

Texas Law Review

See Also

Response

Two Cheers for Procedural Review of Guidance Documents

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Professor Mark Seidenfeld's entry into the debate over agency guidance documents is a welcome one. Through two decades of administrative-law scholarship (including several important articles in the *Texas Law Review*), Professor Seidenfeld has been instrumental in crafting optimal ways for judges to demand reasoned decisionmaking from federal agencies as those agencies carry out their statutory mandates.¹ Along the way, he has thrown some much-needed cold water on the oft-repeated proposition that the specter of this brand of "hard-look review" will inevitably ossify the federal rulemaking process.² His writing is invariably thoughtful, hard-headed, and marked by a real-world understanding of the political, institutional, and

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1. See generally, e.g., Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEXAS L. REV. 83 (1994) [hereinafter Seidenfeld, *Syncopated*] (advocating for a modification of the review process announced in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), that would render its application pluralist rather than deliberative); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEXAS L. REV. 483 (1997) [hereinafter Seidenfeld, *Demystifying*] (exploring deossification proposals, and proposing operational changes to the manner in which courts perform hard-look review); Mark Seidenfeld, Reply, *Hard Look Review in a World of Techno-Bureaucratic Decisionmaking: A Reply to Professor McGarity*, 75 TEXAS L. REV. 559 (1997) [hereinafter Seidenfeld, *Hard Look*] (criticizing Professor Thomas McGarity's argument that "techno-bureaucratic rationality" is an appropriate mode of agency decisionmaking).

2. See, e.g., Seidenfeld, *Demystifying*, *supra* note 1, at 503–23 (proposing modifications to hard-look review to reduce uncertainty, thereby reducing ossification).

psychological pressures that operate on agency heads, lower level staff, and members of regulated industries and beneficiary groups.³

In *Substituting Substantive for Procedural Review of Guidance Documents*, Professor Seidenfeld brings those attributes to bear on the vexed question of guidance documents.⁴ Guidance documents—also known as nonlegislative rules—are statements that a federal agency asserts to be exempt from the notice-and-comment requirements of the Administrative Procedure Act (APA) on the ground that they are “interpretive rules,” or “general statements of policy.”⁵ Interpretive rules clarify the meaning of existing laws or rules;⁶ policy statements announce the agency’s intentions with respect to enforcement.⁷ Neither type of guidance document creates new legal rights or obligations.

Putting the matter briefly (and simplifying both the academic debate and the case law quite a bit), guidance documents are exempt from notice and comment because they lack binding legal force.⁸ Framing the issue in this way helps to illuminate what makes the judicial doctrine in this area so difficult: to figure out which agency statements need not undergo notice and comment, courts have to decide what constitutes binding legal force. This is no easy task—indeed, perhaps an impossible one: how binding is too binding?⁹ The result is a body of case law that has been described by judges and commentators alike as “enshrouded in considerable smog.”¹⁰

Enter the critics. As I have documented in a recent article, over the past few decades, a small battalion of judges, commentators, and scholars—including Kenneth Starr, Donald Elliot, John Manning, and Jacob Gersen—has claimed that the fog can be dispelled by turning the traditional judicial

3. See, e.g., Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486 (2002) [hereinafter Seidenfeld, *Cognitive*] (evaluating judicial review of rulemaking in light of the psychological influences that such review exerts on agency staff); Mark Seidenfeld, *Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review*, 70 OHIO ST. L.J. 251 (2009) [hereinafter Seidenfeld, *Reassessment*] (examining structures and procedures that affect agency priority-setting, including but not limited to judicial review).

4. See generally Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEXAS L. REV. 331 (2011) (proposing that courts undertake substantive review of agency guidance documents, but recognizing the need for courts to adjust doctrines that govern the availability of review).

5. 5 U.S.C. § 553(b) (2006). The APA refers to “interpretative rules,” but, like Professor Seidenfeld, I will economize on syllables and use the term *interpretive rules*.

6. *Syncor Int’l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997).

7. TOM C. CLARK, U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947).

8. *Syncor Int’l Corp.*, 127 F.3d at 94.

9. See Seidenfeld, *supra* note 4, at 351 (“[F]ocusing on the extent to which a guidance document ‘binds’ the public or creates ‘new law’ is neither a manageable nor appropriate inquiry for courts because there is no a priori understanding of how binding is too binding or how much lawmaking is too much lawmaking for a rule to be nonlegislative.”).

