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IN FOCUS

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Communications Between Congress and Federal Agencies During the Rulemaking Process

Congress often delegates legislative authority to federal agencies in statute. Using that authority, agencies issue regulations to implement legislative objectives and programs. Regulations carry the force and effect of law and are often where the details of federal programs and requirements are established. Thus, regulations can have substantial implications for policy implementation.

In light of the legal and policy importance of federal regulations, congressional committees and individual Members often monitor how an agency implements delegated authority. For example, during the course of an agency rulemaking, Congress may seek information about the status or content of a particular proposed rule. Agencies, however, are sometimes unwilling to share that information. Two justifications are often given for this reluctance: a desire to avoid written or oral off-the-record communications, which are sometimes referred to as *ex parte* communications, and a desire to protect the confidentiality of internal communications that reflect agency deliberations.

This In Focus discusses the legal principles and practical hurdles that sometimes inhibit the flow of information from federal agencies to Congress during the rulemaking process. It does not address formal oversight mechanisms Congress has for requesting or requiring information from federal agencies, such as Congress's subpoena power.

Congressional Communications During the Rulemaking Process

The Supreme Court held in *INS v. Chadha*, 462 U.S. 919 (1983), that once Congress delegates authority to an agency, that authority may not be "altered or revoked" except through a subsequent legislative enactment. However, in its delegations of authority, Congress often gives agencies significant discretion to choose from a range of policy options. Over the course of an agency's rulemaking process, therefore, opportunities may exist for Congress and the public to steer the agency in a particular direction.

In seeking to exert influence over agency rulemaking proceedings, Congress has substantial tools at its disposal. Oversight is one such tool, and it can include not only formal hearings and investigations but also informal communications between the agency and lawmakers.

Federal laws including the Administrative Procedure Act (APA) do not prohibit Members or congressional staff from attempting to influence ongoing agency rulemakings by communicating their views and preferences directly to the agency. Courts have said that such action is both expected as part of the Member's representational duties and generally viewed as "entirely proper." *Sierra Club v. Costle*, 657 F.2d 298, 409 (D.C. Cir. 1981). This is true even with respect to *ex parte* communications made during the rulemaking process. The APA generally prohibits *ex parte* communications with anyone outside the agency, including Members of Congress, in "formal" agency rulemakings and adjudications. However, there is no such prohibition on *ex parte* communications during traditional notice-and-comment (also known as "informal") rulemaking, the method most often used to promulgate federal regulations.

Although legally permitted, there are reasons why an agency may be reluctant to engage in *ex parte* communications during notice-and-comment rulemaking, including with Members of Congress. First, if a rule was developed (or was perceived to have been developed) outside of the rulemaking process, the public's confidence in the rule and the rulemaking process could be compromised. Second, under modern administrative practice, an agency generally builds a rulemaking record, which contains public comments, scientific studies, notices, and other materials the agency relied on to make its decision. Among other potential benefits, this record assists courts with judicial review of agency rules. In light of the current practices involving rulemaking records, agencies may be particularly hesitant to engage in off-the-record communications—lest a reviewing court decide that the agency's decision was wholly or in part reliant on information it did not include in the record. If a court were to make such a finding, it could vacate the rule.

In an attempt to balance the potential benefits from additional input against these concerns, agencies may have formal or informal policies governing their *ex parte* communications. For example, some agencies require summaries of any *ex parte* communications, including those received from Congress, and require these summaries to be placed into the public rulemaking records associated with the agency rules.

Improper Influence

While Members are generally free to voice their views on a rule directly to the agency, there may be rare instances in which a Member's attempts to influence an agency rulemaking could create legal concerns. Courts have suggested that an agency rule could be jeopardized if a Member attempts to impose "extraneous" or "improper" pressure upon an agency and if it can be proved that the agency's rulemaking was in fact affected by that pressure. *See, e.g., D.C. Federation of Civic Associations v. Volpe*, 459 F.2d 1231, 1237 (D.C. Cir. 1972).

