General Policy Statements: Legal Overview

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Summary

Agencies frequently use guidance documents to set regulatory policy. While "legislative rules" carry the force of law and are required to undergo the notice and comment procedures of the Administrative Procedure Act (APA), guidance documents are exempt from these constraints and can be issued more swiftly than legislative rules. The issuance of such guidance documents, however, has not escaped criticism. Some have argued that agencies use guidance documents to effectively change the law or expand the scope of their delegated regulatory authorities. This report focuses on agency use and judicial review of one type of guidance document: general statements of policy.

Judicial review of challenges to agency policy statements often turns on whether the agency document is actually a legislative rule. Pursuant to congressionally delegated authority, agencies promulgate legislative rules that carry the force and effect of law. General statements of policy are not legally binding; rather, they are issued in order to advise the public about the manner in which the agency intends to exercise its discretionary authority. While these analytical categories might seem relatively clear, distinguishing between the two in practice can be difficult. Courts often frame the inquiry as to whether the agency has established a binding norm on the public or itself, although a variety of heuristics are applied, ranging from a somewhat formalistic analysis of relevant legal consequences to a more functional focus on a statement's practical effects.

In addition, the question of whether a given agency document is properly identified as a legislative rule or policy statement has a significant impact on a federal court's willingness to engage in judicial review of the agency action. Unlike legislative rules, which may be immediately reviewable once they are finalized, policy statements often cannot be challenged until the agency takes further action to implement or enforce the policy. The Supreme Court, however, has provided only limited guidance in determining whether and when policy statements are reviewable, and as a result, lower courts have not adopted a uniform approach to the reviewability question.

In light of the difficulty in distinguishing between legislative rules and policy statements, questions have been raised concerning whether some judicial tests to make this determination are consistent with Supreme Court doctrine. The Court has made clear that the judiciary may not impose procedural requirements on agencies beyond the text of the APA. The applicable legal test governing agency use of policy statements, whether imposed by courts or Congress, has important implications for the executive branch and the public. One approach might grant agencies flexibility to issue policy statements in order to increase public knowledge of agency priorities, but risks permitting agencies to effectively bind the public without going through notice and comment procedures. An alternative might be to require heightened procedures when agencies issue policy statements, but this approach risks less overall notice to the public about agency intentions.

Finally, although the relevant Supreme Court tests do not entirely preclude federal courts from deferring to an agency's statutory interpretation contained in statements of policy, such documents usually do not receive *Chevron* deference. The weight that a reviewing court is willing to give to an agency's interpretation of the law is an important aspect of judicial review. Indeed, the level of deference accorded to an agency interpretation can sometimes determine the outcome of a challenge to agency action. Interpretations reached through formal processes that have the force and effect of law are most likely to qualify for *Chevron* deference. In contrast, interpretations reached through informal processes, and which are neither binding nor precedential, are unlikely to be eligible for *Chevron* deference.

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Introduction

Agencies use guidance documents to set regulatory policy on a consistent basis.[1] While "legislative rules" carry the force of law and are required to undergo the notice and comment procedures of the Administrative Procedure Act (APA),[2] guidance documents are exempt from these constraints and can be issued more swiftly than legislative rules.[3]

Aside from the benefit to an agency of establishing a centralized, intra-agency approach to enforcing particular statutes,[4] guidance documents can notify the public as to an agency's interpretation of a particular law and inform regulated parties as to an agency's enforcement priorities. For example, the Department of Education has seemingly used guidance documents to implement Title IX more frequently than it has used legislative rules,[5] a strategy that has faced recent scrutiny.[6] The Department of Justice has issued guidance regarding its enforcement priorities with respect to marijuana possession laws,[7] and the Department of the Treasury's Financial Crimes Enforcement Network has done so with respect to financial firms that seek to provide services to marijuana-related companies under the Bank Secrecy Act.[8] Finally, in November 2014, the Department of Homeland Security issued an intragency memorandum to announce that it was expanding the Obama Administration's earlier Deferred Action for Childhood Arrivals (DACA) program and creating a new Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program.[9] These programs would, if implemented, permit certain aliens who have entered or remained in the United States in violation of federal immigration law to obtain relief from removal.[10] The validity of these 2014 programs

[1] *See* Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 398 (2007); Robert A. Anthony, *Interpretative Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 1992 DUKE L.J. 1311, 1316 (1992).

[2] 5 U.S.C. §553(b), (c).

[3] 5 U.S.C. §553(b)(A), (d)(2).

[4] *See* Final Bulletin for Agency Good Guidance Practices, 72 *Federal Register* 3432, 3437 (January 25, 2007); Recommendations of the Administrative Conference Regarding Administrative Practice and Procedure, 57 *Federal Register* 30,101, 30,103, 30,104 (July 8, 1992); Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 808 (2001) ("Agency administration is aided when central officials can advise responsible bureaucrats how they should apply agency law.").

[5] *See* Mendelson, *supra* note 1, at 405. *See, e.g.*, Office of Civil Rights, U.S. Dep't of Educ., Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test—Part Three (2005), *available at* http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.pdf.

[6] *See* Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. (forthcoming August 2016); Letter from Sen. James Lankford, Chairman, Subcomm. on Regulatory Affairs & Fed. Mgmt., to Hon. John B. King, Jr., Acting Sec'y U.S. Dep't of Educ., (January 7, 2016), https://d28htnjz2elwuj.cloudfront.net/wpcontent/uploads/2016/01/07092429/Lankford-letter-to-ED-1-7-2016.pdf. For more on Title IX enforcement, see CRS Report R43764, *Sexual Violence at Institutions of Higher Education*, by Gail McCallion and Jody Feder.

[7] *See* James M. Cole, Deputy Attorney General, *Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement* (August 29, 2013), https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf.

[8] *See* Department of the Treasury's Financial Crimes Enforcement Network, *BSA Expectations Regarding Marijuana-Related Businesses* (February 14, 2014).

[9] *See* DHS Secretary Jeh Charles Johnson, Memorandum, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and With Respect to Certain Individuals Who Are Parents of U.S. Citizens or Permanent Residents*, November 20, 2014.

[10] For more on deferred action, see generally CRS Report R43782, *Executive Discretion as to Immigration: Legal Overview*, by Kate M. Manuel and Michael John Garcia, at pages 18-19.

may be addressed by the Supreme Court, which is reviewing a decision by the U.S. Court of Appeals for the Fifth Circuit upholding a preliminary injunction barring their implementation.[11]

The issuance of such guidance has not escaped criticism. Some have argued that agencies use guidance documents to effectively change the law or expand the scope of their delegated regulatory authorities.[12]

This report examines one type of guidance document of particular recent prominence—agency policy statements. It explores judicial doctrine regarding the difference between legislative rules and statements of policy; discusses when such statements are judicially reviewable; analyzes when courts will grant deference to agency interpretations contained in guidance documents; and notes the relative costs and benefits of potential judicial and statutory rules regarding their use.

Brief Overview of Guidance Documents

APA Rulemaking Requirements

Federal agencies are often permitted to issue rules to effectuate their congressionally delegated authorities. The APA imposes various procedural requirements when agencies do so. A rule, according to the APA, is "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency."[13] If an agency's organic statute explicitly requires rulemaking to be "on the record," then the APA's formal rulemaking procedures are required.[14] Otherwise, the informal notice and comment rulemaking provisions of Section 553 of the APA apply.[15] The most common process for issuing rules is under the latter category.[16] Section 553 requires agencies issuing legislative rules, or rules made pursuant to congressionally delegated authority that carry the force and effect of law, to provide the public with notice of a proposed rulemaking and an opportunity to comment on the rule.[17] It also requires agencies to publish the final rule in the *Federal Register* not less than 30 days before the effective date.[18]

There are nonetheless several exceptions to Section 553's procedural requirements. While "legislative" or "substantive" rules that bind the public or an agency must comply with Section

[11] *See* 86 F. Supp. 3d 591, 676 (S.D. Tex.), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *as revised* (November 25, 2015), *cert. granted*, 136 S. Ct. 906 (2016). For more information on the courts' decisions here, see CRS Report R43839, *State Challenges to Federal Enforcement of Immigration Law: Historical Precedents and Pending Litigation in Texas v. United States*, by Kate M. Manuel.

[12] *See Non-Binding Legal Effect of Agency Guidance Documents*, COMMITTEE ON GOVERNMENT REFORM, H.Rept. 106-1009, at 1 (2000) ("[T]he committee's investigation found that some guidance documents were intended to bypass the rulemaking process and expanded an agency's power beyond the point at which Congress said it should stop. Such 'backdoor' regulation is an abuse of power and a corruption of our Constitutional system."); Anthony, *supra* note 1, at 1316; *see also Government Accountability Office, Regulatory Guidance Processes: Selected Departments Could Strengthen Internal Control and Dissemination Practices*, GAO-15-368 (April 2015).

[13] 5 U.S.C. §551(4).

[14] United States v. Florida East Coast Ry. Co., 410 U.S. 224 (1973); 5 U.S.C. §§556, 557.

[15] Other types include formal, hybrid, direct final, and negotiated rulemaking. *See* CRS Report R41546, *A Brief Overview of Rulemaking and Judicial Review*, by Todd Garvey and Daniel T. Shedd.

[16] *See* CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, coordinated by Maeve P. Carey.

[17] 5 U.S.C. §553(b), (c).

[18] 5 U.S.C. §553(d).

553, "interpretive rules" and "general statements of policy," often known as "guidance documents,"[19] or "nonlegislative rules,"[20] are exempt from these strictures.[21]

Agencies release a variety of documents that may not qualify as legislative rules that can, among other things, guide the actions of agency staff in the field, inform the public about how a particular statutory provision will be interpreted, or announce prospectively the enforcement priorities of the agency.[22] Because individuals may bring suit in federal court challenging an agency's action as violating the APA's procedural provisions, parties may allege that an agency document should have gone through notice and comment procedures.[23] Consequently, judicial review of challenges to a document released by an agency often turns on whether the agency statement is actually a legislative rule, or could more properly be described as an interpretive rule or general statement of policy.[24]

The Attorney General's Manual on the APA offers a description of the nature of each tool:

> *Substantive Rules*—rules, other than organization or procedural [rules], issued by an agency pursuant to statutory authority and which implement the statute.... Such rules have the force and effect of law....
>
> *Interpretative rule*—rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers....
>
> *General Statements of Policy*—statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.[25]

However, as this report will observe, while formulating a broad description of the difference between legislative rules and guidance documents is relatively easy, actually determining what

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[19] *See, e.g.*, M. Elizabeth Magill, *Agency Choice of Policymaking Forum*, 71 U. CHI. L. REV. 1383, 1386 (2004); Connor N. Raso, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 YALE L.J. 782, 788 n.17 (2010).

[20] *See* William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1322 (2001) ("These rules are often called nonlegislative rules, because they are not 'law' in the way that statutes and substantive rules that have gone through notice and comment are 'law,' in the sense of creating legal obligations on private parties.").

[21] 5 U.S.C. §553(b)(A), (d)(2). Guidance documents are not exempt from all statutory requirements. For example, the Freedom of Information Act (FOIA) requires such statements to be made publicly available. 5 U.S.C. § 552(a)(1)(D), (a)(2)(B). Further, "significant" policy statements and guidance documents are subject to review by the Office of Information and Regulatory Affairs in the White House Office of Management and Budget. *See* Memorandum from Peter R. Orszag, Director of the Office of Management and Budget, to Heads and Acting Heads of Executive Departments and Agencies, March 4, 2009, http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-13.pdf. *See infra* "Procedures for Issuing Policy Statements."

