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Petitions for Rulemaking: An Overview

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Maeve P. Carey
Specialist in Government
Organization and
Management

Petitions for Rulemaking: In Brief

The Administrative Procedure Act (APA), enacted in 1946, is known primarily for its procedural requirements for notice-and-comment rulemaking. Those requirements state that when issuing regulations, agencies must generally give public notice (i.e., issue a proposed rule), hold a public comment period, and publish a final rule.

A lesser known provision in the APA is a petition mechanism through which any interested party can request an agency to issue, amend, or repeal a rule (Section 553(e)). Such petitions are sometimes referred to as 553(e) petitions, petitions for rulemaking, petitions for reconsideration, administrative petitions, or citizens' petitions. The APA petition mechanism is a potentially efficient (and arguably underused) means for an individual or stakeholder to call on an agency to take a particular action.

"Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule" (5 U.S.C. §553(e)).

Although Section 553(e) is only one sentence in length and provides very little detail, other sections of the APA contain some additional requirements for agencies with regard to receiving, considering, and responding to rulemaking petitions. An agency is not necessarily required to grant the petition or take the requested action, but the APA does require the agency to consider the petition and respond and to do so "within a reasonable time." Notably, however, agencies have a great deal of discretion in determining the specifics of their procedures for receiving, considering, and responding to petitions. In 2014, the Administrative Conference of the United States (ACUS) found that "few agencies have in place official procedures for accepting, processing, and responding to petitions for rulemaking" and that "how petitions are received and treated varies across—and even within—agencies."

The APA's requirement for a petition mechanism applies to all agencies covered by the APA, which includes executive agencies and independent regulatory agencies. The APA's definition of *rule* is broad and covers a variety of agency actions, including several types of actions that are not subject to the APA's notice-and-comment rulemaking procedures. Such actions include agency interpretive rules and policy statements—categories that are often colloquially referred to as "guidance documents"—and rules of agency organization, procedure, and practice. Thus, the petition mechanism could potentially be used for more than just rules that have undergone, or would be required to undergo, the APA's notice-and-comment procedures.

If an agency grants a petition for rulemaking—thus issuing, amending, or repealing a rule per request of the petitioner—any relevant procedural requirements for rulemaking or other type of action would still apply. Furthermore, in taking any action pursuant to a petition, the agency may act only within the delegated authority Congress has provided to it in statute.

This report briefly discusses the origin of the APA petition mechanism, outlines the mechanism's requirements for agencies, provides information from various outside sources about what may make an effective petition, discusses potential benefits to agencies and the public, and, finally, identifies some examples of statutory petition mechanisms that Congress created in addition to the APA's.

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Introduction

Federal rulemaking is one of the crucial methods through which public policy is established and implemented in the United States. Under the constitutional separation of powers system, Congress enacts statutes that often delegate rulemaking authority to federal agencies. Using that delegated authority, agencies issue regulations to implement those statutes and set the details of public policy.

To structure the ways in which agencies issue regulations pursuant to their delegated authority, Congress has created a statutory scheme of procedural controls.¹ The most significant of these controls is the Administrative Procedure Act (APA) of 1946, which generally requires agencies to issue a proposed rule and take public comment prior to issuing a final rule.² Congress designed these basic steps—which create the backbone of the federal rulemaking process—to allow for public input into federal agencies’ policymaking decisions. As one scholar noted, “One of the APA’s objectives was to open rulemaking to public participation, especially by those whose interests might be adversely affected by an agency’s actions. Congress viewed hearing from such parties as a normal part of the legislative process, and therefore applicable to rulemaking.”³

The APA’s notice and comment requirements are possibly the best known and most significant mechanism allowing for public input into the rulemaking process. A lesser known procedural control that Congress created in the APA is a petition mechanism through which any interested party can request an agency to issue, amend, or repeal a rule.⁴ An agency is not necessarily required to grant the petition or take the requested action, but the APA does require the agency to respond and to do so in a “reasonable time.”⁵ Thus, the APA petition mechanism is a potentially efficient (and arguably underused) means for an individual or stakeholder to call on an agency to take a particular action.⁶

This report briefly discusses the origin of the APA petition mechanism, outlines the mechanism’s requirements for agencies, provides information from various outside sources about what may make an effective petition, discusses potential benefits to agencies and the public, and, finally,

¹ See CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, coordinated by Maeve P. Carey. For a discussion of the role of rulemaking procedures as a means of congressional control over agencies, see Matthew D. McCubbins et al., “Administrative Procedures as Instruments of Political Control,” *Journal of Law, Economics, and Organization*, vol. 3, no. 2 (Fall 1987), pp. 243-277; and Matthew D. McCubbins et al., “Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies,” *Virginia Law Review*, vol. 75, no. 2 (March 1989), pp. 431-482. See also CRS Report R45442, *Congress’s Authority to Influence and Control Executive Branch Agencies*, by Todd Garvey and Daniel J. Sheffner.

