The Dilemma of Nonlegislative Rules

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- David L. Franklin, Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut, 120 **Yale L. J.** 277 (2010)**.**
- Mark Seidenfeld, *Substituting Substantive for Procedural Reiew of Guidance Documents* (FSU College of Law, Public Law Research Paper No. 479, 2011), available at SSRN.

So-called nonlegislative rules, rules adopted as interpretative rules or statements of policy without notice and comment, have posed problems for courts and scholars for a number of years. In addition to myself,[1] in recent years professors Robert Anthony,[2] Peter Strauss,[3] Elizabeth Magill,[4] Nina Mendelson,[5] Donald Elliott,[6] Jacob Gersen,[7] Ronald Levin,[8] and John Manning[9] have all attempted to bring coherence to the questions raised by nonlegislative rules.

Everyone agrees that agencies must be able to issue certain interpretations and policy statements, generically guidances, without having to follow the notice-and-comment process applicable to legislative rules. On the other hand, everyone also agrees that agencies can abuse the ability to avoid notice and comment rulemaking through invocation of the exceptions for “interpretative rules” and “general statements of policy.” How to police the line between those rules requiring notice and comment and those that do not is what has stymied courts and commentators. Now there are two more attempts in this regard, and while both are worthwhile additions to the field, Professor Seidenfeld seems to this author to come closest to hitting the mark.

Nonlegislative rules raise three distinct but interrelated problems. The first question, and the one that has probably received the greatest amount of attention, is how to determine whether a rule adopted without notice and comment is indeed an interpretative rule or statement of policy, or whether it is instead a legislative rule invalidly promulgated because it was not adopted following notice and comment. The second question is when should a nonlegislative rule be subject to preenforcement judicial review or, stated otherwise, whether a nonlegislative rule can be final and ripe for review. The third question is what deference should a policy or an interpretation of law in a nonlegislative rule receive from a reviewing court.

The questions are related, because how they are answered may greatly affect the incentives for an agency to utilize nonlegislative rules in place of a legislative rule. An agency almost always has the authority to issue a nonlegislative rule as a legislative rule, but given the existing statutory and non-statutory hurdles to adopting legislative rules and the relative ease with which regulated entities and regulatory beneficiaries can obtain preenforcement judicial review of legislative rules, there is already a bias in favor of using nonlegislative rules rather than legislative rules. If, however, an agency can both receive the same substantial deference to its interpretations and policies contained in nonlegislative rules as it can in legislative rules and avoid preenforcement judicial review of those nonlegislative rules, the agency will have an even greater incentive to substitute nonlegislative rules for legislative rules.

Both Franklin and Seidenfeld relate the history of the controversy and understand the interrelationship of the three questions. Both recognize the problem with the judicial doctrine that if a rule is legally binding it cannot be a nonlegislative rule: “difficult to apply consistently” (Franklin, P. 288) or “so confused that courts and commentators alike describe the doctrine as engulfed in smog.” (Seidenfeld, P.

14.) Franklin, however, sees his task to be the rebuttal of what he terms the "short cut" approach to dealing with this problem. As Franklin describes the short cut:

> [R]ather than asking whether a challenged rule was designed to be legally binding in order to determine whether it must undergo notice and comment, courts should simply turn the question inside-out and ask whether the rule has undergone notice and comment in order to determine whether it can be legally binding.… No longer would a rule's substantive nature dictate its procedural governance; instead, its procedural provenance would determine its substantive effect. (Franklin, P. 279.)

A number of commentators have argued for this approach, suggesting that substantive judicial review of nonlegislative rules, combined with the lesser deference generally accorded nonlegislative rules, provide a sufficient safeguard against agency abuse.

Franklin, however, questions this conclusion. For one, he doubts that agencies merit any difference between the deference received under *Chevron* or *Skidmore* as worth avoiding nonlegislative rulemaking. A recent article by Richard Pierce might support that conclusion, in which he surveys a number of empirical studies of judicial review of agency action, finding that "the choice of which doctrine to apply… is not an important determinant of outcomes in the Supreme Court or circuit courts."[10] Nevertheless, agencies still spend a lot of energy litigating in favor of *Chevron* versus *Skidmore* deference when the issue comes before a court. Perhaps more important, Franklin doubts the efficacy of substantive review of nonlegislative rules because often, perhaps overwhelmingly, the nonlegislative rules will escape any substantive review. Because of the hurdles imposed by courts to preenforcement review of nonlegislative rules, they are likely to be reviewed only in enforcement actions, but that assumes that a regulated entity will violate a nonlegislative rule. If the regulated community is sufficiently coerced into following the rule, it will never be tested. Equally important, if the nonlegislative rule favors the regulated community and it is the regulatory beneficiaries who wish to challenge the rule, the absence of preenforcement review will mean no review can ever take place. These gaping holes in the availability of substantive review of nonlegislative rules, Franklin believes, renders the check of substantive review an illusion.

Finally, as Franklin says, the "most fundamental" objection to the short cut is that it substitutes judicial review for public scrutiny and participation in making policy as reflected in the requirement for notice and comment. Franklin places a high value on public participation, but the Administrative Procedure Act only requires notice and comment in certain situations. Franklin seems to want to reach the same end the D.C. Circuit wanted to reach in its pre-*Vermont Yankee* line of cases requiring notice and comment for nonlegislative rules that had a substantial impact on persons. That is, if persons are to be adversely affected by a nonlegislative rule, they should be able to participate in the formulation of that rule. Of course, the APA's response to persons adversely affected by agency action is to provide the ability to challenge the lawfulness of that action in court, not to comment on its formulation.

