MORE:

Accommodate Deaf Inmates’ Needs

Challenge Section 8 Voucher Termination

Enable Young Parents and Victims of Domestic and Sexual Violence to Finish School

Protect Children from Lead Dust Hazards

Offer Health Insurance to Every Child

Know Administrative Law

STOP FORECLOSURE EQUITY-STRIPPING SCAMS
Administrative law asks whether an agency has substantive and procedural authority to take a given action.

Administrative agencies in the executive branch of government implement legislative programs. Within Constitutional limits, they may exercise any combination of policy-making, adjudicative, and executive powers as set forth in the legislation creating the agency. Because administrative agencies wield a wide range of powers, many legal and practical issues arise when working with them. Past Clearinghouse Review articles explored administrative hearings practice, avenues for obtaining judicial review of agency actions, and procedural limits on access to federal courts. In this article I explore other aspects of administrative agency practice: access to public information, a research approach to understanding substantive and procedural limits on agency action, and nonlitigation means of influencing agency policy.

I. Know the People and the Agency

When beginning in a new administrative practice area, advocates should develop a thorough understanding of the relevant agency. In this section I suggest formal and informal ways to get to know an administrative agency’s structure, organization, function, and culture, and, perhaps most important, its staff.

A. Access to Information

Advocates may learn about an agency’s organization and operations through formal requests for information. Federal and state open-record laws require agencies to publish certain information and to make other information available upon request. The federal law that requires agencies to disclose information to the general public is known as the Freedom of Information Act, or FOIA. State laws requiring agencies to disclose information are generically referred to as open-record laws.

1On administrative hearings see, e.g., Thomas Yates, Preparing for and Handling Social Security Adult Disability Hearings, 38 CLEARINGHOUSE REVIEW 12 (May–June 2004); see also New England Regional Training Consortium, Administrative Hearing Practice and Procedure, in POVERTY LAW MANUAL FOR THE NEW LAWYER 51–60 (2002); on judicial review of agency action see, e.g., Lauren K. Saunders, Preemption as an Alternative to Section 1983, 38 CLEARINGHOUSE REVIEW 705 (March–April 2003); Jane Perkins, Using Section 1983 to Enforce Federal Laws, id. at 720; for federal courts, see, e.g., Gill Deford et al., Federal Court Access Issues in the U.S. Supreme Court’s 2003–2004 Term, id. at 464 (Nov.–Dec. 2004); Jeffrey S. Gutman & Peyton Whiteley, The Case or Controversy Requirement and Other Preliminary Hurdles, id. at 192 (July–Aug. 2004); Erwin Chemerinsky, Closing the Courthouse Doors, 37 id. at 64 (May–June 2003).

2In this article I draw on my experience in teaching administrative law using JOHN H. REES & RICHARD H. SEAMON, ADMINISTRATIVE LAW: PRINCIPLES AND PRACTICE (2d ed. 2003), and on my experience as a faculty member for Benchmark Institute’s semiannual Public Benefits Overview and my practice experience at California Rural Legal Assistance. See Benchmark Institute, Linking People, Learning and Performance for Social Justice, www.benchmarkinstitute.org (last visited Jan. 20, 2006); California Rural Legal Assistance, www.crla.org (last visited Jan. 20, 2006).

1. Freedom of Information Act

The FOIA requires agencies to publish information about their policies and procedures and to make available upon request records not otherwise published.

Information that Agencies Must Publish. The FOIA requires government agencies to publish information about how they are organized and how they may be reached, along with agency regulations, policy guidance, staff manuals, and other frequently requested items. The FOIA requires some items to be published in the Federal Register, a legal newspaper containing executive branch notices, published every business day by the National Archives and Records Administration. Other items need not be published in the Federal Register but must nevertheless be made publicly available.

Under the FOIA, agencies must publish in the Federal Register descriptions of: the agency organization; how, when, and from whom the public may obtain information or request action; and agency procedures, forms, regulations, general policy statements, and interpretations. The FOIA requires agencies to make publicly available final opinions and orders; policy statements and interpretations not published in the Federal Register; and staff manuals. Agencies must make available copies of frequently requested records, along with an index of these records. Commonly requested information is found in electronic “reading rooms.” For example, the U.S. Department of Health and Human Services’ Administration for Children and Families maintains a FOIA Reading Room, with information about Temporary Assistance for Needy Families (TANF) policy statements, grant-related forms, annual reports, fact sheets, and more. The U.S. Department of Housing and Urban Development (HUD) maintains an online library with “bookshelves” of information related to public and assisted housing, homelessness, fair housing, lead hazards, and other areas.

