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# Fundamentals of Rulemaking

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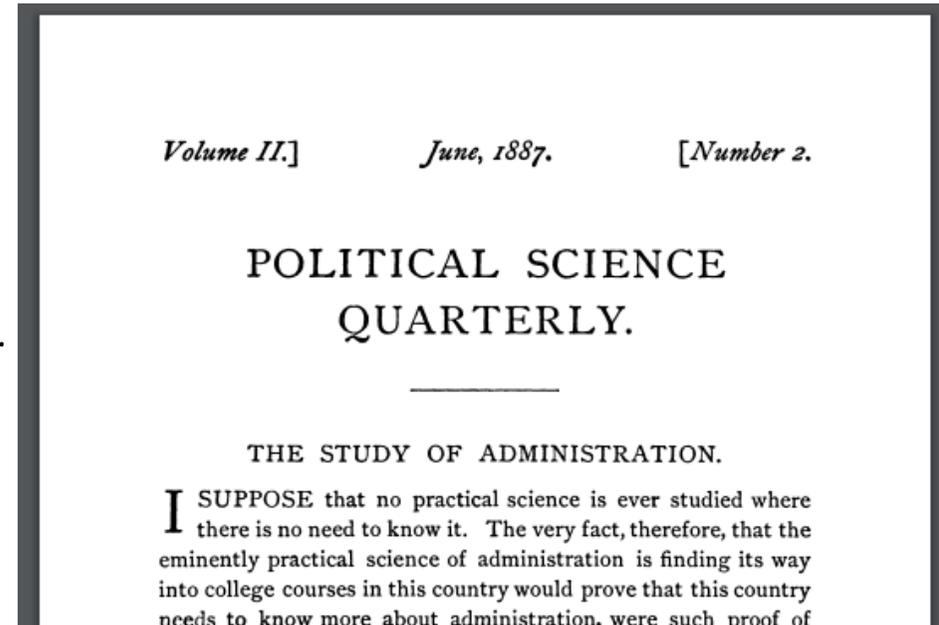
How to Influence the  
Regulatory Process  
(Advanced  
Considerations)

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# The Rulemaking Process

# Principles of the Administrative State

- The regulatory process has its foundations in the Progressive Era and the same principles and basic structures envisioned then remain largely unchanged.
  - Modern society too complex for politicians to govern through divided system of government.
  - Public policy and the administration of government is a science, which has a right and wrong answer. Expertise can perfect public policy.
  - Public policy, therefore, should be made largely by experts who are separate from politics.



# Regulatory Process is the Compromise between these Principles of Administrative State and the Constitution

- How can we square these principles with the Constitution?
  - Lawyers. Lots of lawyers.
- Delegated power -- can only exercise power given by Congress or the President.
- As importantly, a robust process that holds these powerful administrators accountable through the public, the elected branches, and the courts.
  - Administrative Procedure Act (1946).
  - State analogues.

# Basic Process

- Notice of Proposed Rulemaking
  - Published in the Federal Register.

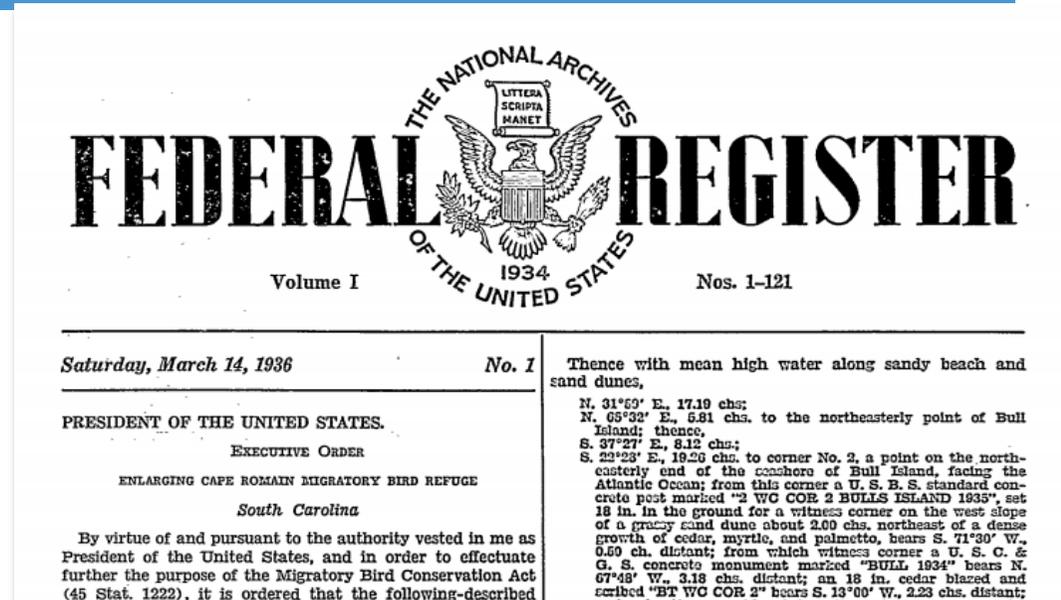
- Period for Public Comment

- Normally 30-60 days.
- May or may not include public hearings.

- Agency consideration of public comments

- Final Rule

- Effective, generally no sooner than 30 days after published in Federal Register.