10. *Noel v. Chapman*, 508 F.2d 1023, 1030 (2d Cir. 1975); Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547, 547–48 (2000).

inquiry on its head.¹¹ Rather than test a rule's procedural validity by investigating whether it was designed to be legally binding, the critics would simply ask whether the rule went through notice and comment.¹² If the answer is yes, then the rule may be given binding legal force, meaning that the agency may rely on a violation of the rule to prove a violation of the underlying statute or legislative rule; if not, not.¹³

In my article, I argue that courts have been right to spurn this seemingly elegant solution—which I label the “short cut”—because it fails to adequately protect regulatory beneficiaries, puts insufficient pressure on agencies to elicit public input before making policy, and sacrifices some of the important benefits of notice and comment.¹⁴ I make clear in the article that my aim is not to endorse every aspect of the prevailing judicial approach with all of its eddies and swirls, but to defend it against critics who would flush the whole enterprise down the drain.¹⁵ In a brief concluding section, I speculate that the very indeterminacy of current doctrine may sometimes operate as a virtue, allowing courts to tailor procedural review to those circumstances where it might do the most good.¹⁶

Now Professor Seidenfeld has joined the debate, and for the most part, he throws his lot in with the critics. He generally approves of the short cut, which he calls the “ex-post-monitoring” approach.¹⁷ At the same time, though, he recognizes that ex post monitoring is “far from a perfect solution,”¹⁸ and he does not propose to do away with preenforcement review of guidance documents altogether. Instead, as the title of his article suggests, he wants courts to substitute substantive for procedural review. We might say that Professor Seidenfeld, somewhat like the three bears in the children's fable, lays out three options for preenforcement review of guidance

11. For a collection of these critiques of procedural review of nonlegislative rules, see David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 289–94 (2010).

12. *Id.* at 289 (citing Jacob E. Gersen, *Legislative Rules Revisited*, 74 U. CHI. L. REV. 1705, 1719 (2007)).

13. I exclude here rules that are exempt from notice and comment on other grounds, such as good cause. *See, e.g.*, 5 U.S.C. § 553(a) (2006) (exempting, among other things, matters relating to agency management and personnel); *id.* § 553(b)(B) (providing that notice-and-comment procedures do not apply when their application is impractical, unnecessary, or against the public interest).

14. Franklin, *supra* note 11, at 303–19.

15. *See id.* at 325 (expressing qualified support for the prevailing judicial approach, while recognizing that “courts could eliminate some of its ambiguities and indeterminacies by turning a few more square corners”).

16. *See id.* (arguing that doctrinal flexibility allows courts to tailor notice-and-comment requirements to situations in which public input would be valuable).

17. *See generally* Seidenfeld, *supra* note 4, at 352–57, 394 (recognizing the “procedural simplicity” of this approach, and noting the approach's shortcomings, including its limited presence in case law).

18. *Id.* at 357.

documents—procedural, substantive, and none at all—and trusts that the reader, like the fable’s protagonist, will pick the one in the middle.¹⁹

In my view, Professor Seidenfeld’s arguments for abandoning procedural review of guidance documents in favor of substantive review, while thought provoking and expressed with his customary cogency, are ultimately not fully convincing. In this brief Response, I will revisit some of my concerns about the ex-post-monitoring approach in light of Professor Seidenfeld’s contribution to the debate, raise a few questions about whether substantive review of guidance documents is a workable alternative to current doctrine, and conclude with some more general thoughts about the intertwining of procedural and substantive review in administrative law.

I. Points of Agreement

Let me start, though, with a proposition on which Professor Seidenfeld and I agree: It is important to ensure that stakeholders are meaningfully involved in the process of policy development.²⁰ Stakeholders in this context include not only entities that will be potentially subject to penalties for noncompliance with agency rules, but also the intended beneficiaries of such rules—be they consumers, employees, or users of public goods such as clear air and national parks. The importance of stakeholder input is the chief reason for Professor Seidenfeld’s reluctance to abandon all judicial review of guidance documents. As he writes, the danger is that “[b]ecause so little is required of the agency before issuing a nonlegislative rule, an agency may issue one with no input even from those with strong interests in it.”²¹

The risk that stakeholders will be left out of policy development is heightened with respect to regulatory beneficiaries, who tend to be “neither repeat players nor organized representatives of focused interests,” and thus, “are apt to be excluded from the formulation process” for guidance documents.²² And, as Professor Seidenfeld recognizes, the risk of abuse is greater still when agencies use guidance documents to ease burdens on regulated entities because doctrines of standing and reviewability often insulate such deregulatory agency actions from judicial scrutiny at the behest of those who seek more stringent regulation.²³ In short, Professor Seidenfeld and I agree that some judicial review of guidance documents is necessary in order to prevent stakeholders and their concerns from being frozen out of the policy-making process.

