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## Guidance Documents and Rules: Increasing Executive Accountability in the Regulatory World

Hale Melnick

*Boston College Law School*, [hale.melnick@bc.edu](mailto:hale.melnick@bc.edu)

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# GUIDANCE DOCUMENTS AND RULES: INCREASING EXECUTIVE ACCOUNTABILITY IN THE REGULATORY WORLD

HALE MELNICK\*

**Abstract:** Guidance documents pose a peculiar problem in administrative law. Although guidance documents are supposed to be non-binding memoranda, they sometimes have the effect of creating binding law in practice. Courts lack an effective way to determine when guidance documents are essentially binding. This Note examines why past, current, and proposed judicial tests for determining whether guidance documents are binding are flawed, and it proposes an alternative model based on executive review.

## INTRODUCTION

The role and validity of guidance documents present a complicated and confusing problem in administrative law.<sup>1</sup> Guidance documents are, generally speaking, non-binding rules issued by agencies that fill the gaps left by statutes and administrative rules.<sup>2</sup> With the increase of complex statutes and administrative rules, newly released court decisions, and changing administrations, guidance documents allow agencies to keep pace with the ever-changing law and keep the public informed of what that law is.<sup>3</sup> Yet guidance documents also pose a threat to the legitimacy and fairness of administrative law.<sup>4</sup> Although there is no simple answer for balancing the necessity of guidance documents on the one hand, and the dangers of them on the other, this Note aims to provide a workable solution.<sup>5</sup>

Part I discusses basic procedures and principles of administrative law, including the Administrative Procedure Act, and the two main methods agencies

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<sup>1</sup> See David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 276 (2010); Sam Kalen, *Changing Administrations and Environmental Guidance Documents*, NAT. RES. & ENV'T, Fall 2008, at 13, 13.

<sup>2</sup> Kristin E. Hickman, *Unpacking the Force of the Law*, 66 VAND. L. REV. 465, 477–78 (2013).

<sup>3</sup> Sam Kalen, *The Transformation of Modern Administrative Law: Changing Administrations and Environmental Guidance Documents*, 35 ECOLOGY L.Q. 657, 657 (2008).

<sup>4</sup> See Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331, 333 (2011).

<sup>5</sup> See *infra* notes 38–88 and accompanying text (describing benefits and problems associated with guidance documents), notes 239–300 and accompanying text (proposing a solution).

use to implement the statutes they administer—rulemaking and adjudication.<sup>6</sup> Part I then discusses guidance documents in greater detail, explaining what they are, why they are beneficial, and why they can be troublesome.<sup>7</sup> Parts II and III describe two methods by which scholars and the courts handle challenges to guidance documents, and they explain why these methods do not solve the problem.<sup>8</sup> Finally, Part IV of this Note proposes an alternative solution, whereby Congress creates an agency under the control of the executive to review guidance documents.<sup>9</sup>

### I. THE AGENCY TOOL BELT: RULES, ADJUDICATIONS, AND GUIDANCE DOCUMENTS

The Administrative Procedure Act (“APA”) governs rulemaking procedures, including procedures for generating guidance documents, for all federal agencies.<sup>10</sup> The APA was passed to create democratic checks on agencies.<sup>11</sup> This was accomplished in part by requiring public participation in the rulemaking process and by establishing standards of judicial review for agency actions, findings, and conclusions of law.<sup>12</sup> Congress hoped that formal procedures would mitigate the inconsistent and unfair results agencies arrived at through *ad hoc* decision making, and that they would create a more predictable and lasting system of rules.<sup>13</sup>

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<sup>6</sup> See *infra* notes 10–31 and accompanying text (discussing general procedures and principles of administrative law).

<sup>7</sup> See *infra* notes 32–105 and accompanying text (explaining what guidance documents are and why they are both beneficial and problematic).

<sup>8</sup> See *infra* notes 106–234 and accompanying text (describing and analyzing procedural challenges to guidance documents, and introducing and analyzing “the short cut” approach).

<sup>9</sup> See *infra* notes 235–296 and accompanying text (proposing a solution).

<sup>10</sup> 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 5372, 7521 (2012); Sean Croston, *The Petition Is Mightier Than the Sword: Rediscovering an Old Weapon in the Battles Over “Regulation Through Guidance,”* 63 ADMIN. L. REV. 381, 383 (2011).

<sup>11</sup> See 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 5372, 7521; John D. Graham & James W. Broughel, *Stealth Regulation: Addressing Agency Evasion of OIRA and the Administrative Procedure Act*, 1 HARV. J.L. & PUB. POL’Y 30, 32 (2014).

<sup>12</sup> See Graham & Broughel, *supra* note 11, at 32; see also 5 U.S.C. § 706.

<sup>13</sup> Kalen, *supra* note 3, at 662 n.11 (citing Henry J. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 863, 872–83 (1962)). *Ad hoc* is defined by Black’s Law Dictionary as “[f]ormed for a particular purpose.” *Ad Hoc*, BLACK’S LAW DICTIONARY (10th ed. 2014). In contrast to rules, *ad hoc* policymaking refers to adjudicatory proceedings where agencies make decisions on a case-by-case basis. Kalen, *supra* note 3, at 663; see also Edward W. Warren, “More Good Than Harm”: A First Principle for Environmental Agencies and Reviewing Courts, 20 ECOLOGY L.Q. 379, 406 (1993) (noting Justice Scalia’s warning that the absence of rules “leads to different treatment of similar cases, a lack of consistency and predictability, and ultimately to ‘judicial arbitrariness’”).

### A. Rulemaking and Notice-and-Comment Requirements

The APA establishes two methods for an agency to promulgate rules: formal and informal rulemaking.<sup>14</sup> Informal rulemaking, the more common form, requires three basic steps.<sup>15</sup> First, the agency must give general notice of the proposed rule by publishing it in the Federal Register.<sup>16</sup> This notice requirement alerts interested parties that the agency is contemplating adopting a new rule, and gives those parties an opportunity to respond.<sup>17</sup> Second, the agency must give interested parties an opportunity to participate in the process through “submission of written data, views, or arguments with or without opportunity for oral presentation.”<sup>18</sup> Third, after the agency considers the presented information, it “shall incorporate in the rules adopted a concise general statement of their basis and purpose.”<sup>19</sup> Formal rulemaking, which among other things requires cross-examination of adverse witnesses and the opportunity for oral presentation, has largely disappeared.<sup>20</sup> Once a rule is promulgated and adopted by the agency, the rule is binding and non-retroactive.<sup>21</sup>

### B. Adjudication

Agencies may also use adjudication to issue orders enforcing their rules and the statutes they administer.<sup>22</sup> In an adjudicative proceeding, an agency formulates an order, which the APA defines as “a final disposition . . . in a mat-

<sup>14</sup> See 5 U.S.C. §§ 553–557; Seidenfeld, *supra* note 4, at 335–41.

<sup>15</sup> See 5 U.S.C. § 553 (outlining the rulemaking procedures under the Administrative Procedure Act); Steven Croley, *Making Rules: An Introduction*, 93 MICH. L. REV. 1511, 1513 (1995); Graham & Broughel, *supra* note 11, at 33.

<sup>16</sup> 5 U.S.C. § 553(b). The notice must 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.” *Id.* § 553(b)(1)–(3).

<sup>17</sup> See *Id.* § 553(b); Croley, *supra* note 15, at 1513. The Federal Register is “[a] daily publication containing presidential proclamations and executive orders, federal-agency regulations of general applicability and legal effect, proposed agency rules, and documents required by law to be published.” *Federal Register*, BLACK’S LAW DICTIONARY (10th ed. 2014). The National Archives and Records Administration publishes the Federal Register. *Id.*

<sup>18</sup> 5 U.S.C. § 553(c).

<sup>19</sup> *Id.*

<sup>20</sup> See *Id.* §§ 556, 557; *Leading Cases*, 114 HARV. L. REV. 179, 374 n.44 (2000). In *United States v. Florida East Coast Railway Co.*, the Supreme Court held that the formal rulemaking procedures established under 5 U.S.C. §§ 556–557 are triggered only when the statute requires that the rulemaking procedure take place “on the record after opportunity for an agency hearing” either explicitly or where similar statutory language is present. 410 U.S. 224, 236 (1973); John F. Stanley, Note, *The “Magic Words” of § 554: A New Test for Formal Adjudication Under the Administrative Procedure Act*, 56 HASTINGS L.J. 1067, 1075 (2005).

<sup>21</sup> Connor R. Raso, Note, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 YALE L.J. 782, 788 (2010).

<sup>22</sup> See 5 U.S.C. §§ 554–557 (setting out APA requirements for formal and informal adjudications).

ter other than rule making . . . .”<sup>23</sup> Whereas rulemaking is often considered quasi-legislative because the agency is creating law that is binding, adjudication is considered quasi-judicial because it is applying existing law to facts, and binds only those parties involved in the adjudication.<sup>24</sup> Under this conception, rulemaking is prospective and general, whereas adjudication is retrospective and specific.<sup>25</sup> In practice though, it is often unclear when an agency should proceed by rulemaking or by adjudication.<sup>26</sup>

### C. *Entering an Age of Rulemaking*

In 1947, the Supreme Court held that agencies had discretion regarding when they should use adjudication versus rulemaking.<sup>27</sup> More recently, however, administrative law has transitioned toward an era of rulemaking.<sup>28</sup> This transition was in large part a result of agencies gaining more responsibilities to regulate industries that were too complex for them to rely on case-by-case adjudications.<sup>29</sup> In addition, Congress increasingly mandated that agencies follow notice-and-comment rulemaking procedures.<sup>30</sup> Yet the trend toward rulemaking has not put an end to the question of how agencies ultimately regulate entities.<sup>31</sup>

### D. *Guidance Documents: An Introduction*

Exacerbating the problem of when agencies must promulgate rules (as opposed to making ad hoc decisions through adjudication) is the difficulty of

<sup>23</sup> *Id.* §§ 551(6)–(7) (defining “order” and “adjudication” for purposes of the APA).

<sup>24</sup> See Samuel Estreicher, *Pragmatic Justice: The Contributions of Judge Harold Leventhal to Administrative Law*, 80 COLUM. L. REV. 894, 909–10 (1980).

<sup>25</sup> See *id.* Compare *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) (increase on valuation of all taxable property in Denver held as a rule because it affected residents of an entire city), with *Londoner v. City & Cty. of Denver*, 210 U.S. 373, 385–86 (1908) (tax levied on small group of residents held as an adjudication because its effect was on a specific group).

<sup>26</sup> See Estreicher, *supra* note 24, at 911.

<sup>27</sup> *Sec. & Exch. Comm’n v. Chenery Corp. (Chenery II)*, 332 U.S. 194, 201–02 (1947) (holding it was not beyond the Securities and Exchange Commission’s authority to adjudicate an issue that it had not yet anticipated through rulemaking).

<sup>28</sup> William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 38 (1975); J. Skelly Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 375 (1974).

<sup>29</sup> See Pedersen, *supra* note 28, at 38 (noting complex matters agencies regulate such as pollution, energy, occupational health and safety, coal mining safety, and consumer product safety).

<sup>30</sup> *Id.*; see Robert W. Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CAL. L. REV. 1276, 1315–26 (1972); see, e.g., 30 U.S.C. § 811 (2012) (mandating the agency give notice and accept public comments when promulgating rules related to health and safety standards in coal mines); 42 U.S.C. § 300g-1 (2012) (mandating the agency give notice and review public comments before deciding to regulate contaminants found in drinking water).