² The APA is Title 5, Sections 551 *et seq.*, of the *United States Code*. The APA’s notice-and-comment rulemaking requirements are at Title 5, Section 553.

³ David H. Rosenbloom, *Building a Legislative-Centered Public Administration: Congress and the Administrative State, 1946-1999* (Tuscaloosa, AL: University of Alabama Press, 2000), p. 42.

⁴ A comprehensive report on petitions for rulemaking was prepared for the consideration of the Administrative Conference of the United States (ACUS). See Jason A. Schwartz and Richard L. Revesz, *Petitions for Rulemaking*, November 5, 2014, <https://www.acus.gov/sites/default/files/documents/Final%2520Petitions%2520for%2520Rulemaking%2520Report%2520%255B11-5-14%2525D.pdf>. See also William V. Luneburg, “Petitioning Federal Agencies for Rulemaking: An Overview of Administrative and Judicial Practice and Some Recommendations for Improvement,” *Wisconsin Law Review*, vol. 1988, no. 1 (1988), pp. 1-64.

⁵ 5 U.S.C. §555(b). See also Revesz, *Petitions for Rulemaking*.

⁶ One observer described the APA petition process in 2015 as a “heretofore largely underutilized mechanism for citizen participation” (Reeve T. Bull, “Building a Framework for Governance: Retrospective Review and Rulemaking Petitions,” *Administrative Law Review*, vol. 67, no. 2 [Spring 2015], p. 293).

identifies some examples of statutory petition mechanisms that Congress created in addition to the APA's.

APA Petition Mechanism: Historical Origins

The APA's petition mechanism essentially re-stated the right to petition the government established by the U.S. Constitution, which can be traced as far back as the Magna Carta and Declaration of Independence.

U.S. Constitution

The principles on which the APA's petition mechanism are based are generally traced by scholars to the Magna Carta and, in the American context, to the Declaration of Independence.⁷ Though it was centuries old by the time of the American Revolution, the Magna Carta was a heavy influence on the colonists who declared their independence from Britain in the 1770s.⁸ The Declaration of Independence, which relied on many of the stated rights and liberties granted under the Magna Carta, referenced the failure of the British government to respond to petitions by stating the following immediately after its list of grievances: "In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury."⁹ Thus, the implication was that the colonists had an inherent right to petition the king, as well as a right to a response.

Likely as a direct consequence of this perceived slight by the British government, the founders explicitly stated in the First Amendment of the U.S. Constitution that the people had a right to petition the government. Specifically, the First Amendment states that "Congress shall make no law ... abridging ... the right of the people ... to petition the Government for a redress of grievances."¹⁰ Although the First Amendment establishes a right to petition the government, it goes no further in detailing whether or how the government shall respond.¹¹

The Administrative Procedure Act

The lineage of this constitutional provision can be traced forward into the 20th century and directly to the APA itself.¹² The APA's petition mechanism, which allows interested persons to petition the government to take a rulemaking action, could easily be considered a more modern

⁷ Harold C. Relyea, "Extending the Freedom of Information Concept," *Presidential Studies Quarterly*, vol. 8, no. 1 (Winter 1978), pp. 96-97.

⁸ See Harry T. Dickinson, "Magna Carta in the American Revolution," in *Magna Carta: History, Context, and Influence*, ed. Lawrence Goldman (London: University of London School of Advanced Study, Institute of Historical Research, 2018), pp. 79-100.

⁹ See <https://www.archives.gov/founding-docs/declaration-transcript> for a transcript of the Declaration of Independence.

¹⁰ U.S. Const. amend. I.

¹¹ Some scholars have argued that historical evidence supports an obligation for the government to respond to such a petition. See Schwartz and Revesz, *Petitions for Rulemaking*, p. 8, for an overview of this debate. Their report also discusses the Supreme Court's interpretation of this constitutional provision; see pp. 7-8.

¹² For an overview of the use of administrative petitions before the APA, see Daniel Carpenter, "On the Emergence of the Administrative Petition: Innovations in Nineteenth-Century Indigenous North America," in *Administrative Law from the Inside Out: Essays on Themes in the Work of Jerry L. Mashaw*, ed. Nicholas R. Parillo (New York: Cambridge University Press, 2017), pp. 349-372; and Maggie McKinley, "Petitioning and the Making of the Administrative State," *Yale Law Journal*, vol. 127, no. 6 (April 2018), pp. 1538-1637.