[22] *See* Syncor Int'l Corp. v. Shalala, 127 F.3d 90, 95-96 (D.C. Cir. 1997) ("By issuing a policy statement, an agency simply lets the public know its current enforcement or adjudicatory approach."); Hoctor v. U.S.D.A.., 82 F.3d 165, 167 (7th Cir. 1996) ("Every governmental agency that enforces a less than crystalline statute must interpret the statute, and it does the public a favor if it announces the interpretation in advance of enforcement."); Strauss, *supra* note 4, at 808 ("Agency administration is aided when central officials can advise responsible bureaucrats how they should apply agency law.").

[23] 5 U.S.C. §§702, 706(2)(D).

[24] If a court determines that a policy statement is reviewable, a legal challenge may also be substantive in nature. A party may seek to invalidate a policy statement on the grounds that the agency action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A).

[25] TOM C. CLARK, ATTORNEY GENERAL, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT, at 30 n.3 (1947), http://www.law.fsu.edu/library/admin/1947iii.html [hereinafter AG Manual]. The APA also exempts interpretive rules from Section 553's procedural requirements. 5 U.S.C. §553(b)(A).

constitutes a legislative rule in practice can prove quite difficult.[26] Because of the attention paid to recent use of policy statements—and in the interest of space and clarity—the report leaves interpretive rules to the side and instead focuses on agency issuance and judicial review of policy statements. As such, the report examines the general framework often employed by courts when assessing whether an agency statement constitutes a legislative rule.

Procedures for Issuing Policy Statements

Whereas an agency must comply with a variety of statutorily established procedural requirements in order to promulgate a legislative rule, federal law imposes few procedural requirements on the issuance of a policy statement. As previously noted, the APA explicitly states that the notice and comment requirements of Section 553 do not apply to "policy statements" and other nonlegislative rules.[27] Nevertheless, an agency must take certain steps in issuing these statements. For example, the Freedom of Information Act (FOIA) amendments to the APA establish a publication requirement for policy statements that impact the general public.[28] Under 5 U.S.C. §552(a)(1), an agency "shall ... publish in the Federal Register for the guidance of the public—substantive rules of general applicability adopted as authorized by law, *and statements of general policy* or interpretations of general applicability formulated and adopted by the agency ..."[29] This provision must be read in conjunction with 5 U.S.C. §552(a)(2), which implicitly recognizes that not all policy statements are required to be published in the *Federal Register* by providing that an agency need only "make available for public inspection and copying ... those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register."[30]

The line between "statements of general policy" that must be published under Section 552(a)(1) and "statements of policy" that do not need to be published under Section 552(a)(2) is "notoriously difficult to draw."[31] Indeed, one commentator has suggested that the line is in fact incapable of being drawn, "except in vague terms."[32] Perhaps due to the difficulty in determining into what category a given policy statement falls, the courts have only rarely addressed—at least in any substantial manner—the question of what types of policy statements require publication in the *Federal Register*. As a result, approaches to the publication question vary. Whereas some courts have focused on whether a policy statement affects "substantive rights" to determine if the publication requirement is triggered, other courts have focused on whether the policy statement is one of "general applicability."[33]

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[26] *See infra* "Distinguishing Between Legislative Rules and Policy Statements."

[27] 5 U.S.C. §553(b). Moreover, it would appear that policy statements may be made effective immediately. 5 U.S.C. §553(d)(2).

[28] 5 U.S.C. §§552 *et seq*.

[29] 5 U.S.C. §552(a)(1)(D) (emphasis added).

[30] 5 U.S.C. §552(a)(2)(B).

[31] Cathedral Candle Co. v. United States, 400 F.3d 1352, 1369 (Fed. Cir. 2005)("The line between matters falling within section 552(a)(1)(D) and matters falling within section 552(a)(2)(B) is notoriously difficult to draw.").

[32] KENNETH DAVIS, ADMINISTRATIVE LAW TREATISE §5.11, at 341 (1978).

[33] *Compare* Nguyen v. United States, 824 F.2d 697, 699-700 (9th Cir. 1987) ("This circuit's precedents firmly establish that a claimant ... cannot succeed under § 552(a)(1) unless the unpublished material at issue affected his 'substantive rights.'") *with* Tax Analysts & Advocates v. IRS, 362 F. Supp. 1298, 1303-04 (D.D.C. 1973) ("Read together these provisions can only mean that interpretations of general applicability are to be published in the Federal Register while all other interpretations adopted by an agency, i. e. those not of general applicability, are to be made available to the public, albeit they need not be published."); *see also* Morton v. Ruiz, 415 U.S. 199, 232, (1974) ("The [APA] was (continued...)

Although exempt from the notice and comment procedures of Section 553, and possibly exempt from the publication requirements of Section 552, recent presidential administrations have placed additional, nonstatutory procedural requirements on the issuance of a limited subset of policy statements. The George W. Bush Administration imposed procedural requirements on the issuance of "significant guidance documents" through Executive Order 13422.[34] That order required all agencies to provide the Office of Management and Budget's (OMB's) Office of Information and Regulatory Affairs (OIRA) with "advance notification" before issuing any "significant guidance document,"[35] and further authorized the OIRA Administrator to require "additional consultation" before the agency was permitted to issue such a document.[36]

Although Executive Order 13422 was later withdrawn by President Obama,[37] a 2007 Bush Administration OMB bulletin governing agency practices for issuing guidance documents remains in effect. The announcement, entitled "Final Bulletin for Agency Good Guidance Practices," establishes "standard elements" for "significant guidance documents" and requires each agency to have in place written procedures for the approval of such documents by appropriate senior agency officials.[38] Perhaps most significantly, the bulletin requires agencies to publish "*economically significant* guidance documents" in draft form in the *Federal Register*; invite public comment on the draft, and make a "response-to-comments" document available on the agency's website.[39]

Thus, although the APA does not require that agencies comply with notice and comment procedures when issuing policy statements, the executive branch has established a policy that requires agencies to engage in a similar process when issuing economically significant policy

(...continued)

adopted to provide [] that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc determinations.").

[34] Exec. Order No. 13422, 72 *Federal Register* 2763 (January 23, 2007).

[35] *Id*. at §7. Upon request of the OIRA Administrator, each agency was also required to provide OIRA with a copy of the draft guidance along with a "brief explanation of the need for the guidance document and how it will meet that need." The order defined "significant guidance documents" as those that had an annual effect of $100 million or more; created a "serious inconsistency" with the actions of another agency; "materially alter" "entitlements, grants, user fees, or loan programs"; or raised novel legal or policy issues. *Id*. at §3.

[36] *Id.* at §7.

[37] Exec. Order No. 13497, 74 *Federal Register* 6113 (February 4, 2009).

[38] Final Bulletin for Agency Good Guidance Practices, 72 *Federal Register* 3432 (January 25, 2007). The bulletin defines "significant guidance document" as:

> a guidance document disseminated to regulated entities or the general public that may reasonably be anticipated to: (i) Lead to an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (ii) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (iii) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (iv) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866, as further amended."

Id. at I. (4).

[39] The bulletin defines an "economically significant guidance document" as a "significant guidance document that may reasonably be anticipated to lead to an annual effect on the economy of $100 million or more or adversely affect in a material way the economy or a sector of the economy.... " *Id*. at I. (5).

statements.[40] Compliance with the process established by the OMB bulletin, however, is not subject to judicial review.[41]

Finally, some policy statements are also subject to the submission requirement and disapproval procedures of the Congressional Review Act (CRA).[42] The CRA provides that before any "rule" may take effect, the agency must submit the rule to each house of Congress and the Comptroller General.[43] The law further establishes expedited procedures by which Congress, through enactment of a joint resolution of disapproval, may invalidate the rule.[44]

Although policy statements are distinguishable from *legislative rules* for the purposes of the APA's notice and comment requirements, some policy statements may nonetheless be considered *rules* for the purposes of the CRA. The CRA adopts the definition of "rule" from Section 551 of the APA that is much broader than the category of rules subject to notice and comment rulemaking under Section 553, and one which may cover some policy statements.[45] Under the CRA, a rule includes "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.... "[46]

The expansive definition goes on, however, to expressly exclude "any rule of particular applicability"; "any rule relating to agency management or personnel"; or "any rule of agency organization, procedure, or practice *that does not substantially affect the rights or obligations of non-agency parties*."[47]

It would appear that many policy statements could be characterized as an "agency statement" designed to "implement or interpret" agency policy or to describe agency "practice." Any such policy statement that does not qualify for one of the CRA's exceptions may be considered a "rule" subject to the law's submission requirement and congressional disapproval mechanism.

Distinguishing Between Legislative Rules and Policy Statements

As mentioned above, while legislative rules must undergo notice and comment rulemaking procedures,[48] agency statements of policy are exempt from these requirements.[49] And because a party may bring suit in federal court challenging an agency's action as violating the APA's procedural provisions, an individual may argue that an agency document should have gone through notice and comment procedures.[50] Judicial review of challenges to agency policy

[40] The bulletin creates various exemptions to the notice and comment requirements. See *Id*. at IV(2) and V.

[41] *Id*. at VI.

[42] 5 U.S.C. §§801-808. *See* CRS Report R43992, *The Congressional Review Act: Frequently Asked Questions*, by Maeve P. Carey, Alissa M. Dolan, and Christopher M. Davis.

[43] 5 U.S.C. §801(a).

[44] 5 U.S.C. §§801(b), 802.

[45] 5 U.S.C. §804(3).

[46] 5 U.S.C. §551(4).

[47] 5 U.S.C. §804(3) (emphasis added).

[48] 5 U.S.C. §553(b), (d).

[49] 5 U.S.C. §553(b)(A), (d)(2).

[50] 5 U.S.C. §§702, 706(2)(D).

statements thus often turns on whether the agency document is actually a legislative rule. When making this determination, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit), for example, has explained that "[a]n agency action that purports to impose legally binding obligations or prohibitions on regulated parties ... is a legislative rule," while "[a]n agency action that merely explains how the agency will enforce a statute or regulation ... is a general statement of policy."[51] A legislative rule can serve as "the basis for an enforcement action for violation" of its requirements,[52] but a policy statement, which is not legally binding, may not.[53] When an agency seeks to apply the policy statement "in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued."[54] It merely articulates how an agency "will exercise its broad enforcement discretion," serving as an "announcement to the public of the policy which the agency hopes to implement in [the] future."[55]

However, while these analytical categories might seem relatively clear, distinguishing between the two in practice can be difficult.[56] A relatively clear case would be when an agency attempts to bring an enforcement action based on the violation of a nonlegislative rule. Because nonlegislative rules cannot be legally binding, agencies may not rely on them to support an enforcement action.[57] However, less distinguishable cases are quite common. For example, a scenario could exist in which an agency directs its field officers to enforce a statute in a certain way, such as by not bringing enforcement actions against certain types of behavior; by only bringing enforcement actions when specific factors are triggered; or by approving permits in specific situations.[58] If the public alters its behavior in response to that guidance, has the agency effectively altered the law?

Speaking broadly, courts agree that policy statements may not have binding legal effects.[59] However, determining precisely what counts as "legally binding" is difficult. As courts and commentators have noted, the distinction between policy statements and legislative rules is "enshrouded in considerable smog."[60] Courts often frame the inquiry as an examination of whether the agency has established a binding norm on the public or itself; a variety of heuristics

[51] Nat'l Min. Ass'n v. McCarthy, 758 F.3d 243, 251-52 (D.C. Cir. 2014).