<sup>31</sup> See Pedersen, *supra* note 28, at 41.

distinguishing rules from guidance documents.<sup>32</sup> The Office of Management and Budget defines guidance documents as “statement[s] of general applicability and future effect, other than [regulations] . . . that set[ ] forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue.”<sup>33</sup> Guidance documents come in many forms, including interpretations of existing rules, policy statements, training manuals for internal agency use, compliance guides, advisory opinions tailored to individual case facts, and memoranda from agency leaders providing direction to agency staff members.<sup>34</sup> There are far more guidance documents than rules, and approximately ten times more rules than enacted legislation.<sup>35</sup> Guidance documents are exempt from the notice-and-comment requirements under Section 553 of the APA.<sup>36</sup> The ability for agencies to forgo notice-and-comment procedures when creating guidance documents has significant consequences for the legitimacy and workability of the administrative state.<sup>37</sup>

## 1. Importance of Guidance Documents

There are a number of good reasons for agencies to issue guidance documents.<sup>38</sup> First, they help regulated entities understand complicated regulations.<sup>39</sup> Second, guidance documents help agencies apply and enforce the law predictably and regularly.<sup>40</sup> Third, when a statute is unclear, guidance documents provide notice to the general public about what the law is in advance of enforcement.<sup>41</sup>

### *a. Guidance Documents Clarify the Law*

In effect, guidance documents provide free legal advice to parties dealing with complicated legal issues.<sup>42</sup> By providing stakeholders with guidance on

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<sup>32</sup> See Franklin, *supra* note 1, at 278; *infra* notes 106–234 and accompanying text (describing two popular methods of distinguishing rules from guidance documents and concluding that neither method is sufficient).

<sup>33</sup> Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3434 (Jan. 25, 2007); see Croston, *supra* note 10, at 382.

<sup>34</sup> Raso, *supra* note 21, at 788.

<sup>35</sup> *Id.* at 785–86.

<sup>36</sup> 5 U.S.C. § 553(b)(A) (2012) (“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 . . .”).

<sup>37</sup> See *infra* notes 32–105 and accompanying text (describing benefits and problems arising from guidance documents).

<sup>38</sup> See, e.g., Croston, *supra* note 10, at 382; Nina Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 408 (2007).

<sup>39</sup> Croston, *supra* note 10, at 382.

<sup>40</sup> *Id.* at 383.

<sup>41</sup> *Id.* (quoting *Hector v. U.S. Dep’t of Agric.*, 82 F.3d 165, 167 (7th Cir. 1996)).

<sup>42</sup> *Id.* at 382–83; see Raso, *supra* note 21, at 822.

regulations in the face of uncertainty, these documents reduce the number of individual requests for clarification that the agency would otherwise address.<sup>43</sup>

Clarification of the law is particularly important for agencies administering complex environmental programs.<sup>44</sup> For example, a 2002 memorandum written by the Director of the Office of Groundwater and Drinking Water provided clarity on how to calculate the Maximum Contaminant Level (“MCL”) for arsenic in drinking water.<sup>45</sup> The EPA had promulgated a rule that required arsenic levels to decrease to .01 mg/L by 2006, and it stated that arsenic sampling results be reported to the nearest .001 mg/L.<sup>46</sup> Subsequently, the Director clarified in a memorandum that all measurements greater than or equal to .0105 mg/L would violate the EPA arsenic rule—because she believed it was best for the EPA to round up the measurement.<sup>47</sup> The Director explained that this method of calculation was supported by cost benefit analysis, and that it received public and stakeholder input.<sup>48</sup> Although the Director’s guidance is not binding, it does alert entities, agency staff, and the public to the agency’s stance, which is helpful when the regulations are unclear.<sup>49</sup>

### *b. Guidance Documents Provide Predictability and Regularity*

Guidance documents also help agencies apply and enforce the law predictably in an ever-changing landscape of statutory and regulatory law.<sup>50</sup> Court decisions can change agency assumptions and interpretations of law, Congress can change laws, new information can become available to the agency that makes the agency rethink its positions, and a new administration might be voted in and change its position entirely.<sup>51</sup> Guidance documents allow agencies to fill in the gaps quickly when promulgating rules is inefficient or unlikely.<sup>52</sup>

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<sup>43</sup> Croston, *supra* note 10, at 382–83.

<sup>44</sup> Kalen, *supra* note 1, at 14–15.

<sup>45</sup> Memorandum from Cynthia C. Dougherty, Dir. Office of Ground Water & Drinking Water, to Water Div. Dirs., Regions, I–X, U.S. ENVTL. PROT. AGENCY (Jan. 25, 2002), <https://nepis.epa.gov/> [<https://perma.cc/UQQ6-DETQ>] (to generate memorandum, follow link provided, type “WSG151” into search box, click search, then click hyperlink entitled “WSG151”).

<sup>46</sup> 40 C.F.R. § 141.23(i)(4) (2001).

<sup>47</sup> Dougherty, *supra* note 45.

<sup>48</sup> *Id.*

<sup>49</sup> See 5 U.S.C. § 553(b)(3)(A) (2012); 40 C.F.R. § 141.23(i)(4); Kalen, *supra* note 1, at 14 (noting the particular importance of agency guidance for technical environmental programs); Dougherty, *supra* note 45.

<sup>50</sup> See Croston, *supra* note 10, at 383; Kalen, *supra* note 1, at 15.

<sup>51</sup> See Kalen, *supra* note 1, at 15. For example, Justice Rehnquist noted in his opinion in *Motor Vehicle Manufacturers Ass’n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.* that a change in the National Highway Traffic Safety Administration policy regarding seatbelts and airbags seemed to be related to a change in political administrations. 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part).

<sup>52</sup> See Croston, *supra* note 10, at 383–84.

Based on the language of the arsenic regulation, for example, it would not be unreasonable for an agency staffer to determine that an arsenic sample of .0105 mg/L is *not* a violation, because the staffer could interpret the rule to apply only to the thousandth place.<sup>53</sup> By circulating the memorandum, the agency is more likely to provide consistent results.<sup>54</sup>

### *c. Guidance Documents Provide Notice to the Public*

Guidance documents provide notice to the public about what the law is and how the agency will enforce it.<sup>55</sup> Because guidance documents apply prospectively, they are generally more reliable than adjudications in regard to how the agency will act in the future.<sup>56</sup> Adjudications are typically backward looking, and they apply only to the specific facts presented in the case.<sup>57</sup> Entities are in a better position if they know how agencies will react, so guidance documents will save agencies time and money in many instances.<sup>58</sup>

An employee testing arsenic levels for a hypothetical entity, then, would be able to determine how the agency would rule before submitting an application.<sup>59</sup> This would save the entity time and money, and the entity could challenge the agency's interpretation in court if it felt the agency's interpretation was improper.<sup>60</sup>

## 2. Problems with Guidance Documents

Despite their many advantages, guidance documents also pose a number of problems.<sup>61</sup> First, because guidance documents are exempt from the notice-and-comment procedures, they threaten the legitimacy of agencies, which undermines their claim to act on behalf of Congress and the President.<sup>62</sup> Second, because agencies typically do not consult interested parties prior to issuing

<sup>53</sup> See *id.* at 383; Dougherty, *supra* note 45.

<sup>54</sup> See Croston, *supra* note 10, at 383; Dougherty, *supra* note 45.

<sup>55</sup> See Seidenfeld, *supra* note 4, at 341.

<sup>56</sup> See *id.*

<sup>57</sup> See *Londoner v. City & Cty. of Denver*, 210 U.S. 373, 385–86 (1908) (tax levied on small group of residents held as an adjudication because its effect was on a specific group); Franklin, *supra* note 1, at 312–13; *supra* notes 24–25 and accompanying text (distinguishing generally the difference between rulemaking and adjudication).

<sup>58</sup> See Franklin, *supra* note 1, at 316; Seidenfeld, *supra* note 4, at 341.

<sup>59</sup> See Croston, *supra* note 10, at 383; Dougherty, *supra* note 45.

<sup>60</sup> See 5 U.S.C. § 706 (2012); Croston, *supra* note 10, at 383.

<sup>61</sup> See, e.g. Croston, *supra* note 10, at 382–84 (discussing benefits of guidance documents); Mendelson, *supra* note 38, at 408 (noting guidance documents sometimes allow agencies to circumvent important notice-and-comment rulemaking procedures); Seidenfeld, *supra* note 4, at 342 (noting agencies are not required to consult with parties affected by guidance documents).

<sup>62</sup> See Mendelson, *supra* note 38, at 417–18 (discussing theories the legitimacy of the administrative state); *infra* notes 65–83 and accompanying text (explaining why guidance documents undermine agencies' legitimacy).



guidance documents, they lack critical input that would help them create better rules.<sup>63</sup> Third, if an entity seeks to challenge a guidance document, doctrines of finality and ripeness may prevent them from having their day in court.<sup>64</sup>

*a. Guidance Documents Threaten the Legitimacy of Agency Action*

By issuing guidance documents, agencies circumvent the costly and time-consuming—but democratically important—notice-and-comment requirements.<sup>65</sup> Understanding why this causes concern requires an understanding of the administrative framework.<sup>66</sup>

The authority of federal agencies to govern is not clearly addressed in the Constitution.<sup>67</sup> Under Article I, Section 1 of the Constitution, all legislative powers are granted to Congress.<sup>68</sup> Under Article II, Section 2, Clause 2 and Article II, Section 3, Clause 5, the President, through the Appointments Clause, may appoint Officers of the United States to assist in the execution of laws passed by Congress.<sup>69</sup> Thus, one could envision agencies as agents of Congress, and the President as merely putting the laws of Congress into effect.<sup>70</sup> This view assumes that Congress makes all of the important determinations in its statutes and agencies simply direct the traffic.<sup>71</sup> But because Con-

<sup>63</sup> See Seidenfeld, *supra* note 4, at 342; *infra* notes 84–86 and accompanying text (noting that issuing guidance documents does not demand input from entities).

<sup>64</sup> See Seidenfeld, *supra* note 4, at 375–84; *infra* notes 87–98 and accompanying text (identifying doctrines of finality and ripeness as hurdles to judicial review of guidance documents).

<sup>65</sup> Graham & Broughel, *supra* note 11, at 39; see Mendelson, *supra* note 38, at 408 (comparing the agency expense of issuing a guidance document versus the agency expense of going through notice-and-comment rulemaking); Raso, *supra* note 21, at 785 (noting concern that agencies try to avoid notice-and-comment rulemaking procedures meant to facilitate public participation and allow the elected branches to monitor agencies).

<sup>66</sup> See Mendelson, *supra* note 38, at 417 (establishing framework for administrative state).

<sup>67</sup> *Id.*; see U.S. CONST. art. I, § 1; *id.* art. II, § 2, cl. 2; *id.* art. II, § 3 (constitutional provisions governing agency action).

<sup>68</sup> U.S. CONST. art. I, § 1 (“All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”).

<sup>69</sup> *Id.* art. II, § 2, cl. 2; *id.*, art. II, § 3, cl. 5. Article II, Section 2, Clause 2 of the Constitution states:

[The President] . . . shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

*Id.* art. II, § 2, cl. 2. Article II, Section 3, Clause 5 of the Constitution states: “[The President] . . . shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.” *Id.* art. II, § 3, cl. 5.

<sup>70</sup> Mendelson, *supra* note 38, at 417.

<sup>71</sup> *Id.* But see Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2260–62 (2001) (criticizing this model, which the author terms the “transmission belt” model).

gress often grants agencies the authority to make value-based policy determinations, agencies have become something much more than mere proxies.<sup>72</sup>

Because agencies derive their power from the president, their authority to promulgate rules—and essentially make law—is increasingly defended on the basis of presidential control.<sup>73</sup> Agencies are viewed as an extension of the President, and their actions are a part of the presidential election.<sup>74</sup> Therefore, to be a legitimate actor in American governance, agencies must be transparent in their decision-making process so that the electorate can evaluate them.<sup>75</sup> Congress requires agencies to publish proposed rules in the Federal Register, and it requires public participation in the rulemaking process in part to ensure agency transparency.<sup>76</sup> When agencies promulgate guidance documents without notice-and-comment, they lose some of that transparency.<sup>77</sup>

Agencies have a number of reasons to try to circumvent notice-and-comment procedures.<sup>78</sup> First, as a result of judicially mandated procedures and congressionally imposed hurdles like oversight by the Office of Information and Regulatory Affairs (“OIRA”), the promulgation of regulations has become increasingly difficult.<sup>79</sup> Second, once agencies do promulgate a rule, they must often defend their rules when challenged in court, which is a burden of time, resources, and political capital.<sup>80</sup> Guidance documents, on the other hand, are much harder to challenge because of doctrinal impediments like ripeness and finality.<sup>81</sup> Third, rules tend to attract more attention from Congress, the President, and the public than do guidance documents.<sup>82</sup> Heightened attention to

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<sup>72</sup> Mendelson, *supra* note 38, at 417–18.