Information that Agencies Must Disclose upon Request. Under perhaps the most powerful tool that the FOIA offers, agencies must produce their records upon request by any person, within a relatively short time frame, at reasonable cost, unless the request seeks information exempt from disclosure for certain policy reasons. Records exempt from disclosure include those that relate to national security, agency personnel practices, information specifically exempted from disclosure by statute, and medical files and similar information “the disclosure of which would constitute a clearly unwarranted invasion of personal privacy,” among other narrowly construed exemptions.

Any person may make a FOIA request for any reason, and the request need not state a reason. A FOIA request must “reasonably describe” the records sought and must be made in accordance with the agency’s published FOIA regulations. Federal agencies...
should respond to FOIA requests within twenty days and should grant access to the records promptly thereafter. In practice, however, receiving agency records may take longer. The FOIA may not be used to compel an agency to create documents or reports that do not already exist.

Agencies may charge reasonable fees for document search and duplication and must establish fee waiver procedures. Fees should be waived if disclosure serves the public interest “because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”

The FOIA’s disclosure tool can be very useful to advocates. For example, advocates who would monitor an agency’s compliance with the Americans with Disabilities Act (ADA) might request the agency’s consumer education materials on the ADA; memoranda, policy statements, and other documents describing the distribution of these materials; reasonable accommodation policy statements; and data on reasonable accommodation requests received, granted, and denied, and the reasons.

To make a FOIA request, you should:

- consult the agency website for its rules regarding how to make a FOIA request;
- address the request to the contact person designated by the agency;
- describe the records sought as specifically as possible;
- include in your description the relevant time frame;
- tell the agency how much you are willing to pay without first being contacted; and
- follow any other requirements specified in the agency’s FOIA regulations.

2. State Open-Record Acts

Every state has open-record laws that, like FOIA, afford the public some access to records created by government agencies. The University of Missouri’s Freedom of Information Center lists state open-record laws. The University of Florida College of Journalism and Communication’s Marion Brechner Citizen Access Project contains a wealth of information on state open-record laws. The Student Press Law Center website automatically generates open-records-act requests tailored for each state.

B. The People and the Organization

Individual clients’ problems with administrative agencies often result from bureaucratic mistakes, confusion, or misinformation. By investing time in getting to know agency staff, advocates may much more efficiently resolve these types

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14Id. § 552(a)(6) (2004).
15FREEDOM OF INFORMATION ACT GUIDE, supra note 12, Time Limits.
16E.g., Jones v. Runyon, 32 F. Supp. 2d 873, 876 (N.D. W. Va. 1998) (concluding that “because the FOIA does not obligate the [agency] to create records,” the agency “acted properly by providing access to those documents already created”), aff’d, 173 F.3d 850 (4th Cir. 1999) (unpublished table decision); see generally FREEDOM OF INFORMATION ACT GUIDE, supra note 12, Proper FOIA Requests.
18Id. § 552(a)(4)(A)(iii).
21See generally FREEDOM OF INFORMATION ACT GUIDE, supra note 12, Procedural Requirements.
of problems. When agency staff members know you and your work, they may well alert you to pending program changes and consult you before making major changes that could affect your clients.

1. Introduce Yourself

As a new lawyer at California Rural Legal Assistance, I was charged with understanding an array of government benefits programs. Our office’s directing attorney, Richard Oliver, encouraged me to set up a meeting with the local Social Security Administration’s district office manager. I asked my predecessor for the “inside” telephone number for the office’s management, placed a call, and before long our staff attorneys met with the district office manager and several of the program managers working under him. In that meeting we learned which staff member supervised which programs (Retirement, Disability, Supplemental Security Income, etc.), how the office organizes its work, and how to get help from staff in understanding and resolving problems. We also gained appreciation for the concerns of the office’s management—in this case, the familiar complaint of a large and increasing volume of work handled by relatively few and decreasing numbers of staff in the local office. The Social Security Administration staff, in turn, learned about our work—the types of cases we handle and the types of problems we see in our cases. We exchanged individual contact information, and the Social Security Administration office shared its invaluable “inside” telephone roster.

In subsequent years we were able to get information quickly from the local Social Security Administration office and often resolve client questions, in large part because we knew whom to ask for assistance, and because the staff members we spoke with knew who we were. Of course, there are many instances when a simple telephone call will not resolve a client’s problem, and the advocate must pursue formal legal challenges. Nevertheless, an established rapport with agency staff can be invaluable for gathering information, getting quick action in an emergency, and resolving matters of simple miscommunication.

2. Get an Organization Chart and Telephone Roster

When you introduce yourself to the agency, request a copy of its organization chart and a telephone roster. An agency organization chart will help you understand how tasks are assigned within the agency and whom to call about various questions. Agency organization and contact information generally may be found on the agency’s website. Federal agencies are required to publish this information. For state agencies, know that, if the agency does not comply with an informal request and if you cannot find the chart on the agency website, you can probably get this information through a formal open-records-act request.

