

Peter Strauss
Public Member
April 2, 2019

I wish I had more time to respond than I do and that I could be present even virtually at Thursday's meeting, but at this point can send only a very general reaction, which I ask you to share with the whole committee; I am copying Cary.

Here's a slide I regularly use in my ad law classes:

The Federal Government's Possibly Influential Prescriptive Texts

One Constitution, ratified by "the people"
Hundreds of statutes, enacted by an elected Congress

Thousands of regulations, adopted by politically responsible agency heads

Tens of thousands of interpretations and other guidance documents, issued by agency bureaus

Countless advice letters, press releases, and other statements of understanding, generated by individual bureaucrats

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This pattern exists in *every* developed legal system

Whatever falls above the dashed line, if valid, has statutory force and effect

Statutes, above the solid line, may *only* be enacted by Congress; democratically legitimate yet constrained by "rights," they barely require reasons

What falls *below* the solid line is *strictly* an executive (or judicial) product, whose possible influence on private behavior is constrained by rights and statutory authority

Cary's remarkable study understandably treats everything below the dashed line as "guidance" (along with things not mentioned here, such as an agency head's speeches), and the draft recommendation appears to echo this in leaving it to agencies to define what is and is not "guidance," with then quite detailed prescriptions how it ought to be handled. To me this is over-broad, and may for that reason be unlikely to find a sympathetic agency ear. My strong

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wish would be for an introductory provision limiting what the recommendation covers to the kinds of instruments described in the first of the two lines under the dashed line above, viz.:

This recommendation is addressed to agency guidance documents that the agency or its bureaus seriously intend to govern the actions of staff and/or to be understood as "soft law" which the agency may be entitled to invoke on a rebuttable basis in subsequent agency proceedings -- that is, to documents having the character addressed in 5 U.S.C. 552(a)(2).

Here, publication and indexing requirements are already in place, permitting some simplification of what follows. So limited, I'd find the recommendation much more likely to be helpful and well-received by agencies. That it would omit much of what Cary describes as "guidance" is, for me, a practical necessity.

Peter