19. *Cf. id.* at 332 & n.4 (citing Franklin, *supra* note 11, at 324–25) (suggesting that I, like Goldilocks, think that courts have “gotten it just right”).

20. *See id.* at 332 (criticizing other proposals for allowing agencies to avoid stakeholder participation).

21. *Id.* at 342.

22. *Id.*

23. *Id.* at 344.

Where we part company is on the question of whether current doctrines of procedural review do an effective job of ensuring public input without unduly bogging agencies down in process or depriving regulated entities of fair notice. Professor Seidenfeld's primary objection to judicial review of guidance documents for procedural validity, at least in its current form, is that the doctrine fails to match up with the "costs and benefits of issuing guidance."²⁴ In particular, he claims, echoing John Manning, that procedural review requires courts to second guess agency resource-allocation decisions, a task that courts are not well-suited to perform.²⁵

Indeed, Professor Seidenfeld goes further and argues that current procedural-review doctrine creates perverse incentives, encouraging agencies "to avoid guidance precisely when guidance is likely to be most valuable."²⁶ Thus, for instance, he contends that in determining the procedural validity of a document alleged to be a general statement of policy, courts treat the document's clarity and precision as signs that the agency intended the document to have binding legal force and are therefore more likely to strike down a crisply delineated norm as a legislative rule in disguise.²⁷ But this gets things precisely backwards, says Professor Seidenfeld, because courts should be encouraging clear and precise guidance documents rather than invalidating them.²⁸ As for guidance documents that are claimed to be interpretive rules, Professor Seidenfeld argues that courts are more likely to invalidate such rules on procedural grounds when they cannot easily be derived from existing law—but it is precisely these not-easily derivable rules that provide the most valuable notice to the public.²⁹

Rather than simply embracing the ex-post-monitoring approach, however, Professor Seidenfeld advances the intriguing suggestion that guidance documents be subjected to immediate substantive judicial review under the APA's "arbitrary and capricious" standard.³⁰ In particular, he argues that agencies should be required to show to the satisfaction of generalist judges that their guidance documents are the result of "reasoned

24. *Id.* at 359.

25. *Id.* at 359–60 & n.155 (citing John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 896–97 (2004)).

26. *Id.* at 360.

27. *Id.*

28. *Id.*

29. *See id.* at 360–61 ("[T]he message from the courts is that the weaker the link between the interpretation and the text of the statute or regulation being interpreted, the less likely a court is to allow the agency to announce the interpretation by guidance document.").

30. *See generally id.* at 385–94. *Preenforcement* substantive review is the novelty here; guidance documents, or at least the policies embodied in them, are routinely subjected to substantive review once they are enforced. *See generally, e.g.,* *Barnhart v. Walton*, 535 U.S. 212 (2002) (undertaking substantive review of the Social Security Administration's enforcement of a rule defining the term *disability*); *United States v. Mead Corp.*, 533 U.S. 218 (2001) (reviewing the application of an interpretive rule promulgated by the United States Customs Service to govern tariff classifications for particular imports).

decisionmaking” by explaining the content of the guidance “in terms of factors that are relevant and alternatives that are plausible given the state of knowledge available to the agency when it acted.”³¹

II. Revisiting the Ex-post-monitoring Approach

Before turning to the merits of Professor Seidenfeld’s substantive review proposal, it is worth taking a moment to assess the ex-post-monitoring approach in light of his reasons for endorsing it. Like the other critics of procedural review, Professor Seidenfeld takes the position that as far as the APA is concerned, an agency may dispense with notice and comment whenever it chooses, subject only to the burden of being unable to rely on the resulting guidance document as an independent legal basis for later enforcement. In this respect, I think he goes too far. Although I agree with Professor Seidenfeld that rule-like consistency in standards of procedural review is too much to expect from judges, I do not believe this concern justifies giving up the enterprise altogether.³²