II. Know the Substantive and Procedural Law Governing the Agency

Administrative law asks whether an agency has authority to take a given action (or to fail to take action). Agencies must act within their substantive and procedural authority. Substantively an agency must carry out the mandate given to it by the legislative body that creates it. In carrying out its substantive mandate, an agency must also follow the procedures set forth by the legislature, whether in a

25In its semiannual Public Benefits Overview training, Rosemary French, the Benchmark Institute president, stresses the importance of developing agency contacts.

26Benchmark Institute’s Public Benefits Overview also stresses the importance of obtaining an agency organization chart.


29See Fully Automated, supra note 24.
statute unique to the agency or in a general administrative procedure act. Of course, the agency must also follow the Constitution, although that is not the subject of this article.

Beginning advocates may be tempted to focus exclusively on learning an agency’s regulations in order to discern whether a particular agency action complies with the law. While advocates must thoroughly understand an agency’s regulations, a sophisticated practitioner will also question whether a given action is consistent with statutes that govern the agency and whether it was adopted through proper procedures. In this section I discuss sources of administrative law, agency obligations to comply with substantive law; and a research approach to understanding required agency procedures.

A. Sources of Law

Authority for agency action may be found in the statute that governs the agency, an applicable Administrative Procedure Act, the agency’s regulations, manuals and other policy guidance, executive orders, and case law, explained in more detail below.

1. Organic Legislation

Administrative agencies are created by Congress or the state legislature. Any action that an agency takes must be authorized generally or specifically by the legislative body that created the agency. Such authorization comes in the form of a statute, referred to as the agency’s “organic legislation.” Federal statutes are codified in the United States Codes. State statutes are also codified. For example, the Social Security Administration’s organic legislation is found in 42 U.S.C. §§ 401–434 (“Title II–Federal Old-Age, Survivors, and Disability Insurance Benefits”), 901–913 (“Title VII–Administration”), and 1381–1383f (“Title XVI–Supplemental Security Income for Aged, Blind and Disabled”). Section 901 states:

(a) There is hereby established, as an independent agency in the executive branch of the Government, a Social Security Administration …

(b) It shall be the duty of the Administration to administer the old-age, survivors, and disability insurance program under Title II and the supplemental security income program under Title XVI.

In essence, this statute creates the Social Security Administration (“there is hereby established …”) and establishes its mandate and powers (“it shall be the duty …”).

2. Agency Regulations

Agency regulations are “ministatutes” that are created by agencies and carry the force and effect of statutes passed by the legislature. The general public, and agencies themselves, must comply with properly adopted agency regulations. Generally agency regulations are adopted through a process of notice to the public with an opportunity for public comment. Once formally adopted, or “promulgated,” agency regulations are published in the Code of Federal Regulations, for federal agencies, or a comparable state compilation of administrative rules (for example, the California Code of Regulations). Social Security Administration regulations, for example, are published in 20 C.F.R. §§ 400–499.

3. Agency Adjudications

Agency adjudicative decisions, such as decisions of courts of law, are legally binding on the parties before the agency. The decisions may have precedential effect on the agency and the entities that come before it. For example, the California Unemployment Appeals Board adjudicates individuals’ entitlement to unemployment benefits. It designates as “precedent decisions” those that contain “a significant legal or policy determination of general application that is likely to recur.” These precedent decisions bind the board in future matters.

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30See infra III.A.1.

31REESE & SEAMON, supra note 2, at 511–12.

32CAL. UNEMP. INS. CODE § 409 (2005); CAL. GOV’T CODE § 11425.60 (2005).

33CAL. UNEMP. INS. CODE § 409.
4. **Guidance Material**

Federal agencies and many state agencies may issue guidance material that advises the public of the agency’s position, in a manner short of a legally binding regulation or adjudication. These materials, in the form of manuals, bulletins, handbooks, letters, and the like, give invaluable information about the agency’s view of its programs and authority. For example, the Social Security Administration’s POMS (Program Operations Manual System) and HALLEX (Hearings, Appeals, and Litigation Law Manual) give detailed instruction to agency staff. A manual, *The Red Book on Work Incentives*, published by the Social Security Administration, describes various work incentive programs for disabled individuals receiving Social Security Disability Insurance and Supplemental Security Income.

5. **Case Law**

State and federal courts may make decisions about the substantive and procedural law affecting administrative agencies.