<sup>73</sup> *See id.* at 418; *see also* U.S. CONST. art. II, § 2, cl. 2; *id.* art. II, § 3.

<sup>74</sup> Mendelson, *supra* note 38, at 418; *see* U.S. CONST. art. II, § 1 (constitutional provision regarding election of the President); *id.* art. II, § 2, cl. 2; *id.* art. II, § 3 (constitutional provisions governing agency action).

<sup>75</sup> Mendelson, *supra* note 38, at 418; *see* John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 904 (2004) (explaining that an opportunity for the public to participate in notice-and-comment rulemaking can be an effective substitute for the lack of electoral accountability of agencies); *supra* notes 67–74 and accompanying text (describing the authority of agencies to promulgate rules).

<sup>76</sup> Russell L. Weaver, *Chenery II: A Forty Year Retrospective*, 40 ADMIN L. REV. 161, 164 (1988).

<sup>77</sup> *See id.*

<sup>78</sup> *See Raso, supra* note 21, at 798–805; *infra* notes 79–83 and accompanying text (explaining why agencies might want to circumvent notice-and-comment rulemaking).

<sup>79</sup> Kalen, *supra* note 3, at 665–66; *see* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 556 (1978) (finding the D.C. Circuit “unjustifiably intruded into the administrative process” by imposing additional hurdles on the agency before the agency could make certain rules); Exec. Order No. 13,422, 72 Fed. Reg. 2763, 2764–65 (Jan. 18, 2007) (requiring Office of Information and Regulatory Affairs (“OIRA”) review of all “significant guidance documents” issued by federal agencies).

<sup>80</sup> *See* Kalen, *supra* note 3, at 668; Mendelson, *supra* note 38, at 408.

<sup>81</sup> Kalen, *supra* note 3, at 676.

<sup>82</sup> Raso, *supra* note 21, at 799.

agency activity often increases collaboration with, and opposition from Congress, limiting the discretion of agencies.<sup>83</sup>

### *b. Agencies Lack Input from Regulated Entities and the Public*

Because the requirements for issuing guidance documents are so minimal, agencies do not need to receive input from entities with a strong interest in, or knowledge of, the subject matter.<sup>84</sup> Comments from these sources are important to rulemaking because they expose agencies to data, views, and arguments that test the proposed rules.<sup>85</sup> When agencies do not receive these comments from the public, they are less informed and are at a greater risk of making bad policy.<sup>86</sup>

### *c. Hurdles to Getting into Court*

Parties that wish to challenge guidance documents in court face an uphill battle as a consequence of the doctrines of finality and ripeness.<sup>87</sup> These doctrines generally focus on the suitability of a challenge for review, and the resulting hardship if review is deferred or denied by the court.<sup>88</sup>

## 3. Guidance Documents and Finality

Section 704 of the APA states that final agency action and agency action made reviewable by statute are subject to judicial review.<sup>89</sup> Guidance documents are usually not reviewable by statute because they are generally not considered final agency action.<sup>90</sup> The United States Supreme Court has clarified that to be a final agency action, the action must be the “consummation of the agency’s decision-making process,” and the action must be one “by which rights or obligations have been determined, or from which legal consequences will flow.”<sup>91</sup> The first step essentially requires that the agency’s review of the particular matter be complete, and the second step requires that the action have

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<sup>83</sup> *Id.* at 799–80 (noting the greater ease at which agencies may act when Congress and special interests stay out of the agencies’ affairs).

<sup>84</sup> Seidenfeld, *supra* note 4, at 342. By contrast, 5 U.S.C. § 553 requires agencies to consider all comments submitted by the public. *See* 5 U.S.C. § 553(c) (2012).

<sup>85</sup> *See* Seidenfeld, *supra* note 4, at 342.

<sup>86</sup> *See id.* (noting agencies see value in soliciting input from stakeholders with whom they work frequently, but that these stakeholders typically are special interests groups who have already organized and are sufficiently focused on the particular guidance document’s subject matter).

<sup>87</sup> Kalen, *supra* note 3, at 676; Raso, *supra* note 21, at 795.

<sup>88</sup> *See* Bennett v. Spear, 520 U.S. 154, 177–78 (1997) (establishing standard for finality); Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967) (establishing standard for ripeness).

<sup>89</sup> 5 U.S.C. § 704 (2012).

<sup>90</sup> Seidenfeld, *supra* note 4, at 375; *see* 5 U.S.C. § 704 (stating which types of agency actions are reviewable before a court).

<sup>91</sup> Bennett, 520 U.S. at 177–78.

some legally binding effect.<sup>92</sup> Meeting the second step is difficult because guidance documents are not supposed to have legally binding effect.<sup>93</sup> The legal test therefore essentially begs the question: is the guidance document really a disguised rule?<sup>94</sup>

#### 4. Guidance Documents and Ripeness

Agency action is ripe for review when the issue being litigated is fit for judicial decision and the issue poses a hardship to the parties.<sup>95</sup> Because guidance documents often have the practical effect of binding parties, there is a strong argument that guidance documents pose an immediate hardship to parties and therefore may be ripe for review.<sup>96</sup> Yet because guidance documents do not have formal legal force, some courts hold that they do not mandate conduct and thus cannot pose a hardship.<sup>97</sup> And because it is often unclear how agencies will apply guidance documents in real life, courts are reluctant to review them until they are applied to concrete cases.<sup>98</sup>

#### 5. Guidance Documents Versus Rules

The distinction between guidance documents and rules is hopelessly vague.<sup>99</sup> As agencies issue more guidance documents, those guidance documents are increasingly challenged by regulated entities for being binding rules that should have gone through the notice-and-comment rulemaking process.<sup>100</sup> This has led courts in the past few decades to develop tests to determine whether a guidance document is in effect a rule.<sup>101</sup>

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<sup>92</sup> See *id.*

<sup>93</sup> Seidenfeld, *supra* note 4, at 378; see *Bennett*, 520 U.S. at 177–78.

<sup>94</sup> See Seidenfeld, *supra* note 4, at 380–81; see also *Bennett*, 520 U.S. at 177–78 (finding advisory opinion was final agency action despite not being legally binding because the advisory opinion “had direct and appreciable legal consequences”).

<sup>95</sup> Seidenfeld, *supra* note 4, at 381 (citing *Abbott Labs.*, 387 U.S. at 149).

<sup>96</sup> See *id.* at 381–82.

<sup>97</sup> *Id.* at 381; see, e.g., *Nat’l Park Hosp. Ass’n v. Dep’t of the Interior*, 538 U.S. 803, 810–11 (2003) (finding National Park Service guidance document interpreting Contracts Dispute Act did not impose hardship on park concessioners directly because it was not authorized to administer the statute).

<sup>98</sup> Robert A. Anthony, *Interpretative Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1312, 1362 (1992) (noting that agencies are “rewarded for stating . . . rules with less precision and authority than might otherwise be required” because courts will be less likely to treat these rules as binding law); Seidenfeld, *supra* note 4, at 383–84 (noting that courts prefer to review guidance documents only in concrete cases).

<sup>99</sup> See Franklin, *supra* note 1, at 278–79; Graham & Broughel, *supra* note 11, at 39.

<sup>100</sup> Stephen M. Johnson, *In Defense of the Short Cut*, 60 U. KAN. L. REV. 495, 509 (2012).

<sup>101</sup> Hickman, *supra* note 2, at 479 (describing a number of different tests the courts have applied in the past few decades); see *infra* notes 106–234 and accompanying text (describing in detail the

Broadly speaking, courts have two methods to distinguish between administrative rules and guidance documents.<sup>102</sup> One method is to show procedurally that the guidance document is essentially binding on the agency, and therefore, that it is a rule that should have gone through notice-and-comment rulemaking.<sup>103</sup> The second method, which is referred to as the “short cut,” is to disregard the nature or effect of the guidance document, and instead simply ask whether the rule went through notice-and-comment rulemaking.<sup>104</sup> If it did, the reviewing court should enforce the rule as if it were law; if it did not, the court should not give it the force of law.<sup>105</sup>

## II. CHALLENGING GUIDANCE DOCUMENTS PROCEDURALLY

One approach to challenging a guidance document is to challenge the document procedurally.<sup>106</sup> That is to say, courts should consider whether or not the guidance document is legally binding as a practical matter.<sup>107</sup> As the United States Court of Appeals for the District of Columbia stated in 1974, “[w]hen the agency applies [a] policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued.”<sup>108</sup> If the court determines that the agency is relying on the guidance document itself to make its decision, then the court need not affirm it.<sup>109</sup> Over the past few decades, courts have attempted to devise tests to determine whether guidance documents are legally binding in fact.<sup>110</sup>

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most popular tests established by the courts and legal scholars and explaining why they are insufficient).

<sup>102</sup> Compare Franklin, *supra* note 1, at 279 (discussing substantive challenge to guidance documents); with *Pac. Gas & Elec. Co. v. Fed. Power Comm’n*, 506 F.2d 33, 39 (D.C. Cir. 1974) (applying procedural challenge to guidance documents).

<sup>103</sup> See *U.S. Tel. Ass’n v. Fed. Commc’ns Comm’n*, 28 F.3d 1232, 1233 (D.C. Cir. 1994) (applying impact on agencies test); *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993) (applying modern *American Mining* test); *Pac. Gas & Elec. Co.*, 506 F.2d at 39 (applying legal affects test); *Lewis-Mota v. Sec’y of Labor*, 469 F.2d 478, 482 (2d Cir. 1972) (applying substantial impact test).

<sup>104</sup> Franklin, *supra* note 1, at 279. Legal scholar David Franklin was the first to propose the “short cut” method and coin the term. *Id.*

<sup>105</sup> See *id.*

<sup>106</sup> *Id.* at 286; see, e.g., *Pac. Gas & Elec. Co. v. Fed. Power Comm’n*, 506 F.2d 33, 35–36 (D.C. Cir. 1974) (outlining the claim alleging that the Federal Power Commission’s informal policy should have gone through notice-and-comment rulemaking because policy created a practically legally binding rule).

<sup>107</sup> See Anthony, *supra* note 98, at 1317; Seidenfeld, *supra* note 4, at 345.

<sup>108</sup> *Pac. Gas & Elec. Co.*, 506 F.2d at 39.

<sup>109</sup> See *id.* at 40; Robert A. Anthony, “Interpretative” Rules, “Legislative” Rules and “Spurious” Rules: *Lifting the Smog*, 8 ADMIN. L.J. AM. U. 1, 15 (1994).

<sup>110</sup> Richard J. Pierce, *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547, 547 (2000) (noting that courts and commentators have struggled with this question for over fifty years); see *Pac. Gas & Elec. Co.*, 506 F.2d at 50–51 (applying the legal effects test); *Lewis-Mota v. Sec’y of Labor*, 469 F.2d 478, 482 (2d Cir. 1972) (applying the substantial impact test); *U.S. Tel.*

### A. Tests to Determine Whether a Guidance Document Is a Rule

The legal effects test looks at whether the agency used a guidance document to create a “binding norm,” or essentially, whether the agency applied the guidance document as though it carried the force of law.<sup>111</sup> The D.C. Circuit applied this test in *Pacific Gas & Electric Co. v. Federal Power Commission* to determine whether a statement of policy issued by the Federal Power Commission (“FPC”) regarding a priority schedule for a gas pipeline was indeed a substantive rule and thus should have gone through notice-and-comment rulemaking.<sup>112</sup> The court held that because the guidance document stated that the FPC would reexamine the policy itself in specific cases, the guidance document was not intended to be a binding rule, and thus did not require notice-and-comment rulemaking procedures.<sup>113</sup> The problem with the legal effects test, however, is that agencies could significantly influence regulated entities by characterizing the guidance as nonbinding in text, but in reality, treat the guidance as mandatory.<sup>114</sup>

A second method courts have applied is the substantial impact test.<sup>115</sup> This test is broader than the legal effects test by inquiring whether the guidance has a substantial impact on regulated industries.<sup>116</sup> But the test faces its own set of problems, namely that every agency action can arguably have a substantial impact on regulated entities.<sup>117</sup> If the courts were to apply this test aggressively, they would chill agencies from ever issuing guidance, thus denying agencies the beneficial uses of guidance.<sup>118</sup>

A third method courts apply, which legal scholar Gary Lawson refers to as the “impact on agencies” test, is similar to the legal effects test, but instead asks whether agencies treat the guidance as binding over a period of time.<sup>119</sup> In

Ass’n v. Fed. Comm’n Comm’n, 28 F.3d 1232, 1233 (D.C. Cir. 1994) (applying the “impact on agencies” test).

