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Administrative Law

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22 April, 2019

Influential Intersections of Agencies and the American Public

Civil participation is a fundamental value instilled in Americans and essential to functional democracy. The first three words of the Preamble to the Constitution prioritize the voice of "We the People." Engaged citizens deserve access to transparent interaction with the government, and this extends to agency functions promulgated by informal rulemaking, which influences various aspects of public life, from water quality to adequate school lunch cuisine. Section 553 of the Administrative Procedure Act guarantees the opportunity for interested individuals to submit their input on proposed agency action subject to this section, namely informal rulemaking. Using modern technology, the Federal Register website makes amplifying one's voice heard almost as easy as wishing your second cousin twice removed a happy birthday on Facebook. Greater awareness of this tool could bolster the people's trust in the government, which has sharply declined in recent years. This platform also enables people to advocate for themselves, increases awareness of agency happenings and their influence in everyday life, holds agencies accountable, and results in more well-informed rules. This essay examines the purpose and efficacy of public comment on informal rulemaking as well as flaws in the existing notice-and-comment procedures, then assesses available methods to improve these shortcomings.

Although the Framers could not fathom the current expansive administrative state, Great Depression recovery efforts in the 1930's required government intervention and expansion, prompting the implementation of many new regulatory agencies. These institutions occasionally

transgress their boundaries and limit the rights of individuals. As a safeguard to protect the interest of the private person, the Administrative Procedure Act was enacted to facilitate efficient agency action with consideration for external participation. Section 553 of the Administrative Procedure Act lays the groundwork for the notice-and-comment procedure as it pertains to informal rulemaking. The APA definition of a rule is, "an agency statement of…future effect designed to implement, interpret, or prescribe law or policy…" (§551 (4)). Informal rulemaking, then, is used to enact any rule that may dictate future agency action under the circumstances of the proposed rule. It is the default rulemaking procedure unless a proposed rule is published pursuant to a statute which mandates formal rulemaking procedures.

Certain types of informal rulemaking are excluded from notice-and-comment procedures. §553 of the APA does not apply to rules involving military or foreign affairs, because these rules may contain information about national security that, if readily available, could jeopardize the safety of American citizens. Rules that only apply to agency management and personnel, which generally dictate day-to-day operations and conduct of agency employees, are not required to undergo notice and comment, since the public is not directly affected by the number of Keurig cups that government employees are allowed to take from the break room. Rules pertaining to public property, loans, grants, benefits and contracts are also exempt from §553 procedures because, "when the government regulates its own property, or makes grants, loans, or benefits available to persons, or enters into contracts with persons, it is not restricting or imposing its will on the liberty of private persons" (Funk 74). Section 553 is also not applicable to general policy statements, defined as, "A statement issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power," nor interpretive rules, which are intended to inform the public of "the agency's construction of the statutes and

rules which it administers" (Funk 339). These instances are considered nonlegislative rules because they are not binding and are typically used to instruct the public rather than implement new rules and regulations.

Informal rulemaking is the bread and butter of administrative law. Formal rulemaking procedures, subject to the regulations detailed in APA §556 and 557, are only triggered "[w]hen rules are required by statute to be made on the record after the opportunity for an agency hearing, "…or by similar language mandating public comment to be made on the formal record" (Funk 92). The distinction between whether or not a formal hearing is warranted was contested in *United States v. Allegheny-Ludlum Steel Corp.* 406 U.S. 742 (1972), when railroad shippers sought judicial review for a regulation promulgated by the Interstate Commerce Commission. They argued that the Esch Act mandated all ICC rulemakings to be made "after hearing," and presumed this language to be equivalent to the "on the record" requirement which triggers formal rulemaking procedures. Upon appeal by the Supreme Court, Justice Rehnquist declared that statutes which mandate formal rulemaking do so deliberately, so if the Esch Act necessitated formal rulemaking, it would contain language that explicitly indicated hearings be made "on the record." The courts' deference to informal rulemaking unless a rule is promulgated pursuant to a statute which designates otherwise was upheld in subsequent decisions, *United States v. Florida East Coast Railway Co* 410 U.S. 224, 93 S. Ct. 810, 35 L. Ed. 2d 223, (1973) and *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council* 435 U.S. 519, S. Ct. 1197, 55 L.Ed.2d 460 (1978). To curtail appeals in which parties complained they were entitled to a formal hearing, *Vermont Yankee* establishes, "[a]gencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have chosen not to grant them" (Funk 94). This ruling works to the

layperson's advantage because it prevents notice-and-comment from being reserved for the elite inner circle who have the ability to appear and present their comments in person. As these cases exemplify, agencies primarily depend on informal rulemaking notice-and-comment procedure and courts defer to these measures unless blatantly noted, so it is important to proliferate a comprehensive understanding of the process at the heart of civic involvement into agency matters.

