



Comments of the Regulatory Action Center

Re: Notice of Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Improving and/or Reforming Regulatory Enforcement and Adjudication
Docket ID: OMB-2019-0006-0001

March 16, 2020

The Regulatory Action Center at FreedomWorks Foundation is dedicated to educating Americans about the impact of government regulations on economic prosperity and individual liberty. FreedomWorks Foundation is committed to lowering the barrier between millions of FreedomWorks citizen activists and the rule-making process of government bureaus to which they are entitled to contribute.

On behalf of over 5.7 million activists nationwide, FreedomWorks Foundation appreciates the opportunity to offer these comments regarding the notice and request for information on Improving and/or Reforming Regulatory Enforcement and Adjudication (OMB-2019-0006-0001). This notice seeks comment on potential reforms to administrative enforcement and adjudication in an effort to better safeguard the civil liberties of American citizens.

Given the depth of the regulatory state's abuses, it is near impossible to detail each with the thoroughness it deserves. However, there are a number of lines of inquiry being considered by the Bureau that merit special attention. Due to these realities, the comments that follow will be narrowly focused on the following questions posed by the Bureau::

- 1) What evidentiary rules apply in regulatory proceedings to guard against hearsay and/or weigh reliability and relevance? Would the application of some of the Federal Rules of Evidence create a fairer evidentiary framework, and if so, which Rules?
- 2) Should agencies be required to produce all evidence favorable to the respondent? What rules and/or procedures would ensure the expedient production of all exculpatory evidence?
- 3) Are agencies and agency staff accountable to the public in the context of enforcement and adjudications? If not, how can agencies create greater accountability?



In his book *Bureaucracy: What Government Does and How They Do It*, Professor James Q. Wilson presents what is widely considered one of the best in-depth analyses of the nature of bureaucracy. Throughout, he applies many of the principles of public choice theory to understand the ways in which incentive structures impact bureaucratic performance in pursuit of their statutorily defined goals. He points out that government agencies cannot be examined in the same way as private firms because they are fundamentally different. Private firms are responsive to the market. Government agencies are only responsible to their overseer -- and sometimes not even then as in the case of the Consumer Financial Protection Bureau.

As Wilson put it, “putting people first is hard to do in a government that, ultimately, has the power to command people and even to send them to prison. A business may put people first because businesses compete with each other in order to attract customers, but the government competes with nobody. And cutting red tape may be possible in a business firm that can tell whether it is doing a good job by looking at its sales and profits, but cutting it in a government agency is much harder because (ordinarily) government agencies deal with neither sales nor profit.”¹

The monopoly governments have on the “power to command people,” often referred to as the power of coercion, is what makes the issue of enforcement and adjudication so important. The Office of Management and Budget accurately described in their notice that “The growth of administrative enforcement and adjudication over the last several decades has not always been accompanied by commensurate growth of protections to ensure just and reasonable process.” We would take this one step further to say that the expansion of the administrative state has practically never been matched with the requisite protections of civil liberties. As such, we applaud the administration’s efforts to begin the much needed review of administrative enforcement and adjudication. It is our hope that this request for information is only the first step in a long road to reform.

What evidentiary rules apply in regulatory proceedings to guard against hearsay and/or weigh reliability and relevance? Would the application of some of the Federal Rules of Evidence create a fairer evidentiary framework, and if so, which Rules?

Since the codification of the Administrative Procedure Act under 5 U.S.C. Subchapter II, the federal government has generally held that “an administrative hearing is the equivalent of a

¹ Wilson, James Q. *Bureaucracy: What Government Agencies Do and Why They Do It*. Basic Books. 1989.



trial in federal court.”² However, this is rarely the case in reality. While parts of the adjudication process -- like document service requirements -- mirror the protections afforded in the court system, evidentiary rules in administrative enforcement and adjudication are often insufficient to ensure due process.

For an example of this, we need look no further than to the evidentiary standards of the Environmental Protection Agency (EPA). Their *Citizen’s Guide* -- a summary of adjudication procedure for *pro se* defendants -- states that “a party may want to file and serve a document entitled ‘Motion in Limine’ in order to” request the administrative law judge (ALJ) exclude evidence that is “irrelevant, immaterial, unduly repetitious, unreliable, or lacking in probative value.”³

As in civil and criminal courts, the burden for objecting to the introduction of evidence is placed upon the opposing party. However, unlike in the court system where an extensive network of services exist to aid *pro se* defendants, EPA’s guidelines specifically preclude the administration from assisting individuals in the defense of their case.⁴ In other words, the only people who have the necessary knowledge of EPA regulations and practices to aid *pro se* defendants are barred from doing so. It is unreasonable to preclude ALJs from independently reviewing the admissibility of evidence when dealing with a *pro se* defendant who lacks the depth of understanding required to make valid objections.

Another prime example of the necessity of expanding the Federal Rules of Evidence to cover administrative adjudication is the Securities and Exchange Commission (SEC) rules regarding the admissibility of sworn statements and witnesses.⁵ Although the regulations have become the industry standard for many other financial agencies, like the Consumer Financial Protection Bureau (CFPB), it remains significantly inferior to the due process protections afforded under Article VI of the Federal Rules of Evidence. If an administrative hearing is to be equivalent to a federal court, then OMB should seriously consider extending Article VI to apply to all federal regulatory adjudication. Similarly, OMB should also consider extending Article VIII to administrative adjudication since there currently exists no unified code regarding the admittance of hearsay into an enforcement action.