<sup>111</sup> *Pac. Gas & Elec. Co.*, 506 F.2d at 39; see Reginald Parker, *The Administrative Procedure Act: A Study in Overestimation*, 60 YALE L.J. 581, 598 (1951); see also Thomas J. Fraser, Note, *Interpretative Rules: Can the Amount of Deference Accorded Them Offer Insight into the Procedural Inquiry?*, 80 B.U. L. REV. 1303, 1311 (2010).

<sup>112</sup> 506 F.2d at 35–36, 39; Fraser, *supra* note 111, at 1311.

<sup>113</sup> *Pac. Gas & Elec. Co.*, 506 F.2d at 50–51; Fraser, *supra* note 111, at 1311.

<sup>114</sup> Hickman, *supra* note 2, at 479 (noting that contemporary courts use agencies’ characterizations of their guidance documents merely as “a starting point”).

<sup>115</sup> Fraser, *supra* note 111, at 1312.

<sup>116</sup> See *id.*; see also *Lewis-Mota*, 469 F.2d at 482 (finding guidance document issued by Secretary of Labor that repealed precertification of certain occupations for visa issuance was invalid because it had a substantial impact both on immigrants and employers).

<sup>117</sup> Hickman, *supra* note 2, at 480.

<sup>118</sup> *Id.*; see *supra* notes 38–60 and accompanying text (outlining the benefits of guidance documents).

<sup>119</sup> GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 378, 390 (6th ed. 2013); see Fraser, *supra* note 111, at 1313 (describing the “impact on agencies” test); *supra* notes 111–114 and accompanying text (explaining and analyzing the legal effects test).

*U.S. Telephone Ass'n v. Federal Communication Commission*, the U.S. Telephone Association claimed that a statement of policy regarding penalties for violating the Communications Act was binding.<sup>120</sup> After reviewing three hundred adjudications, the D.C. Circuit determined that the U.S. Telephone Association followed the statement of policy in nearly every case, and the statement was therefore binding.<sup>121</sup> The problem is that this test requires a substantial amount of past agency determinations, and therefore it cannot be used to evaluate guidance documents at the time they are issued.<sup>122</sup>

The test adopted by most federal circuit courts is a multi-factor test derived from the United States Court of Appeals for the District of Columbia Circuit's 1993 decision in *American Mining Congress v. Mine Safety & Health Administration*.<sup>123</sup> In that case, the court stated that the determination of whether a guidance document should go through notice-and-comment rule-making depends on whether the guidance document establishes a new duty or right.<sup>124</sup> If the guidance document creates a new duty or right not previously legislated by Congress or promulgated by an agency through notice-and-comment rulemaking, the guidance is invalid.<sup>125</sup> But if the duty or right already existed, the agency can articulate that duty or right in greater detail.<sup>126</sup>

To determine whether the guidance document has legal effect, the court examined the following factors:

- (1) [W]hether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule.<sup>127</sup>

An affirmative answer to any of those questions will suggest that the guidance document has a legally binding effect in practice, and is therefore invalid.<sup>128</sup>

As the court notes, distinguishing between a guidance document that creates a new duty or right and one that merely interprets existing legislation or

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<sup>120</sup> 28 F.3d at 1233.

<sup>121</sup> *Id.* at 1234.

<sup>122</sup> LAWSON, *supra* note 119, at 390; see Fraser, *supra* note 111, at 1314.

<sup>123</sup> 995 F.2d 1106, 1110 (D.C. Cir. 1993); Hickman, *supra* note 2, at 481; see, e.g., Sweet v. Sheahan, 235 F.3d 80, 91 (2d Cir. 2000) (citing the *American Mining* test as a more comprehensive test for distinguishing guidance documents than any in the court's own precedent).

<sup>124</sup> *Am. Mining*, 995 F.2d at 1110; Anthony, *supra* note 109, at 15.

<sup>125</sup> See *Am. Mining*, 995 F.2d at 1110, 1112; Anthony, *supra* note 109, at 15.

<sup>126</sup> See *Am. Mining*, 995 F.2d at 1110, 1112; Anthony, *supra* note 109, at 15.

<sup>127</sup> *Am. Mining*, 995 F.2d at 1112.

<sup>128</sup> See *id.*

rules is difficult because every guidance document could claim to do both.<sup>129</sup> Although the *American Mining* test gets closer to solving this conundrum—and outlining the factors to consider—it does not add much to the substance of the final determination.<sup>130</sup> Whether there would have been “adequate legislative basis” for the agency action, or whether the guidance document “effectively amends a prior legislative rule” are simply two ways of assessing whether the agency is creating a new, legally binding rule.<sup>131</sup> The *American Mining* test does not provide a way of answering this question.<sup>132</sup>

### B. Procedural Challenges to Guidance Documents Are Insufficient

All of these tests fail to resolve the issue because they only inquire about the general principle—that guidance documents cannot create practically legally binding rules.<sup>133</sup> Guidance documents can have a substantial binding effect on entities even if courts do not recognize the guidance document as legally binding.<sup>134</sup> Regardless of how carefully the courts consider various factors, they will always have to perform some fanciful reasoning to make their final determinations.<sup>135</sup> The standard is therefore akin to the vague and general rule announced in *Pennsylvania Coal Co. v. Mahon*, in that if the guidance document “goes too far”—a rule that puts very few parameters on judicial discretion—it will be recognized as a legally binding rule requiring notice-and-comment rulemaking.<sup>136</sup> This leaves courts with great discretion to determine

<sup>129</sup> *Id.* at 1110.

<sup>130</sup> See Anthony, *supra* note 109, at 20–21 (finding that the *American Mining* test breeds confusion). Anthony instead proposes a two-step inquiry that asks, “Does the nonlegislative rulemaking document interpret existing legislation? . . . If it does not do so, has the agency nevertheless made it binding on the public?” *Id.* When the guidance document interprets existing legislation, it is a valid interpretive rule and need not go through notice-and-comment rulemaking. *Id.* When the guidance document is not interpretive of existing legislation and has not been made binding, it is a valid policy statement and need not go through notice-and-comment rulemaking. *Id.* Only when the guidance document is not interpretive of the existing legislation and is practically binding should it be promulgated through notice-and-comment rulemaking. *Id.*

<sup>131</sup> *Am. Mining*, 995 F.2d at 1112; see Anthony, *supra* note 109, at 21 (explaining that certain rules, which the *American Mining* test would presumably require to go through notice-and-comment rulemaking, could also be valid interpretive rules exempted from the statutory requirements of the Administrative Procedure Act).

<sup>132</sup> See *Am. Mining*, 995 F.2d at 1112; William Funk, *When Is a “Rule” a Regulation? Marking a Clear Line Between NonLegislative Rules and Legislative Rules*, 54 ADMIN. L. REV. 659, 662 (2002).

<sup>133</sup> See Funk, *supra* note 132, at 662; *supra* 111–132 and accompanying text.

<sup>134</sup> See Funk, *supra* note 132, at 663, 663 n.25.

<sup>135</sup> *Id.*

<sup>136</sup> *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (finding that where government action results in the diminution of the value of property that is too great, it is a taking and must be compensated for by the government); see Funk, *supra* note 132, at 663. For another analogy, c.f. *Jacobellis v. Ohio*, 378 U.S. 184 (1964) (Stewart, J., concurring) (declining to define what constitutes pornography, but stating, “I know it when I see it”).



whether a guidance document is valid, and such discretion allows courts to act quasi-legislatively.<sup>137</sup>

### III. SUBSTANTIVELY CHALLENGING GUIDANCE DOCUMENTS

Another way for courts to deal with agencies circumventing notice-and-comment requirements is simply for judges to treat promulgated rules as binding and guidance documents as non-binding.<sup>138</sup> This approach eliminates the need for courts to determine whether the rule is in practice legally binding or not.<sup>139</sup> Under this scenario, if an agency treats a guidance document as binding and refuses to reconsider the guidance in a subsequent case, the court should strike down the agency's action in that case because the agency did not explain why the guidance document should have governed.<sup>140</sup> The agency then has two options: either go through the public scrutiny of notice-and-comment rulemaking on the front end—and avoid case-by-case adjudications in the future—or avoid rulemaking procedures and defend itself in every subsequent challenge.<sup>141</sup> To understand how this proposal might solve the problem of guidance documents, it is necessary to first understand what actions entities may bring against agencies in court, and second, the level of deference agencies are afforded by the court if the entity succeeds in getting its case heard.<sup>142</sup>

#### A. *The Challenge: What Type of Action to Bring*

The Administrative Procedure Act (“APA”) generally provides three tests for judicial review of rules.<sup>143</sup> Since the United States Supreme Court’s 1971 decision in *Citizens to Preserve Overton Park, Inc. v. Volpe*, circuit courts have almost universally adopted the arbitrary and capricious test for review of in-

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<sup>137</sup> See Funk, *supra* note 132, at 663 (comparing procedural tests to a “pre-*Vermont Yankee*” world, referring to when judges themselves determined how much process an agency was required to undergo before adopting a rule, as opposed to following the standards set out in 5 U.S.C. § 553); William S. Morrow, *A Brief Look at Agency Policy Statements and Interpretative Rules Under the APA*, ADMIN. & REG. L. NEWS, Spring 2001, at 4, 5.

<sup>138</sup> Franklin, *supra* note 1, at 279; Funk, *supra* note 132, at 663.

<sup>139</sup> Franklin, *supra* note 1, at 279; Funk, *supra* note 132, at 663.

<sup>140</sup> E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1491 (1992).

<sup>141</sup> *Id.*

<sup>142</sup> See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (establishing level of deference afforded an agency when interpreting a statute the agency is in charge of implementing); *Citizens to Pres. Overton Park, Inc. v. Volpe (Overton Park)*, 401 U.S. 402, 416–17 (1971) (presenting the typical challenge to guidance documents); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413–14 (1945) (establishing level of deference afforded an agency when it interprets its own regulations); *Skidmore v. Swift*, 323 U.S. 134, 140 (1944) (establishing level of deference afforded an agency when it issues a guidance document).

<sup>143</sup> 5 U.S.C. § 706(2)(A), (E), (F) (2012); Pedersen, *supra* note 28, at 46–47.

formal rulemaking.<sup>144</sup> In that case, the Secretary of Transportation approved funding for a highway to be built through a public park, but he did not provide any statement of factual findings as to why there existed no alternative routes or design changes to mitigate harm to the park.<sup>145</sup> Petitioners, a combination of local residents and environmentalist organizations, contended that the Secretary's decision was invalid without such a finding, and the Court agreed.<sup>146</sup> To make a finding under Section 706(2)(A), Justice Thurgood Marshall, writing for the Court, found that "the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."<sup>147</sup> To do this, the court must consider the full record, and where the record is lacking, testimony by administrative officials.<sup>148</sup> Although the standard of review is "narrow," an inquiry into the facts must be "searching and careful."<sup>149</sup> This has become the most common test for arbitrary and capricious informal rulemakings.<sup>150</sup>

### B. Deference for Agencies Interpreting the Law

A major distinction between administrative rules and guidance documents is the deference afforded them in court.<sup>151</sup> Below is an outline of the various levels of deference the courts apply to agency interpretations of law.<sup>152</sup>

#### 1. *Chevron* Deference

When an agency follows notice-and-comment rulemaking procedures under Section 553 of the APA to promulgate an informal rule, agencies receive significant deference from the courts if the rule interprets a statute the agency administers.<sup>153</sup> The standard of review for this situation was established in

<sup>144</sup> See 401 U.S. at 416–17 (1971); *Appalachian Power Co. v. Env'tl. Prot. Agency*, 477 F.2d 495, 505 (4th Cir. 1973) (applying "arbitrary and capricious" test to challenge rule concerning interpretation of Clean Air Act statute); Pedersen, *supra* note 28, at 48; see also *Motor Vehicle Mfrs. Ass'n, of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46 (1983) (applying "arbitrary and capricious" standard test to challenge rule concerning seatbelts).