To see why not, it may be helpful to revisit briefly the facts of a case that helped give rise to the ex-post-monitoring critique, *Community Nutrition Institute v. Young*.³³ In *Community Nutrition Institute*, the Food and Drug Administration (FDA) issued a guidance document declaring that it would not take enforcement action against companies that produced corn containing fewer than twenty parts per billion of a contaminant called aflatoxin.³⁴ On preenforcement review, the D.C. Circuit held that the FDA’s pronouncement was in fact a legislative rule and was therefore invalid for failure to undergo notice and comment.³⁵ Under a pure ex-post-monitoring regime, the FDA’s standard would go into effect in the sense that producers would treat it as a safe harbor. The problem is that the Community Nutrition Institute would have no opportunity to challenge the twenty-parts-per-billion threshold as

31. Seidenfeld, *supra* note 4, at 388.

32. Professor Seidenfeld also argues that procedural invalidation of guidance documents that purport to carry the force of law may run afoul of the Freedom of Information Act, which provides that an agency cannot use any rule against a party unless it has been printed in the Federal Register or otherwise made public. *Id.* at 351 (citing 5 U.S.C. § 552(a)(2) (2006)). He reads this provision as entailing the negative implication that agencies may use guidance documents against parties so long as they publish them first. *Id.* If Professor Seidenfeld means to suggest that guidance documents may be accorded binding legal force, the suggestion is incorrect even under the premises of the ex-post-monitoring approach, which takes as its starting point that guidance documents lack independent authority. If, as seems more likely, he means to suggest that guidance documents may be treated as a kind of administrative precedent, *id.* at 348, I am inclined to agree—but I do not think this treatment precludes review for procedural validity. For instance, an interpretive rule may be cited as persuasive authority in support of an agency’s understanding of existing law, but it may not create new legal obligations. *See supra* text accompanying notes 5–8. If it tries to do that, it should be deemed procedurally invalid.

33. 818 F.2d 943 (D.C. Cir. 1987) (per curiam). For a fuller discussion of *Community Nutrition Institute*, see Franklin, *supra* note 11, at 291–92, 309.

34. *Cnty. Nutrition Inst.*, 818 F.2d at 945.

35. *Id.* at 946–49.

unlawfully lenient, because an agency's decision *not* to bring enforcement proceedings is generally unreviewable.³⁶

Professor Seidenfeld recognizes that the ex-post-monitoring solution is imperfect for this reason—which is why he proposes subjecting guidance documents to immediate substantive review.³⁷ I will turn to the merits of that proposal in Part III of this Response. Before doing so, however, I want to address one of the primary reasons that Professor Seidenfeld offers for preferring substantive to procedural review. Procedural review, he says, is “much ado about nothing” because the policies embodied in guidance documents can still be applied by the agency in an adjudicatory context even after the documents themselves have been struck down as procedurally invalid.³⁸ Thus, he contends, the only practical upshot of a procedural invalidation is less overall notice to the public³⁹—assuming, I should add, that it even has that effect.

Professor Seidenfeld's “much ado about nothing” critique rests on the practical implications of the *Chenery II*⁴⁰ doctrine, which holds that “the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.”⁴¹ Procedural invalidation of guidance documents is largely ineffective, Professor Seidenfeld argues, because under *Chenery II* the agency could simply apply the same policy in the course of adjudicatory enforcement.⁴² Ironically, the same doctrine underlies my own skepticism about the benefits of ex post monitoring: given that agencies may cite the policy embodied in a guidance document in support of an adjudicatory order, I have argued, they are unlikely to be deterred by the threat of being unable to “rely” on such rules in the strictest legal sense.⁴³

36. Franklin, *supra* note 11, at 309.

37. Seidenfeld, *supra* note 4, at 373.

38. *Id.* at 361.

39. *Id.* It is not clear what the appropriate remedy for a procedurally invalid general statement of policy should be; even if the statement were vacated or enjoined, it would seem open to the agency to reissue it with the addition of language making clear that it is merely advisory. Franklin, *supra* note 11, at 302. There is also the question, raised by Professor Seidenfeld, as to whether a guidance document that has been invalidated on procedural grounds can nonetheless provide the notice that is necessary in some circuits before an agency may depart from a longstanding policy in the course of an adjudication. Seidenfeld, *supra* note 4, at 363. My own view is that an invalid agency statement should not be permitted to serve any legal function, including that of providing adequate notice. See *id.* at 363 n.171 (acknowledging this position, and tying it to the views of a majority of justices in *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969)).