6. **Additional Sources of Law**

**Governing Agency Procedures—Executive Orders and Administrative Procedure Acts**

The above-described sources of law inform agency substantive and procedural obligations. Two other sources of law dictate procedures to agencies: executive orders and administrative procedure acts. Orders from the state or federal executive branch may give agencies general instructions about how to exercise their powers. Administrative procedure acts designate procedures that agencies must follow in promulgating regulations, adjudicating disputes, and other matters.

**B. The Agency’s Substantive Law**

Agency legal interpretations must be consistent with organic legislation.

1. **Know the Organic Legislation**

When a federal agency interprets a statute through a decision or regulation, that interpretation must be consistent with the agency’s organic legislation. Where the agency’s legal interpretation is not consistent with governing statute, it will be overturned. Be aware, however, that where the statute is ambiguous, courts will defer to the agency’s reasonable interpretation.

In a case that illustrates the importance of scrutinizing an agency’s organic legislation, housing advocates challenged as contrary to federal statute evictions of public housing tenants, where the tenants did not have actual knowledge of the criminal activity of members of their household and guests. The statute at issue provided that each “public housing agency shall utilize leases which … provide that any drug-related criminal activity on or off [the] premises, engaged in by a public housing tenant, any member of the tenant’s household, or any guest or other person under the tenant’s control, shall be cause for termination of tenancy.” HUD, charged with administering this statute, promulgated regulations which established local public housing authorities’ discretion to evict tenants for drug-related activity even when the tenant “did not know, could not foresee, or could not control behavior by other occupants of the unit.” “Innocent” tenants, who were
not aware of the criminal activity of other household members or guests or both, challenged the statute under the Administrative Procedure Act and argued that the lease terms and regulations were contrary to statute and therefore were not authorized. Although they ultimately lost, advocates convinced the district court and an en banc panel of the Ninth Circuit that the regulations and lease provisions contravened statutory authority.

State agencies also must make legal interpretations consistent with organic legislation. State courts give agencies varying degrees of deference in ascertaining the validity of an agency legal interpretation—from exercising independent judgment (no deference), to extremely deferential, and many points in between.

2. Know the Agency Regulations
Agencies must follow their own substantive regulations, which represent policy decisions by an agency about the meaning of the statute it is charged with implementing. When arguing with an agency over its decision, the advocate should always be aware of the regulations that apply to the problem at hand. When an agency takes action contrary to the regulations it has promulgated, the action is not authorized and is vulnerable to judicial challenge. Moreover, through rule making, agencies commit to the policy expressed in promulgated regulations. Administrative law judges and other agency decision makers will apply agency regulations to the facts before them.

3. Know the Agency Policy Guidance
Agency opinions in the form of handbooks, guides, bulletins, policy manuals, and the like are persuasive authority. Although not legally binding, agency interpretations of statutes are persuasive authority. Policy guidance may come in the form of handbooks, guides, bulletins, manuals, opinion letters, and even amicus briefs. Agency policy guidance should always cite the agency since the agency, by stating its guidance, commits to following it. In a federal court challenge, federal agency policy guidance is considered persuasive authority but not legally binding. Because the agency is charged with administering the area of law, the court defers to the agency’s expertise. How much deference in a particular circumstance depends on the thoroughness with which the agency considered its opinion, the validity of its reasoning, consistency with other prior and later agency pronouncements, and other factors affecting the opinion’s persuasiveness.

In some states, however, informal policy guidance is not considered persuasive. A minority of states, including California, Iowa, Louisiana, Minnesota, New Hampshire, Ohio, and Vermont, require agencies to allow the public to comment on proposed policy guidance prior to adoption. In such states, policy guidance not adopted through a process of prior notice and public comment may be considered “underground regulations,” and decisions relying on such policy guidance may be thrown out for failure to follow notice and comment procedures.

4. Check a Research List for Agency Substantive Law
The following sources inform the substantive authority of an administrative agency: the organic legislation, agency regulations, guidance material, and case law.

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44Id.; 5 U.S.C. § 706(2)(A);
48The federal rule-making process is summarized in infra III.A.1.
51Id. at 635–37.
C. Procedures that the Agency Must Follow

In addition to falling substantively within the scope of the agency’s authority, agency actions must comply with procedural prerequisites. Administrative procedure acts, together with the agency’s organic legislation and regulations, dictate the procedures that federal and state agencies must follow. To understand procedural rules affecting an agency, the advocate should identify the action as rule making, adjudication, or other executive action; discern whether the action is authorized by the organic legislation; and determine what procedures apply through a review of the agency organic legislation, the applicable administrative procedure act, and agency regulations.