<sup>145</sup> *Overton Park*, 401 U.S. at 404, 407–08.

<sup>146</sup> *Id.* at 408–09, 420.

<sup>147</sup> *Id.* at 416.

<sup>148</sup> *Id.* at 420.

<sup>149</sup> *Id.*

<sup>150</sup> Pedersen, *supra* note 28, at 48; see note 144 and accompanying text.

<sup>151</sup> See Raso, *supra* note 21, at 794 (noting the difference in deference afforded to rules versus guidance documents); *infra* notes 153–231 and accompanying text (explaining and analyzing the difference between different types of agency deference).

<sup>152</sup> See *infra* notes 153–231 and accompanying text (explaining and analyzing the difference between different types of agency deference).

<sup>153</sup> See 5 U.S.C. § 553 (2012); *Chevron*, 467 U.S. at 842–43; Jim Rossi, *Respecting Deference: Conceptualizing Skidmore within the Architecture of Chevron*, 42 WM. & MARY L. REV. 1105, 1115–16 (2001).

1981 in *Chevron v. Natural Resources Defense Council*, which involved an Environmental Protection Agency (EPA) interpretation of the Clean Air Act (“CAA”) Amendments of 1977.<sup>154</sup> The amendments imposed certain requirements on states that had not achieved national air quality standards established by EPA (“nonattainment states”).<sup>155</sup> The amendments required nonattainment states to obtain a permit for any new or modified major stationary source of pollution.<sup>156</sup> In 1980, EPA adopted a rule stating that if any part of a stationary source was replaced or modified, a permit was required.<sup>157</sup> A year later, in 1981, EPA adopted an alternative rule stating that as long as there was no increase in aggregate emissions from the source, no permit was necessary.<sup>158</sup> The question for the Court was whether EPA’s interpretation of the amendments was a permissible construction of the statute.<sup>159</sup> Applying a two-part test, the Supreme Court ruled in favor of EPA.<sup>160</sup>

The *Chevron* two-part test has become the benchmark case for determining whether an agency’s interpretation of its statute is permissible.<sup>161</sup> The Court stated:

First, always is the question whether Congress has directly spoken to the precise issue. If the intent of Congress is clear, that is the end of the matter for the court; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute as would be necessary in the absence of an administrative interpretation. Rather if the statute is silent or unambiguous with respect to the specific issue the question for the court is whether the agency’s answer is based on a permissible construction of the statute.<sup>162</sup>

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<sup>154</sup> 467 U.S. at 842; see 42 U.S.C. § 7491(a)(1) (2012); *Chevron, U.S.A. v. Natural Res. Def. Council*, U.S. DEP’T OF JUSTICE (May 14, 2015), <http://www.justice.gov/enrd/chevron-usa-v-natural-res-def-council> [<https://perma.cc/ML5D-FXUK>] [hereinafter DEP’T OF JUSTICE].

<sup>155</sup> 42 U.S.C. § 7491(a)(1); *Chevron*, 467 U.S. at 839–40.

<sup>156</sup> 42 U.S.C. § 7491(a)(1); *Chevron*, 467 U.S. at 839–40.

<sup>157</sup> *Chevron*, 467 U.S. at 857.

<sup>158</sup> See *id.* at 857–58.

<sup>159</sup> See *id.* at 859.

<sup>160</sup> *Id.* at 842–43, 866.

<sup>161</sup> DEP’T OF JUSTICE, *supra* note 154; see *Chevron*, 467 U.S. at 842–43; see also *Michigan v. Env’tl. Prot. Agency*, 135 S. Ct. 2699, 2707 (2015) (applying *Chevron* to determine whether the Environmental Protection Agency (EPA) interpretation of Clean Air Act was permissible); *Util. Air Regulatory Grp. v. Env’tl. Prot. Agency*, 134 S. Ct. 2427, 2439 (2014) (applying *Chevron* to determine whether EPA’s interpretation of Clean Air Act was permissible).

<sup>162</sup> *Chevron*, 467 U.S. at 842–43.

In almost every major case since the *Chevron* decision, courts have affirmed the agencies' interpretation of its organic statute at step two.<sup>163</sup> Therefore, whether the language of the statute is clear will almost certainly determine the case.<sup>164</sup>

## 2. *Skidmore* Deference

Courts afford less deference to informal agency actions outside the scope of notice-and-comment rulemaking.<sup>165</sup> In 1944, the United States Supreme Court decided *Skidmore v. Swift* and established the early standard for deference to agency legal interpretations made in the context of informal adjudications.<sup>166</sup> In *Skidmore*, the Administrator of the Wage and Hour Division submitted an amicus brief clarifying an interpretative bulletin relating to the plaintiffs' cause of action.<sup>167</sup> The Court held that although the Administrator's findings were not based on adversary proceedings, the findings were still entitled to "respect"—something less than *Chevron* deference but more than *de novo* review.<sup>168</sup> The Court stated that the weight afforded to guidance documents would "depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."<sup>169</sup> These factors are to be weighed in totality to determine how much influence the guidance document should have.<sup>170</sup> This level of deference is often referred to as *Skidmore* deference or "weak deference" because the court is not bound by the agency's interpretation.<sup>171</sup>

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<sup>163</sup> See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 484–85 (2001) (finding the EPA interpretation of an ambiguous statute unreasonable at step two because EPA's interpretation would have rendered a subpart of the statute nugatory); *Michigan v. Env'tl. Prot. Agency*, 135 S. Ct. at 2711 (finding EPA's decision to regulate power plant unreasonable because EPA refused to consider costs of regulation); Marianne Kunz Shanor, Case Note, *Administrative Law—The Supreme Court's Impingement of Chevron's Two-Step*; *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498 (2009), 10 WYO. L. REV. 537, 552–53 (2010).

<sup>164</sup> See Shanor, *supra* note 163, at 552–53.

<sup>165</sup> Rossi, *supra* note 153, at 1116; see *Skidmore*, 323 U.S. at 140 (establishing standard of deference afforded an agency when it acts outside the scope of notice-and-comment rulemaking); see also *Wos v. E.M.A. ex rel. Johnson*, 133 S. Ct. 1391, 1402 (2013) (affording two opinion letters issued by the federal Centers for Medicare and Medicaid Services *Skidmore* deference, but declining to afford *Chevron* deference).

<sup>166</sup> *Skidmore*, 323 U.S. at 140; Rossi, *supra* note 153, at 1116, 1118.

<sup>167</sup> *Skidmore*, 323 U.S. at 139.

<sup>168</sup> *Id.* at 139–40.

<sup>169</sup> *Id.* at 140.

<sup>170</sup> *Id.*

<sup>171</sup> Rossi, *supra* note 153, at 1110, 1117.

### 3. *Chevron* or *Skidmore* Deference for Guidance Documents?

Following the *Chevron* decision, a question arose as to when a court should apply *Chevron* deference and when it should apply *Skidmore* deference.<sup>172</sup> This question is important because if a court defers to an agency's decision, and the agency's decision is based on a guidance document, the court essentially validates the guidance document and gives it legally binding effect.<sup>173</sup> Whether the court affords an agency *Chevron* deference or *Skidmore* deference has important consequences for the effect of the guidance document.<sup>174</sup>

The Supreme Court addressed the question of *Chevron* versus *Skidmore* deference in *Christensen v. Harris County*, which involved an interpretation of overtime work under the Fair Labor Standards Act.<sup>175</sup> Concerned about the costs of overtime pay, Harris County proposed to require its employees to take or use compensatory time in order to reduce their overtime pay.<sup>176</sup> Harris County wrote to the Department of Labor's Wage and Hour Division to inquire whether its proposal was appropriate, and the Administrator approved the proposal in an opinion letter, so long as the prior agreement allowed for it.<sup>177</sup> Harris County then implemented the policy, and its employees sued.<sup>178</sup> The Court held that *Skidmore* deference applied to the agency's opinion letter because the interpretation was not based on formal adjudication or notice-and-comment rulemaking.<sup>179</sup> And therefore, such interpretations did not warrant *Chevron*-style deference.<sup>180</sup> The Court's ruling signified that interpretations in guidance are entitled to deference only to the extent that they have the "power to persuade," and no more.<sup>181</sup>

In 2001, the United States Supreme Court further clarified its position on informal agency interpretations of law in *United States v. Mead Corp.*<sup>182</sup> After

<sup>172</sup> See *id.* at 1105, 1109; see also *Chevron*, 467 U.S. at 842–43 (affording greater deference to agencies); *Skidmore*, 323 U.S. at 140 (affording less deference to agencies).

<sup>173</sup> See Franklin, *supra* note 1, at 315; *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 96 (1995) (deferring to Department of Health and Human Services informal interpretation of reimbursement procedures because interpretation was reasonable); see also *United States v. Cinemark USA, Inc.*, 348 F.3d 569, 578–80 (6th Cir. 2003) (deferring to Department of Justice's informal interpretation of its own regulation because interpretation was reasonable).

<sup>174</sup> See Franklin, *supra* note 1, at 315; see also *Chevron*, 467 U.S. at 842–43; *Skidmore*, 323 U.S. at 140.

<sup>175</sup> 529 U.S. 578, 578 (2000); see 29 U.S.C. §§ 201–219 (1994); *Chevron*, 467 U.S. at 842–43; *Skidmore*, 323 U.S. at 140.

<sup>176</sup> *Christensen*, 529 U.S. at 580.

<sup>177</sup> *Id.* at 580–81.

<sup>178</sup> *Id.* at 581.

<sup>179</sup> *Id.* at 587; see *Skidmore*, 323 U.S. at 140.

<sup>180</sup> *Christensen*, 529 U.S. at 587; see *Chevron*, 467 U.S. at 842–43.

<sup>181</sup> *Christensen*, 529 U.S. at 587; see *Skidmore*, 323 U.S. at 140

<sup>182</sup> 533 U.S. 218, 229–31 (2001); Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1452 (2005).

treating Mead day planners as duty free for several years, the United States Customs Service reclassified them as “bound diaries,” subject to tariff.<sup>183</sup> Tariff classification letters do not generally require notice-and-comment rulemaking, and they are binding only on the persons to whom the letter is addressed.<sup>184</sup> Any of the more than forty United States Customs Service offices may issue ruling letters, as may the Customs Headquarters Office.<sup>185</sup>

In *Mead*, the Court denied *Chevron* deference to the United States Customs Service, finding that it applies only when “Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law . . . and the agency exercises such authority.”<sup>186</sup> The first prong sought to ensure that Congress intended for the agency to make decisions regarding the relevant statutes, and the second prong sought to ensure that the agency was acting in that capacity, and not just incidentally to it.<sup>187</sup> In cases where *Chevron* deference does not apply, the Court preserved the possibility of *Skidmore* deference.<sup>188</sup> Although the Court noted that notice-and-comment rulemaking and formal adjudication are both “very good indicator[s]” of *Chevron* treatment, such formality is not always required.<sup>189</sup> The Court did not specifically address guidance documents, leaving the question of *Chevron* deference for those documents in flux.<sup>190</sup>

The Supreme Court further attempted to clarify *Mead* in 2002 in *Barnhart v. Walton*.<sup>191</sup> *Barnhart* concerned a provision of the Social Security Act that defined “disability” as an “inability to engage in any substantial gainful activity by reason of any medically determinable . . . impairment . . . which has lasted or can be expected to last for a continuous period of not less than 12 months.”<sup>192</sup> Walton, who had developed a serious mental disability, was unable to work, or in statutory terms, “engage in any substantial gainful activity,” for eleven months, but then found permanent work before the twelve-month period ran.<sup>193</sup> The Social Security Administration (“SSA”) denied Walton’s disabil-

<sup>183</sup> *Mead*, 533 U.S. at 224–25.

<sup>184</sup> *Id.* at 233.

<sup>185</sup> *Id.* at 224.

<sup>186</sup> *Id.* at 229 (internal quotations omitted); see *Chevron*, 467 U.S. at 842–43.

<sup>187</sup> See *Mead*, 533 U.S. at 229.