Identifying when appropriate attempts at persuasion or legitimate uses of political leverage cross into improper political pressure is not easily done. Federal courts have suggested that agencies are generally "expected to balance Congressional pressure with the pressures emanating from all other sources." *Costle*, 657 F.2d at 410. Members voicing their views on a rule is nearly always appropriate. Things become murkier, however, when a Member threatens adverse action against an agency in an effort to influence the outcome of a rulemaking. One court suggested in a 1971 decision that a Member attempting to influence an agency rulemaking by threatening to withhold funding for an unrelated agency program is the type of "extraneous" or "improper" pressure that could put a rule in jeopardy—at least when it can be proved that aspects of the rule were "based in whole or in part on the pressures emanating" from the Member. *Volpe*, 459 F.2d at 1246.

Congressional Communications Regarding Agency Decision-Making

In addition to communicating their views to an agency, Members of Congress and staff may also wish to gain insight into the agency's internal deliberative process during a rulemaking. This may be especially true during the earliest stages of the rulemaking process, when an agency is most likely to be considering various regulatory approaches and is perhaps most open to a variety of regulatory outcomes and susceptible to influence.

While informed congressional oversight often involves access to internal agency communications, agency deliberations relating to an ongoing rulemaking are sometimes protected by the deliberative process privilege (DPP). A component of executive privilege, the DPP is a common law privilege with possible "constitutional dimensions" that applies to agency documents and communications that are both "predecisional" (created prior to the agency reaching its final decision) and "deliberative" (related to the thought process of executive officials). *See. e.g.*, *Committee on Oversight and Government Reform v. Lynch*, 156 F. Supp. 3d 101, 104, 108 (D.D.C. 2016). This would cover information on how and why an agency moved toward a certain policy choice and information that would prematurely disclose the agency thought process, including a variety of early-stage rulemaking documents such as leadership and staff recommendations and proposals, draft rules, and internal policy debates. The DPP is frequently implicated in congressional oversight investigations, because it gives protection to the very decisionmaking process that Congress is trying to understand.

While the DPP may be a hurdle to Congress and its Members gaining access to an agency's deliberations, it is not an absolute bar to congressional oversight of an ongoing agency rulemaking. First, the DPP does not protect factual information. Thus, Congress may access materials that are essential for informed and effective oversight, including research and data that forms the underlying basis for a proposed rule. In addition, the DPP does not protect entire documents. Rather, the executive branch must disclose non-privileged information that can be reasonably segregated from privileged information in the requested documents. Finally, even when applicable to a given document or communication, the DPP can be overcome by a sufficient showing of need. Thus, if Congress has an adequate oversight interest, or if there are allegations of agency misconduct, the protections of the DPP give way. *See, e.g.*, *Lynch*, 156 F. Supp. 3d at 105.

The DPP does not prohibit an agency from disclosing information. Asserting the DPP in response to a congressional request is a choice an agency may make when certain information is requested, but it does not have to do so.

Additional Options for Congress to Engage in the Rulemaking Process

As described above, agencies are generally not prohibited from communicating with Congress about specific rulemakings. Where difficulties are encountered, Congress has other avenues for engaging in the rulemaking process and influencing the outcome of rules.

The most direct way for Congress to influence rules is through legislation. Congress can direct an agency to take specific actions, or it can prohibit agencies from taking or finalizing certain actions. Congress's power of the purse gives it control over how agencies use appropriated funds. Congress can, for example, deny funds to finalize or implement a rule. Congress can also hold hearings on rules under development (though, at times, agencies have asserted the DPP when asked about rules under development).

Members of Congress, like members of the public, can submit comments to an agency on a proposed rule during the public comment period. Agencies are not required to treat comments submitted by Members or committees differently from other comments, but a letter from a Member or committee may put political pressure on an agency.

Finally, Congress may consult the publicly available *Unified Agenda of Federal Regulatory and Deregulatory Actions* to ascertain information about a particular rule under development. The *Unified Agenda* is a government-wide document published twice annually that contains a list of all proposed and final rules that federal agencies are developing, including a brief summary of each rule and an estimated timeline for its completion. The *Unified Agenda* is available at http://www.Reginfo.gov.

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