[52] *Id.* at 251.

[53] *Id.* at 253.

[54] Pacific Gas & Electric Co. v. Federal Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974).

[55] *Id.* at 38.

[56] *See* John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 893 (2004).

[57] *See, e.g.*, United States v. Picciotto, 875 F.2d 345, 349 (D.C. Cir. 1989).

[58] *See, e.g.*, Texas v. United States, 86 F. Supp. 3d 591, 676 (S.D. Tex.) (concluding that because a DHS memorandum directed to agency staff "virtually extinguished" employee discretion as to whether to grant deferred action to individual aliens it constituted a legislative rule), *aff'd*, 809 F.3d 134, 146 (5th Cir. 2015), *cert. granted*, 136 S. Ct. 906 (2016).

[59] Whether a purported policy statement is actually a legislative rule can significantly overlap with the finality inquiry. *See* Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta, 785 F.3d 710, 716 (D.C. Cir. 2015) ("In litigation over guidance documents, the finality inquiry is often framed as the question of whether the challenged agency action is best understood as a non-binding action, like a policy statement or interpretive rule, or a binding legislative rule."). *See infra* "Reviewability of Policy Statements."

[60] Noel v. Chapman, 508 F.2d 1023, 1030 (2d Cir. 1975); Cmty. Nutrition Inst. v. Young, 818 F.2d 943, 946 (D.C. Cir. 1987); Am. Trucking Associations, Inc. v. I. C. C., 659 F.2d 452, 462 (5th Cir. 1981); U.S. ex rel. Parco v. Morris, 426 F. Supp. 976, 984 (E.D. Pa. 1977); Jean v. Nelson, 711 F.2d 1455, 1480 (11th Cir. 1983) ("[A]nalyzing a rule within the general statement of policy exception is akin to wandering lost in the Serbonian Bog."); K. DAVIS, ADMINISTRATIVE LAW TREATISE §7:5, at 32 (2d ed. 1979) ("[T]he problem is baffling. The statute is unclear, and its legislative history helps hardly at all.").

are applied, however, ranging from a somewhat formalistic analysis of relevant legal consequences to a more functional focus on a statement's practical effects.[61]

A somewhat formalistic analysis when making this determination focuses on the concrete legal effects of policy statements for regulated parties.[62] Such an approach can ask, for example, whether the agency is relying on a violation of the terms of the document *itself* to support an enforcement proceeding, or if the agency is pointing to an independent substantive statute or regulation that constitutes the underlying binding norm.[63] If the violation is predicated on the latter, then the agency's statement is presumably not a legislative rule. In other words, if no legal consequences flow from a violation of the agency statement itself, then it does not establish a legislative rule.[64] For example, although often framed within the finality inquiry,[65] if an agency policy statement merely restates what is already required of a regulated party in a statute or regulations, then it does not alter rights or obligations.[66]

Another line of cases diagnoses legislative rules according to a more functional approach—even if a specific document does not formally operate with independent legal force, a purported guidance document can be practically binding and qualify as a legislative rule.[67] This analysis can include a focus on whether a guidance document "genuinely leaves the agency and its decisionmakers free to exercise discretion."[68] In other words, the agency can deliberately bind itself through a statement that restricts its own discretion in applying a policy.[69] If an agency statement narrows the scope of discretion for agency officials applying a statute or rule such that

[61] Divergence can even be seen within the same circuit. *Compare McCarthy*, 758 F.3d at 252 ("The most important factor concerns the actual legal effect (or lack thereof) of the agency action in question on regulated entities. Here, that factor favors EPA. As a legal matter, the Final Guidance is meaningless.") *with Cmty. Nutrition*, 818 F.2d at 948 ("But the fact that action levels do not completely bind food producers as would a more classic legislative rule ... is not determinative of the issue."). It should be emphasized, however, that this does not represent absolutely binary categories of analysis—there may be significant overlap between the two at the conceptual level. *See, e.g.*, Nat. Res. Def. Council v. EPA, 643 F.3d 311, 318-21 (D.C. Cir. 2011) (vacating an EPA guidance document ex ante because it "changed the law" by binding regional directors and authorizing them to accept alternatives to statutory requirements).

[62] *See, e.g., McCarthy*, 758 F.3d 243 at 252; Sec. Indus. & Fin. Markets Ass'n v. U.S. Commodity Futures Trading Comm'n, 67 F. Supp. 3d 373, 416 (D.D.C. 2014). One might read certain cases dismissing challenges because the agency action is not final as consistent with a more formal approach to reviewing policy statements. For example, in Nat'l Assoc. of Home Builders v. Norton, 415 F.3d 8, 16 (D.C. Cir. 2005), the court ruled that an agency statement did not qualify as final agency action, but considered and rejected arguments that the guidance document was practically binding. *Id.* at 17. *See also* Am. Paper Inst., Inc. v. E.P.A., 882 F.2d 287, 289 (7th Cir. 1989) ("[T]elegraphing your punches is not the same as delivering them.").

[63] *See Cmty. Nutrition*, 818 F.2d at 952-53 (D.C. Cir. 1987) (Starr, J., concurring in part and dissenting in part); Pacific Gas & Electric Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974).

[64] *See McCarthy*, 758 F.3d 243 at 251-52; *Ass'n of Flight Attendants*, 785 F.3d at 717.

[65] *See infra* "Reviewability of Policy Statements."

[66] *See* Nat'l Pork Producers Council v. EPA, 635 F.3d 738, 756 (5th Cir. 2011) ("Moreover, an agency's actions are not reviewable when they merely reiterate what has already been established."); *Am. Paper Inst.*, 882 F.2d at 289 ("[T]elegraphing your punches is not the same as delivering them.").

[67] *See Cmty. Nutrition*, 818 F.2d at 948 ("We are not unmindful that in a suit to enjoin shipment of allegedly contaminated corn, it appears that FDA would be obliged to prove that the corn is 'adulterated,' within the meaning of the FDC Act, rather than merely prove non-compliance with the action level.... But the fact that action levels do not completely bind food producers as would a more classic legislative rule (where the only issue before the court would be if the agency rule were in fact violated) is not determinative of the issue."). The regulatory scheme at issue might affect whether the agency has imposed a practically binding rule. *See Nat'l Assoc. of Home Builders*, 415 F.3d at 16.

[68] *Cmty. Nutrition*, 818 F.2d at 946; Gen. Elec. Co. v. EPA, 290 F.3d 377, 382 (D.C. Cir. 2002); Chamber of Commerce v. Dep't of Labor, 174 F.3d 206, 212 (D.C. Cir. 1999).

[69] *See* Am. Bus Ass'n v. United States, 627 F.2d 525, 529 (D.C. Cir. 1980).

application of the statement to particular facts is automatic, leaving no room for discretion, then courts may find that the statement has created a legislative rule.[70] Under this heuristic, if a "so-called policy statement is in purpose or likely effect one that narrowly limits administrative discretion, it will be taken for what it is—a binding rule of substantive law."[71] Of course, this analysis can overlap with an examination of the effect on regulated parties. If an agency applies a document as conclusively dispositive of an issue with "present-day binding effect" on the public, the document can operate as a substantive rule.[72] Further, courts may be more likely to find a legislative rule has been created when the statement is binding on the agency and expands an agency's regulatory reach[73] or "creates new rights or imposes obligations" on the public.[74]

Courts pay close attention to the particular language used in the document when making this determination.[75] Mandatory language delineating an agency's position can serve as strong evidence of intent to bind the public or the agency itself.[76] As the D.C. Circuit has noted in the past, "an agency pronouncement will be considered binding as a practical matter if it ... appears on its face to be binding."[77] Agency statements "couched in terms of command" may be read to eliminate agency discretion when applying a policy, transforming the statement into a legislative rule.[78] In *General Electric Company v. E.P.A.*, for example, the EPA issued a guidance document outlining when it would accept applications for plans to conduct certain types of waste disposal in order to conform to substantive regulations.[79] The court noted that the document facially "impos[ed] binding obligations" on applicants to adhere to the terms of the guidance document and upon the agency to accept applications that met a certain standard.[80] The court vacated the document because its "commands ... indicate that it has the force of law."[81]

In contrast, if an agency directive or statement allows agency officials to retain discretion when applying a statute or rule, then courts will be more likely to view the statement as a guidance document.[82] In other words, if an agency statement permits agency officials to enjoy flexibility to

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[70] *See* Ryder Truck Lines, Inc. v. United States, 716 F.2d 1369, 1377 (11th Cir. 1983); *see, e.g.*, Texas v. United States, 86 F. Supp. 3d 591, 676 (S.D. Tex.) (concluding that because a DHS memorandum that was directed to agency staff "virtually extinguished" employee discretion, it constituted a legislative rule), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *cert. granted*, 136 S. Ct. 906 (2016).

[71] *Cmty. Nutrition.*, 818 F.2d at 948; Guardian Fed. Sav. & Loan Ass'n v. Fed. Sav. & Loan Ins. Corp., 589 F.2d 658, 666 (D.C. Cir. 1978).

[72] McLouth Steel Products Corp. v. Thomas, 838 F.2d 1317, 1321 (D.C. Cir. 1988).

[73] *See* Syncor Int'l Corp. v. Shalala, 127 F.3d 90, 95-96 (D.C. Cir. 1997).

[74] *Ass'n of Flight Attendants*, 785 F.3d at 717; CropLife America v. EPA, 329 F.3d 876, 881 (D.C. Cir. 2003).

[75] Courts might also consider whether the document was published in the *Code of Federal Regulations* or the *Federal Register*. *Ass'n of Flight Attendants*, 785 F.3d at 717. It should be noted that courts may reject as "boilerplate" disclaimers in guidance documents that claim not to create rights or obligations, especially if the remainder of the document reads as a mandate. *See, e.g.*, Appalachian Power Co. v. EPA, 208 F.3d 1015, 1022-23 (D.C. Cir. 2000).

[76] *See Cmty. Nutrition*, 818 F.2d at 946 ("[W]e have, for example, found decisive the choice between the words 'will' and 'may.'"); Nat'l Mining Ass'n v. Sec'y of Labor, 589 F.3d 1368, 1372 (11th Cir. 2009); *Appalachian Power*, 208 F.3d at 1023; Am. Trucking Ass'ns v. I.C.C., 659 F.2d 452, 463 (5th Cir. 1981).

[77] *Gen. Elec.*, 290 F.3d at 383 (quoting *Appalachian Power*, 208 F.3d at 1023).

[78] *Am. Bus Ass'n*, 627 F.2d at 531 (quoting *Pacific Gas*, 506 F.2d at 38, 42).

[79] *Gen. Elec.*, 290 F.3d at 379. Specifically, the regulations concerned the cleanup and disposal of polychorinated biphenyls remediation waste. 30 C.F.R. §761.61.

[80] *Gen. Elec.*, 290 F.3d at 385.