When promulgating an informal rulemaking subject to the procedures under §553 of the APA, the initiating agency must give notice of the potential rule. While it is provided in §553(a) that notice is sufficient if, "persons subject thereto are named and either personally served or otherwise have actual notice," most agencies post notice to the Federal Register because if it is published on the Federal Register, it has met the conditions required in the Act, whether or not a party seeking judicial review on a rule was aware that it was made available. Proposed rulemaking notices must include, "…a statement of the time, place, and nature of the public rulemaking proceedings," which are generally fulfilled by listing the length of time that the rule will be available for comment to satisfy the "time" condition, and instructions on how to submit comments to the Federal Register to satisfy the "location" clause. APA §553(b)(2) requests that agencies cite, "the legal authority under which the rule is proposed," so that commenters are cognizant of whether the agency has been delegated the authority to promulgate the proposed rule. The third substantive guideline, §553(b)(3), mandates that the posted notice contain, "either the terms or substance of the proposed rule or a description of the subjects and issues involved." To avoid challenges based on inadequate explanation, agencies often post the contents of the rule itself, along with a preamble explaining why this rule is being proposed. Agencies that depend heavily on technical and scientific data to formulate rules have also been mandated to include

their figures so commenters can evaluate the validity of the research that prompted the action. This precedent was established in *Portland Cement Association v. Ruckelshaus* 486 F.2d 375 (D.C. Cir. 1973), where the EPA was promulgating new performance standards for cement plants based on test results which were not included in the substance of the proposed regulation. Petitioners complained they could not accurately assess the grounds for the proposed regulation without the test data. The rule was remanded to EPA to undergo a new comment period during which interested parties had access to both the rule and the test outcomes. This function of the notice-and-comment period allows citizens to hold agencies accountable for using solid science to support the rules. As indicated by the outcome of *Portland Cement Association v. Ruckelshaus,* agencies can avoid the rigmarole of judicial review and additional notice-and-comment procedures if they proactively divulge all pertinent information and research when the proposed rule is initially published.

Public comment allows agencies to receive input about potential issues with a rule from all sides, which often illuminates concerns the agency failed to consider. One such example is *Chocolate Manufacturers Association v. Block* 755 F.2d 1098 (4th Cir. 1985). The Food and Nutrition Service of the USDA published a proposed rule which requested feedback regarding high sugar content foods that should be excluded from the subsidized lunches provided for beneficiaries of the Special Supplemental Food Program for Women, Infants and Children. The preamble expressed specific concerns about the sugar content of cereals and juices, but also generally requested a wide scope of input. Seventy-eight comments were received from participants and executive members of the WIC program suggesting that chocolate milk be cut out of the food packages. The final rule reflected these suggestions by eliminating chocolate milk, much to the dismay of petitioners, Chocolate Manufacturers Association. They argued that

the substance of the rule contained lengthy assessment of sugar contents of juice and cereal, but does not extend this same level of consideration to chocolate milk. This lack of discourse weighing the benefits of chocolate milk disadvantaged CMA because they were unaware that they should be defending the inclusion of chocolate milk since they did not know its removal was being considered. Justice Sprouse of the 4th Circuit reversed this rulemaking because the agency did not explicitly suggest that chocolate milk was under scrutiny, and in the final rule, the agency failed to sufficiently explain the reasoning for their decision. This case established the "logical outgrowth" standard, which dictates that a proposed rule notice is inadequate if the final rule, "substantially departs from the terms or substance of the proposed rule." However, if the agency had sufficiently notified interested parties that chocolate milk was under consideration, this case would be a prime example of the potential influence that comments can have on rules, particularly when they come from people who are immediately affected by the outcome rather than big industry interests. Even though the alterations were determined to be outside the scope of consideration noted in the preamble, public input urged the USDA to issue a rule reflecting the desires and concerns of interested parties which had previously not been deliberated. Following this decision, the court instructed the agency to reopen the comment period to allow CMA to submit counterarguments and foster a comprehensive discourse of the pros and cons of chocolate milk. The extent to which this discourse was transformative and provoked agency action reiterates the purpose of the notice-and-comment period to give a voice to the American people and allow agencies to proliferate rules that balance the needs of citizens with the duties of government.

