-anywhere-throw-away-key.html

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N	Date	What / Title	Where
13	Sept. 3, 2016	ALERT U.S. CDC Giving Itself Unconstitutional POWERS To Round Up And Detain Citizens En Masse Anytime, Anywhere And Throw Away The Key	Prepper Dome http://www.prepperdome.com/alert-u-s-cdc-giving-itself-unconstitutional-powers-to-round-up-and-detain-citizens-en-masse-anytime-anywhere-and-throw-away-the-key/
14	Sept. 5, 2016	The CDC medical police state: the right to detain anyone	Jon Rappoport's Blog https://jonrappoport.wordpress.com/2016/09/05/the-cdc-medical-police-state-the-right-to-detain-anyone/
15	Sept. 5, 2016	The CDC Medical Police State: The Right To Detain Anyone Agency on the verge of expanding its power to detain and force medical treatment on anyone	Alex Jones's Infowars https://www.infowars.com/the-cdc-medical-police-state-the-right-to-detain-anyone/ Reprint of article from Jon Rappoport's Blog

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N	Date	What / Title	Where
16	Sept. 5, 2016	Dr. Andrew Wakefield: "CDC Plans To Impose Medical Tyranny" "CDC proposes rule to apprehend and detain anyone, anywhere and at any time for any duration without due process or right of appeal and administer forced vaccinations."	Vaccine Information Network http://www.vaccinationinformationnetwork.com/dr-andrew-wakefield-cdc-plans-to-impose-medical-tyranny/ (Summary of Andrew Wakefield's Sept. 3, 2016 video interview)
17	Sept. 5, 2016	Apprehension, Detainment, and Vaccination for Suspicion of Infection: The CDC's Quarantine Proposal	Green Med Info http://www.greenmedinfo.com/blog/apprehension-detainment-and-vaccination-suspicion-infection-cdc-s-quarantine-prop
18	Sept. 6, 2016	CDC Given Itself Dictatorial Powers To Vaccinate Anyone At Anytime	Aplanetruth.info A Plane not A Planet https://aplanetruth.info/2016/09/06/cdc-given-itself-dictatorial-powers-to-vaccinate-anyone-at-anytime/

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19	Sept. 6, 2016	The Militarization of the CDC Zika, Money, Quarantine Power	Age of Autism http://www.ageofautism.com/2016/09/the-militarization-of-the-cdc-zika-money-quarantine-power.html
20	Sept. 6, 2016	The CDC Medical Police State: The Right To Detain Anyone (Video)	Truth Uncensored http://truthuncensored.net/the-cdc-medical-police-state-the-right-to-detain-anyone-video/ (Video from YouTube user potrblog)
21	Sept. 7, 2016	The CDC Wants YOU! (To Be Vaccinated)	Texans for Vaccine Choice http://www.texansforvaccinechoice.com/online/the-cdc-wants-you-to-be-vaccinated/
22	Sept. 8, 2016	Warning: CDC wants to quarantine and force vaccinate Americans for suspicion of infectious disease	NaturalHealth365 http://www.naturalhealth365.com/cdc-quarantine-1963.html

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23	Sept. 8, 2016	CDC Threats to Force Vaccinate	Dwight Lilly Radio Show with John Hammell http://kcorradio.com/KCOR/Podcasts/The-Dwight-Lilly-Show/2016/September/September-8-2016-John-Hammell-Zika-Virus-The-Dwight-Lilly-Show-KCOR-Digital-Radio-Network.mp3
24	Sept. 9, 2016	National Health Freedom Action's Response to the CDC's Notice of Proposed Rulemaking for Control of Communicable Disease	A Voice for Choice Advocacy http://avoiceforchoiceadvocacy.org/nhfa-response-to-cdc-nprm-communicable-disease/
25	Sept. 9, 2016	COMMENTS by NATIONAL HEALTH FREEDOM ACTION Requesting the Withdrawal of the CDC's Notice of Proposed Rulemaking entitled: Control of Communicable Disease	National Health Freedom Coalition https://nationalhealthfreedom.org/wp-content/uploads/2017/02/CDC-NHFA-Response-to-NPRM-Control-of-Communicable-Disease-Sept-19-2016-FINAL.pdf
26	Sept. 9, 2016	CDC Threats to Force Vaccinate	International Advocates for Health Freedom mailing list http://ymlp.com/zO4fs1

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27	Sept. 10, 2016	By Diane Miller JD September 9, 2016—CDC has proposed a shocking new power grab over personal liberties	Aircrap.org | Monitoring the Planned Poisoning of Humanity | http://www.aircrap.org/2016/09/10/shocking-power-grab-diane-miller-jd-response-to-cdc-medical-police-state/ (reprint of Sept. 9 article)
28	Sept. 10, 2016	CDC's Alarming Quarantine/Communicable Disease Proposal Draws Call To Action from Health Freedom Organization	Green Med Info http://www.greenmedinfo.com/blog/cdcs-alarming-quarantinecommunicable-disease-proposal-draws-call-action-health-fr (Reprint of National Health Freedom Action (NHFA) Response)
29	Sept. 13, 2016	CDC Wants to Expand Power to Eliminate Measles—What You Need to Know and Do Now	Mercola.com http://articles.mercola.com/sites/articles/archive/2016/09/13/cdc-to-amend-public-health-service-act.aspx