[81] *Id.*

[82] *See* Vietnam Veterans v. Secretary of the Navy, 843 F.2d 528, 539 (D.C.Cir.1988); *McCarthy*, 758 F.3d 243 at 252; Catawba County v. E.P.A., 571 F.3d 20, 33-34 (D.C.Cir. 2009); Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 452 F.3d 798, 809 (D.C. Cir. 2006); Sec. Indus. & Fin. Markets Ass'n v. U.S. Commodity Futures Trading (continued...)

make individualized determinations in particular cases, then the agency has not created or imposed a binding norm.[83] For instance, in *National Mining Association v. Secretary of Labor*, the Mine Safety and Health Administration permitted agency officials to, on a case-by-case basis, approve plans that exempted mine operators from compliance with certain regulations.[84] The agency sent a letter to its officials providing factors to consider when granting an exemption. The court ruled that the directive was simply a statement of policy because agency officials had discretion to consider individual facts on a case-by-case basis when considering whether to grant an exemption. This discretion meant that no binding norm was created.[85]

Similarly, some courts have found that when parties have been "reasonably led to believe that failure to conform will bring adverse consequences," then an agency statement is practically binding.[86] In addition, if an agency statement purports to create a "safe harbor," compliance with which can shield an entity from enforcement, "it can be binding as a practical matter."[87] In other words, if an agency statement "specifi[es] precisely what a regulated entity can do to comply with agency legislative rules," it has effectively established a legislative rule.[88]

Some courts have arguably expanded this approach and looked to an agency's treatment of a policy statement in the field—concluding that an agency's application of a document can reveal its binding nature.[89] As the D.C. Circuit put it, when an agency:

> acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule ... if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes "binding."[90]

For example, in *U.S. Telephone Association v. F.C.C.*, the Federal Communications Commission (FCC) issued a schedule of penalties to determine fines for violation of the Communications

(...continued)

Comm'n, 67 F. Supp. 3d 373, 416 (D.D.C. 2014).

[83] *See* Professionals & Patients for Customized Care v. Shalala, 56 F.3d 592, 600 (5th Cir. 1995); Sacora v. Thomas, 628 F.3d 1059, 1070 (9th Cir. 2010).

[84] *Nat'l Mining Ass'n*, 589 F.3d at 1370-71.

[85] *Id.* at 1372.

[86] *Gen. Elec. Co.*, 290 F.3d at 383 (quoting Anthony, *supra* note 1, at 1355); Iowa League of Cities v. EPA, 711 F.3d 844 (8th Cir. 2014); *Appalachian Power*, 208 F.3d at 1021.

[87] Sec. Indus. & Fin. Markets Ass'n v. U.S. Commodity Futures Trading Comm'n, 67 F. Supp. 3d 373, 419 (D.D.C. 2014) (quoting *Gen. Elec.*, 290 F.3d at 382); Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 452 F.3d 798, 809 (D.C. Cir. 2006) ("There is also nothing to indicate that automakers can rely on the guidelines as 'a norm or safe harbor by which to shape their actions,' which might suggest that the guidelines are binding as a practical matter.") (quoting *Gen. Elec.*, 290 F.3d at 383.)).

[88] Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*; 90 TEX. L. REV. 331, 347 (2011); *Gen. Elec.*, 290 F.3d at 384; *Appalachian Power*, 208 F.3d at 1023. That said, courts often reject claims that voluntary industry compliance with the terms of a policy statement transforms a statement into a legislative rule, sometimes noting a distinction between practical effects and legal effects. *See Ctr. for Auto Safety*, 452 F.3d at 811; *Nat'l Ass'n of Home Builders*, 415 F.3d at 15; Nat'l Min. Ass'n v. McCarthy, 758 F.3d 243, 253 (D.C. Cir. 2014) ("But while regulated parties may feel pressure to voluntarily conform their behavior because the writing is on the wall about what will be needed to obtain a permit, there has been no 'order compelling the regulated entity to do anything.'") (quoting Independent Equipment Dealers Association v. E.P.A., 372 F.3d 420, 428 (D.C. Cir. 2004)).

[89] *See Appalachian Power*, 208 F.3d at 1021; *Gen. Elec.*, 290 F.3d at 382.

[90] *Appalachian Power*, 208 F.3d at 1021.

Act.[91] The Commission described the schedule as a policy statement and claimed that it retained discretion to "depart from the standards in specific applications."[92] The D.C. Circuit noted that the agency had applied the schedule 300 times and claimed to have departed from the schedule in only eight situations. The court, however, largely rejected the eight departures as truly exercising any sort of discretion. The court concluded that this practice revealed the agency's intention to bind itself to a particular position and set aside the schedule because it had not undergone notice and comment rulemaking.[93]

The importance of the difference between a formal and a functional heuristic is illustrated by a case currently pending before the Supreme Court.[94] In *Texas v. United States*, a federal district court entered a nationwide preliminary injunction barring the Obama Administration from implementing the DAPA program and its proposed expansion of the earlier DACA program, initiatives which had been announced in a memorandum from the DHS Secretary to high-level agency officials.[95] The memorandum directed agency officials to establish a process whereby aliens that met certain criteria could, on a "case-by-case basis," obtain one type of relief from removal, known as deferred action.[96] The district court found that because this memorandum constituted a legislative rule rather than a policy statement, its issuance without notice and comment violated the APA.[97] The court rejected the agency's claim that agency employees maintained meaningful discretion when determining whether to grant deferred action to individual aliens who met the criteria set forth in the memorandum, reasoning that the memorandum "virtually extinguished" discretion for agency personnel, who would simply decide whether an application met the specified criteria.[98] In reaching this conclusion, the court relied on data regarding the implementation of the earlier DACA program, noting that there is "no reason to believe that DAPA will be implemented any differently than DACA."[99] Under DACA, the court found, while a small percentage of applications were denied,[100] those were the result of

[91] U.S. Tel. Ass'n v. F.C.C., 28 F.3d 1232, 1233 (D.C. Cir. 1994).

[92] *Id*. at 1234.

[93] *Id*. at 369. In *Texas v. United States*, the district court rejected the claim that the DAPA memorandum preserved agency discretion, in part because of DHS's implementation of an earlier deferred action program, the Deferred Action for Childhood Arrivals (DACA) program, where only 5% of the thousands of applications were reportedly denied. Texas v. United States, 86 F. Supp. 3d 591, 609, 670 (S.D. Tex.) *aff'd*, 809 F.3d 134 (5th Cir. 2015), *cert. granted*, 136 S. Ct. 906 (2016).

[94] As this report is limited to analysis of agency policy statements, larger questions concerning immigration law are beyond the scope of this report. For more on legal challenges to executive branch enforcement of immigration law, see CRS Report R43839, *State Challenges to Federal Enforcement of Immigration Law: Historical Precedents and Pending Litigation in Texas v. United States*, by Kate M. Manuel.

[95] The order also barred expansion of the DACA program. *See* Texas v. United States, 86 F. Supp. 3d 591, 609, 670 (S.D. Tex. 2015); CRS Report R43839, *State Challenges to Federal Enforcement of Immigration Law: Historical Precedents and Pending Litigation in Texas v. United States*, by Kate M. Manuel.

[96] *See* DHS Secretary Jeh Charles Johnson, Memorandum, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and With Respect to Certain Individuals Who Are Parents of U.S. Citizens or Permanent Residents*, at 4, November 20, 2014.

[97] *Texas*, 86 F. Supp. 3d at 672-73.

[98] *Id*. at 669-70.

[99] *Id*. 669 n.96; *see* Texas v. United States, 809 F.3d 134, 172 (5th Cir. 2015) ("That finding was partly informed by analysis of the implementation of DACA, the precursor to DAPA.").

[100] In a dissent from the Fifth Circuit's majority opinion upholding the district court's order, Judge King criticized this characterization of "denials," noting that the court conflated "denials" with "rejections." Texas v. United States, 809 F.3d 134, 210 (5th Cir. 2015) (King, J., dissenting). *See infra* note 114.

failing to meet the eligibility criteria or for fraud; the government failed to present evidence of an application that met the relevant criteria but was rejected based on individualized discretion.[101]

On appeal, the Fifth Circuit reviewed the district court's order for clear error and upheld its ruling.[102] Dissenting from the majority's opinion, Judge King criticized the district court's legal reasoning and factual findings, concluding that the DHS memorandum was a statement of policy.[103] She noted that applying the applicable criteria to particular facts *itself* required discretion, and that one criterion set forth in the DHS memorandum explicitly preserved agency employees' discretion to deny an application if granting it would be "inappropriate," a term the memorandum does not define.[104] Apparently adopting a more formal approach to distinguishing between legislative rule and policy statements than the district court, she noted that the most important relevant factor is the "actual legal effect" of the memorandum, which she viewed as having no effect.[105] Denied applicants could not, in her view, challenge the agency's decision in court, and the agency could generally not be prevented from removing individuals who met the relevant criteria.[106] Judge King also criticized the district court's focus on the memorandum's apparently mandatory commands to implement the policy. She noted that "channeling enforcement discretion ... is entirely consistent"[107] with policy statements; in fact, "that is their point."[108] So long as the agency retains discretion to make "individualized determinations," the memorandum does not become a legislative rule, in Judge King's view.[109] Judge King also critiqued the district court's factual conclusions, particularly its finding that the memorandum's discretionary language is "merely pretext."[110] She noted that DAPA had yet not been implemented, so the court lacked evidence to conclude that agency employees retained no discretion.[111] Further, she wrote, the court erred in relying on data about DACA's implementation in concluding that agency officials had no discretion in implementing DAPA. The application process to implement DAPA had not been established and the "substantive criteria" for eligibility for the two programs are different, in Judge King's view.[112]

This case is currently pending before the Supreme Court, although it is unclear whether the Court will reach these issues.[113] In arguing for affirmance of the district and circuit court decisions, the

[101] *Texas*, 86 F. Supp. 3d at 669 n.101.

[102] Texas v. United States, 809 F.3d 134, 176 (5th Cir. 2015).

[103] *Id*. at 214 (King, J., dissenting).

[104] *Id*. at 204.

[105] Judge King pointed to a D.C. Circuit case that focused on the formal legal effects of an agency document. *See id*. at 204 (citing *McCarthy*, 758 F.3d at 252).

[106] *Id*.

[107] *Id*. at 206.

[108] *Id*. (quoting Professionals & Patients for Customized Care v. Shalala, 56 F.3d 592, 600 (5th Cir. 1995)).

[109] *Id*. (quoting Professionals & Patients for Customized Care v. Shalala, 56 F.3d 592, 597 (5th Cir. 1995)).

[110] *Id*. at 207 (quoting Dist. Ct. Op., 86 F.Supp.3d at 669 n.10).

[111] *Id*. at 207-08.

[112] *Id*. at 209. Judge King also found fault with the district court's perception that the acceptance rate under DACA indicated the removal of discretion, noting the "self-selecting nature of the program." *Id*. at 210. In addition, she criticized the district court's characterization of the circumstances in which the agency denied applications, noting that the court conflated "denials" with "rejections." *Id*. at 210-11. Finally, she critiqued the district court for improperly shifting the burden from the plaintiffs to the government to show evidence that the agency retained discretion. *Id*. at 211-13.

