

Comments from Jon Siegel

Mr. Cole,

I regret that I will be unable to attend today's committee meeting. Below please find a comment regarding the draft recommendation. Please forward the comment to the committee.

This is an interesting topic and the recommendation should be useful. A couple of thoughts on the draft recommendation:

1. According to the report, some agencies are reluctant to include a severability clause in their rules out of concern that courts will infer from the inclusion of such a clause that the agency believes that portions of its rule are vulnerable on judicial review. Is it worth mentioning (perhaps in the preamble?) that the more common severability clauses become, the less worrisome this concern should be? If severability clauses were routinely included in every rule, then no inference would arise that a rule including such a clause was thought to be any more vulnerable than any other rule.

I wouldn't go so far as to suggest that every rule should contain a severability clause. The critical determinant should be whether the agency believes that the rule could usefully function if severed. Sometimes severability would be inappropriate, if the rule would not function well if important parts were severed. So a severability clause should not always be included. Still, the more often severability clauses are included, the less concern there would be that severability clauses signal to courts that the agency has doubts about the lawfulness of its rule.

2. The draft recommendation suggests the possibility of adopting a narrow rule as a "test case." But, as the draft recommendation itself notes, this strategy could take too long to be feasible. I think it would be a rare case in which this strategy would work. If it takes 1-2 years to adopt the test case rule and another 1-2 years to see how the rule fares in judicial review, the agency could easily be into a new presidential administration and have new leadership by the time the agency could get around to adopting the rule it really wanted to adopt (for which the test case rule was serving as a test case). I suppose the possibility is worth mentioning but I think it would be used rarely in practice.

Best regards,

Jon Siegel