

For the Members of the Committee on Judicial Review
From Andrew N. Vollmer, Public Member
Subject: Agency Guidance Through Interpretive Rules

I remain concerned about the tension between the non-binding nature of interpretive rules and the paragraph planned for the Recommendation that would make an interpretive rule binding on certain agency employees. My concern pertains to adjudications, especially enforcement adjudications. This is one area in which interpretive rules differ from policy statements. The Committee should discuss whether the effect of an interpretive rule in an adjudication would create a practical binding effect that is too strong and, if so, whether the Recommendation should reduce that danger by saying that an interpretive rule should play no role or at least no undue role in an adjudication.

Paragraph 3 of the draft Recommendation would permit an agency, as an internal management matter, to direct some of its employees to act in conformity with an interpretive rule. The aim of the paragraph is to help an agency maintain uniformity of interpretation among the many employees who implement a nationwide program, preserve stability, and respect private reliance interests, such as the interest of a private party in being free from an enforcement action when the party complied with the guidance. Emerson-Levin Report 37-39.

The draft Recommendation tries to balance these interests with the core principle that an interpretive rule is not legally binding. The first paragraph of the Recommendation proposes to say: “An agency should not use an interpretive rule to create a standard binding on the public”

The Committee should discuss whether the Recommendation should exclude agency adjudicators from the group of agency officials who could be directed to act in conformity with an interpretive rule. The interests in administrative uniformity are not strong or predominant in an adjudication, especially one charging a private party with a violation of law. In an adjudication, the specific facts matter, and the interests of the private party in an independent, unbiased, and impartial resolution of the legal issues is paramount. Allowing the use of an interpretive rule to support an agency’s enforcement charge gives too much weight to the interpretive rule, prejudices the outcome, and tilts too far toward giving the rule a binding effect. The prejudicial effect and confusion would substantially outweigh the value of using an interpretive rule. A defendant in an adjudication should not be required to overcome the practically binding effect of the rule.

No reliance interests arise in an enforcement adjudication against a defendant when the interpretive rule could be asserted against the defendant to its detriment rather than

in its favor. In those relatively rare occasions in which two or more private parties could have differing interests in an agency adjudication, a party wishing to claim that it reasonably relied on an interpretive rule should be able to take that position.

It is true that a defendant in an adjudication would be able to argue that the rule is not binding and would be able to present reasons why a rule should not apply in its particular circumstances, but that is not sufficient protection. Proceedings before an ALJ are expensive and burdensome, and a defendant should not be required to appeal an ALJ loss, which could cause serious commercial and reputational harm, to higher agency review to avoid the binding effect of an interpretive rule.

The better approach would be to exclude the use of an interpretive rule during an adjudication and require the charging agency to make its case without tipping the scales with the rule. Enforcement staff and agency heads would be able to invoke legally binding material that is independent of the interpretive rule. If the independent reasons for an interpretive rule are solid, they should have force in the adjudication.

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