[113] *See* 136 S. Ct. 906 (2016). Among various other questions at issue in the case is whether the states have standing to bring claims in the first place. *See* Texas v. United States, 86 F. Supp. 3d 591, 609, 670 (S.D. Tex.) aff'd, 809 F.3d 134 (5th Cir. 2015).

plaintiff states' brief arguably adopts a functional approach to analyzing policy statements, claiming that the DHS memorandum is a legislative rule because it legally binds the agency and "modifies substantive rights and interests."[114] The memorandum legally binds the agency, the brief argues, because of what it characterizes as the prior "mechanical[]" application of DACA,[115] mandatory language in the memorandum,[116] and the fact that the agency's policy is not "tentative," but rather reflects the agency's final decision.[117] The policy establishes legal rights, the plaintiff states argue, because it "modifies substantive rights and interests."[118] The policy is thus a legislative rule because without the memorandum, the plaintiff states assert, the agency could not support its "action to confer benefits."[119] In contrast, the Department of Justice's (DOJ) brief appears to follow a more formal tack in disputing these claims, noting that the memorandum preserves agency discretion in individual cases, and confers no legal rights on anyone.[120] Deciding not to enforce a law against a particular individual does not have "the force and effect of law" necessary to transform a policy into a legislative rule.[121] Moreover, notice and comment procedures have already taken place independently for the regulations that authorize the specific benefits at issue (e.g., authorization to work in the United States).[122] Further, DOJ argues that it is entirely appropriate for policy statements to direct the activities of agency staff—Congress delegated discretionary authority to the Secretary of DHS, who has lawfully delegated aspects of his responsibilities to agency personnel.[123] A legal principle that finds all such directives to be legislative rules subject to notice and comment would disrupt the proper functioning of the Executive Branch, in DOJ's view.[124]

Reviewability of Policy Statements

The question of whether a given agency document is properly identified as a legislative rule or policy statement has a significant impact on a federal court's willingness to engage in judicial

[114] *See* Texas v. United States, No. 15-674, Brief for the State Respondents at 61, 66 (filed March 28, 2016) *available at* http://www.scotusblog.com/wp-content/uploads/2016/03/15-674_ts_Texas.pdf. Other states have filed an amicus brief supporting the federal government. *See* Texas v. United States, No. 15-674, Amicus Brief of the States of Washington, et al. (filed March 8, 2016) *available at* http://www.scotusblog.com/wp-content/uploads/2016/03/March-8-AG-Amicus.pdf.

[115] *Id*. at 63.

[116] *Id*. at 64.

[117] *Id*. at 65-66. The brief finds support for its argument in cases that this report has characterized as representing a somewhat functional analysis of agency policy statements. *See id.* at 64-66 (citing *Cmty. Nutrition Inst.*, 818 F.2d at 947; *Chamber of Commerce*, 174 F.3d at 213); *supra* notes 67-93.

[118] Texas v. United States, No. 15-674, Brief for the State Respondents at 66 (filed March 28, 2016).The differences between "lawful status" and "lawful presence," as well as other relevant aspects of immigration law, are beyond the scope of this report. For more on the legal issues surrounding immigration law, see CRS Report R43839, *State Challenges to Federal Enforcement of Immigration Law: Historical Precedents and Pending Litigation in Texas v. United States*, by Kate M. Manuel.

[119] Brief for the State Respondents at 67 (quoting Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993)).

[120] Texas v. United States, No. 15-674, Brief for the Petitioners at 65-73 (filed March 1, 2016), *available at* http://www.scotusblog.com/wp-content/uploads/2016/03/15-674tsUnitedStates.pdf.

[121] Texas v. United States, No. 15-674, Reply Brief for the Petitioners at 28 (filed April 11, 2016) *available at* http://www.scotusblog.com/wp-content/uploads/2016/04/15-674-rb-United-States.pdf.

[122] *Id*. at 29.

[123] Texas v. United States, No. 15-674, Brief for the Petitioners at 68-70 (filed March 1, 2016).

[124] *Id*. at 69.

review of the agency action. Indeed, obtaining judicial review of a pronouncement that is characterized as a policy statement can be difficult. Unlike legislative rules, which may be immediately reviewable once they are finalized (i.e., issued as a final rule), policy statements often cannot be challenged until the agency takes further action to implement or enforce the policy.[125] The Supreme Court, however, has provided only limited guidance in determining whether and when policy statements are reviewable, and as a result, lower courts have not adopted a uniform approach to the reviewability question.[126]

As a general matter, there is a "strong presumption that Congress intends judicial review of administrative action."[127] The APA, however, extends this presumption only to "final" agency action.[128] In *Bennett v. Spear*, the Supreme Court held that, for purposes of the APA, an action is final and reviewable only if it is (1) "the 'consummation' of the agency's decisionmaking process," and (2) an action "by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'"[129] The finality inquiry, the Court has suggested, is both "flexible" and "pragmatic."[130]

Many policy statements may satisfy the first prong of the finality test, in that they represent the culmination of the agency's deliberative process, and are not "tentative or interlocutory."[131] It is the "legal consequences" prong of the finality requirement that typically acts as a significant obstacle to obtaining judicial review of an agency policy statement.[132] Policy statements, by definition, are nonbinding or advisory, and thus generally neither create legal "rights or obligations" nor "command anyone to do anything or to refrain from doing anything."[133] It would appear that the Supreme Court's interpretation of the APA's finality requirement acts as a barrier to obtaining judicial review of true policy statements (i.e., those that are advisory only and, as a result, do not hold direct legal consequences).[134]

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[125] The D.C. Circuit, for instance, appears to have recently adopted a bright line rule that policy statements are not subject to "pre-enforcement" review. *See McCarthy*, 758 F.3d 243 at 251 ("In terms of reviewability, legislative rules and sometimes even interpretive rules may be subject to pre-enforcement judicial review, but general statements of policy are not."); Ass'n of Flight Attendants-CWA v. Huerta, 785 F.3d 710, 717 (D.C. Cir. 2015) ("The guidance offered in Notice N8900.240 reflects nothing more than a statement of agency policy or an interpretive rule. The Notice is therefore unreviewable."). In the past, however, the D.C. Circuit has found policy statements to be reviewable when "binding." *Appalachian Power*, 208 F.3d at 1021. In *Appalachian Power*, the court held that a guidance document issued by the EPA had legal consequences for purposes of finality because "[i]t commands, it requires, it orders, it dictates." 208 F.3d at 1023. The court ultimately invalidated the guidance. *Id.* at 1028.

[126] *See McCarthy*, 758 F.3d 243 at 251-52 (focusing on whether the policy statement was a legislative rule); *Mineta*, 357 F.3d at 640-42 (focusing on whether the interpretation within the policy statement qualified for deference under *Chevron*); Western Ill. Home Health Care v. Herman, 150 F.3d 659 (7thCir. 1998) (focusing on whether the policy statements had a "direct effect" on the parties sufficient to make the statement "final for purposes of judicial review.").

[127] Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670 (1986).

[128] 5 U.S.C. §704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.").

[129] Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (citations omitted); Sackett v. EPA, 566 U.S. __, 5-6, 132 S. Ct. 1367 (2012).

[130] Abbott Labs. v. Gardner, 387 U.S. 136, 149-50 (1967); *Mineta*, 357 F.3d at 638 ("The finality inquiry... is a 'flexible' and 'pragmatic' one.").

[131] *Bennett* , 520 U.S.at 178.

[132] *See, e.g.*, Nat'l Ass'n of Home Builders v. Norton, 415 F.3d 8, 15 (D.C. Cir. 2005)("[I]f the practical effect of the agency action is not a certain change in the legal obligations of a party, the action is non-final for the purpose of judicial review.").

[133] Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 733 (1998).

[134] It would appear that courts are generally more willing to find that an informal agency pronouncement has "legal (continued...)

Lower federal courts have struggled, however, with the reviewability question when the basis of a challenger's argument is that the agency pronouncement, although identified as a policy statement, is effectively binding on either the agency or the public and should have been promulgated pursuant to the notice and comment procedures of Section 553. In evaluating these more contentious policy statements, some courts appear to have merged the "legal consequences" prong of the finality inquiry with the ultimate, merits-based question of whether a policy statement is in fact a legislative rule.[135] In the D.C. Circuit, for example, it would appear that a party seeking to challenge a policy statement will be required to prove that the policy statement constitutes a "de facto rule or binding norm that could not properly be promulgated absent the notice-and-comment rulemaking required by §553 of the APA."[136]

In *Center for Auto Safety v. National Highway Traffic Safety Administration*, the D.C. Circuit held that a series of agency letters to automakers establishing guidelines for the agency's regional recall policy were policy statements that did not constitute final agency action and, therefore, were not subject to judicial review.[137] After noting that "it is not always easy to distinguish between those 'general statements of policy' that are unreviewable and agency 'rules' that establish binding norms," the court immediately turned to the "critical" question of whether the letters were a rule for purposes of Section 553.[138] The court reasoned that if the letters "constitute a de facto rule ... then they would clearly meet *Bennet's* test for final agency action and §553 of the APA would require the agency to afford notice of a proposed rulemaking and an opportunity for public comment prior to promulgating the rule."[139] The court then held that to distinguish between unreviewable policy statements and "agency actions that occasion legal consequences that are subject to review," it was necessary to consider the same factors used to determine whether an action was a legislative rule for purposes of Section 553.

Similarly, in *National Mining Association v. McCarthy*, the D.C. Circuit found an Environmental Protection Agency (EPA) guidance document relating to the conditions upon which a state should grant Clean Water Act permits to be unreviewable.[140] In evaluating the agency guidance, the circuit court began by asserting a bright line rule that "in terms of reviewability, legislative rules ... may be subject to pre-enforcement judicial review, but general statements of policy are not."[141] In order to determine whether the EPA guidance was reviewable, the court then moved directly to

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consequences" when the document contains particularized determinations that impact a party. *See* Sackett v. EPA, 566 U.S. __, 132 S. Ct. 1367 (2012) (reviewing a "compliance order"); Hawkes v. U.S. Army Corps of Engineers, 782 F.3d 994 (8thCir. 2015) (reviewing a "jurisdictional determination"); Ass'n of Am. Railroads v. Fed. R.R. Admin., 612 F. App'x 1 (D.C. Cir. 2015) (reviewing a "letter ruling").

[135] Ass'n of Flight Attendants v. Huerta, 785 F.3d 710, 717 (D.C. Cir. 2015) ("In litigation over guidance documents, the finality inquiry is often framed as the question of whether the challenged agency action is best understood as a non-binding action, like a policy statement or interpretive rule, or a binding legislative rule.").

[136] Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 452 F.3d 798, 806 (D.C. Cir. 2006).

[137] *Id.* at 807.

[138] *Id.* at 806 ("In order to sustain their position, appellants must show that the 1998 policy guidelines either (1) reflect 'final agency action,'[] or (2) constitute a de facto rule or binding norm that could not properly be promulgated absent the notice-and-comment rulemaking required by § 553 of the APA. These two inquiries are alternative ways of viewing the question before the court.").

[139] *Id.* at 807.

[140] 758 F.3d 243, 247 (D.C. Cir. 2014) ("[U]nder our precedents, the Final Guidance is not a final agency action reviewable by the courts at this time.").

[141] *Id.* at 251.

the question of whether it was properly characterized as a policy statement or a legislative rule.[142] The court held that the agency guidance was not a legislative rule; did not qualify as final agency action; and therefore was not subject to review.[143]

The circuit court did clarify, however, that although the EPA guidance was not subject to immediate judicial review, once an applicant was denied a permit "the applicant at that time may challenge the denial of the permit as unlawful."[144] As such, the court acknowledged that "[t]he question is not whether judicial review will be available but rather whether judicial review is available *now*."[145] In the case of such a challenge, the agency would need to "be prepared to support the policy just as if the policy statement had never been issued."[146] Because the EPA guidance was nonbinding, it could not act as a source of authority for agency action.