² EPA: Office of Administrative Law Judges. *Practice Manual*. July 2011.

https://www.epa.gov/sites/production/files/2013-09/documents/alj-practice-manual_0.pdf

³ EPA: Office of Administrative Law Judges. *Citizen’s Guide*. October 2010.

<https://www.epa.gov/sites/production/files/2013-09/documents/citizens-guide.pdf>

⁴ EPA: Office of Administrative Law Judges. *Practice Manual*. July 2011.

https://www.epa.gov/sites/production/files/2013-09/documents/alj-practice-manual_0.pdf

⁵ 60 FR 32796, June 23, 1995, as amended at 81 FR 50238, July 29, 2016.



Should agencies be required to produce all evidence favorable to the respondent? What rules and/or procedures would ensure the expedient production of all exculpatory evidence?

In 1963, the United States Supreme Court held in the case of *Brady v. Maryland* that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”⁶ While Brady specifically applied to criminal courts, this fundamental assertion by the Warren court should be applied across all areas of government interaction with its citizens, notwithstanding administrative adjudication.

Continuing with the example of the EPA, a serial abuser of administrative adjudication, we find that EPA has a strong policy of discovery. In all cases, “the Prehearing Order directs that at the hearing, the parties will be prohibited from presenting any information that they did not previously exchange.”⁷ However, EPA lacks any codified requirement that investigators disclose exculpatory evidence that they may have collected during their investigation. This is a violation of our basic civil liberties, including the right to a fair trial.

The greatest action that OMB can take to address this consistent violation of due process rights would be to initiate a rulemaking codifying a universal requirement that administrators turn over all evidence collected during their investigations. As it stands, investigators must only produce that evidence which will be used to adjudicate the case. Requiring agencies to grant the defense access to all information collected during the investigation is an essential privilege that should be afforded the defense. Ultimately, it is up to the agencies themselves to determine whether or not they care more about expediency or civil liberties, but OMB is perfectly situated to lead the way and direct these necessary reforms.

Are agencies and agency staff accountable to the public in the context of enforcement and adjudications? If not, how can agencies create greater accountability?

One of the fundamental dangers that bureaucracy presents is that bureaucrats are not accountable to the citizens in the same way that elected officials are. Among all the various roles bureaucrats take to serve our society, the most dangerous is when they sit in judgement of their fellow citizens. ALJs are unaccountable, unelected arbiters that work for government agencies

⁶ *Brady v. Maryland*, 373 U.S. 83 (1963)

⁷ EPA: Office of Administrative Law Judges. *Citizen's Guide*. October 2010.

<https://www.epa.gov/sites/production/files/2013-09/documents/citizens-guide.pdf>



rather than for the people. While the job of an ALJ is “functionally comparable” to the role of all other Article III judges, ALJs are not as accountable to the public as all other judges.⁸ Because ALJs are appointed based on a civil service scheme and protected through qualified immunity, the administrative adjudication process lacks sufficient oversight and accountability.

Though our court system has many flaws, it nevertheless protects the rights of citizens far better than administrative courts. There is certainly a strong case to be made in favor of the independence of ALJs for many of the same reasons that Supreme Court Justices ought to be shielded from political pressures. However, the 35+ agencies that use ALJs often choose to protect the independence of judges over the due process rights of the citizens. This problem has become so ingrained in the administrative adjudication process that the 7th Circuit Court of Appeals ruled in 2015 that ALJ case quotas are permissible as a tool to “speed up decision-making,” completely disregarding the well-known dangers of placing expediency above accuracy.⁹

Although much of the responsibility for reigning in ALJs rests with Congress, there is much that OMB can do to help encourage accountability. An important step the OMB should take to improve accountability in enforcement and adjudication is to improve the rulemaking process to ensure that regulations leave no room for ambiguity. Far too often we have seen instances in which ALJs have effectively been creating federal policy through adjudicatory determinations. This is primarily because the formal regulations and guidance documents are ambiguous regarding a particular case. OMB should take steps to end such practices by encouraging every agency to review existing regulations for ambiguities, especially in those regulations that outline enforcement actions.

Although it is rarely discussed outside of Washington circles, the unprecedented growth of the administrative state has presented our country with unprecedented challenges. While the size and scope of federal regulation has grown, civil liberties protections have remained nearly stagnant. It is vital for the longevity of our country that the federal government take steps now to prevent abuse in the future. We applaud OMB for taking this chance to solicit public comment on administrative enforcement and adjudication. Furthermore, we hope that this request for information is only the beginning and the OMB will take action to protect the American people from regulatory overreach. FreedomWorks Foundation looks forward to working with OMB in

⁸ Butz v. Economou, 438 U.S. 478 (1978)

⁹ Association of Administrative Law Judges et al. v. Carolyn W. Colvin, Acting Commissioner of Social Security. 2015 U.S. Court of Appeals for the 7th Circuit. No. 14-1953.



the future to continue cutting red tape and rolling back those regulations that are most damaging to the American people.

Respectfully submitted,

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