<sup>188</sup> *Id.* at 235; see *Chevron*, 467 U.S. at 842–43; *Skidmore*, 323 U.S. at 140. Compare *Lopez v. Terrell*, 654 F.3d 176, 183 (2d Cir. 2011) (upholding agency interpretation of statute regarding calculation of Good Conduct Time because it was persuasive under *Skidmore*), with *Sec. & Exch. Comm’n v. Rosenthal*, 650 F.3d 156, 160 (2d Cir. 2011) (declining to defer to agency interpretation of penalty statute because it was not persuasive).

<sup>189</sup> *Mead*, 533 U.S. at 229–31; see *Chevron*, 467 U.S. at 842–43; Bressman, *supra* note 182, at 1452.

<sup>190</sup> Raso, *supra* note 21, at 794; see *Mead*, 533 U.S. at 229–31; *Chevron*, 467 U.S. at 842–43.

<sup>191</sup> 535 U.S. 212, 222 (2002).

<sup>192</sup> 42 U.S.C. § 423(d)(1)(A) (2012); 535 U.S. at 214–15.

<sup>193</sup> *Barnhart*, 535 U.S. at 215.

ity insurance benefits.<sup>194</sup> Walton appealed, and the United States Court of Appeals for the Fourth Circuit held that the twelve-month duration requirement modified the word “impairment,” not the word “inability”; therefore, it did not matter that he returned to work in less twelve months.<sup>195</sup> What mattered was that his *impairment* lasted, or would be expected to last, longer than twelve months.<sup>196</sup>

Prior to the SSA’s decision, however, the SSA had issued a guidance document interpreting the Social Security Act and its regulations promulgated under the act.<sup>197</sup> The guidance document stated that a claimant was not disabled if “within 12 months after the onset of an impairment . . . the impairment no longer prevents substantial gainful activity.”<sup>198</sup> In 2001, probably to address the litigation, the SSA issued the same interpretation through notice-and-comment rulemaking.<sup>199</sup> Based on the guidance document and the subsequent final rule, the SSA concluded that Walton did not qualify for Social Security insurance benefits because Walton was able to engage in substantial gainful activity within eleven months.<sup>200</sup> The Supreme Court upheld the SSA’s decision and rejected Walton’s argument—that the SSA’s interpretation was not entitled to *Chevron* deference because the SSA failed to promulgate the guidance document through notice-and-comment rulemaking.<sup>201</sup>

The Court in *Barnhart* announced that *Chevron* deference does not apply only to rules promulgated through notice-and-comment rulemaking.<sup>202</sup> Rather, it will consider the following factors when determining whether to grant *Chevron* deference to a guidance document: “the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question . . . .”<sup>203</sup> Largely because the SSA’s interpretation of the statute was “longstanding”—and not necessarily because the SSA had promulgated a rule regarding the interpretation—the Court determined *Chevron* deference was due.<sup>204</sup>

Although the considerations listed in *Barnhart* purportedly give lower courts more guidance for following *Mead*, they also allow the courts consider-

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 216.

<sup>196</sup> *Id.*

<sup>197</sup> Determining Disability and Blindness; Substantial Gainful Activity Guides, 65 Fed. Reg. 42,771, 42,774 (July 11, 2000) (to be codified at 20 C.F.R. pt. 404); *Barnhart*, 535 U.S. at 217.

<sup>198</sup> *Barnhart*, 535 U.S. at 217.

<sup>199</sup> *Id.* at 217, 221.

<sup>200</sup> *Id.* at 221–22.

<sup>201</sup> *Id.*; see *Chevron*, 467 U.S. at 842–43.

<sup>202</sup> *Barnhart*, 535 U.S. at 221; see *Chevron*, 467 U.S. at 842–43.

<sup>203</sup> *Barnhart*, 535 U.S. at 222; see *Chevron*, 467 U.S. at 842–43.

<sup>204</sup> See *Barnhart*, 535 U.S. at 221; *Chevron*, 467 U.S. at 842–43.

able leeway in determining when to apply *Chevron* deference.<sup>205</sup> As legal scholar Lisa Schultz Bressman notes, the problem with the Supreme Court's guidance is that the tests can conflict, and in many cases *Chevron* deference depends more on the test the court chooses to apply than the rulemaking procedure that the agency uses.<sup>206</sup> What is clear, though, is that *Chevron* deference is not necessarily ruled out for guidance documents that do not go through notice-and-comment rulemaking.<sup>207</sup> Furthermore, even if courts do not afford guidance documents *Chevron* deference, *Skidmore* deference may be sufficient in most cases for agency guidance document to prevail.<sup>208</sup>

### C. Deference for Agencies Interpreting Regulations

When agencies interpret their own regulations, courts are even more deferential.<sup>209</sup> In 1945, in *Bowles v. Seminole Rock & Sand Co.*, the United States Supreme Court established the standard of deference afforded to an agency's interpretation of its own regulations.<sup>210</sup> *Seminole Rock* involved an interpretation of a regulation issued by the Office of Price Administration under the Emergency Price Control Act of 1942.<sup>211</sup> Justice Murphy, writing for the Court, started by stating that courts should only look to an agency's interpretation of the regulation if the regulation is ambiguous.<sup>212</sup> If there is ambiguity, courts "must necessarily look to the administrative construction of the regulation."<sup>213</sup> Although courts may consider Congressional intent and Constitutional

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<sup>205</sup> Raso, *supra* note 21, at 794; *see Barnhart*, 535 U.S. at 222; *Mead*, 533 U.S. at 229; *Chevron*, 467 U.S. at 842–43; *see also* Krzalic v. Republic Title Co., 314 F.3d 875, 877–79 (7th Cir. 2002) (arguing *Barnhart* conflated *Chevron* and *Skidmore* deference). *Compare* Fournier v. Sebelius, 718 F.3d 1110, 1120 (9th Cir. 2013) (applying *Barnhart* factors at the second step of the *Mead* test), and *Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235, 1247 (9th Cir. 2013) (same), with *Hagans v. Comm'r of Soc. Sec.*, 694 F.3d 287, 300 (3d Cir. 2012) (applying *Mead* test and *Barnhart* factors separately).

<sup>206</sup> Bressman, *supra* note 189, at 1459; *see Barnhart*, 535 U.S. at 222; *Mead*, 533 U.S. at 229; *Chevron*, 467 U.S. at 842–43; *supra* note 212 and accompanying text.

<sup>207</sup> Franklin, *supra* note 1, at 321; *see Barnhart*, 535 U.S. at 222; *Mead*, 533 U.S. at 229; *Chevron*, 467 U.S. at 842–43.

<sup>208</sup> Franklin, *supra* note 1, at 321; *see Chevron*, 467 U.S. at 842–43; *Skidmore*, 323 U.S. at 140. In 2007, a study found that from June 2001 through June 2006 United States Courts of Appeal upheld the agency action sixty percent of the time when using *Skidmore* deference. Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1259–60, 1275 (2007).

<sup>209</sup> *See Seminole Rock*, 325 U.S. at 413–14; *infra* notes 210–231 and accompanying text (analyzing *Seminole Rock* deference).

<sup>210</sup> *Seminole Rock*, 325 U.S. at 413–14; Kevin O. Leske, *Splits in the Rock: The Conflicting Interpretations of the Seminole Rock Deference Doctrine by the U.S. Courts of Appeals*, 66 ADMIN. L. REV. 787, 793 (2014).

<sup>211</sup> *Seminole Rock*, 325 U.S. at 411.

<sup>212</sup> *Id.* at 413–14.

<sup>213</sup> *Id.*; *see also* *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1213 (2015) (Thomas, J., concurring) (questioning legitimacy of modern day *Seminole Rock* deference); *Thorpe v. Hous. Auth. of*



principles, the administrative interpretation controls unless it is plainly erroneous or inconsistent with the regulation.<sup>214</sup>

The Court in *Seminole Rock* then proceeded to consider the issue in more detail.<sup>215</sup> The Court first performed its own statutory interpretation of the text, arriving at the same conclusion as the agency.<sup>216</sup> It then added that any question regarding the Court's interpretation of the regulation was erased by the agency's own interpretation of it.<sup>217</sup> The Court noted that the agency had issued a bulletin concurrently with the regulation that addressed the exact issue.<sup>218</sup> The agency's bulletin, in conjunction with its own interpretation of law, led the Court to rule in favor of the agency interpretation.<sup>219</sup> Therefore, under *Seminole Rock* the courts give agencies enormous deference in interpreting their own regulations through guidance documents.<sup>220</sup>

Although courts have generally accepted the *Seminole Rock* standard of deference, most notably in the 1997 decision *Auer v. Robbins*, the Supreme Court cut back somewhat on this level of deference and suggested that it might reevaluate the doctrine in the future.<sup>221</sup> In *Christopher v. SmithKline*, for example, the Court struck down an agency's interpretation of its own regulations (via an amicus brief) defining "outside salesman" within the context of pharmaceutical sales representatives.<sup>222</sup> *SmithKline* held that deference might not

City of Durham, 393 U.S. 268, 276 (1969) (reversing eviction of tenant in federally assisted housing project after Department of Housing and Urban Development issued circular clarifying eviction procedures); Leske, *supra* note 218, at 794–95 (examining *Seminole Rock* deference); Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of Seminole Rock*, 65 EMORY L.J. 47, 59 (2015) (examining *Seminole Rock* deference).

<sup>214</sup> *Seminole Rock*, 325 U.S. at 413–14.

<sup>215</sup> *Id.* at 414–17.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* 417.

<sup>218</sup> *Id.* The bulletin stated: "The highest price charged during March 1942 means the highest price which the retailer charged for an article actually delivered during that month or, if he did not make any delivery of that article during March, then his highest offering price for delivery of that article during March." *Id.*

<sup>219</sup> *Id.* at 418.

<sup>220</sup> See *Mead*, 533 U.S. at 246 (Scalia, J., dissenting) (underscoring high level of deference courts afford to agencies' own regulations); *Seminole Rock*, 325 U.S. at 413–14 (holding courts must defer to an agency's interpretation of its own regulation unless the interpretation is plainly erroneous or inconsistent with the regulation); Franklin, *supra* note 1, at 322–23 (noting the "extraordinary deference" the courts give to agencies under *Seminole Rock*); see also *Guernsey Mem'l Hosp.*, 514 U.S. at 95 (deferring to agency's interpretation of statute); *Cinemark*, 348 F.3d at 578–79 (deferring to agency's interpretation of statute).

<sup>221</sup> See *Christopher v. SmithKline*, 132 S. Ct. 2156, 2168–69 (2012) (declining to extend *Seminole Rock* deference where agency interpreted its own regulations); *Auer v. Robbins*, 519 U.S. 452, 462 (1997) (same); *Seminole Rock*, 325 U.S. at 413–14 (defining the standard); Leske, *supra* note 210, at 796 (noting Court has reconsidered *Seminole Rock* deference); see also *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1342 (2013) (Scalia, J., concurring in part and dissenting in part) (criticizing *Seminole Rock* deference).

<sup>222</sup> *Christopher*, 132 S. Ct. at 2161, 2161–69.

be appropriate when there is the possibility that the agency's interpretation conflicts with an earlier interpretation, or if the interpretation seems merely to be a *post hoc* rationalization of a prior decision.<sup>223</sup> *SmithKline* was a rare departure from *Seminole Rock* deference, but it began the conversation for a possible shift in doctrine.<sup>224</sup>

The problem with *Seminole Rock* deference was summed up nicely by Justice Antonin Scalia in his concurring and dissenting opinion in *Decker v. Northwest Environmental Defense Center*.<sup>225</sup> In that case, EPA submitted an amicus brief interpreting its Clean Water Act ("CWA") regulations defining a discharge into navigable waters.<sup>226</sup> The majority found EPA's interpretation reasonable and deferred to EPA's interpretation under *Seminole Rock*, especially because the interpretation was neither inconsistent from prior practice nor a *post hoc* rationalization arrived at only during litigation.<sup>227</sup> Justice Scalia disagreed, writing, "[f]or decades, and for no good reason, we have been giving agencies the authority to say what their rules mean, under the harmless-sounding banner of [*Seminole Rock* deference]." <sup>228</sup> Scalia continued, stating, "however great may be the efficiency gains derived from *Auer* [*Seminole Rock*] deference, beneficial effect cannot justify a rule that not only has no principled basis but contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation."<sup>229</sup> In other words, *Seminole Rock* (or *Auer*) deference all but eliminates judicial review of an agency action.<sup>230</sup> This scheme creates the incentive for agencies to promulgate vague regulations, which they can later interpret using guidance documents without having to go through the onerous process of notice-and-comment rulemaking.<sup>231</sup>

#### *D. Deference to Agencies Makes the Short-Cut Solution Unworkable*

Whether agencies receive *Chevron* deference, *Skidmore* deference, or *Seminole Rock* deference, the short-cut solution to guidance documents tilts the scale too far in favor of agency interpretations, thus giving guidance docu-

<sup>223</sup> *Id.* at 2166 (quoting *Auer*, 519 U.S. at 462); Leske, *supra* note 210, at 798.