The U.S. Court of Appeals for the Sixth Circuit (Sixth Circuit), by contrast, appears to have adopted a different approach. In *Air Brake Systems v. Mineta*, the court considered whether a series of opinion letters authored by the National Highway Traffic Safety Administration's (NHTSA's) chief counsel in response to questions from Air Brake customers—stating that a certain Air Brake braking system would not comply with NHTSA standards—constituted final agency action subject to judicial review.[147] In evaluating these letters, the court drew a sharp distinction between the "essential content" of the letters and the "legal interpretations" within each letter.[148]The court found the essential content of the letter to be "tentative," based on a "hypothetical factual situation," and therefore not final under the standards established by the Supreme Court in *Bennett*.[149] The Sixth Circuit focused on the conditional nature of the chief counsel's conclusions, noting that "by their terms, they state tentative conclusions based on limited information presented to the agency."[150]

The court applied a separate line of reasoning when considering the *legal interpretations* contained within the letters. Citing to the second prong of the *Bennett* finality test, the court noted that "the [] question is whether the letters, while not directly binding on Air Brake, occasion sufficient legal consequences to make them reviewable."[151] In an attempt to answer this question, the court noted that "one reliable indicator that an agency interpretation [] has the requisite legal consequence ... is whether the agency may claim *Chevron* deference for it."[152] The court, therefore, appears to have adopted an analytical framework in which a legal interpretation found within a policy statement may be considered to have a legal consequence, and therefore reviewable, if the interpretation would qualify for deference under *Chevron v. Natural Resources Defense Council*.[153] The *Chevron* doctrine is a judicial doctrine under which courts will defer to reasonable agency interpretations of ambiguous statutes.[154] As discussed in greater detail below,

[142] *Id*. at 251-53.

[143] *Id*. at 253.

[144] *Id*. at 247.

[145] *Id*. at 253.

[146] *Id*.

[147] *Mineta*, 357 F.3d at 638.

[148] *Id*.

[149] *Id*. at 639; Bennett v. Spear, 520 U.S. 154, 177-78 (1997).

[150] *Mineta*, 357 F.3d at 639.

[151] *Id*. at 641; *Bennett*, 520 U.S. at 178.

[152] *Mineta*, 357 F.3d at 641.

[153] 467 U.S. 837 (1984).

[154] Id. For a discussion of the Chevron doctrine, see CRS Report R43203, *Chevron Deference: Court Treatment of* (continued...)

whether an agency interpretation qualifies for *Chevron* deference depends on both the formality of the process used in adopting the interpretation and its "binding" nature, thus making the doctrine's application to policy statements an area of significant debate.[155] In *Mineta*, the court found that the letters were "too informal" to qualify for deference under *Chevron* and therefore were not final for purposes of the APA and not subject to judicial review.[156]

It is difficult to glean much clarity from the varying approaches that lower federal courts have taken to the question of finality and the reviewability of policy statements.[157] However, it would appear that policy statements may generally be subject to judicial review in at least two instances. First, if a court determines that an agency policy statement has "legal consequences"—an ambiguous standard that may require the challenger to make any range of showings, including that the policy statement is, in fact, a legislative rule—that statement may then be subject to review.[158] Second, absent a showing that a policy statement has the required "legal consequences" to establish finality, once the agency implements the policy in a concrete way by taking final agency action pursuant to the statement—often in the form of enforcement action or the denial of a permit or benefit—that action would then likely be subject to judicial review.[159]

Debate Concerning Potential Tension with Supreme Court Doctrine

One might argue that some of the tests to distinguish between policy statements and legislative rules impose procedures on agencies beyond what the APA requires. At least one commentator has noted that certain judicial methods of distinguishing between legislative rules and statements of general policy may be hard to square with Supreme Court doctrine.[160] The Court has made clear that the APA provides the "maximum procedural requirements" that courts may impose on agencies.[161] Courts may not require notice and comment rulemaking beyond what the APA requires. In the 1978 case *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense*

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Agency Interpretations of Ambiguous Statutes, by Daniel T. Shedd and Todd Garvey.

[155] *See infra* "Judicial Deference to Agency Policy Statements."

[156] *Mineta*, 357 F.3d at 642. The opinion also suggested that "the controlling nature of *Seminole Rock* deference ... would seem to have the requisite legal consequences for APA finality purposes." *Id*. at 644. *Seminole Rock* deference applies to agency interpretations of their own ambiguous regulations. Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945). *See also* CRS Report R43153, *Seminole Rock Deference: Court Treatment of Agency Interpretation of Ambiguous Regulations*, by Daniel T. Shedd.

[157] There are also cases in which courts are not required to address this threshold question. For example, in *Texas v. United States*, 809 F.3d 134, 163 n.82 (5th Cir. 2015), the government did not dispute that the challenged DHS memorandum was final agency action for purposes of the APA. The Supreme Court has granted certiorari to review the case. *See* 136 S. Ct. 906 (2016).

[158] This line of cases establishes a "high bar" for obtaining review of policy statements. It has been suggested that restricting review in this manner is inconsistent with the judicial review provisions of the APA. *See* Gwendolyn McKee, *Judicial Review of Agency Guidance Documents: Rethinking the Finality Doctrine*, 60 ADMIN L. REV. 371 (2008).

[159] *See Mineta*, 357 F.3d at 638 ("In contrast, '[a] preliminary, procedural, or intermediate agency action or ruling [is] not directly reviewable' and may be examined by a federal court only through 'review of the final agency action' itself.") (citing 5 U.S.C. §704).

[160] *See* Cass Sunstein, '*Practically Binding': General Policy Statements and Notice-and-Comment Rulemaking* (January 6, 2016) (unpublished manuscript) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2697804.

[161] Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U. S. 519, 524 (1978).

Council, Inc., the Supreme Court rejected the imposition by federal courts of procedural requirements on agencies beyond the text of the APA.[162] The Court characterized the practice as "Monday morning quarterbacking" that forces agencies to adopt more stringent procedures than those required by Congress.[163] Permitting courts to do so would make the parameters of judicial review unpredictable, obfuscate the benefits of informal rulemaking that Congress intended to permit in certain circumstances, and rob agencies of the discretion to decide what procedures are best when permitted by Congress.[164]

The Supreme Court recently applied this doctrine to invalidate a line of cases in the D.C. Circuit—which established what is known as the *Paralyzed Veterans* doctrine—that similarly imposed procedural requirements on agencies beyond the APA's requirements. In *Perez v. Mortgage Bankers Association*, the Supreme Court ruled unanimously that an agency need not undergo notice and comment rulemaking procedures when modifying an interpretive rule.[165] The D.C. Circuit had ruled that when an agency gives a regulation a definitive interpretation, and later significantly changes that interpretation, the agency has effectively altered its rule, and must undergo notice and comment procedures to do so.[166] The Supreme Court reversed, stressing that the APA established the full scope of "judicial authority to review executive agency action for procedural correctness"—courts are barred from imposing additional procedural requirements.[167] Because the APA expressly exempts interpretive rules from notice and comment requirements, requiring agencies to do so when changing an interpretive rule—whether sound as a policy matter or not—violated the text of the APA.[168]

Under *Mortgage Bankers* and *Vermont Yankee*, courts may not require notice and comment procedures for anything other than legislative rules. Arguably, some applications of the functional tests for distinguishing between legislative rules and policy statements might run afoul of this principle.[169] While the Supreme Court has not conclusively articulated a test for making the distinction, its opinion in *Lincoln v. Vigil* is instructive.[170] In that case, the Indian Health Service discontinued a program—funded out of lump sum appropriations—that provided direct clinical services to Indian children in favor of a nationwide services program.[171] The U.S. Court of Appeals for the Tenth Circuit (Tenth Circuit) had held that the decision—announced via a memorandum addressed to agency staff—amounted to a legislative rule and should have undergone notice and comment procedures.[172] The Supreme Court reversed, explaining that the category of policy statements "surely include[] an announcement ... that an agency will

[162] *Id*. at 524.

[163] *Id*. at 547.

[164] *Id*. at 546-47.

[165] Perez v. Mortg. Bankers Ass'n, __ U.S. __, 135 S.Ct. 1199, 1206 (2015). At issue in the case were the Department of Labor's (DOL) regulations implementing the Fair Labor Standards Act. 29 U.S.C. §§201 *et seq.*; 29 C.F.R. §541.203. In 2006, the Department of Labor issued an interpretation of its regulations that found that mortgage-loan officers were exempt from minimum wage requirements, but reversed itself in 2010 by withdrawing the 2006 letter and finding that mortgage-loan officers were not exempt under the regulations. *Mortg. Bankers*, 135 S.Ct. at 1204-05.

[166] Mortg. Bankers Ass'n. v. Harris, 720 F.3d 966 (D.C. Cir. 2013).

[167] *Id*. (quoting F.C.C. v. Fox Television Stations, 556 U.S. 502, 513 (2009)).

[168] *Id*.

[169] *See* Sunstein, *supra* note 160, at 12.

[170] Lincoln v. Vigil, 508 U.S. 182 (1993).

[171] *Id*. at 185-89.

[172] *Id*. at 197.

discontinue a discretionary allocation of unrestricted funds from a lump-sum appropriation."[173] While the Court did not engage in lengthy analysis on the distinction between legislative rules and policy statements, the agency decision at issue appears to have been "practically binding" on the agency itself with direct consequences for the public. In the words of one commentator, the agency decision had a "binding effect" because it "changed the legal condition of [the] plaintiff[s] ... by announcing 'the termination of all direct clinical services to children'" in certain areas.[174] After the decision, agency officials could no longer administer certain benefits to a specific class of people. Nonetheless, the Court rejected the proposition that it constituted a legislative rule.[175]

Insofar as *Lincoln v. Vigil* classifies an agency document with certain binding effect on an agency and the public as a policy statement, rather than a legislative rule, the case might stand in some tension with many appellate opinions distinguishing between legislative rules and statements of policy.[176] One reading of the case is that it provides implicit support for identifying legislative rules by analyzing whether the agency statement has the force of law.[177] One commentator has argued that *Lincoln v. Vigil* is "difficult to take ... as anything other than an endorsement of the 'force of law' test.[178] As mentioned above,[179] this approach would not classify agency statements that are practically binding as legislative rules. Instead, only documents with independent legal force would qualify.[180] In effect, this would likely mean that policy statements would be reviewable only if an agency relied on a statement's substantive content to support its action. Otherwise, the document would not constitute a legal norm independent of an underlying statute or regulation.

On the other hand, a defense of the practically binding test, or at least some of its iterations, might note that the ultimate question is *what constitutes a legislative rule*.[181] As an initial matter, one might distinguish the Supreme Court's opinion in *Lincoln v. Vigil* as limited to agency decisions concerning their discretionary appropriations, rather than a broad principle rejecting a legal test that understands legislative rules to include statements that functionally bind the agency or the

[173] *Id*. at 197.

[174] Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. AM. U. 1, 15 (1996) (quoting *Lincoln*, 508 U.S. at 188) (quotation marks and citations omitted).

[175] The Court also noted the broad discretion afforded the Service to disburse with lump-sum appropriations and cited *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971), for the principle that "decisions to expend otherwise unrestricted funds are not, without more, subject to" notice and comment procedures. *Lincoln*, 508 U.S. at 198.

[176] *See* Sunstein, *supra* note 160, at 12. The Court's opinion has not escaped criticism for its conceptualization of agency statements. *See* Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. AM. U. 1, 15 (1996) (criticizing the analysis for, among other things, considering an agency decision with binding effects to be a policy statement).

[177] Sunstein, *supra* note 160, at 14.

[178] *Id*. at 15.

[179] *See supra* "Distinguishing Between Legislative Rules and Policy Statements."