# Advanced Process

- Unified Agenda
  - Agencies generally publish their plan for the year – know what’s coming.
- Working groups or other advisory groups.
  - Often write the regulations that agency will consider.
- Petitions for Rulemaking
- OIRA (Oh-eye-ruh)
  - OMB’s review of “significant” regulations.
- Congressional Review Act
- Judicial Review

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# Rulemaking at the State Level

# States are Becoming Increasingly Active in Regulatory Space

- Federal government is generally not passing a lot of laws.
  - Federal agencies are embarked on de-regulation efforts, which will itself involve the regulatory process.
- States are reacting, in going one of two ways:
  - Passing “replacement” regulations.
    - Environmental
    - Consumer protection
    - Health care/insurance
  - Undertaking their own de-regulatory push.
- Predict: state regulatory processes will become more complex, more sophisticated, and more like the federal system.

# State Processes Already Parallel to Federal

- State administrative procedures are usually similar to federal.
- State Legislatures normally have more active role in legislating, so much of the regulatory push will come from the State Legislatures.
- State processes attract very little interest or participation.
  - Wide open – strong public policy advocacy at the state level can be very effective in shaping outcomes.

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# How to Influence the Regulatory Process (Basics)

# The Basics: Know the Process

- The regulatory process will grind on with or without you.
- To be heard, you must know when the regulatory process is at work, so pay attention:
  - The more technical and specific your interest, the less likely it will be in the papers before it is too late!
  - Regulations.gov – Great tool.
  - Reginfo.gov – OIRA's tracking tool.
- Set up alerts, follow actions that may be of interest, and stay current.

# The Basics: Public Comment

- The Public Comment period is the time for stakeholders and other interested parties to let the agency know their views.
- If there was no “pre-rule” group that considered the rule, then the first Notice of Proposed Rulemaking is likely the first written, public regulation.
- System is designed to allow open input that is transparent:
  - Judicial review requires that rulemaking be done on the record at the agency, meaning the public comments and the agency’s review process.
- So, if you want to have views heard, submit Comments!

# The Basics: Effective Public Comments

- Public Comments should be relevant, substantive, and directed at the issue before the agency.
- Include legal and policy arguments.
  - If believe the agency is acting outside of its authority, say so. But don't only say that – agencies will likely have already considered issues, so focus most on the policy.
- Support your positions *with evidence*.
  - Emphasize BENEFITS if you support.
  - Emphasize COSTS if you oppose.
  - DON'T JUST SAY IT—PROVE IT.

# The Basics: Effective Public Comments

- Public Comments: Who is the Messenger?
  - Depends on the issue.
    - Trade associations are frequent players to gather common interests and promote them before an agency.
    - Former regulators or respected technical experts.
    - Build coalitions of interests.
  - If there are public hearings, generally want a presence, but the “play” all depends on the circumstances.
  - Big PR stunts or other mass messaging strategies – they are not likely to be directly effective, but could nonetheless be worthwhile for indirect effects.

# The Basics: (Substantive) Public Comments Matter

- Regulators want to enact good public policy.
  - Where data and facts support one position over another, they want to know about it.
  - Oftentimes, the decision-makers are not themselves experts on the subject-matter, but the agency staff is. Public comments are your only ability to get them to pay attention to facts and opinions they do not otherwise have.
- Public Comments are not an election!
  - While strong opposition or support from the public or key stakeholders will be considered, the entire *purpose* of the administrative process is for the agencies to make decisions based on reasoned analysis, not an opinion poll.
  - Treating the comment period as such is not effective and even counter-productive.

## The Basics: (Substantive) Public Comments Matter (cont)

- Judicial Review!!!
  - The agency must consider the public comments it receives.
  - Substantive, factual public comments create the foundation to either support or oppose ultimate agency action in court proceedings.
  - Sophisticated advocates know this, and they proceed to either put in comments to support or oppose an action with an eye towards what a reviewing court will see.

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# How to Influence the Regulatory Process (Advanced Considerations)

# Advanced Considerations: Know Your End Game

- What do you want to happen, and what is the likelihood?
  - If very technical and non-ideological, may not need much more than straight-forward participation in the regulatory process.
  - If controversial, then need to have a multi-dimensional approach.
- Know the process that it will undergo – is it an executive agency or independent?
  - Is there a working group or other advisory group involved? Be involved EARLY.
  - Will OIRA review it?
  - Who at the agency will be writing it, reviewing it, advising on it?
- Know who the stakeholders will be.
  - Politically powerful?

## Advanced Considerations: Work the System

- Consider whether, when, and how to engage with political branches.
  - OIRA Review
  - Congressional action?
    - APPROPRIATIONS – Congress can exert great power over agencies through the appropriations process. Know who those players are.
      - In state government, this pressure can be even stronger – Virginia budget is full of legislative mandates to stop or start regulating something.
    - Congressional Review Act (unlikely to be necessary or available).
  - Do not get too cute, though – undue influence can jeopardize a rulemaking.

# Advanced Considerations: Work the System

- Judicial Review
  - Either way, controversial rules will likely be challenged.
  - If this is where it is going, then know that at the beginning – act accordingly.
    - Help the agency with comments if support.
    - Help the opposition with comments if opposed.
  - Remember deference to agencies is substantial.

# Advanced Considerations: Work the System

- TIMING!
- Align the regulatory calendar with the political one.
  - No one has a crystal ball, but think about it.
  - Will there be new people in office?
  - Generally, if you oppose something, delay is your friend. If you support something, delay is your enemy.

# Advanced Considerations: Work the System

## BUT REMEMBER:

- No substitute for embracing the regulatory process.
- Make the arguments. Be responsive. Be persuasive. Give them no reason to dismiss your views.
  - Oftentimes, regulators make decisions based on thin records and without much engagement.
  - Showing up is the most important step to influencing the regulatory process.

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