<sup>224</sup> See *Christopher*, 132 S. Ct. at 2166; *Seminole Rock*, 325 U.S. at 413–14; Leske, *supra* note 210, at 798.

<sup>225</sup> 133 S. Ct. at 1339–44 (Scalia, J., concurring in part and dissenting in part); see *Seminole Rock*, 325 U.S. at 413–14; Leske, *supra* note 210, at 798–99.

<sup>226</sup> *Decker*, 133 S. Ct. at 1330–31.

<sup>227</sup> *Id.* at 1337; *Seminole Rock*, 325 U.S. at 413–14.

<sup>228</sup> *Decker*, 133 S. Ct. at 1339 (Scalia, J., concurring in part and dissenting in part) (quotation omitted); see *Seminole Rock*, 325 U.S. at 413–14.

<sup>229</sup> *Decker*, 133 S. Ct. at 1342; see *Auer*, 519 U.S. at 461; *Seminole Rock*, 325 U.S. at 413–14.

<sup>230</sup> See *Decker*, 133 S. Ct. at 1339, 1342; *Auer*, 519 U.S. at 461; *Seminole Rock*, 325 U.S. at 413–14.

<sup>231</sup> See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 551–52 (2003).

ments greater effect than they deserve under the APA.<sup>232</sup> Even if an agency issues a guidance document that is binding in practice, the court will generally defer to it so long as the statute or regulation is ambiguous and the guidance document is reasonable.<sup>233</sup> Because agencies receive such deference, entities will be hesitant to challenge agencies in court and the guidance will stand.<sup>234</sup>

#### IV. PROPOSING A SOLUTION

This Note so far has explained why challenging guidance documents in court fails to solve the problem that guidance documents present—namely that agencies use guidance documents to make legally binding rules without going through notice-and-comment rulemaking.<sup>235</sup> Furthermore, finality and ripeness issues make it difficult for parties to even challenge these practices in court.<sup>236</sup> This Note proposes an altogether different solution, one based on executive review of agency guidance documents.<sup>237</sup> The proposal rejects judicial review as the primary method to challenge guidance documents, and instead gives it to the executive.<sup>238</sup> The proposal not only offers a more practical solution to the problem of transparency, but it also increases accountability in the executive branch.<sup>239</sup>

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<sup>232</sup> See 5 U.S.C. § 553 (2012); *Chevron*, 467 U.S. at 842–43; *Seminole Rock*, 325 U.S. at 413–14; *Skidmore*, 323 U.S. at 140; Robert A. Anthony & David A. Codevilla, *Pro-Ossification: A Harder Look at Agency Policy Statements*, 31 WAKE FOREST L. REV. 667, 680 (1996); Franklin, *supra* note 1, at 321–23; Hickman, *supra* note 2, at 513; Kalen, *supra* note 3, at 700.

<sup>233</sup> See *Chevron*, 467 U.S. at 842–43; *Seminole Rock*, 325 U.S. at 413–14; *Skidmore*, 323 U.S. at 140; Franklin, *supra* note 1, at 321–23.

<sup>234</sup> See *Chevron*, 467 U.S. at 842–43; *Seminole Rock*, 325 U.S. at 413–14; *Skidmore*, 323 U.S. at 140; Anthony & Codevilla, *supra* note 232, at 680; Franklin, *supra* note 1, at 312–324.

<sup>235</sup> See *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1110 (D.C. Cir. 1993) (discussing modern day procedural test); Franklin, *supra* note 1, at 279 (discussing the “short cut” method); see also *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (establishing level of deference afforded an agency when it follows notice-and-comment rulemaking); *Skidmore v. Swift*, 323 U.S. 134, 140 (1944) (establishing level of deference afforded an agency when it issues a guidance document); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413–14 (1945) (establishing level of deference afforded an agency when it interprets its own regulations).

<sup>236</sup> See Kalen, *supra* note 3, at 676; Raso, *supra* note 21, at 795.

<sup>237</sup> See *infra* notes 273–296 and accompanying text (proposing a solution to review of guidance documents).

<sup>238</sup> See *Am. Mining Cong.*, 995 F.2d at 1110 (discussing modern day procedural test); Franklin, *supra* note 1, at 279 (discussing the “short cut” method); Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981) (centralizing executive review of agency rulemaking).

<sup>239</sup> See *Graham & Broughel*, *supra* note 11, at 39 (noting agencies might try to avoid notice-and-comment rulemaking by issuing guidance documents instead); Exec. Order No. 12,291, *supra* note 238 (centralizing executive review of agency rulemaking).

### A. The Office of Information and Regulatory Affairs Model

Executive review of guidance documents is not new.<sup>240</sup> Since Richard Nixon, presidents have taken steps to oversee agency action beyond the requirements enumerated in the Administrative Procedure Act.<sup>241</sup> President Nixon implemented a system under the Office of Management and Budget (“OMB”), under which the OMB circulated proposed rules to other agencies for comment.<sup>242</sup> In 1980, Congress created the Office of Information and Regulatory Affairs (“OIRA”) within the OMB, and in 1981 President Ronald Reagan issued Executive Order 12,291, which centralized executive review of agency rulemaking in the OMB and OIRA.<sup>243</sup> Under this scheme, agencies were required to submit proposed and final rules, along with regulatory impact assessments (“RIAs”), to OIRA for review before publishing them in the *Federal Register*.<sup>244</sup> The goal of Executive Order 12,291 featured three key elements: centralized review of agency action, additional analytical requirements for agency rulemaking beyond the APA, and an express focus on presidential priorities.<sup>245</sup> The order advanced democratic principles by giving the president, the only elected official in the executive branch, more control over agency rulemaking.<sup>246</sup>

Presidents Bill Clinton and George W. Bush modified the scope of OIRA review to include what they termed “significant” rules and guidance.<sup>247</sup> In 1993, President Clinton issued Executive Order 12,866, which replaced Reagan’s Executive Order.<sup>248</sup> That order limited OIRA review to “economically significant” rules, including rules “with an economic impact of \$100 million or more,” and “those raising novel legal or policy issues, among other rules.”<sup>249</sup> In 2007, Bush issued Executive Order 13,422, which required OIRA to review “significant guidance documents” out of concern that agencies strategically avoided review through alternative rulemaking tactics.<sup>250</sup> President

<sup>240</sup> Graham & Broughel, *supra* note 11, at 33–34.

<sup>241</sup> See 5 U.S.C. §§ 553–557 (2012); Nina A. Mendelson & Jonathan B. Wiener, *Responding to Agency Avoidance of OIRA*, 37 HARV. J.L. & PUB. POL’Y 447, 454 (2014).

<sup>242</sup> Mendelson & Wiener, *supra* note 241, at 454.

<sup>243</sup> Mendelson & Wiener, *supra* note 241, at 455; Exec. Order No. 12,291, *supra* note 238.

<sup>244</sup> Mendelson & Wiener, *supra* note 241, at 455; Exec. Order No. 12,291, *supra* note 238 (signed by President Reagan).

<sup>245</sup> Mendelson & Wiener, *supra* note 241, at 455–56; see Exec. Order No. 12,291, *supra* note 238.

<sup>246</sup> Graham & Broughel, *supra* note 11, at 34; see Exec. Order No. 12,291, *supra* note 238.

<sup>247</sup> Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 18, 2007); Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993); see Mendelson & Wiener, *supra* note 241, at 456–58. Both executive orders went on to define “significant” rules and guidance. Exec. Order No. 13,422, *supra* (signed by President Bush); Exec. Order No. 12,866, *supra* (signed by President Clinton).

<sup>248</sup> Exec. Order No. 12,866, *supra* note 247; see Mendelson & Wiener, *supra* note 241, at 456.

<sup>249</sup> Exec. Order No. 12,866, *supra* note 247; see Mendelson & Wiener, *supra* note 241, at 456.

<sup>250</sup> Exec. Order No. 13,422, *supra* note 247; see Mendelson & Wiener, *supra* note 241, at 456–58; Paul R. Noe & John D. Graham, *Due Process and Management for Guidance Documents: Good*

Obama maintained much of Bush's OIRA review structure and continued to review some agency guidance documents.<sup>251</sup>

OIRA review, however, does not solve the problem of guidance documents because entities themselves are not able to bring direct challenges to the agencies regarding guidance documents.<sup>252</sup> Although the executive has an interest in how agencies implement laws, it will not have the same incentive as entities to strike down invalid, binding guidance documents.<sup>253</sup> This leaves entities with little protection from agency overreach in the form of guidance documents.<sup>254</sup>

### B. Mendelson's Proposal

Legal scholar Nina Mendelson has suggested a petition system to address the above-stated problem.<sup>255</sup> Under Mendelson's scheme, Congress would pass an amendment entitling citizens to receive notice when an agency issues guidance documents and to petition the agency to revise or repeal them.<sup>256</sup> The agency would have 180 days to respond to the petition, after which the agency could either modify the document or defend its position publicly.<sup>257</sup> The agen-

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*Governance Long Overdue*, 25 YALE J. REG. 103, 103 (2008). According to the Office of Management and Budget significant guidance documents are documents that:

[M]ay reasonably be anticipated to: [(1)] Lead to an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety; [(2)] Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; [(3)] Materially alter the budgetary impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or [(4)] Raise novel legal or policy issues.

Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, *supra* note 33, at 3439.

<sup>251</sup> Graham & Broughel, *supra* note 11, at 40–41; Mendelson & Wiener, *supra* note 241, at 458–59, 486; see Memorandum from Peter R. Orszag, Dir., Office of Mgmt & Budget, to Heads & Acting Heads of Exec. Dep'ts and Agencies (Mar. 4, 2009), [http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda\\_fy2009/m09-13.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-13.pdf) [<http://perma.cc/0v7MyocpEnX>] (explaining OIRA maintained authority to review significant guidance documents).

<sup>252</sup> See Exec. Order No. 13,422, *supra* note 247; Franklin, *supra* note 1, at 316–17; Mendelson, *supra* note 38, at 440–41.

<sup>253</sup> See Franklin, *supra* note 1, at 316–17; Mendelson, *supra* note 38, at 440–41; Mendelson & Wiener, *supra* note 241, at 487.

<sup>254</sup> See Franklin, *supra* note 1, at 316–17; Mendelson, *supra* note 38, at 440–41; Mendelson & Wiener, *supra* note 241, at 487.

<sup>255</sup> Mendelson, *supra* note 38, at 438–44; see *supra* note 260 and accompanying text; see also Mendelson & Wiener, *supra* note 241 (discussing OIRA review of guidance documents); Nina A. Mendelson, *Private Control over Access to the Law: The Perplexing Federal Regulatory Use of Private Standards*, 112 MICH. L. REV. 737 (2014) (discussing the need for publicly available regulatory law).

<sup>256</sup> Mendelson, *supra* note 38, at 438.