Franklin concludes by approving of the very inconsistency of judicial decisions that he acknowledged in the beginning. This inconsistency means that agencies are never sure how far they can go in making nonlegislative rules; to avoid judicial invalidation they will err on the side of restricting their output of nonlegislative rules and will have a greater incentive to adopt legislative rules that will be insulated from procedural invalidation. This assures greater public participation.

Seidenfeld's article, although apparently written mostly before Franklin's article was published, is a direct response to Franklin's proposed solution – the status quo – as well to proposals made by Elizabeth Magill and Nina Mendelson. Seidenfeld clearly does not value public participation as highly as Franklin.

Perhaps as a former regulator Seidenfeld appreciates what the literature overwhelmingly supports: that the formal public participation involved in the notice-and-comment process usually does not in fact have much influence on agency decision-making. Also, perhaps as a former regulator, Seidenfeld values more highly the importance of agencies being able to issue guidance documents without either the procedural hurdles of notice-and-comment rulemaking or the uncertainty of outcome resulting from ad hoc judicial review as to whether the guidance is an invalidly adopted legislative rule.

Seidenfeld's solution is to adjust judicial doctrine to respond to the practical problems Franklin identifies with using the short cut. First, he endorses the short cut, that is, the use of substantive judicial review of nonlegislative rules in place of courts attempting to discern the procedural validity of such rules. He recognizes the limitations existing in current doctrine on preenforcement review of nonlegislative rules and would make appropriate changes to that doctrine to enable the substantive review to be a real "check" on potential agency abuse of the use of nonlegislative rules. Perhaps it would be more accurate to say that he suggests courts have been applying current doctrine incorrectly. For example, he points out that courts finding nonlegislative rules non-reviewable because they are not "final agency action" are really just wrong in their application of the finality doctrine, albeit they have some excuse because the Supreme Court has not been clear as to whether the second prong of finality doctrine actually requires the agency action to have binding legal consequences or whether it merely changes the legal landscape. He further argues that ripeness as appropriately applied should not bar review of most guidance documents that adversely affect either regulated entities or regulatory beneficiaries.

Finally, Seidenfeld addresses at some length an issue no one has previously dealt with precisely – how should substantive judicial review of an agency policy statement proceed in the absence of an administrative record to which outside parties had no opportunity to contribute. His answer is simple; courts should simply apply traditional "arbitrary and capricious review," or stated another way, use a requirement of reasoned decision-making. That is, in essence his proposal would have courts review that agency's nonlegislative rule on the basis of the information the agency had available to it when it adopted it, supplemented by a requirement that the agency provide a contemporaneous explanation for its action – both of which are standard, current practice for judicial review of agency action. And, Seidenfeld adds, drawing from the Court's decision in *Massachusetts v. EPA,*[11] where the Court was reviewing an agency action without a traditional administrative record, courts could, in assessing whether the agency had "considered the relevant factors," also take into account what the agency should have known and considered. This might in some degree make up for the lack of third party input to the record.

With these modifications or clarifications to existing doctrine, Seidenfeld suggests the dilemma of nonlegislative rules can be solved. Whether he is right I expect will lead to further articles; whether the courts will adopt his suggestions I fear is as unlikely as the legislative solutions I proposed years ago.

1. William Funk, *Legislating for Nonlegislative Rules*, 56 **Admin. L. Rev.** 1023 (2004), available at SSRN; *When is a "Rule" a "Regulation"? Marking a Clear Line Between Nonlegislative Rules and Legislative Rules*, 54 **Admin. L. Rev.** 659 (2002), available at SSRN; *A Primer on Nonlegislative Rules*, 53 **Admin. L. Rev.** 1321 (2001), available at SSRN.
2. Robert Anthony, Interpretive Rules, Policy Statements, Guidances, Manuals and the Like –Should Federal Agencies Use Them to Bind the Public?, 41 **Duke L.J.** 1311, 1372 (1992).
3. Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 **Admin L. Rev.** 803, 807 (2001), available at SSRN.
4. Elizabeth Magill, *Agency Choice of Policy Making Form*, 71 **U. Chi. L. Rev.** 1383 (2004), available at SSRN.
5. Nina Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 **Cornell L.**

Rev. 398 (2007), available at SSRN.
6. E. Donald Elliott, Re-Inventing Rulemaking, 41 **Duke L.J.** 1490 (1992).
7. Jacob Gersen, Legislative Rules Revisited, 74 **U. Chi. L. Rev.** 1705, 1709 (2007).
8. Ronald M. Levin, Nonlegislative Rules and the Administrative Open Mind, 41 **Duke L.J.** 1497 (1992).
9. John F. Manning, Nonlegislative Rules, 72 **Geo. Wash. L. Rev.** 893, 926-27 (2004).
10. Richard J. Pierce, Jr.,*What Do the Studies of Judicial Review of Agency Action Mean?*, 63 **Admin L. Rev.** 77, 85 (2011), available at SSRN (showing an affirmation rate of 60%-81.3% for *Chevron* review and of 55.1%-73.5% for *Skidmore* review).
11. Massachusetts v. EPA, 549 U.S. 497 (2007).

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