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30	Sept. 13, 2016	National Vaccine Information Center Calls U.S. Proposal to Apprehend and Involuntarily Quarantine Travelers for Rashes and Cough A "Violation of Civil Liberties"	Business Wire (press release service) http://www.businesswire.com/news/home/20160913005590/en/National-Vaccine-Information-Center-Calls-U.S.-Proposal
31	Sept. 13, 2016	NVIC Calls U.S. Proposal to Apprehend and Involuntarily Quarantine Travelers for Rashes and Cough A "Violation of Civil Liberties"	The Vaccine Reaction http://www.thevaccinereaction.org/2016/09/nvic-calls-u-s-proposal-to-apprehend-and-involuntarily-quarantine-travelers-for-rashes-and-cough-a-violation-of-civil-liberties/
32	Sept. 14, 2016	CDC's measles hysteria: Proposed rule calls for detention or quarantine of travelers suspected of having a contagious disease	Signs of the Times https://www.sott.net/article/328306-CDCs-measles-hysteria-Proposed-rule-calls-for-detention-or-quarantine-of-travelers-suspected-of-having-a-contagious-disease (Reprint of Mercola article, with new headline)

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33	Sept. 17, 2016	URGENT: CDC Attempts Unconstitutional "Power Grab"	The Truth About Cancer https://thetruthaboutcancer.com/cdc-unconstitutional-power-grab/
34	Sept. 17, 2016	The "Spider's Web" Of Controlling Factors 2016: Understanding The CDC's Power-Grab Proposed Rule On Communicable Diseases	Activist Post http://www.activistpost.com/2016/09/spiders-web-controlling-factors-2016-understanding-cdcs-power-grab-proposed-rule-communicable-diseases.html
35	Sept. 18, 2016	The "Spider's Web" of Controlling Factors 2016	Shift Frequency http://www.shiftfrequency.com/cdc-overreach-reaches-new-heights/ (reprint of Frompovich's Activist Post article)
36	Sept. 18, 2016	SB 277 Fight—We Are Winning. Increase the Pressure . . . How do I know we are winning? Easy? Reactions to our efforts are getting more strident. Near panic reigns . . .	Bolen Report http://bolenreport.com/sb-277-fight-winning-increase-pressure/

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37	Sept. 22, 2016	CDC Proposes New "Rule" To Illegally Detain And Forcibly Vaccinate You	Weston A. Price Foundation https://www.westonaprice.org/action-alerts/2016-action-alerts/cdc-proposes-new-rule-illegally-detain-forcibly-vaccinate/
38	Sept. 22, 2016	CDC Medical Police State—how could it happen?	CDC Mutiny https://cdcmutiny.com/2016/09/22/cdc-medical-police-state-how-could-it-happen/
39	Sept. 23, 2016	CDC's New Rule Will Allow Them To Forcibly Vaccinate All Americans	Your News Wire http://yournewswire.com/cdcs-new-rule-will-allow-them-to-forcibly-vaccinate-all-americans/
40	Sept. 26, 2016	Control Of Communicable Diseases Dissenting Comment To The CDC	Activist Post http://www.activistpost.com/2016/09/control-communicable-diseases-dissenting-comment-cdc.html?utm_source=Activist+Post+Subscribers&utm_medium=email&utm_campaign=940ab8e26e-RSS_EMAIL_CAMPAIGN&utm_term=0_b0c7fb76bd-940ab8e26e-387807929

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41	Sept. 27, 2016	What's At Stake With The Proposed CDC Rulemaking That Has An Open Comment Period Until October 14, 2016?	Activist Post http://www.activistpost.com/2016/09/whats-stake-proposed-cdc-rulemaking-open-comment-period-october-14-2016.html
42	Sept. 29, 2016	CDC To Begin Detaining Travelers For Forced Vaccinations Unless You Do Something About It	Collective Evolution http://www.collective-evolution.com/2016/09/29/cdc-to-begin-detaining-travellers-for-forced-vaccinations-unless-you-do-something-about-it/
43	Sept. 29, 2016	Get Vaccinated or You Can't Fly?	Citizen's Council for Health Freedom (St. Paul, MN) http://www.cchfreedom.org/cchf.php/1205
44	Sept 2016, after the 27th	A Voice for Choice Advocacy strongly opposes the CDC's proposed rules and seeks for the CDC to withdraw the NPRM for Control of Communicable Disease	A Voice for Choice Advocacy http://avoiceforchoiceadvocacy.org/cdc-nprm-communicable-disease-avfca-objects/