Significant comments can provoke, alter, or halt agency action if they are relevant to the issues at hand. Unfortunately, valuable input can be swept away in the deluge of comments that

some proposed rules receive, so it is crucial that valuable comments are constructed effectively. Regulations.gov, an alternative to the Federal Register, recommends that users pay attention to issues that the agency has flagged for reconsideration, often listed in the summary. It also suggests that contributors cite evidence to support why they agree or object to the rule, identify their credentials and why they have a vested interest, and consider both sides of the issue at hand. Additionally, it is important that commenters are familiar with background information as well as the politics that underlie the intentions of the proposed rule. When expressing dissent, provide personal examples about the rule's potential negative impact, and suggest an alternative that would remedy the issue at hand. Comments that include situated knowledge, information that the agency would not otherwise have access to, and display a nuanced understanding of the issues at hand are the most beneficial to the agency, so be sure to include this knowledge if it is available. Under APA §553, there is no designated length of time that rules must be open for comments besides a provision mandating final rules to be posted 30 days before the date they take effect. Some rules are subject to statutory time requirements, but most proposed rules are available for approximately 60 days, and agencies are flexible about extending the deadlines for controversial rules (Funk 111). However, to write a substantiated comment, allot enough time to conduct the necessary research and write an eloquent response. Towards the end of a controversial rulemaking comment period, agencies often receive flurries of comments hoping to be at the top of the docket when comment review begins, so try to avoid being mixed in with these last ditch efforts.

When comments are submitted past the deadline or through back-alley contact with rulemakers, public interest is compromised because their contribution is discounted by interest groups and powerful officials pressuring agencies to prioritize their concerns. Appropriate

procedure for dealing with ex parte communications was contested in *Home Box Office v. Federal Communications Commission* 567 F.2d 9 (D.C. Cir. 1977). To protect the survival of broadcast television in the wake of cable programming, the FCC enforced strict regulations on cable content. When the FCC began deregulation, at least 18 fearful broadcast industry executives and interests sought direct counsel with agency officials, violating the comment procedure in place to ensure all voices are given equal consideration. In examining the executives' transgressions, courts clarified appropriate agency ethics, instructing them to refuse conversation about a proposed rule that operates outside of the framework in place to receive comments.

To redress the insufficient record, the courts insisted that involved officials submit, "any written document or a summary of oral communication must be placed in the public file established for each rulemaking docket immediately after the communication is received so that interested parties may comment thereon" (Funk 117). This solution is not ideal, because these parties who have already violated procedures in place which safeguard honest, just legislation are again being trusted to truthfully disclose conversations which must have been proprietary to some extent if they felt the need to suppress them in the first place. The courts have stated that ex parte communications stand in violation of due process when they are found to have significantly altered the outcome of the rulemaking so much that it would have been different if these exchanges have not occurred, but attempting to discern what decision the agency would have made otherwise is pure speculation.

Discussions in the shade only serve the interests of connected parties, which undermines the usefulness of the public comment period. Such ethical transgressions highlight shortcomings in the existing comment procedure, and acknowledging them makes space for interventions to

address what is working about current practices for notice-and-comment and what needs to be improved. To reconcile current online public comment practices, we must first echo the goals of these procedures, which Cary Coglianese, Heather Kilmartin and Evan Mendleson identify in their article, "Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration." They inquire, "How can the rulemaking process be designed to advance the twin goals of legitimacy and quality in agency decisionmaking?" (926). Positing this question situates the crux of informal rulemaking notice-and-comment around fairness, transparency and genuine consideration of citizen contribution. These objectives benefit interested members of the public by supplying pertinent data to further the clearest possible understanding of an agency's intentions and the implications of rules. Feedback that agencies receive from commenters is mutually beneficial because it enhances the agency's ability to understand the needs of the people. It holds them accountable for setting forth valid legislation because, "…under the microscope of public scrutiny, regulators are reluctant to choose policies that are sloppy or expedient" (928). While at times agencies may consider notice-and-comment as a hindrance, it is likely preferable to promulgate quality legislation from the outset rather than having to undergo the hassle of an initial comment period and judicial review, only to be told to retroactively propagate the rule under the procedures that should have been followed in the first place.