1. Types of Agency Action

The organic legislation states what powers the agency may exercise. In administrative law, agency powers are often categorized as either rule-making, adjudication, or executive power. Rule-making power refers to the power to set policy in the form of regulations. For example, the Clean Air Act empowers the Environmental Protection Agency to set air quality standards by promulgating regulations. Adjudicative power includes the power to make fact-specific decisions that affect individuals. When welfare caseworkers decide on a family’s eligibility for TANF benefits, the caseworkers are exercising adjudicative power—applying the rules to the facts of the family before them. When a state department of social services administrative law judge decides on the same case, the administrative law judge also exercises adjudicative power. Executive power includes power that is not rule-making or adjudication, such as the power to decide how to allocate program funds, to investigate and prosecute violations of law, and to create interpretive guidance materials. When the Equal Employment Opportunity Commission investigates a complaint of employment discrimination, it exercises executive power. When the Indian Health Service reallocates funds from a program that provides direct clinical services to children with disabilities in the Southwest to a nationwide treatment program, that, too, is considered an exercise of executive power.

2. Actions Under a Specific Grant of Authority

Agency action must be authorized by a grant of power to the administrative agency in the agency’s organic legislation. Thus, in the seminal Skidmore case, the fair labor standards administrator gave his opinion about when wages should be paid to firefighters for when they were required to stay in the company fire hall but were not called to fight fires. The administrator’s opinion came in an amicus brief, interpreting a bulletin issued under the Fair Labor Standards Act. No regulation or official agency decision supported the Administrator’s position because the administrator did not have the authority to promulgate regulations or to adjudicate violations of the Fair Labor Standards Act.

3. Administrative Procedure Acts—History and Purpose

In 1939, in response to the proliferation of agencies under the New Deal, Pres. Franklin D. Roosevelt authorized the appointment of a committee to study administrative procedures and make recommendations. Known as the Attorney General’s Committee on Administrative Procedure, the committee of lawyers, judges, scholars, and administrators stud-


53Lincoln v. Vigil, 508 U.S. 182, 192 (1993) (allocation of funds from a lump-sum appropriation is an administrative decision traditionally regarded as committed to agency discretion).

54Skidmore, 323 U.S. at 134.

55Id at 138–139.


57RESE & SEAMON, supra note 2, 76–77.
ied major federal agencies, prepared a final report to Congress, and participated in legislative hearings on administrative procedures. Its Final Report of 1941 served as the basis for what became the federal Administrative Procedure Act. The Act itself was enacted in 1946 for four main purposes: (1) to require agencies to keep the public currently informed of their organization, procedures, and rules; (2) to provide for public participation in rule making; (3) to prescribe uniform standards for the conduct of formal rule-making and adjudicatory proceedings; and (4) to restate the law of judicial review.

Around the same time, states also began enacting administrative procedure acts, with a Model State Administrative Procedure Act approved in 1946 by the National Conference of Commissioners on Uniform State Laws. About half of the states have adopted the Model Act; most others' administrative procedure acts are influenced by the Model Act or the federal Administrative Procedure Act or both.

The federal Administrative Procedure Act applies to most federal agencies. It does not apply to state or local agencies. State administrative procedure acts may apply to state and local agencies.

4. Determining What Procedures Apply

In light of the existence of administrative procedure acts, a research model may help in understanding what procedures an agency must follow for a given agency action. To understand what procedures an agency must follow, consider the following questions.

Does an Administrative Procedure Act Apply to the Agency? To discern whether an Administrative Procedure Act applies to the agency in general, advocates should consult both the Act and the agency's organic legislation. By definition, the federal Administrative Procedure Act applies to all federal government entities except the Congress, courts, states and territories, the District of Columbia, political parties, and certain military authorities. The Act does not apply to the president. Even though the Act by its terms applies to nearly all authorities of the U.S. government, the Act's terms alone do not settle the question. Agency organic legislation may exempt agency procedures from the Act. A similar analysis applies to state administrative procedure acts. The state administrative procedure act defines what agencies it covers. Agency-specific organic legislation may supersede the applicable state administrative procedure act definition.

Does the Administrative Procedure Act Apply to the Particular Agency Action Involved in the Problem? Even where the Administrative Procedure Act applies to the agency in general, it might not give guidance to the particular procedural problem at issue. Again, the practitioner should consult the text of the applicable Administrative Procedure Act and the agency's organic legislation. The practitioner should consult the agency regulations for additional procedures adopted by the agency.

In federal Administrative Procedure Act rule making, for example, agencies must give notice of proposed rules and an

58Id. at 77.
61REESE & SEAMON, supra note 2, at 78.
63This approach derives from the research model in REESE & SEAMON, supra note 2, at 84–91.
65Franklin v. Massachusetts, 505 U.S. 788, 800 (1992); see generally REESE & SEAMON, supra note 2, at 85.
66REESE & SEAMON, supra note 2, at 86–87.
opportunity for public comment before adopting regulations. Agencies need not conduct “notice and comment rule making,” however, where the action at issue involves certain subject matters, such as government benefits. Statutes governing specific benefit programs may nevertheless provide that the Administrative Procedure Act applies. Moreover, the agency may adopt such Act procedures—or other procedural protection provisions beyond those required by statute—by regulation. Conversely an agency’s organic legislation may provide that the Administrative Procedure Act does not apply to the agency rule making even though it would otherwise apply under the terms of the Act. The agency may not, however, opt out of the Act by regulation since it may not employ lesser procedural protection provisions than those imposed by statute.