40. *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194 (1947).

41. *Id.* at 203; see also *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 293 (1974) (reaffirming the *Chenery II* doctrine).

42. Seidenfeld, *supra* note 4, at 338.

43. Franklin, *supra* note 11, at 312–16. Since *Chenery II* appears to undermine both procedural and substantive review of guidance documents—and since Professor Seidenfeld and I agree that *some* form of review is appropriate—perhaps it follows that *Chenery II* should be abandoned. That prospect, which I imagine Professor Seidenfeld would not favor, is both unlikely and beyond the scope of this Response. For a related critique of *Chenery II* and discussion of its “troubling”

Professor Seidenfeld doubts that the *Chenery II* doctrine deprives ex post monitoring of its deterrent effect, emphasizing how difficult it is for agencies to defend policies embodied in nonlegislative rules when those policies are challenged in subsequent enforcement proceedings.⁴⁴ Although I have acknowledged that agencies are obliged to entertain arguments concerning factual differences between cases,⁴⁵ I continue to doubt that this obligation provides much solace to parties seeking to uproot well-established agency policies.⁴⁶ Particularly when the initial policy does not rest on the adjudicatory facts of a particular case—as it did not in *Chenery II* itself⁴⁷—the agency’s duty to hear arguments concerning factual discrepancies gives later parties scant leverage with which to effect policy change. Elaborate citation of case law seems unnecessary here: as one leading casebook puts it, “lawyers know that adjudicators’ tempers (and explanations) will grow short once the new doctrine has become firmly rooted.”⁴⁸ Nor do agencies face much of a burden when seeking to *change* general policies grounded in prior adjudications. As the Supreme Court recently explained, the agency need only show it is aware that it *is* changing position and supply some good reason for the change.⁴⁹

Finally, because a section of Professor Seidenfeld’s critique of procedural review is targeted directly at my recent article,⁵⁰ I should take a moment to respond. In particular, Professor Seidenfeld asserts that my article defends current doctrine “without either providing a conceptual foundation or disavowing its incoherence”⁵¹ and advances no “conceptual understanding of guidance documents.”⁵²

As for defending current doctrine, I have already noted that this was not my central aim; the article sought only to protect the practice of procedural

aspects, see Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 535–36 (2003).

44. Seidenfeld, *supra* note 4, at 358 n.144.

45. Franklin, *supra* note 11, at 312–13 & nn.189–91.

46. Professor Seidenfeld’s sole support for the notion that reliance on adjudication is burdensome for agencies is *Shell Oil Co. v. FERC*, 707 F.2d 230 (5th Cir. 1983), a case I cited in my article, along with two other cases supporting the same basic proposition. Franklin, *supra* note 11, at 313 n.190 (citing *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1184 (D.C. Cir. 1987) (en banc); *Shell Oil Co.*, 707 F.2d at 235–36; and *NLRB v. St. Francis Hosp. of Lynwood*, 601 F.2d 404, 414–16 (9th Cir. 1979)).

47. See *Chenery II*, 332 U.S. at 206–07 (noting that the agency did not find any wrongdoing in the case before it but “felt that all of its general considerations of the problem were applicable to [the] case”).

48. PETER L. STRAUSS ET AL., *GELLHORN & BYSE’S ADMINISTRATIVE LAW, CASES AND COMMENTS* 411 (11th ed. 2011).

49. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009); see also *id.* at 1824 (Kennedy, J., concurring) (adopting the Court’s undemanding test for cases where an agency “did not base its prior policy on factual findings”).

50. See generally Seidenfeld, *supra* note 4, at 357–64.

51. *Id.* at 359.

52. *Id.* at 357.

review of guidance documents from those who would dismantle it altogether. As for not advancing a conceptual understanding of guidance documents, perhaps the best reply is one of confession and avoidance. Beyond canvassing the costs and benefits of guidance documents, which my article does at some length,⁵³ I do not believe it is possible to construct a one-size-fits-all conceptual template for guidance documents. They can be used to announce tentative policies pending further development; to inform agency staff about enforcement norms or priorities; to fill in gaps in regulated entities' understandings of existing law; to make new law while economizing on the costs of full-blown rulemaking; or to do any or all of the above. The (admittedly difficult) task of courts engaged in procedural review is, in essence, to ensure that the purpose of the challenged guidance is not to promulgate new binding law. If one of the primary costs of using guidance documents rather than full-blown rules is a diminution in public participation, then procedural review—when performed with sensitivity to notice and reliance interests—can match up quite well with the “costs and benefits of issuing guidance.”⁵⁴ Professor Seidenfeld is correct to say⁵⁵ that this kind of review entails judicial interference with agency preferences about resource allocation—but so does all judicial review of administrative action to one degree or another, including his preferred option of immediate substantive review of guidance documents. It is to that option that I now turn.