While these goals are the primary focus of improving informal rulemaking notice-and-comment, it is necessary to balance the desired level of participation with administration efficiency. Unfettered public comment inevitably results in procedural ossification, an outcome that neither side desires. Coglianese and colleagues assert, then, that agencies should seek to solicit quality comments from diverse points of view, as opposed to mass quantities of redundant

arguments. The threshold for a constructive level of transparency follows a similar rule. The information that agencies choose to disclose in the proposed rulemaking administrative docket needs to be comprehensive and comprehensible, but commenters are not privy to the inner machinations of agency officials because, "Decisionmakers do need some protected space in which to think critically and even ask “dumb” questions" (929). Excessive transparency may also discourage private interests from contributing their voice due to a fear of proprietary information being compromised.

The abstract objectives of informal rulemaking notice-and-comment and their tedious equilibrium can be applied to the United States existing framework and practices to identify where improvements should be made. Coglianese, Kilmartin, and Mendelson first identify how the existing procedures for obtaining public input occurs too late in the rulemaking process. Composing a rule entails considering all statutory requirements, collecting data to support the agency's reason for making the rule, and potentially conducting cost benefit and environmental impact reports, just to name a few possible additional procedural impositions. Putting this significant amount of investment into the proposed rule makes agencies apprehensive to accept beneficial suggestions that might require them to replicate these studies with under the new provisions. Additionally, the "logical outgrowth" standard for how much a final rule can deviate from the proposal forces agencies to initiate another comment period when numerous people suggest the same modifications. Conversely, opening the proposed rule for comment early in the process disadvantages some eager commenters, because the agency may still be adding supporting documents to the rulemaking docket. Inaccessible data prevents the public from making fully informed arguments for their stance on a rule, thus, "the participation that does occur will likely be less informed and therefore potentially less helpful or meaningful than it

otherwise could be" (Coglianese 933). Without adequate data, agencies lose out on potentially beneficial advice from the public because parties were not afforded adequate resources to support their recommendations.

Concern about violating ex parte communication restrictions often prevents agencies from reaching out to groups who may have an under voiced perspective, even though the courts have repeatedly stated that interagency discussions are the bread and butter of administrative policymaking. This wariness narrows the scope of opinion that a rulemaking might receive because agencies avoid reaching out to underrepresented groups, assuming they will be admonished for ex parte contact. As a result, these groups may miss the opportunity to participate in the discourse. This unilateral tendency lends itself to another deficiency of current procedure, that platforms such as the Federal Register do not facilitate actual debate about the terms of rules and regulations because there is no option to respond directly to a comment. Federal Register comments are published under a nondescript numerical identification, and the comment landing page shows no substantive preview which might pique the interest of other commenters. Such ambiguity dissuades participants from reading any other comments, because they have to click aimlessly until they find a comment related to their opinion on the rule. Not reading other comments causes people to submit repetitive comments, which ossifies the agency post-comment revision period. On the other hand, they are also not drawn to read any of the comments that might introduce an explanation for the rule that they may agree with, or that may clarify a general misunderstanding. Regulations.gov provides a glimpse at comment content, but also fails to allow direct replies. The uninformative nature of the Federal Register's comment preview and the lack of a response function are substantial impediments to creating an ideal comment forum.

To advise the then-new Obama administration on how to redress the weaknesses of the existing online notice-and-comment process, OMB Watch established the Task Force on Transparency and Public Participation. Members came from academic communities, NGOs, government employees, and business and special interest advocates. Balancing the need for transparency and meaningful public participation with agency efficiency and their latitude for discretion, the Task Force suggested that agencies should implement experimental interactive comment periods, "for rulemakings in which (1) the issues involved are extremely technical or complex; (2) comments filed in the initial round of commenting raise new or unanticipated issues; or (3) comments filed in the initial round of commenting contain significantly conflicting data" (Coglianese 947). This interactive method would institute a secondary rebuttal phase so that initial participants may read adversarial comments and respond during the second round. The Task Force claims, "This two-round approach would assist commenters and the agency staff in evaluating underlying data, assessing arguments offered by others, improving the quality of information available to decisionmakers…[and] removing the strategic incentives to make extreme or unsupported claims or to file last-minute commentary" (948). Although this design is less discursive than other structures might be, commenters are still able to defend their position from attempts to undermine its credibility and agencies receive multifaceted debates that examine divergent views without being hindered by incessant counterarguments. This approach will also streamline agency review because comment readers will be working with stronger arguments