Similarly for adjudications, the federal Administrative Procedure Act describes the duties and powers of administrative law judges and other decision makers in formal administrative hearings. Not all agency hearings are governed by the Act since the Act’s formal hearing procedures apply only where an adjudication is required by statute to be determined on the record after an opportunity for an agency hearing. Again, an agency’s organic statute may specify different procedures. Moreover, the agency may adopt the Act’s hearing procedures by regulation even where they would not otherwise (consistent with the agency’s organic legislation).

Where an agency is required by statute—whether an applicable Administrative Procedure Act or the organic legislation—to follow certain procedures for a given action, the agency must do so. If the agency fails to do so, its action may be held invalid. Agencies should comply with any additional procedures that the agencies themselves have adopted.

Does Other Authority Apply to the Agency Action? Other authority that may apply to agency action includes executive orders relating to the regulatory process and case law defining due process of law. Executive orders from the president or state governor may dictate additional executive branch procedures that an agency must follow. For example, federal Executive Order 12866 requires agencies engaged in rule making to consider alternatives to direct regulation, to consider costs and benefits of intended regulations, and to submit proposed regulations for review by the Office of Management and Budget’s Office of Information and Regulatory Affairs. Agency adjudications that could deprive individuals of life, liberty, or property must also meet minimum procedural fairness requirements under the Constitution’s due process clauses.

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68Id. § 553(a)(2).
69Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council., 435 U.S. 519, 524 (1978) (the Administrative Procedure Act establishes minimum procedural requirements for rule making; “[a]gencies are free to grant additional procedural rights in the exercise of their discretion”).
71Id. § 554(a).
72Seacoast Anti-Pollution League v. Costle, 572 F.2d 972 (1st Cir.1978) (remanding to agency an adjudication that relied on information not part of the official record, in violation of Administrative Procedure Act formal hearing requirements); National Welfare Rights Organization v. Mathews, 533 F.2d 637 (D.C. Cir. 1976) (invalidating regulation on welfare resource limits, where agency failed to comply with Administrative Procedure Act rule-making requirements).
73National Welfare Rights Organization, 533 F.2d at 646.
5. A Research Checklist for Agency Procedural Questions

The following sources inform the procedural authority of an administrative agency: the applicable Administrative Procedure Act, the organic legislation, agency regulations, executive orders, and case law.

III. Influence Agency Policy and Administration

Agency policy and administration may be influenced through a variety of means—representing clients in individual administrative hearings; litigation against the agency; participation in public rule-making proceedings; and informal policy advocacy. Because the former two means are generally more familiar to advocates, I address the latter two means here.

A. Through Formal Means

Under the federal Administrative Procedure Act, agencies must give notice of many, but not all, proposed regulations and some form of opportunity for public comment prior to adopting final regulations. Exceptions to notice and comment requirements include emergency regulations, interpretive rules, and procedural rules. Subject-matter exemptions from notice and comment requirements include regulations regarding agency management or personnel, public property, loans, grants, benefits, or contracts. For example, the benefits exemption from Administrative Procedure Act rule-making requirements has been held to apply to Medicare provider reimbursement regulations.

1. The Right to Comment on Proposed Regulations

The agency must adopt a general statement of basis and purpose of the adopted regulation, which reflects that the agency has actually considered comments on the regulation. Where the statement of basis and purpose does not give sufficient detailed information to satisfy a reviewing court that the agency’s policy decision is not “arbitrary” or “capricious,” the regulation may be invalidated.

State administrative procedure acts also provide for notice and an opportunity to comment on proposed regulations, usually with exceptions for emergencies and internal procedures. Proposed federal regulations, along with information about the process for submitting comments, are published in the Federal Register. Proposed state regulations generally are published in a similar regulatory notice register. To find out about proposed regulation changes without a daily subscription to a government register, contact the agency’s counsel or FOIA officer, and make sure your organization is included in the list of entities to be notified of regulatory changes. Advocates should offer comments on proposed rules affecting their clients. Comments may focus on rules’ practical impact and consistency with statutory authority and purpose.

