**Civics 101**

**Episode 3: The Comment Period**

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**Virginia Prescott:** [00:00:32] OK everybody before we get into this episode of Civics 101 we have an update.

[00:00:36] When we started this podcast we plan to tackle one Civics related question per week for the first 100 days of the Trump administration. Well it looks like we've really hit a nerve because there are loads of you listening right now and a lot of questions coming in to us about everything from the National Security Council to Supreme Court nominations to the process of impeachment. And we are trying to answer as many of your questions as we can which means that you will be hearing from us much more frequently. We urge you to subscribe to the podcast and you will not miss a thing. If there's something you'd like us to cover you can visit NHPR dot org slash Civics 101 or look for us on Twitter.

[00:01:17] The hashtag is Civics 101 pod and submit your question. Okay got to get to class.

**OPENER:** [00:01:24] Who is the current speaker of the house? The guy that cries, and I don't know his name. Twenty nine percent of those Americans that were asked could not name the vice president. Don't even know. Donald Trump today unveiled his choice for Press Secretary. Reince Priebus will serve as Trump's chief of staff. Congressional redistricting. Separation of powers. Shall appoint embassadores. The filibuster.

[00:01:45] Judges of the Supreme Court. Civics-- civics -- civics 101.

**Virginia Prescott:** [00:01:51] I'm Virginia Prescott and this is Civics 101.

[00:01:55] It's the podcast refresher course on some basics that you may have forgotten or slept through in school. Today the notice and comment rule-making procedure, or as it's more commonly, known the comment period. The Trump administration has made clear that it will eliminate or reverse a number of Obama's policies. But before he does, some will be submitted to the public for comment and a number of you asked about that. You probably heard the term "comment periods" but do you know what it means or what exactly happens during the comment period? And does it ever sway decision making? To find out we get in touch with Jody Freeman, a professor of law at Harvard Law School and asked her about the basic framework of the comment period.

**Jody Freeman:** [00:02:38] So this is the process that federal agencies use when they issue rules which are also called regulations and when they put out a new rule, they have to propose it and wait for a period for public comment to come in -- they take that comment. Sometimes it's 30 days 50 days or sometimes longer when the opportunity is there for anybody to actually comment on that proposed rule. Then the agency takes all of that input under consideration and usually revises the rule accordingly and then issues a final rule in the end.

**Virginia Prescott:** [00:03:08] So when people say or advocates say call your senator or send a letter or send something to the president is that what they mean? This is the comment period.

**Jody Freeman:** [00:03:17] No it's not quite like that. It's really more formal than that let's say it's the Environmental Protection Agency issuing an environmental regulation. There's actually what's called a docket which is really just the file system for managing that rule-making process and you have to submit the comments to the agency through a process. Actually you don't even have to do it anymore, physically. You can do it online through e-mail rule-making.

**Virginia Prescott:** [00:03:43] And you meaning any member of the public could do that.

**Jody Freeman:** [00:03:46] Anybody can do it.

**Virginia Prescott:** [00:03:47] So it's a way of kind of registering your opinion outside of voting.

**Jody Freeman:** [00:03:52] Exactly. And it's not just organized groups that do it of course. Business groups are very sophisticated at this and they hire teams of lawyers to file these comments to represent their interests. And there are also advocacy groups, public health groups, citizen groups and labor organized labor.

[00:04:08] Every group you can imagine is involved in filing comments along with business but also individual citizens can do it too.

**Virginia Prescott:** [00:04:14] How do we file a comment.

**Jody Freeman:** [00:04:16] Well you just have to go to the agency web site and you can look at that agency's proposed rules. And you can see the process for filing comments. Often you can do it online, e-commenting and so it's actually a pretty easy process.

**Virginia Prescott:** [00:04:31] OK. Does anyone really pay attention. Like if you notice something is proposed and there are 17 comments pro and 19 con. Does that mean the Cons have it?

**Jody Freeman:** [00:04:41] No it's not really like a vote. They're really meant to be substantive comments on what the agency is suggesting it wants to do. And in fact there can be literally hundreds of thousands of comments that come into an agency and some of the most controversial rules like air pollution rules. Let's say they attract an awful lot of comments and many of them are incredibly detailed really sophisticated from experts on the particular topic and especially from business interests and advocacy groups that have a lot to say about those rules.