Turning to the conflicts of agency transparency and avoiding ex parte communication while trying to garner the most diverse input possible, the Task Force recommends, "The new administration should strive to create an agency culture in which administrators understand that

communications with outsiders during informal rulemaking are not only permitted, but are also beneficial if documented transparently" (949). This paradigm shift moves away from demonizing all extra-agency interactions with affected parties, such as industry interests, because they are mostly innocuous, essential to efficient agency function, and will happen regardless. Making these conversations available to the public for comment eliminates the possibility of having, "one record for the people, and another for the Commission." Sanctioning these meetings, as long as they are conducted in a transparent manner, permit agencies to meet with interested parties and factor in their perspectives prior to the publication of the proposed rule. These preemptive considerations allow agencies to be more flexible in modifying final rules as a response to comments, because major concerns will have been attended to in the original making of the rule.

Maximizing transparency in the informal rulemaking notice-and-comment process is intended to increase meaningful public participation so that agencies can enact legislation that satisfies a majority of affected subjects. Unfortunately, elevated citizen input often manifests in the form of mass comments as stipulated by activist groups, which reiterate a simplified objection to a rule rather than offering fresh, insightful angles. To curtail this "magical thinking" about the causal assumption that more participation is inherently better, Cynthia Farina, Mary Newhart, and Josiah Heidt penned, "Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts." The authors propose alternative trajectories for rulemaking based on an experiment at Cornell dubbed the Regulation Room, which focuses on, "discovering how information and communication technologies (ICTs) can be used most effectively to engender broader, better participation in rulemaking and similar types of complex public policymaking" (Farina 125). Current modes of thought that conflate "more" comments to mean more "quality" contributions contradict the reality of widely utilized technology for participating in agency

decisions. Agencies receive astronomical numbers of comments on controversial rulemakings as part of advocacy campaigns for various causes. The authors cite, for example, "…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," as just one instance that an influx of comments has inhibited agency action rather than improving it (127). In her essay, "Should Mass Comments Count?", Nina Mendelson reflects on the actual impact of these comments by analyzing the preambles of final rules that instigated a comment blitz, concluding that generally, agencies acknowledge the concerns raised by these groups of petitioners, but otherwise disregard their contribution. She goes on to assert that while these comments may not offer unrealized situated knowledge, value-based citizen comment should be given a certain weight, because, "When choices among competing values must be made, government should be attending to citizens' value preferences," at least to the extent that they are relevant and can be accommodated (132).

Having attributed the appropriate weight to give mass comments, Farina and partners prioritize submissions authored by participants whose input is based in their informed and adaptive policymaking preferences. These contributions are most often supported by tangible evidence and are more likely to provide situated knowledge, or, "information about impacts, problems, enforceability, contributory causes, unintended consequences, etc. that is known by the commenter because of lived experience in the complex reality into which the proposed regulation would be introduced" (148). Data concerning dilemmas that agencies may overlook has the most potential to influence rules and regulations, so Cornell researchers suggest that government modifications to existing notice-and-comment procedure should extend the use of optimized Rulemaking 2.0 technology to rules and audiences which hold such situated knowledge. The functions of this technology are best applied to enable interest parties whose

opinions are typically under voiced. Utilizing these reformed platforms in conjunction with existing programs, such as Regulations.gov and the Federal Register, is an innovative solution which upholds the democratic principles of participation and transparency while balancing agency need for situated knowledge that drastically affects their legislation but is often silenced.

The government was created to serve the needs of the people, so it only makes sense that in this modern era, we utilize available technology to bridge this gap between the two entities. These intersections of the public and the U.S. government encourage compliance because contributors feel a sense of fairness when given the opportunity to influence the rules and regulations they are beholden to, so it is in the best interest of the agency to facilitate meaningful participation in order to reduce the need for later enforcement efforts. Under this current administration, where even the value of the vote has been brought into question due to evidence of Presidential team members colluding with Russia to sway election outcomes, it is imperative that citizens are reassured that their opinion counts. Implementing these optimized notice-and-comment programs for hotly contested proposed rules enables citizens to make their voice heard where it matters. Raising awareness among diverse, underrepresented groups about these channels for influencing agency action will bolster citizens' trust in the government and inspire people to reinvigorate the Constitution's opening proclamation which empowers "We the People" to take change into their own hands.

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