2. The Right to Request Regulations

The federal Administrative Procedure Act provides for the public an opportunity to petition an agency to issue or change a regulation. The agency must respond to the request. Its response (or lack of

77 Id. § 553(b)(3).
78 Id. § 553(a)(2).
79 Baylor University Medical Center v. Heckler, 758 F.2d 1052, 1059 (5th Cir. 1985); see generally REESE & SEAMON, supra note 2, at 189–91.
80 5 U.S.C. § 553(c); National Welfare Rights Organization, 533 F.2d at 648.
81 National Welfare Rights Organization, 533 F.2d at 648 (invalidating welfare resource regulation for insufficient statement of basis and purpose); see 5 U.S.C. § 706(2)(A) (courts reviewing actions of agencies subject to the Administrative Procedure Act shall hold unlawful and set aside agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law). For more on public participation requirements in rule making, see generally Gary F. Smith The Quid Pro Quo for Chevron Deference: Enforcing the Public Participation Requirements of the Administrative Procedure Act, 30 CLEARINGHOUSE REVIEW 1132 (March—April 1997).
84 Id.
response) is subject to limited judicial review. As with subject-matter exemptions to notice and comment rule making, this provision does not apply to regulations regarding agency management or personnel, public property, loans, grants, benefits, or contracts. Many state further provides that agencies may be sued if they fail to do so; under the federal Administrative Procedure Act courts should “compel agency action unlawfully withheld or unreasonably delayed.” Advocates should be aware, however, that courts find “unreasonable delay” only in “extraordinary circumstances” in deference to agencies’ executive authority to allocate staff resources. In In re International Chemical Workers the D.C. Circuit ordered the Occupational Safety and Health Administration (OSHA) to revise safety standards for occupational exposure to cadmium, a chemical that OSHA recognized to be extremely dangerous at the then-permitted exposure limit. The court’s order came six years after the International Chemical Workers Union first petitioned OSHA for an emergency rule on cadmium (in 1986) and five years after the union first sought relief in court (in 1987). The court first denied relief because OSHA agreed that it would start rule making by late 1987. When, in June 1989, OSHA still had not acted, the union again sought a writ of mandamus to compel OSHA to issue an emergency standard. Instead of granting mandamus, the court required status reports from OSHA. In 1992 the court finally ordered OSHA to promulgate a rule by August 31, 1992—the target date identified by OSHA. This order came only after OSHA had filed with the court its status report stating that OSHA would further delay the rule because of unanticipated staffing problems. Many state administrative procedure acts also obligate agencies to conclude matters within a given time.

3. The Right to Compel an Agency to Act

Under the federal Administrative Procedure Act, agencies have a duty to conclude matters presented "within a reasonable time." The Act further provides that agencies may be sued if they fail to do so; under the federal Administrative Procedure Act courts should “compel agency action unlawfully withheld or unreasonably delayed.” Advocates should be aware, however, that courts find “unreasonable delay” only in “extraordinary circumstances” in deference to agencies’ executive authority to allocate staff resources. In In re International Chemical Workers the D.C. Circuit ordered the Occupational Safety and Health Administration (OSHA) to revise safety standards for occupational exposure to cadmium, a chemical that OSHA recognized to be extremely dangerous at the then-permitted exposure limit.

Note also that, because of concerns with separation of powers, federal courts are very reluctant to compel agencies to take particular action and defer to agency discretion to administer the program delegated to the agency by Congress. Agencies that have

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85 U.S.C. § 706(2); WWHT Inc. v. Federal Communications Commission, 656 F.2d 807, 818–19 (D.C. Cir. 1981) (identifying three circumstances wherein a court might set aside an agency’s refusal to initiate rulemaking: where the facts have changed, where the agency is mistaken about its jurisdiction, and where the agency’s decision was based on erroneous legal interpretation); see generally REESE & SEAMON, supra note 2, at 233–34.


87 See 45 C.F.R. § 1612 (2005); see also infra III.C.

88 See 45 C.F.R. § 1612 (2005); see also infra III.C.


90 Id. § 706(1).


92 Id.

93 Id. at 1146.

94 Id. at 1147.

95 Id.

96 Id. at 1148–49.

97 Id. at 1148.

98 REESE & SEAMON, supra note 2, at 311.
rule-making and adjudication powers generally retain discretion to establish policy by rule making or adjudication, although, where the agency seems to be adjudicating in a standardless way, the agency may be compelled to promulgate rules. Agencies with enforcement power generally retain discretion to decide whether and when to exercise it.

B. Through Informal Means

In many areas of law, agencies meet regularly with constituent groups, including poverty law advocates, with whom they frequently come into contact. These meetings are opportunities, among other benefits, for advocates to communicate client community concerns to the agencies, to obtain commitments that may help resolve systemic problems, and to learn about upcoming changes within the agencies. Where these meetings are not occurring, advocates may request them.

