Interpretations of Section 553 That Influence Informal Rule-Making . . .

WEEK FIVE (Second Part)
Tuesday, Sept. 21, 2021
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NOTICE: "LOGICAL OUTGROWTH"

- The "Logical Outgrowth" concept is a statutory interpretation of § 553(a)
- Concept: Where the proposed rule is modified the admin agency may promulgate a modified rule as the final rule without additional notice and opportunity for comment, so long as the final rule is a logical outgrowth of the proposed rule.

NOTICE: "LOGICAL OUTGROWTH"

- Test for logical outgrowth?
- "A final rule is a logical outgrowth of [a] proposed rule *only if* interested parties should have anticipated that the change was possible and thus reasonably should have filed their comments on the subject during the notice and comment period."

Excerpt of *Veterans Justice Group v. Sec. of Veterans' Affairs*, 818 F.3d 1336 (Fed. Cir. 2016), at textbook 316.

NOTICE: "LOGICAL OUTGROWTH"

- The test for logical outgrowth:
  - Is based on the concept of providing *fair notice*
  - Is very fact & circumstance specific
  - Is not completely settled
  - Is often litigated & exists as its own research issue.

NOTICE: "LOGICAL OUTGROWTH"

- Courts *will not* allow a "surprise switcheroo on regulated entities." (Text at 320)
- Courts *will* allow an admin agency to decide against issuing the proposed rule.
  - "[O]ne logical outgrowth of a proposal is surely . . . to refrain from taking the proposed step." (Text at 317)
  - Withdrawal of the proposed rule is one foreseeable outcome. (Text at 318)

Veterans Justice (Fed. Cir. 2016) (text 313-17)

- Admin agency proposing change in claim initiation process
- Old rule: narrative submissions recognized as placeholder for claim
- Proposed rule: only incomplete forms recognized as place holder for claim
- Final rule: recognized 3 methods of creating a place holder for claim
- YES – Logical Outgrowth.

Allina Health (D.C. Cir. 2014) (text 320-21)

- Admin agency considering whether to count patients with certain insurance in Medicaid or Medicare fraction for hospital reimbursement
- Admin agency said it was "clarifying" which of 2 possible interpretations of Act it would follow.
- Proposed rule: fraction applicable to Medicaid
- Final rule: fraction applicable to *Medicare*!
- NO – Not a Logical Outgrowth
  - *This was an underhanded **switcheroo**!*

NOTICE: "LOGICAL OUTGROWTH"

- Two gnarly issues exist:
  - Issue 1: How to measure foreseeability of a change between the proposed and final rule?
    - Foreseeable to the general public? [*outsiders*]
    - Foreseeable to the regulated industry? [*insiders*]
      - This matters because it prompts participation

"Though [the NPRM] would be gobbledygook to an outsider, *insiders* such as the plaintiffs would realize that the focus of the [rule-making] proceedings would [impact their activity which they KNEW was a controversial target for reform by the admin agency.] They knew enough to know that if they wanted to protect their [activity,] they would have to participate in rulemaking proceedings."

Alto Dairy v. Veneman, 336 F.3d 560, 569-70 (7th Cir. 2003)

"We are sympathetic to the view expressed by the Seventh Circuit [in *Alto Dairy*]that proposed rules that might seem obscure to the average reader should alert members of the regulated class [i.e., *insiders*] to the possible options and an examination of a policy [via a rule-making proceeding] would imply. . . But we ask ourselves, would a reasonable member of the regulated class – even a good lawyer – anticipate that such volte-face with enormous financial implications would follow the Secretary's proposed rule[?] Indeed, such a lawyer might well advise a hospital client not to comment opposing such a possible change for fear of giving the Secretary the very idea."

Allina Health Serv. v. Sebelius, 746 F.3d 1002, 1006 (D.C. Cir. 2014).

NOTICE: "LOGICAL OUTGROWTH"

- Two gnarly issues exist:
  - Issue 2: Should a court make inferences based on participation?
    - What inference should one make from a LACK of comments submitted by *insiders*?
      - *That they didn't foresee the change?*
      - *That they are trying to game the system?*

NOTICE: LOGICAL OUTGROWTH

- A logical outgrowth challenge is a complaint about the procedure followed by the admin agency.
- Thus, "the remedy would have been procedural in nature, requiring the [admin] agency to take comments on the changes." (Textbook at 317-18)

OPPORTUNITY TO COMMENT & CONCISE GENERAL STATEMENT

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments . . . After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. . . .

§ 553(c)

- *U.S. v. Nova Scotia Food Prod. Corp.*, 568 F.2d 240 (2d Cir. 1977).

(holding that the regulation was within the authority delegated to the FDA, but invalid due to "serious inadequacies" in the procedure followed during the rule-making process).