III. Is Substantive Review a Better Alternative?

Professor Seidenfeld's proposal of preenforcement review of guidance documents for reasoned decisionmaking is innovative and intriguing, but it raises some difficult questions of its own concerning burdens on courts and agencies. I can only suggest some of those questions here.

The proposal builds on a solid foundation. Review for reasoned decisionmaking has been a well-established component of administrative law since the Supreme Court's 1983 *State Farm*⁵⁶ decision, with roots that stretch back much further.⁵⁷ Indeed, Professor Seidenfeld himself has been one of

53. See generally Franklin, *supra* note 11, at 303–06.

54. This goal is set forth in Seidenfeld, *supra* note 4, at 359.

55. *Id.*

56. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

57. See, e.g., *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 406, 420 (1971) (remanding for a determination of whether the Secretary of Transportation acted within the scope of his authority and acted justifiably under the applicable standard by authorizing the construction of an interstate highway through a public park); *SEC v. Chenery Corp. (Chenery I)*, 318 U.S. 80, 94–95 (1943) (holding that a remand to the Securities and Exchange Commission was necessary where the agency had misapplied rules of equity).

the leaders in justifying a cost-sensitive version of reasoned-decisionmaking review and placing it at the center of contemporary administrative law.⁵⁸

Extending it to guidance documents, however, would be an innovation in several respects. First, as Professor Seidenfeld discusses at length, doctrines of finality and ripeness would need to be loosened somewhat to allow for preenforcement substantive review of such documents.⁵⁹ I have no objection to this aspect of his proposal, although I do suspect that there are instances under current ripeness doctrine in which the *procedural* validity of a guidance document—say, an interpretive rule—would be ripe for review even though its *substantive* validity remains unripe. For instance, the issue of whether a given rule is truly interpretive—as opposed to legislative—might be purely legal in nature and therefore fit for immediate review, while the issue of whether it is arbitrary and capricious may require further factual elaboration in the context of concrete applications. I do not claim that preenforcement challenges are always, or even usually, ripe—deciding whether a document is a general statement of policy, for instance, often entails waiting to see how it is enforced—but, as Professor Seidenfeld seems to acknowledge, procedural review of guidance documents may require less “massaging” of timing doctrines than would his substantive approach.⁶⁰

Even putting timing doctrines to one side, Professor Seidenfeld’s proposal raises the question of whether review for reasoned decisionmaking could work effectively absent the relatively robust procedural requirements of informal rulemaking or formal adjudication.⁶¹ In the usual case of hard-look review, the court asks how thoroughly and reasonably the agency responded to the plausible objections and alternatives that were before it when it took its action.⁶² Under Professor Seidenfeld’s proposal, it is not clear how the agency at the time of promulgation—or the reviewing court at

58. *See, e.g.*, Seidenfeld, *Syncopated*, *supra* note 1, at 138 (concluding that *Chevron* rests upon a theory that encourages inefficient regulations that benefit the empowered); Seidenfeld, *Cognitive*, *supra* note 3, at 547–48 (arguing that economic rationality is an imperfect model for analyzing decision making); Seidenfeld, *Demystifying*, *supra* note 1, at 485–87 (chronicling agency frustrations concerning the costs of rulemaking and perceived barriers to setting standards that will pass judicial muster); Seidenfeld, *Hard Look*, *supra* note 1, at 569 (observing that his debate with Professor McGarity “hinges on different estimates of the benefits and costs that hard look review bestows on the rulemaking process”); Seidenfeld, *Reassessment*, *supra* note 3, at 321 (noting that “[t]he costs and benefits of regulation to society differ greatly from the costs and benefits that the agency experiences when it regulates”).

59. Seidenfeld, *supra* note 4, at 375–85.

60. *Id.* at 375.