[180] *See* William Funk, *When Is A "Rule" A Regulation? Marking A Clear Line Between Nonlegislative Rules and Legislative Rules*, 54 ADMIN. L. REV. 659, 663 (2002) ("[A]ny rule not issued after notice and comment is an interpretive rule or statement of policy, unless it qualifies as a rule exempt from notice and comment on some other basis").

[181] In an analogous context, one observer has noted that the Court's decision in *Perez v. Mortgage Bankers* appeared to ignore the relevant inquiry at the D.C. Circuit in the *Paralyzed Veterans* cases. The question was not whether courts could require additional procedures when an agency changed an interpretive rule, but when an interpretive rule transformed into a legislative rule. *See* Adam J. White, *Perez v. Mortgage Bankers: Heralding the Demise of Auer Deference*, 2015 CATO SUP. CT. REV. 333, 346 (2015).

public.[182] Consequently, if agency statements that effectively bind the agency or the public—without independently carrying the force of law such that they can be relied upon to bring an enforcement action—actually qualify as legislative rules, then requiring agencies to undergo notice and comment procedures is required by the APA.[183] One might argue that to conceptualize legislative rules as simply those relied upon by an agency in enforcement actions is ultimately too formalistic an understanding of a substantive regulation. Instead, a legislative rule includes situations where the agency functionally binds itself or the public.[184] A substantive regulation can take the form of a "binding norm" that induces compliance with the agency's statement.[185] Even if a document is not binding in a formal sense, if the agency acts as if it does control, and the public alters its behavior in response to the agency's position, then a substantive rule has been created in all but name.[186] In other words, agencies establishing binding norms through the issuance of documents are effectively promulgating substantive rules.[187] As such, courts requiring notice and comment procedures for agency statements that effectively bind the agency or the public are not adding to the APA's procedural requirements, but simply complying with them.

Judicial Deference to Agency Policy Statements

The weight that a reviewing court is willing to give to an agency's interpretation of the law is an important aspect of judicial review. Indeed, the level of deference accorded to an agency interpretation can control the outcome of a challenge to agency action.[188] Supreme Court precedent would appear to suggest that agency interpretations of ambiguous statutory provisions reached in policy statements are generally not accorded the same weight that a court will typically give to an interpretation that is reached through more formal processes.[189]

The Supreme Court, in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, outlined a limited role for courts in reviewing interpretive decisions reached by agencies in implementing

[182] *See Lincoln*, 508 U.S. at 196-98.

[183] *See Cmty. Nutrition*., 818 F.2d at 948.

[184] *See Am. Bus Ass'n*, 627 F.2d at 529.

[185] *See Appalachian Power*, 208 F.3d at 1021.

[186] David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 305 (2010) ("Often these policy decisions in effect command compliance from regulated industries and thus have substantial practical effects on the public, regardless of whether they are framed as mere guidances, interpretations, or tentative policy statements. It would seem inconsistent with both legislative intent and democratic theory to allow agencies to make such decisions without public input whenever they wish.").

[187] *See Cmty. Nutrition*., 818 F.2d at 948.

[188] *See* Orin S. Kerr, *Shedding Light on* Chevron: *An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 31 (1998) (determining that in 1995 and 1996 courts that reached step two "upheld the agency view in 89% of the applications."). *But see* Melissa F. Wasserman, *Deference Asymmetries: Distortions in the Evolution of Regulatory Law*, 9 TEX. L. REV. 625, 638-39 (2015); David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 161 (2010) ("So while in theory, *de novo* review is a very different standard from that of reasonableness, in practice it is difficult to see how courts would be able to ignore reasonable agency interpretations in reaching their conclusions.").

[189] Whereas agency interpretations of statutory provision are generally evaluated under *Chevron*, agency interpretations of their own rules are generally evaluated under *Bowles v. Seminole Rock & Sand Co*., 325 U.S. 410 (1945). Whether an agency is accorded deference under *Seminole Rock* does not appear to be subject to the same "formality" considerations applied under *Chevron*. *See* Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 171 (2007) (providing deference to an agency interpretation of a regulation reached in an advisory memorandum.). For a more detailed discussion of *Seminole Rock* deference, see CRS Report R43153, *Seminole Rock Deference: Court Treatment of Agency Interpretation of Ambiguous Regulations*, by Daniel T. Shedd.

delegated authority.[190] The *Chevron* test requires courts to first enforce the clearly expressed intent of Congress.[191] In the absence of such clarity, *Chevron* instructs reviewing courts to defer to an agency's construction of an ambiguous statute if the agency's interpretation is reasonable.[192] Under *Chevron* then, it is generally left to federal agencies, and not the courts, to resolve ambiguities necessary to interpret and implement authority provided to the agency by Congress.[193]

In the wake of *Chevron*, however, the Court has made clear that not all methods of interpretation will be accorded this degree of deference. The formality of the agency process undertaken to reach the interpretation is an important factor in determining whether an interpretation is eligible, in the first instance, for *Chevron* deference.[194] Although the legal principles governing this threshold determination are uncertain, it would appear that while legislative rules with the force and effect of law are eligible for *Chevron* deference, policy statements often are not.[195]

In *Christensen v. Harris County*, the Court held that interpretations reached through informal processes, such as opinion letters, guidance documents, policy statements, interpretive documents, and agency manuals, do not qualify for *Chevron* deference.[196] The Court drew a distinction between interpretations reached in formal adjudications and notice and comment rulemaking, which warrant deference, and informal agency interpretations lacking the "force of law," which do not.[197] *Christensen*, therefore, arguably established a bright line rule that policy statements simply do not qualify for deference under *Chevron*.

Subsequent Supreme Court cases, however, appear to have rejected such an absolutist view of *Christensen*. In *United States v. Mead Corp,* the Court held that a U.S. Customs Service letter ruling was not entitled to *Chevron* deference.[198] *Mead* established that the applicability of *Chevron* deference would turn not only on the process through which the agency adopted its interpretation, but also the extent to which Congress had intended to delegate authority to the agency to reach definitive interpretations.[199] Specifically, the Court held that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the *force of law*, and that the agency interpretation claiming deference was *promulgated in the exercise of that authority*."[200]

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[190] 467 U.S. 837 (1984).

[191] *Id*. at 842-43 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

[192] *Id*. at 843 ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

[193] *See*, *e.g*., NISH v. Cohen, 247 F.3d 197, 202 (4th Cir. 2001) ("A reviewing court may not second-guess the wisdom of the agency's reasonable policy choice.") (citing *Chevron*, 467 U.S. at 866).

[194] *See* UnitedStates. v. Mead Corp., 533 U.S. 218 (2001); Christensen v. Harris County, 529 U.S. 576 (2000).

[195] *Christensen*, 529 U.S. at 587 ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.").

[196] 529 U.S. 576 (2000).

[197] *Id*. at 587.

[198] 533 U.S. 218 (2001).

[199] *Id*. at 227-34.

[200] *Id*. at 226-27 (emphasis added).

The "force of law" standard from *Mead* has not been clearly articulated, and importantly, *Mead* further suggested that an agency interpretation need not necessarily be reached by notice and comment rulemaking or formal adjudication in order to receive *Chevron* deference.[201] The majority noted that the determination did not rest solely on whether the interpretation was made via rulemaking, "for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded."[202]

The Court further obfuscated *Chevron* eligibility in *Barnhart v. Walton* by identifying a number of additional factors to be considered in determining whether a specific interpretive process is one that may qualify for *Chevron*.[203] In that case, the Court reaffirmed that an interpretation need not be reached pursuant to notice and comment rulemaking to qualify for *Chevron* deference by suggesting that a Social Security Administration interpretation reached in an agency adjudication, manual, and letter warranted deference.[204] In evaluating the interpretation in question, the Court suggested that whether "*Chevron* provides the appropriate legal lens through which to view the legality of the agency interpretation here at issue" depends on a variety of factors, including "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the agency has given the question over a long period of time."[205]

Despite the somewhat abstruse language in *Barnhart*,[206] it would appear that in determining whether an agency interpretation qualifies for *Chevron* deference, federal courts generally look to (1) the process by which the interpretation was reached and (2) the degree to which the interpretation is of a "binding character."[207] Interpretations reached through formal processes that have the force and effect of law are most likely to qualify for *Chevron* deference.[208] In contrast, interpretations reached through informal processes, and which are neither binding nor precedential, are unlikely to be eligible for *Chevron* deference. In accordance with these factors, courts have generally held that interpretations reached in policy statements—which typically are not issued through formal processes and, by definition, are nonbinding—do not qualify for *Chevron* deference.[209]

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[201] *Id*. at 231 ("[A]s significant as notice-and-comment is in pointing to Chevron authority, the want of that procedure here does not decide the case ... "). *See also* Barnhart v. Walton, 535 U.S. 212, 221 (2002) ([T]he fact that the Agency previously reached its interpretation through means less formal than 'notice and comment' rulemaking, [] does not automatically deprive that interpretation of the judicial deference otherwise its due.").

[202] *Mead*, 533 U.S. at 231.

[203] 535 U.S. 212 (2002).

[204] *Id*. at 219-20.

[205] *Id*. at 222.

[206] *See* Carter v. Welles-Bowen Realty, Inc., 736 F.3d 722,727 (6th Cir. 2013) (characterizing the *Christensen* rule as a "norm and not an 'absolute rule'") (citing *Barnhart*, 535 U.S. at 222).

[207] *Mead*, 533 U.S. at 233. *See also Appalachian Power*, 208 F.3d at 1021 ("If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes 'binding.'").

[208] Federal courts have, at times, extended *Chevron* deference to less formal agency interpretations. *See, e.g.*, Mylan Laboratories v. Thompson, 389 F.2d 1272, 1279-80 (D.C. Cir. 2004) (according *Chevron* deference to an FDA letter decision); Davis v. EPA, 336 F.3d 965, 972 n.5 (9th Cir. 2003) (according *Chevron* deference to an informal EPA adjudicatory decision).

[209] Exelon Wind 1, L.L.C. v. Nelson, 766 F.3d 380, 392 (5th Cir. 2014) ("Even assuming arguendo that an agency's interpretation of a court's jurisdiction could warrant deference, FERC's Letter would still not be entitled to *Chevron* deference because it is an informal guidance document."); Carter v. Welles-Bowen Realty, Inc., 736 F.3d 722, 726-27 (continued...)