**Virginia Prescott:** [00:05:12] Can these comments actually affect the final ruling or change a ruling?

**Jody Freeman:** [00:05:18] Absolutely. In fact by law there's a specific law that requires these agencies to consider these comments and to respond to the most important points that those comments make. So the agency can't just ignore them. They actually have to come out with a document after the comment period that explains all of the major points that were made in the comments and then also explains what the agency has done about them. And the reason we know this is actually important and legally binding on the agency and the reason we know they take it seriously is that if that rule is ever challenged in court the court will look at the agency's reasoning and we'll look at the statement that the agency has made in response to the comments and will evaluate whether the agency has been arbitrary or has been rational in how it has issued this rule.

**Virginia Prescott:** [00:06:08] So what is the process for the rules after the public comments have been made?

**Jody Freeman:** [00:06:13] So after the comments the agencies have to take some time and digest them and then they have to issue what's called a concise statement of basis and purpose and all that means is they have to issue a written rationale or a written explanation of why their rule has come out the way it's come out and how it responds to the most cogent important comments that have been made. And so it's really a written document that justifies the agency's decision. And that's what goes into the record to support the rule. And if it ever gets legally challenged that's really the agency's defense of its rule-making.

**Virginia Prescott:** [00:06:49] Can you give us a real world example of how comment periods or comments have affected a rule?

**Jody Freeman:** [00:06:57] Well give you an example, sure. So in a classic case about the regulation of sugared foods and sugared milk being subsidized by the federal government, whether the federal government should put certain foods into a nutrition program for citizens who are getting some assistance with food packages. The government took comment on what foods belong in that subsidized nutrition package and a lot of comments came in saying you know sugared cereals are really bad for kids and sugared flavored milks are really bad for kids and you shouldn't subsidize these when you're trying to boost the nutrition of women and children and the agency responsible for this took a look at it and said you're right we shouldn't really subsidize foods that are bad for you. We're going to remove chocolate milk from our food packets. And this created a huge uproar because the chocolate milk industry went bananas and were very upset. And it produced a lawsuit but it just shows you how a community can comment on a rule making make a difference in the final result.

**Virginia Prescott:** [00:08:00] So you're talking about government agency rules. But for example we're talking to you at the beginning of the Trump administration. Donald Trump has made clear that he will eliminate or reverse a number of Obama administration policies on day one. Now since this means changing government rules does this open up a comment period?

**Jody Freeman:** [00:08:21] Yes. So when you want to rescind a rule, revoke a rule, you have to go through the exact same process. You can't just wipe it off the books on day one. The president would have to ask his agency, let's say in this case the Environmental Protection Agency since we've been working with that example. And that agency would have to go through the same notice and comment process for actually rescinding a rule and replacing it with something different. So again this isn't just with the stroke of a pen that you can do this, a president can announce he's going to do something but he has to go through the responsible federal agency.

**Virginia Prescott:** [00:08:57] So Jody, what do you think is the most crucial takeaway for listeners for our civics lesson on comment periods?

**Jody Freeman:** [00:09:04] I think the most important thing to know is there's actually a legal process for how government agencies issue binding legal rules that affect the public. They don't do things arbitrarily. They don't do things in a day or two. They have to take the time to submit them to the public for comment and then to consider those comments. So nothing happens at the stroke of a pen. It's a very considered careful process and it's governed by a whole set of laws that try to hold those agencies to account. And on top of that there is judicial review meaning those rules can be challenged in court and they have to be defended by the agency too. So there are lots of checks and balances on what agencies can do.

**Virginia Prescott:** [00:09:46] Jody Freeman, thank you for speaking with us.

**Jody Freeman:** [00:09:49] My pleasure.

**Virginia Prescott:** [00:09:54] That is it for today's lesson. Hope you took some notes. But even if you didn't you can listen again and you can pass it along to someone else. No penalty for sharing, This episode of civics 101 was produced by Jimmy Gutierrez and edited by Maureen McMurry. I'm your host Virginia Prescott. We would really like to hear from you. If there's something you want us to cover you can visit NHPR dot org slash Civics 101 or look for us on Twitter.

[00:10:19] The hash tag is Civics 101 Pod. Civics 101 is the production of new Hampshire Public Radio.