<sup>257</sup> *Id.* at 439.

cy could defend its position either by arguing that the petition did not demand a substantive response or by publishing the guidance document for a full notice-and-comment procedure.<sup>258</sup> The agency's response, or failure to respond, would be subject to judicial review.<sup>259</sup> In order to avoid multiple petitions of the same guidance document, the agency could publish notice of the petition and allow other parties to join.<sup>260</sup>

Mendelson gives a number of reasons for why this proposal would be superior to the current scheme.<sup>261</sup> For one, agencies would have to respond to the substance of the guidance document, creating a dialogue comparable to that of a notice-and-comment proceeding or an enforcement action.<sup>262</sup> The agency's response would create a more coherent record for judicial review.<sup>263</sup> Second, the specter of a petition would encourage agencies to be more judicious in their use of guidance documents, and to consult affected entities prior to issuing guidance documents.<sup>264</sup> Third, the petition requirement would narrow judicial review to familiar questions such as whether the agency's decision is arbitrary and capricious.<sup>265</sup> The court, therefore, would not be bogged down by the tenuous tests described above in Part II of this Note.<sup>266</sup>

Mendelson's proposal raises a number of problems though, most significantly the cost of time and money to the agency.<sup>267</sup> If agencies are required to either respond to every petition, or go through a notice-and-comment-like process, they might avoid guidance documents except when absolutely necessary.<sup>268</sup> Mendelson addresses this shortcoming by allowing agencies to argue that the petition does not require a substantive response.<sup>269</sup> But this fix could hinder the process, based on the fact that courts generally avoid telling agencies how to use their resources.<sup>270</sup> Therefore, courts would generally defer to the agency and reject the petition without meaningful review.<sup>271</sup> Given the important benefits of guidance documents, it would be mistaken either to burden agencies with defending the guidance documents incessantly, or to require the

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<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 440–41.

<sup>262</sup> *Id.* at 440.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at 441.

<sup>265</sup> *Id.*

<sup>266</sup> *See id.*; *supra* notes 106–137 and accompanying text (describing and analyzing procedural challenges to guidance documents); *see also* *Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 39 (D.C. Cir. 1974) (establishing legal effects test).

<sup>267</sup> *See* Mendelson, *supra* note 38, at 441–42; Seidenfeld, *supra* note 4, at 367–68.

<sup>268</sup> *See* Seidenfeld, *supra* note 4, at 368.

<sup>269</sup> *See* Mendelson, *supra* note 38, at 439; Seidenfeld, *supra* note 4, at 368.

<sup>270</sup> Seidenfeld, *supra* note 4, at 368; *see* Mendelson, *supra* note 38, at 439.

<sup>271</sup> Seidenfeld, *supra* note 4, at 368; *see* Mendelson, *supra* note 38, at 439.

agency to follow notice-and-comment procedures every time a party petitions a guidance document.<sup>272</sup>

### *C. This Note's Proposal: The Office of Guidance Review*

This Note proposes a solution similar to that of Mendelson's, but it substitutes executive review for judicial review of petitions.<sup>273</sup> For convenience, this agency will be referred to as the Office of Guidance Review ("OGR"). The review would work as follows. After an agency issues a guidance document, the agency would be required to issue notice of the guidance document in a public record similar to the Federal Register.<sup>274</sup> Entities would then have the opportunity to petition OGR.<sup>275</sup> OGR would have the authority to review petitions at its own discretion.<sup>276</sup> If OGR decides to review a petition, it would notify the agency, allowing it either to initiate a notice-and-comment procedure or to defend the guidance document before OGR.<sup>277</sup> OGR would have the authority to review the guidance document facially—that is, OGR would determine whether the rule is practically legally binding using a test similar to the test derived from *American Mining Congress v. Mine Safety & Health Administration*.<sup>278</sup> If OGR determines the guidance document is legally binding, the agency has three options: it can (1) rescind it; (2) go through notice-and-comment rulemaking to promulgate a rule; or (3) request the president to issue the guidance document as an executive order.<sup>279</sup> If OGR determines the guid-

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<sup>272</sup> See Seidenfeld, *supra* note 4, at 367–68 (noting that entities who most desire guidance from agencies would suffer the most from this proposal because agencies would avoid issuing them unless absolutely necessary, given the cost to the agency of amending and/or defending them); *supra* notes 38–60 and accompanying text (explaining the benefits of guidance documents).

<sup>273</sup> See Mendelson, *supra* note 38, at 438–44; *infra* notes 274–296 and accompanying text (explaining proposal).

<sup>274</sup> See 5 U.S.C. § 553(b) (2012) (notice-and-comment rulemaking similarly requires an agency to publish notice of its proposed rule); Mendelson, *supra* note 38, at 438 (proposing requirement that agency's issue notice of guidance documents in a public record).

<sup>275</sup> See 5 U.S.C. § 553(e) (permitting "an interested person the right to petition for the issuance, amendment, or repeal of a rule" under notice-and-comment rulemaking); see also Mendelson, *supra* note 38, at 438–39.

<sup>276</sup> See 5 U.S.C. § 553(e); Mendelson, *supra* note 38, at 438–39. Under this proposal, entities would have the opportunity to petition the Office of Guidance Review regarding an agency's guidance document, similar to how interested persons can petition an agency for the issuance, amendment, or repeal of a rule. See 5 U.S.C. § 553(e); Mendelson, *supra* note 38, at 438–39.

<sup>277</sup> See Mendelson, *supra* note 37, at 439.

<sup>278</sup> See 995 F.2d at 1106, 1112; *supra* notes 123–132 and accompanying text (describing and analyzing the *American Mining* test).

<sup>279</sup> See U.S. CONST. art. II, § 1, cl. 1; *id.* art. II, § 3, cl. 5 (outlining general authority under the U.S. Constitution conferring power on the President to issue executive orders); see also Mendelson, *supra* note 37, at 438–39.

ance document is valid, then the petitioning agency retains the right to appeal the decision in court.<sup>280</sup>

There are five primary benefits to OGR review. First, allowing OGR to review petitions at its discretion would avoid preliminary issues of ripeness and finality.<sup>281</sup> Guidance documents are by their nature informal and nonbinding, meaning entities generally cannot challenge a guidance document in court until they violate it and are penalized.<sup>282</sup> Even if an entity is able to prove a guidance document is ripe and final, the time and money it costs an entity to do so will often encourage it to acquiesce to the guidance document.<sup>283</sup>

Second, because OGR would be directly under the control of the President, this proposed review would lend greater legitimacy to agency action.<sup>284</sup> Unlike judges and administrators, the president is an elected official.<sup>285</sup> By giving OGR the discretion to review guidance documents, the president becomes more accountable for agency action.<sup>286</sup> If entities are unhappy with the president's actions toward individual guidance documents, they can vote him out.<sup>287</sup>

Third, the petition process gives the public a voice in agencies' decision-making.<sup>288</sup> Although a petition does not rise to the same level of involvement and public scrutiny as notice-and-comment rulemaking, it still gives important feedback to the agency.<sup>289</sup> It also has the benefit of creating a record for judicial review in the future.<sup>290</sup>

Fourth, as explained above, the various tests courts use to determine whether guidance documents are legally binding are vague, and they depend substantially on the discretion of the court.<sup>291</sup> Allowing the executive to determine what the law is up front, instead of leaving it to the courts to decide on an

<sup>280</sup> See 5 U.S.C. § 706.

<sup>281</sup> See Kalen, *supra* note 3, at 676; Mendelson, *supra* note 38, at 440; *supra* notes 87–98 and accompanying text (explaining how finality and ripeness can be significant hurdles in challenging a guidance document prior agency action).

<sup>282</sup> See Kalen, *supra* note 3, at 676; Mendelson, *supra* note 38, at 440; *supra* notes 87–98 and accompanying text (explaining how finality and ripeness can be significant hurdles in challenge a guidance document).

<sup>283</sup> See Seidenfeld, *supra* note 4, at 343; *supra* notes 87–98 and accompanying text.

<sup>284</sup> See Mendelson, *supra* note 38, at 418; *supra* notes 65–83 and accompanying text (describing the threat guidance documents pose to the legitimacy of federal agencies).

<sup>285</sup> See U.S. CONST. art II, § 1 (constitutional provision regarding presidential election); *id.* art. II, § 2, cl. 2 (constitutional provision regarding appointment of agency officials).

<sup>286</sup> See Mendelson, *supra* note 38, at 418; Weaver, *supra* note 76, at 164; *supra* notes 65–83 and accompanying text (describing the threat guidance documents pose to the legitimacy of federal agencies).

<sup>287</sup> See Mendelson, *supra* note 38, at 418; *supra* notes 65–83 and accompanying text.

<sup>288</sup> See Mendelson, *supra* note 38, at 440; Seidenfeld, *supra* note 4, at 342.

<sup>289</sup> See Mendelson, *supra* note 38, at 440–41.

<sup>290</sup> *Id.* at 440.

<sup>291</sup> See *supra* notes 111–137 and accompanying text (describing, analyzing, and criticizing the various tests used to challenge guidance documents on procedural grounds).



*ad hoc* basis, is more in line with the constitution's separation of powers.<sup>292</sup> Shifting the responsibility of guidance review from the courts to OGR would limit the court's quasi-legislative power.<sup>293</sup> By reducing deference afforded to the agency, the executive would be held more accountable for the administrative action, thus creating greater legitimacy and encouraging agencies to consider input from the public.<sup>294</sup>

Finally, OGR review would leave the great majority of guidance documents undisturbed, removing the cloud of uncertainty that often hangs over them; this promotes good government because most guidance documents are beneficial, even essential, to the administrative state.<sup>295</sup> OGR will have the discretion to review only those guidance documents its sees as an abuse of agency power.<sup>296</sup>

### CONCLUSION

Guidance documents are a necessary tool in the modern administrative state, but they also pose problems. Guidance documents are meant to be non-binding memoranda, but in practice they have the ability to create binding law. Unlike notice-and-comment rulemaking, agencies are not required to seek input from the public, and their decision-making process can be far less transparent. As a result, guidance documents further undermine the already-tenuous authority agencies have to execute the laws of the United States. Current and proposed judicial tests devised to determine whether a guidance document is binding—namely the “short cut” and the *American Mining* test—have largely failed to address guidance documents' shortcomings.

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<sup>292</sup> See U.S. CONST. art. I, § 1; *id.* art. II, § 2, cl. 2; *id.* art. II, § 3 (constitutional provisions governing agency action).

<sup>293</sup> See U.S. CONST. art. I, § 1; *id.* art. II, § 2, cl. 2; *id.* art. II, § 3 (constitutional provisions governing agency action); Anthony & Codevilla, *supra* note 232, at 680–81 (noting courts applying *American Mining*-like tests give courts room to consider underlying policy); Funk, *supra* note 132, at 663 (suggesting *American Mining* allows courts to make decisions based on policy rather legal interpretation).

<sup>294</sup> See U.S. CONST. art. I, § 1; *id.* art. II, § 2, cl. 2; *id.* art. II, § 3 (constitutional provisions governing agency action); *Chevron*, 467 U.S. at 842–43 (1984) (establishing level of deference afforded an agency when agency follows notice-and-comment rulemaking); *Seminole Rock*, 325 U.S. at 413–14 (establishing level of deference afforded an agency when agency interprets its own regulations); *Skidmore*, 323 U.S. at 140 (establishing level of deference afforded an agency when agency issues a guidance document); Kalen, *supra* note 3, at 701–02 (noting that courts are prone to defer to agency interpretations); Seidenfeld, *supra* note 4, at 342 (discussing the importance of the agency receiving input from the public prior to issuing guidance documents).

<sup>295</sup> See Croston, *supra* note 10, at 382–84 (discussing benefits of guidance documents); Mendelson, *supra* note 38, at 438 (noting it is sometimes desirable for agencies to issue guidance flexibly because agencies cannot always foresee how their policies will be applied in every fact pattern).

<sup>296</sup> See Croston, *supra* note 10, at 382–84 (discussing benefits of guidance documents); Mendelson, *supra* note 38, at 438 (noting it is sometimes desirable for agencies to issue guidance flexibly because agencies cannot always foresee how their policies will be applied in every fact pattern).

This Note suggests that it is best to give the branch of government responsible for executing the law the authority to regulate itself. The president is an elected official who is accountable to the public. If stakeholders or the public are unhappy with the president's choices, they can speak with their votes. Furthermore, although a petition is less powerful than notice-and-comment rulemaking, the petition would nonetheless give the public a voice. A petition would give the public a path to challenge guidance documents when doctrines of ripeness and finality would otherwise prevent them from doing so. Finally, discretionary OGR review would allow the majority of beneficial guidance documents to continue to be issued without interference.