OPPORTUNITY TO COMMENT

- "An agency may resort to its own expertise outside the record in an informal rulemaking procedure," but "[w]hen the basis for a proposed rule *is a scientific decision*, the scientific material which is believed to support the role *should be exposed of review* of interested parties for their comment."
- "To *suppress meaningful comment* by failure to disclose the basic data relied upon is akin to rejecting the comment all together."
- There are items that the admin agency must "make known so as to elicit comments that probe the fundamentals."

Nova Scotia, textbook at 327-28.

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The commenting process is meant to "VENTILATE" the policy issues to be covered by the rule-making.

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Nova Scotia Food, textbook at 328.

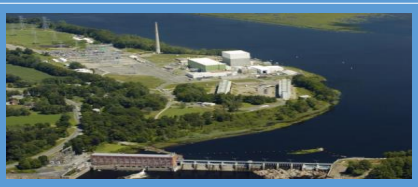
CONCISE GENERAL STATEMENT

- Courts recognize that the "concise general statement" requirement:
  - does <u>not</u> require an exhaustive, detailed account of *every aspect* of the rulemaking proceedings;
  - it is <u>not</u> meant to include formal findings of fact and conclusions of law;
  - but also cannot be read TOO literally (because it is but a bare bone!)
- Admin agencies urged by courts to:
  - tie the general statement explicitly to statutory authority & policy
  - identify major issues ventilated and explain how they were handled.
  - directly and frankly identify and support policy choices made and how they were informed by the admin agency's expertise.

CONCISE GENERAL STATEMENT

- Here, the admin agency was asked whether if needed to promulgate a rule applicable to all species, was warned that the proposed rule would destroy the commercial product, and was offered an alternative by a sister agency.
- *Yet, it neither discussed nor answered any of these items.*
- "[T]o sanction silence the face of such vital questions would be to make the statutory requirement of a concise general statement less than an adequate safeguard against arbitrary decision making."

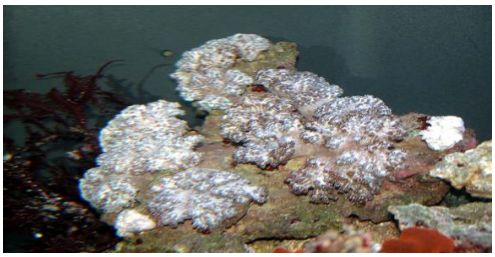
Nova Scotia Food, textbook at 328-29.



***VERMONT YANKEE* AND THE RISE OF THE PAPER HEARING**

"This section outlines the procedural demands that § 553 imposes on rule-making. It begins with [*Vermont Yankee* which] reject[ed] judicial efforts to impose procedural requirements not constitutionally mandated or contained in the APA, other statutes, or agency regulations. But that leaves courts free to insist on adherence to the APA's rule-making procedures. Thus, a core question becomes determining exactly what § 553 requires. . . . [O]ver the years the courts have added quite a significant gloss to section § 553's spare statutory terms."

ADMIN LAW at 294.

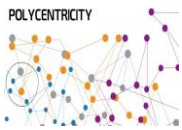


RULE-MAKING IN THE *MIDDLE* OF ADJUDICATION?

- Easier example to grasp:
  - Promulgation of medical/vocational **guidelines** through *rule-making* to be used during Social Security Disability eligibility determinations (which are mini-individualized *adjudications*).
  - Use of rule-making to resolve a question common to all such adjudications
    - No need for testimony on this issue in adjudication
    - More efficient/more uniform than case-by-case assessment

RULE-MAKING AND THE MAKING OF POLICY in SCIENCE & TECH

- Are facts related to science & technology more like legislative fact or adjudicatory fact?



WHAT IS A RECORD?

What is a Record?

- Rule-making (both formal and informal) creates an *administrative record*.
- "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

- Historically, admin agencies did not make a "contemporaneous" *administrative record*, but assembled a "historical record" of what had been available for consideration when the rule was being created if the rule was later challenged.
- This does NOT occur anymore. Admin agencies are VERY conscious of the need to build a complete *administrative record* to facilitate judicial review.
- Items relevant to the notice and comment process would BE in the *administrative record* unless subject to some kind of privilege or redaction.
- Much of it would also be publicly available (regulations.gov dockets and/or resort to FOIA request).

"[G]enerally speaking [§ 553] established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures. Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them. [While there may be circumstances that would justify such, these are "extremely rare" if they even exist.]

Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 524-25 (1978), textbook at 297.

"Even apart from the [APA], this Court has . . . emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments. [This is] 'an outgrowth of the congressional determination that administrative agencies and administrators will be familiar with the industries which they regulate and will be in a better position than federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved.'"

Id. at 524–25, textbook at 297.

"[T]his much is absolutely clear. Absent constitutional constraints or extremely compelling circumstances the " administrative agencies 'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.' " [As the legislative history of the APA suggests] . . . '[c]onsiderations of practicality, necessity, and public interest . . . will naturally govern the agency's determination of the extent to which public proceedings should go.'"

Id. at 543, 545 (internal citations omitted).

