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*An APA Provision on Nonlegislative Rules?*

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Abstract by Raymond R. Janairo

The Administrative Procedure Act contains provisions governing nonlegislative rules, but fails to address specifically the deference courts should accord to such agency pronouncements. Section 553 authorizes agencies to issue interpretive rulings and general policy statements. Although § 706 and *Marbury v. Madison* give courts discretion in evaluating agency pronouncements, courts tend to defer to agencies because they have more expertise, making them better able to interpret their statutes and regulations than courts. Section 552 requires agencies to publish certain statements in the Federal Register. These provisions do not allow the deference courts should accord to nonlegislative rules.

The author suggests an amendment to the APA that would address judicial deference toward nonlegislative rules. The author enumerates a number of principles in arriving at this amendment. First, agencies should primarily be encouraged to use legislative processes to promulgate rules and policy, but should also be able to pronounce policy through nonlegislative means. Requiring only legislative policies would be impossible and impracticable. Second, judicial deference is a pragmatic, rather than formulaic, concept. The author argues “courts do not strictly adhere” to the *Chevron* or *Skidmore* deference standards. Rather, courts defer to agency interpretations under a presumption of regularity based on, *inter alia*, special expertise and congressional delegation of power. Courts may reject agency interpretations it believes are wrong or causes unjustness. Third, courts should defer only to authoritative (i.e., institutional) nonlegislative rules rather than rules which one or two individuals in an agency drafted. After this enumeration, the author presents a number of conditions that would help determine judicial deference: the agency must publish the interpretation in the Federal Register, or otherwise make it publicly known and available; a judicial court must refuse to allow an agency to apply a nonlegislative rule retroactively if doing so would cause undue hardship; and, courts may accept an agency’s reversal or modification of a policy as long as the new interpretation is reasonable and the agency offers a sound justification for the alteration. The author finally concludes with the actual text of his suggested amendment.