61. It is no coincidence that the Court in *Overton Park* struggled to reconcile the obligation of reasoned decisionmaking with the virtual absence of APA procedural requirements in the informal adjudicatory setting. *See* 401 U.S. at 420 (remanding for review of “the full administrative record,” while recognizing that such a record might not exist and that agency officials might be required to testify as to their decision-making process).

62. *See, e.g.*, *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–44 (1983) (explaining the arbitrary and capricious standard, and applying this standard to an agency’s explanation for rescission of a safety standard).

the time of litigation—would determine which objections and alternatives the agency must address lest its guidance be declared substantively invalid. Professor Seidenfeld says that agencies would have to explain the substance of their guidance documents in light of “well-recognized debates in the relevant field about issues of fact and prediction.”⁶³ But how are courts to determine which debates in the field are well-recognized? Should we rely on generalist judges to decide which factual considerations are salient given the state of knowledge available to “one who is familiar with the underlying predicates for the policy or interpretation”?⁶⁴ In the end, I might place greater trust in a court’s ability to discern whether a document was intended to be truly binding than in its ability to ascertain, on a limited or nonexistent record, which objections or alternatives to an “action level” of twenty parts of aflatoxin per billion in corn, are plausible and why.⁶⁵

In this respect, Professor Seidenfeld’s analysis may understate the interaction between review for reasoned decisionmaking (labeled “substantive”) on the one hand and the requirements of notice and comment (labeled “procedural”) on the other. He observes approvingly that “[r]eview for reasoned decisionmaking has . . . helped transform the informal rulemaking process into one that allows stakeholder input that agencies must address before acting.”⁶⁶ Yet it is often the process of notice and comment that brings stakeholder input to light and helps courts determine whether the agency has adequately taken that input into account. The notice-and-comment process also places helpful boundaries on judicial review. As Professor Seidenfeld himself has argued in prior work, “[c]ourts can reduce uncertainty about the significance of issues relating to a rule by refraining from raising *sua sponte* issues that commenters in the rulemaking proceeding did not themselves squarely bring before the agency.”⁶⁷ Preenforcement substantive review of guidance documents would reintroduce some of that uncertainty.⁶⁸

63. Seidenfeld, *supra* note 4, at 388.

64. *Id.*

65. See *supra* text accompanying notes 33–36.

66. Seidenfeld, *supra* note 4, at 373.

67. Seidenfeld, *Demystifying*, *supra* note 1, at 515.

68. To be sure, Professor Seidenfeld tries to address this objection by predicting that agencies might voluntarily solicit input from stakeholders before issuing guidance documents, Seidenfeld, *supra* note 4, at 390–91, and by arguing that the prospect of substantive review will give agencies “an incentive to ferret out the likely claims that might be raised in an arbitrary and capricious suit and the information supporting such claims.” *Id.* at 392. Perhaps so, but my concern remains: without the procedural discipline provided by notice and comment, courts will often have difficulty determining which substantive challenges are relevant and which ones are mere hand-waving. In short, I agree with Professor Seidenfeld that his proposal would generate “uncertainty about arguments petitioners might present,” *id.*—but where he sees this uncertainty as a boon to challengers, I see it as a headache for generalist judges.

Another procedural requirement that ordinarily aids the process of substantive review is the APA's mandate that final rules be accompanied by a "concise general statement of their basis and purpose."⁶⁹ Acting in the shadow of hard-look review, agencies typically use this statement as an occasion to respond to salient critiques and alternatives raised during the comment period. (As a result, such statements nowadays are usually neither concise nor general.) Agencies understand that they must respond to relevant comments at the time they promulgate their rules or adjudicatory orders and that rationales arrived at afterwards will not be accepted by a reviewing court.⁷⁰ Yet when an agency issues a guidance document, there is no requirement of an accompanying statement of basis and purpose. Agencies, of course, are free to issue such statements, and perhaps Professor Seidenfeld expects that they would do so more regularly under a regime of substantive review.⁷¹ But then much of the benefit of guidance documents as a less costly and elaborate alternative to full-blown rules might be lost.

IV. Conclusion: On Substance and Procedure in Administrative Law

The broader lesson here is one that scholars and judges have long recognized: it is "quite impossible to disentangle process and substance in the context of judicial review of agency action."⁷² Though at their cores procedural and substantive review are distinct, there is substantial blurring at the margin—and hard-look review occupies that margin.