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45	Sept. 30, 2016	Part 2: What's At Stake With The Proposed CDC Rulemaking That Has An Open Comment Period Until October 14, 2016?	Activist Post http://www.activistpost.com/2016/09/part-2-what-is-at-stake-proposed-cdc-rulemaking-open-comment-period-october-14-2016.html
46	Oct. 2016	CDC published a Notice of Proposed Rulemaking (NPRM) regarding Communicable Disease!!	Oregonians For Medical Freedom Newsletter October 2016—Oregon Chiropractic Association http://oregonchiroassoc.com/news/24
47	Oct. 5, 2016	What The CDC Has Planned For Us CDC Police Will Eventually Arrest The Unvaccinated As "Diseased Criminals"	Jon Rappoport's Blog https://jonrappoport.wordpress.com/2016/10/05/cdc-police-will-eventually-arrest-the-unvaccinated-as-diseased-criminals/

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48	Oct. 5, 2016	What The CDC Has Planned For Us CDC Police Will Eventually Arrest The Unvaccinated As "Diseased Criminals"	Vaccine Information Network http://www.vaccinationinformationnetwork.com/what-the-cdc-has-planned-for-us-jon-rappoport/ Reprint of Jon Rappoport's article
49	Oct. 5, 2016	Part 3: What's REALLY At Stake With The Proposed CDC Rulemaking That Has An Open Comment Period Until October 14, 2016?	Activist Post http://www.activistpost.com/2016/10/part-3-whats-really-stake-proposed-cdc-rulemaking-open-comment-period-october-14-2016.html
50	Oct. 6, 2016	Proposed Quarantine Law Gives CDC Police Powers To "Apprehend, Detain And Isolate" For Suspected Exposure To Minor Illnesses	Children's Medical Safety Research Institute http://info.cmsri.org/blog/proposed-quarantine-law-gives-cdc-police-powers-to-apprehend-detain-and-isolate-for-suspected-exposure-to-minor-illnesses

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51	Oct. 7, 2016	CDC Proposes Indefinite Detainment, Forced Vaccination and Unlimited Surveillance For Travelers	Stop Mandatory Vaccination http://www.stopmandatory vaccination.com/cdc/cdc-proposes-indefinite-detainment-forced-vaccination-and-unlimited-surveillance-for-travelers/
52	Oct. 9, 2016	Less Than A Week To Go: Did You Send Your Comment To The CDC?	Activis Post http://www.activistpost.com /2016/10/less-than-one-week-did-you-send-comment-to-cdc.html
53	Oct. 10, 2016	Concerns Over Proposed Rules for Preventing Spread of Infectious Diseases	Healthline http://www.healthline.com/ health-news/proposed-rule-for-preventing-spread-of-diseases
54	Oct. 11, 2016	An EPIC Rulemaking Comment Period Regarding the CDC's Power Grab Ends October 14, 2016— What Is Your Position About Its Infringements Upon Your Health?	Liberty Beacon http://www.theliberty beacon.com/epic-rulemaking-comment-period-regarding-cdcs-power-grab-ends-october-14-2016/

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55	Oct. 11, 2016	STOP CDC Proposed Rule for Forced Detention, Isolation, Vaccination and Quarantine	National Vaccine Information Center Federal Action Alert http://www.nvic.org/nvic-vaccine-news/october-2016/stop-2016-cdc-forced-detention-and-vaccination.aspx
56	Oct. 12, 2016	CDC to Require Airplane Personnel to Report 'Unwell' Travelers	Epoch Times http://www.theepochtimes.com/n3/2171209-cdc-to-require-airplane-personnel-to-report-unwell-travelers/
57	Oct. 14, 2016	Health Choice's Mary Holland Comments on CDC's Proposed Rule to Detain Americans and Coerce Vaccination and Treatment	Health Choice (Minnetonka, MN) http://healthchoice.org/2016/10/14/health-choices-mary-holland-comments-on-cdcs-proposed-rule-to-detain-americans-and-coerce-vaccination-and-treatment/
58	Oct. 14, 2016	Arrest and Vaccinate	James Robert Deal Attorney PLLC http://jamesrobertdeal.org/arrest-and-vaccinate/

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59	Oct. 14, 2016	Increased CDC Powers Come into Effect on 10/14/2016 and it is Not Good News!	Steemit https://steemit.com/truth/@steemtruth/cdc-will-own-you-on-10-14-16-3-weeks-from-now-i-m-not-joking-please-read
60	Oct. 14, 2016	Comments by NHF on CDC Quarantine Rulemaking—9/2016	National Health Federation https://thenhf.com/component/content/article?id=4474:comments-by-nhf-on-cc-quarantine-rulemaking-9-2016

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