Although policy statements generally do not qualify for *Chevron* deference, they may nonetheless be accorded a lesser degree of deference under *Skidmore v. Swift*.[210] In *Skidmore*, the Supreme Court held that respect was due to agency policies that are "made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case."[211] The Court concluded that such interpretations should be accorded the "power to persuade, if lacking power to control."[212]

The weight to be accorded statutory interpretations reached in policy statements that do not qualify for *Chevron* deference is generally evaluated under the *Skidmore* rubric.[213] *Skidmore* deference does not require that a court defer to an agency's interpretive choice. Rather, the degree of deference accorded by a reviewing court directly correlates to the strength of the agency's reasoning. Under *Skidmore*, evaluating the strength of an agency's interpretive choice involves an assessment of the "thoroughness," "validity," and "consistency" of the agency's decision making.[214] Later in *Mead*, the Supreme Court suggested that courts may also consider factors such as the "agency's care" and "formality" in reaching the interpretation, "consistency" with past interpretations, and the agency's "relative expertness."[215]

Implications for Agencies and the Public

The applicable legal test governing agency use of policy statements, whether imposed by courts or Congress, has important implications for the executive branch and the public. As discussed above, one framework would require notice and comment procedures only for rules that formally carry the "force of law."[216] Judicial review, under this theory, would generally occur only ex post under a strict understanding of the APA's procedural limits—if an agency document did not undergo notice and comment rulemaking, then agencies could not rely upon the document in any proceeding.[217] Policy statements would usually be unreviewable ex ante because—at least as a

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(6thCir. 2013) (holding that a policy statement which offered only "non-binding advice about the agency's enforcement agenda" was "not a binding interpretation" of the law, and therefore was not entitled to *Chevron* deference.); Precon Dev. Corp v. U.S. Army Corps of Eng'rs, 633 F.3d 278, 290 n.10 (4th Cir. 2011) (holding that nonbinding guidance does not qualify for *Chevron* deference); *Mineta*, 357 F.3d at 642 (rejecting *Chevron* deference for an informal letter); Am. Express Co. v. United States, 262 F.3d 1376, 1382 (Fed. Cir. 2001) ("[A]n interpretation ... not reflected in a regulation adopted after notice and comment [] probably would not be entitled to *Chevron* deference."). In *Texas v. United States*, the Fifth Circuit explicitly did not decide whether the DHS memorandum qualified for *Chevron* deference. 809 F.3d 134, 179 n.160. The court noted that that determination was unnecessary because, even assuming that the memorandum was eligible for *Chevron* under the standards established in *Mead* and *Barnhart*, the agency interpretation reached in DAPA was "not a reasonable construction" of the Immigration and Nationality Act therefore could not "prevail even under *Chevron*." *Id*.

[210] 323 U.S. 134 (1944). The deference received under *Skidmore* is clearly of a lesser degree. *See* Fed. Express Corp. v. Holowecki, 552 U.S. 389, 399 (2008).

[211] *Skidmore*, 323 U.S. at 139.

[212] *Id.* at 140. *See also Mead*, 533 U.S. at 228 ("But whether or not they enjoy any express delegation of authority on a particular question, agencies charged with applying a statute necessarily make all sorts of interpretive choices, and while not all of those choices bind judges to follow them, they certainly may influence courts facing questions the agencies have already answered.").

[213] *See, e.g.*, Carter v. Welles-Bowen Realty, Inc. 736 F.3d (6th Cir. 2013); *Mineta*, 357 F.3d at 642.

[214] *Skidmore*, 323 U.S. at 140.

[215] *Mead*, 533 U.S. at 228.

[216] Funk, *supra note* 180, at 671; Jacob E. Gersen, *Legislative Rules Revisited*, 74 U. CHI. L. REV. 1705, 1719 (2007).

[217] *See Cmty. Nutrition*, 818 F.2d at 952-53 (D.C. Cir. 1987) (Starr, J., concurring in part and dissenting in part). "Ex (continued...)

formal matter—they lack legal effect.[218] Consequently, in order to challenge an agency's policy statement, a party must challenge an agency's stance after the culmination of a full proceeding, such as an enforcement action, petition for a permit or license, or application for a benefit. Ultimately, agencies would enjoy significant latitude to release guidance documents without the procedural constraints of notice and comment rulemaking or ex ante judicial review.

Supporters of agencies having flexibility in issuing policy statements might argue that the use of policy statements can increase administrative efficiency by easily notifying the public of an agency's policy priorities, guiding agency staff as to enforcement directives, and permitting the agency to focus resources away from procedural requirements.[219] Agency leaders can thus distribute guidance to sometimes widely dispersed staff as to how to apply particular statutes and regulations. In turn, this guidance can inform the public as to an agency's policy priorities, eliminating confusion as to what an agency requires[220]—which may, for example, save costs for regulated firms or potential applicants for licenses.[221]

Conversely, one might argue that this approach would permit agencies to issue policy statements that effectively bind the public—or, at least do so practically speaking—without effective oversight.[222] At least in some cases, such as the nonenforcement context, policy statements would never be subject to judicial review.[223] Regulated parties may very well adjust their behavior in response to policy statements even though the guidance document formally lacks the force of law.[224] Further, if no ex ante judicial review is available for policy statements, the third party beneficiaries of agency regulations may never have an opportunity to object to agency positions.[225] However, at least some commentators suggest that under such a legal regime, agencies nonetheless have a strong incentive to participate in ex ante notice and comment

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post" refers to an occurrence after a specified event. *See, e.g.*, Mark A. Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129, 130 (2004) ("I refer to both of these new arguments as ex post justifications for intellectual property because they defend intellectual property rights ... on the basis of the incentives the right gives its owner to manage works that have already been created."); EX POST, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Based on knowledge and fact; viewed after the fact, in hindsight; objective; retrospective.").

[218] "Ex ante" refers to an occurrence before a specified event. *See, e.g.*, Mark A. Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129, 130 (2004) ("I refer to this standard explanation as an ex ante justification for intellectual property since, under this conception, the goal of intellectual property is to influence behavior that occurs before the right comes into being."); EX ANTE, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Based on assumption and prediction, on how things appeared beforehand, rather than in hindsight; subjective; prospective.").

[219] *See* Franklin, *supra* note 186, at 308-09.

[220] *See* Hoctor v. USDA, 82 F.3d 165, 167 (7th Cir. 1996) ("It would be no favor to the public to discourage the announcement of agencies' interpretations by burdening the interpretive process with cumbersome formalities."); *Cmty. Nutrition*, 818 F.2d at 949 (D.C. Cir. 1987) ("We recognize that such guidelines have the not inconsiderable benefits of apprising the regulated community of the agency's intentions as well as informing the exercise of discretion by agents and officers in the field."); Strauss, *supra* note 4, at 839.

[221] *See* Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1481 (1992).

[222] *See Gen. Elec.*, 290 F.3d at 383; Final Bulletin for Agency Good Guidance Practices, 72 *Federal Register* 3432, 3432 (January 25, 2007); Franklin, *supra* note 186, at 308-09; Magill, *supra note* 19, at 1397 (2004); Anthony, *supra* note 1, at 1328.

[223] *See* Franklin, *supra* note 186, at 308-09.

[224] *See* Strauss, *supra* note 221, at 1476; Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals To Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 489 (1997).

[225] *See* Mendelson, *supra* note 1, at 420-24.

procedures.[226] Doing so—at least in the usual case—triggers *Chevron* deference for the agency's legal interpretations.[227]

An alternative legal test would restrict the circumstances in which agencies may issue policy statements, for example, by looking at the practical effects of policy statements on the agency or the public to determine when a legislative rule has been created. Arguably, this requirement could generate more public participation in a greater number of agency decisions than would occur if agencies have to seek public participation only for rules that carry the force of law. Increased public participation could be justified on at least two grounds.[228] First, one might argue that requiring agencies to consult with the public before issuing policy statements fosters dialogue and thereby serves to bolster democratic legitimacy.[229] Under this view, engagement with the public legitimates government decisions and processes. Second, it might increase the relative amount of information available to agencies in formulating their policies.[230] Public comment can aid regulators by fleshing out issues and providing insight into a regulated industry's behavior and preferences. In turn, agency choices might better accommodate and recognize the practical effects of enforcement policies on the public.

On the other hand, the response of agencies to more stringent limits on the use of policy statements is unclear. Arguably, faced with a requirement to use notice and comment procedures when issuing policy statements, agencies may significantly limit their use in the first place.[231] The Supreme Court has made clear that the choice between using adjudication or rulemaking is up to the agency, even if the agency pursues specific policy objectives via adjudications.[232] Similarly, a legal test requiring notice and comment procedures if a statement practically binds the agency or the public could result in fewer guidance statements being released, or issuance of much broader statements that cannot be considered binding, but are less helpful to regulated parties.[233] Either

[226] *See* Gersen, *supra* note 216, at 1720-21; E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1491 (1992).

[227] *See Mead*, 533 U.S. at 229; *but see Barnhart*, 535 U.S. at 222 (granting *Chevron* deference to an agency statutory interpretation outlined in a policy statement); *Auer*, 519 U.S. at 461 (granting *Seminole Rock* deference to an agency's interpretation of its regulations from a position enunciated in an amicus curiae brief); Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 171 (2007) (granting *Seminole Rock* deference to an agency's own regulation outlined in an internal memorandum).

[228] *See* Sunstein, *supra* note 160, at 8-9.

[229] *See* Mendelson, *supra* note 1, at 420 (arguing that when agencies announce policies in guidance documents, rather than rules, "regulatory beneficiaries are less likely to view agency choices as legitimate"); Stephen M. Johnson, *Good Guidance, Good Grief!*, 72 MO. L. REV. 695, 735 (2007) ("[I]ncreased public participation in agency decisionmaking is more democratic and increases the legitimacy of agency decisions and public trust in the agencies.").

[230] *See* Sunstein, *supra* note 160, at 8-9.

[231] *See* Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993) ("The protection that Congress sought to secure by requiring notice and comment for legislative rules is not advanced by reading the exemption for 'interpretive rule' so narrowly as to drive agencies into pure ad hocery—an ad hocery, moreover, that affords less notice, or less convenient notice, to affected parties."); Hoctor v. U.S. Dep't of Agric., 82 F.3d 165, 167 (7th Cir. 1996) ("It would be no favor to the public to discourage the announcement of agencies' interpretations by burdening the interpretive process with cumbersome formalities."); Franklin, *supra* note 186, at 306 ("If policymaking by rule becomes sufficiently costly, then agencies will shift to purely adjudicatory mechanisms—sacrificing in the process all of the potential benefits of the rulemaking mode, such as clear notice and broad public participation.").

[232] *See* SEC v. Chenery Corp. (Chenery II), 332 U.S. 194 (1947). The Supreme Court has reaffirmed this principle since Chenery II. *See* Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 96-97 (1995); NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).

[233] *See* Seidenfeld, *supra* note 88, at 375 ("Without some protection from full-fledged hard-look review, opening guidance documents to more immediate judicial review would increase the expected costs of issuing them and, therefore, likely discourage issuance even of guidance documents that are valuable."); Manning, *supra* note 56, at 896 (continued...)

way, the result is less concrete guidance for the public as to an agency's enforcement strategy and priorities.[234]

Ultimately, the precise effect of either legal approach on agency behavior is unclear.[235] For now, federal courts do not consistently apply either test. However, at least one commentator has noted that the lack of a clear principle in the federal courts for determining a legislative rule ultimately permits courts to require notice and comment procedures in situations where the benefits of seeking public input are substantial, but decline to do so when the benefits are minimal.[236] Congress has authority to either increase or reduce the scope of judicial review of agency policy statements by amending the APA and providing a new definition of legislative rule or policy statement,[237] which would clarify more precisely when notice and comment procedures are required.

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("If a court were to require agencies to announce important or generally applicable policies ex ante in regulations, the typical agency could fulfill that obligation by adopting vague rules, secure in the knowledge that the agency itself (as adjudicator) would resolve any resulting indeterminacy.").

[234] This concern might be analogous to claims that heightened judicial review incentivizes agencies to avoid issuing rules or at least causes delay in doing so. *See* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992) ("During the last fifteen years the rulemaking process has become increasingly rigid and burdensome."); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 65-66 (1995). *But see* William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 440 (2000).

[235] *See* Sunstein, *supra* note 125, at 10-12.

[236] *See* Franklin, *supra* note 186, at 325 (making this argument in the somewhat broader context of legislative versus nonlegislative rules).

[237] *See generally* Florida Power & Light Co. v. Lorion, 470 U.S. 729, 745 (1985) ("Absent a firm indication that Congress intended to locate initial APA review of agency action in the district courts, we will not presume that Congress intended to depart from the sound policy of placing initial APA review in the courts of appeals.").