In a sense, the debate between procedural and substantive review of guidance documents mirrors the classic duel of concurrences in a 1976 D.C. Circuit case upholding the Environmental Protection Agency's regulations concerning the lead content of gasoline.⁷³ In his separate opinion, Chief Judge David Bazelon cautioned as follows:

[I]n cases of great technological complexity, the best way for courts to guard against unreasonable or erroneous administrative decisions is

69. 5 U.S.C. § 553(c) (2006).

70. *See, e.g., Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2263 (2011) ("The courts may not accept appellate counsel's *post hoc* rationalizations for agency action; [*Chenery I*] requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself." (internal quotation marks and citation omitted)).

71. A model suggested by Seidenfeld is the statement accompanying the EPA's denial of a petition for rulemaking in *Massachusetts v. EPA*, 549 U.S. 497 (2007). Seidenfeld, *supra* note 4, at 389.

72. Ronald J. Krotoszynski, Jr., "History Belongs to the Winners": *The Bazelon-Leventhal Debate and the Continuing Relevance of the Process/Substance Dichotomy in Judicial Review of Agency Action*, 58 ADMIN. L. REV. 995, 1005 (2006) (citing Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 391); *see also, e.g.,* Richard B. Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805, 1818 (1978) ("The 'substantive' adequacy of a record cannot be entirely divorced from the procedures employed in generating it.").

73. *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976) (en banc). On the dueling concurrences and their contemporary importance, *see generally* Krotoszynski, *supra* note 72, at 999–1006.

not for the judges themselves to scrutinize the technical merits of each decision. Rather, it is to establish a decision-making process that assures a reasoned decision that can be held up to the scrutiny of the scientific community and the public.⁷⁴

In his own concurrence, Judge Harold Leventhal called Bazelon's procedural approach an "abdication" of the proper judicial role and argued that judges had no choice but to "acquire whatever technical background is necessary" to make substantive judgments about the rationality of agency decisions.⁷⁵

In the context of informal rulemaking under § 553 of the APA, history has not been kind to Bazelon's process-based approach to judicial review. Just two years after the gasoline case, the Supreme Court issued its landmark *Vermont Yankee*⁷⁶ decision unanimously reversing another decision by Bazelon and firmly rejecting the notion that judges are empowered to supplement the sparse dictates of § 553 with additional procedural requirements.⁷⁷ Leventhal's approach to hard-look review, grounded in the substantive standards of review enumerated in § 706 of the APA, rather than ad hoc procedural requirements imposed by judges, carried the day.⁷⁸ Yet courts typically carry out such review in a basically procedural way, by asking whether the agency has responded adequately to challenges that were before it when it acted, and remanding to the agency for reconsideration and fuller explanation if it has not done so.⁷⁹ In this sense, procedure and substance reinforce one another—and Bazelon's doubts about judicial competence continue to inform the practice of rulemaking review. For guidance documents, where no ready-made procedural framework exists to elicit public input, it is not clear whether generalist judges are capable of providing reliable substantive review in the same way.

Preenforcement invalidation of guidance documents for failure to undergo notice and comment is, and should be, the exception rather than the rule. This reflects the fact that doctrines such as finality and ripeness prevent many preenforcement challenges from being adjudicated.⁸⁰ It also reflects a healthy deference on the part of courts to agencies' choices about the appropriate procedural mode in which to develop policy. Nonetheless, the risk remains that agencies will use guidance documents to change the law

74. *Ethyl Corp.*, 541 U.S. at 66 (Bazelon, C.J., concurring) (citing *Int'l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 652 (D.C. Cir. 1973) (Bazelon, C.J., concurring)).

75. *Id.* at 68–69 (Leventhal, J., concurring).

76. *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).

77. *Id.* at 548–49.

78. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41–43 (1983) (grounding hard-look review in the arbitrary and capricious standard of § 706(2)(A) of the APA).

79. For a discussion of such an approach to judicial review, see Krotoszynski, *supra* note 72, at 1012–15.

80. *See Seidenfeld*, *supra* note 4, at 375 ("These doctrines . . . can also stymie review necessary to discourage agency misuse of guidance documents."). For a full discussion of these doctrines, see *id.* at 375–85.

without adequate input from stakeholders and the public. Because of that continuing risk—and because Professor Seidenfeld’s proposal for substantive review, as thought-provoking and innovative as it is, does not fully vindicate the interest in ensuring public participation—a persuasive case for abandoning procedural review has yet to be made.