VERMONT YANKEE

- *Congress* can add to § 553's procedural requirements via agency-specific legislation.
- Theoretical: Procedure can be used to expand/restrict power to act.
  - *Congress knows that* and experiments with it.
  - *Courts know that too* and may be tempted to dress up their reasoning as in "interpretations" of § 553 or as substance to get around *Vermont Yankee*
  - *Admin agencies know that as well* and sometimes use procedural requirements to expand their own power.
    - Admin agencies can make procedural rules that pre-termit questions for an entire class (even in the middle of adjudication as occurred in *Vermont Yankee*).

PAPER HEARING PROCESS?

Formal rule making (trial-like, rarely used)

"Paper hearing"

Informal rule making (true APA-dictated, bare bones "notice and comment" process)

PAPER HEARING PROCESS

Combo of some of the trial-like procedures of a formal rule-making (*but without oral testimony & cross-examination*), plus the avoidance of delay and cost that comes from use of the truly informal notice & comment process.

Based on the notion that rule-making does have an undeniably adversarial nature in certain settings and this more procedure will foster true ventilation.

PAPER HEARING & *VERMONT YANKEE*

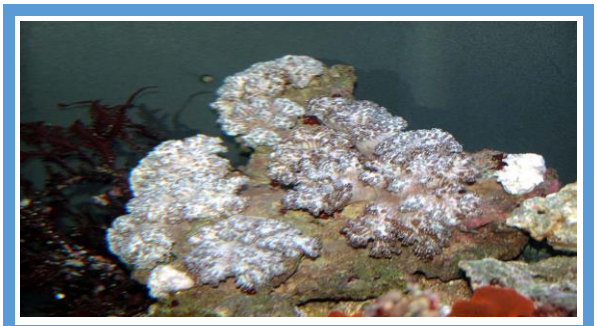
- Admin agencies often create rules that capture a policy choice based on legislative-type facts.
- Can become adversarial, especially when the underlying policy choice is based on scientific uncertainty.
- *Paper Hearing* allows participation and ventilation while maintaining some measure of cost-containment and efficiency.
- Should judges exercising judicial review of such rules . . .
  - limit themselves to reviewing the procedures adopted by the admin agency to deal with the science? [Judge Bazelon]
  - "roll up their sleeves" and examine the science because Congress delegated authority to agencies expecting that kind of judicial review of their rulemaking? [Judge Leventhal]

PAPER HEARING & *VERMONT YANKEE*

- Recognizing the ever-increasing need for "science" as a basis of rulemaking and in order to foster informed judicial review, Congress has created or recognized some institutes as having expertise to lend.
- Two examples:
  - National Institute of Occupational Safety & Health (NIOSH)
  - Clean Air Special Advisory Panel

(*Just know to look for such in science-rich rulemaking contexts*)

- Paper hearing process *is* firmly established and often used (<u>especially</u> where "science" is involved).
- Yet, there is continuing discrepancy over the *true source* of the paper hearing process:
  - APA § 553 as *interpreted*?
  - "record" linked to judicial review under APA § 706?



EXCEPTIONS TO NOTICE & COMMENT RULE MAKING

To Get Us Ready for Next Week's Guest Speaker . . .

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

§ 553(b)

(b) General notice of proposed rule making shall be published in the Federal Register, *unless* persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, *this subsection does not apply*—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

TWO LAYERS OF COMPLEXITY

Trying to differentiate between:

- a legislative-type rule that should be put through notice-and-comment rulemaking vs. something that fits this exception
- interpretive rules v. policy statements and guidance

FRUSTRATION!!

"As to **interpretive rules**, agency action that merely interprets a prior statute or regulation, and does not itself purport to impose new obligations for prohibitions or requirements on regulated parties, is an interpretive rule. An agency action that merely explains how the agency will enforce a statute or regulation – in other words, how will exercise its broad enforcement discretion . . . – is **a general statement of policy**."

Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243, 252 (D.C. Cir. 2014)

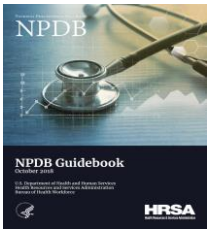
IN GENERAL . . .

In distinguishing between legislative rules that should go through notice-and-comment rulemaking vs. policy statements and guidance, courts tend to focus on whether the agency action is *binding*.

If so, it is deemed to be legislative.

And then what?

SAMPLE GUIDANCE DOCUMENT



SAMPLE GUIDANCE DOCUMENT

- TOC for Chapter E (just for sense of depth/complexity)
- Preface and a few paragraphs of the Background section
- 4-provision snippet taken from Chapter E
  - Investigations
  - Temporary Clinical Privileges
  - Summary Suspensions
  - Proctors

7. The linguistic "canons of construction," which are a tool for statutory interpretation, are often criticized because:

A. They are not necessarily known to or honored by those who draft statutes, including Congressional staffers.

B. There are many of them and thus it is not uncommon to see them being used against each other in a "thrust & parry" argument fashion.

C. They do not necessarily recognize how language and writing conventions can change over time.

D. All of the above.