In California, for example, advocates meet routinely with the state Department of Social Services regarding its implementation of TANF and food stamp programs. In late 2005 California advocates met with the department’s State Hearings Division and gave input on procedures for new telephonic hearings; making hearing requests through the Web; obtaining subpoenas; and handling negotiated settlements where the welfare department fails to implement promised changes. In Oregon activists combined research, education, and negotiation to change these aspects of the state’s administration of its food stamp program: the application form was shortened from sixteen to two pages; the food stamp office increased outreach by working with local nonprofit organizations; applicants were allowed to apply at any food stamp office, not just the one nearest their home; the food stamp office agreed to hire more interpreters; and the food stamp office implemented a procedure to screen every applicant for emergency food stamps.

To attain these program improvements, activists first interviewed food stamp applicants and identified barriers to using food stamps. They issued a report, Hunger Pangs: Oregon Food Stamp Program Fails to Deliver, which recommended solutions to improve food stamp access. They were invited to meet with representatives from Oregon’s food stamp office and obtained the office’s commitment to increase enrollment. They published a second report, Still Not Making the Grade: AFS Gets a “C” from Families Seeking Food Stamp Benefits, which examined and graded the actions the food stamp office had taken to remedy barriers. They were again invited to meet with the food stamp office and obtained the program changes described above.

99Securities and Exchange Commission v. Chenery Corporation, 332 U.S. 194, 203 (1947) (the choice “between proceeding by general rule or by individual, ad hoc litigation … lies primarily in the informed discretion” of the agency); Curry v. Block, 733 F.2d 1556, 1563 (1984) (requiring Farmers Home Administration to implement loan deferral program through rule making given the long delay in implementing the deferral program, the urgent need for deferral relief to farmers, and the national scope of the problem).

100Heckler v. Chaney, 470 U.S. 821, 831 (1985) (finding a general presumption that agency decisions not to initiate enforcement are immune from review under the Administrative Procedure Act, 5 U.S.C. § 701(a)(2)).


103Id.

104Id.

105Id.

106Id.

107Id.
C. Without Violating LSC Restrictions

Advocates employed with LSC-funded organizations may influence agency decisions without running afoul of LSC rules on lobbying and welfare reform. Advocates may use any funds to represent individuals in agency adjudications and appeals from agency adjudications.\(^{108}\)

Advocates may litigate to challenge agency rules, regulations, guidelines, or policies.\(^{109}\) Notwithstanding the ban on welfare reform litigation, advocates may challenge welfare reform laws in an individual client’s claim for relief.\(^{110}\)

Advocates may freely communicate with governmental agencies in order to obtain information, clarification, or interpretation of agency rules, regulations, practices, or policies.\(^{111}\)

Advocates may use non-LSC funds to respond to agencies’ and elected officials’ written requests for information or testimony, so long as the LSC recipient organization does not solicit the request for testimony or information and maintains copies of written requests and responses.\(^{112}\)

Moreover, advocates may use non-LSC funds to comment on any public rule-making proceeding.\(^{113}\)

In an instructive example, the Center for Law and Social Policy outlines many ways that LSC recipients may encourage states to seek waivers of draconian food stamp rules that restrict food stamp assistance for many able-bodied adults to three months out of every three years.\(^{114}\) By statute, waivers are available in states with high unemployment levels. The center notes that advocacy here is unlikely to involve welfare reform litigation, legislative lobbying, or rule making.\(^{115}\) The center opines that LSC-funded advocates may contact local or state welfare agency officials, the governor’s office, legislative officials, social service providers, low-income client organizations, and other entities to advocate waivers.\(^{116}\)

The center opines that advocates may engage in direct advocacy with officials, grassroots advocacy with individuals and organizations, educational activities, data analysis, informing the media, and working with coalitions, among other activities.\(^{117}\)

Administrative law and practice is exciting, and it is doable. Advocates have ample formal and informal tools to learn what an agency does, how it does it, and from whom to seek information and assistance. Advocates should pay attention to agency compliance with the substantive mandate expressed in the agency organic legislation and to agency compliance with procedural requirements expressed in the organic legislation, an administrative procedure act, and agency regulations. Advocates may substantially influence agency policy affecting client communities by taking individual cases to hearings and litigating them and also by participating in public rule making and in informal policy-making.

\(^{108}\) 45 C.F.R. § 1612.5(a) (2005).

\(^{109}\) Id. § 1612.5(b).


\(^{111}\) 45 C.F.R. § 1612.5(c)(2).

\(^{112}\) Id. § 1612.6.

\(^{113}\) Id. §§ 1612.6(e), 1639.5.


\(^{115}\) Id.

\(^{116}\) Id.

\(^{117}\) Id.