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Once More Unto the Breach, Dear Friends — Levin on the Guidance Exception

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Ronald Levin, *Rulemaking and the Guidance Exception*, 70 **Admin. L. Rev.** (forthcoming 2018), available at [SSRN](#).

The late, great Kenneth Culp Davis was known for many [things](#), but humility was not among them. He knew the answers; he knew them better than did the Supreme Court; and he knew that he knew them. So it is remarkable that there was a problem in administrative law he found “baffling.” That was the distinction between legislative rules, interpretive rules, and statements of policy.

Interpretive rules and statements of policy are now generally labeled “guidance documents,” although that term does not appear in the Administrative Procedure Act. (At least not yet. Indicative of the attention and controversy that surround them, the Senate version of the pending [Regulatory Accountability Act](#) would amend the APA to define and attempt to constrain the use of “guidance.”) Agency reliance on guidance documents has led to two related controversies. One is normative and empirical: is the phenomenon an instance of responsible and helpful governance or, rather, an abusive end-run around notice-and-comment requirements? The other is doctrinal: how can one tell what’s a legislative rule and what’s a guidance document? The distinction matters, because the former are subject to the APA’s notice-and-comment requirements and the latter are not. Yet the courts have been as baffled as K.C. Davis, unable to construct a coherent and manageable body of law. Umpteen pages of law review commentary have not improved matters, and the recent politicization of the debate has only compounded the confusion and disarray.

With his usual clarity and breadth of knowledge, Ron Levin has now waded into this swamp. The article begins by reviewing the normative debate, ending with a summary of various “institutional pronouncements” – from the [ABA](#), [ACUS](#), [OMB](#), and others. He describes and endorses a professional consensus. Guidance documents can be abused and agencies should be careful not to give them the force of law. Nonetheless, they are an important and legitimate tool for providing important information to agency staff and the public and agencies should and will continue to rely on them.

He then turns to the doctrinal mess, taking a cue from the fact that most of the aforementioned institutional pronouncements draw no distinction between interpretive rules and policy statements, lumping them together in the guidance documents category. Levin’s essential point is that the courts have done a better job than is generally acknowledged with the exception for general statements of policy, and that they should now take the principles developed in that setting and apply them to the exception for interpretive rules.

In Part II, then, Levin provides a thorough overview of the caselaw on general statements of policy. The core idea developed by the courts is that a statement falls within that exemption if, both in its wording and in its application by the agency, it does not create a binding norm. “The key inquiry is whether the document in question expresses or implements a policy judgment in a binding fashion.” And the essential justification for this approach is that public participation is less important in formulating a non-binding statement because there will be later opportunities for reconsideration. In a lengthy review, Levin describes how this test operates, focusing in particular on what “binding effect” means. He defends the test against various objections, including (a) [arguments](#) for abandoning the judicial effort to distinguish legislative and non-legislative rules at all in favor of what David Franklin has labeled the “[short cut](#),” (b) [the suggestion](#) that judges should not police procedures but should vary the level of substantive scrutiny for different kinds of rules, and (c) [a recent attack](#) by Cass Sunstein, who argues that the binding effect test violates *Vermont Yankee*.

Part III turns to the interpretive rules exception, which fares much less well. Here, Levin finds the existing caselaw incoherent. There is a little fancy theorizing about the nature of interpretation, but the core position is practical and purposive: whatever it is that an agency is doing when it purports to “interpret” a statute, either its pronouncement is a true no-brainer, in which case notice and comment can and should be forgone for good cause, or public input *might* actually be valuable but for just the same reasons as it *might* be valuable for statements of policy. So why forgo it? Well, again, for the same reason as for statements of policy—the “interpretation” is not binding and there will opportunity to fight about it later.

Along the way, there is a great deal of insightful discussion of the key precedents in the area, which I will gloss over. But perhaps the most valuable is Levin’s two objections to the key D.C. Circuit precedent, [American Mining Congress v. MSHA](#), with its famous four-prong ([later reduced to three-prong](#)) test for identifying a legislative rather than an interpretive rule. Levin finds the test useful enough, but emphasizes two limitations. First, while the prongs tell you when a rule is legislative, they are useless in explaining what’s interpretive. Accordingly, they could be equally useful in distinguishing legislative rules from statements of policy. Second, they are extraordinarily narrow; it will be the rare guidance document that can be found to be “really” a legislative rule under this test alone.

All of which forms the foundation for Levin’s suggestion: courts should apply the same test—the binding norm test—to all guidance documents. There is no need to struggle to define “interpretative rule” or distinguish such a creature from policy statements. Notice-and-comment is required for legislative rules, i.e. binding substantive rules. If something lacks binding effect, it is not a legislative rule. Easy peasy.

A recent best-seller by Marie Kondo, [The Life-Changing Magic of Tidying Up: The Japanese Art of Decluttering and Organizing](#), urges us to find happiness through cleaning out our closets. ([Reportedly](#) it really is like magic.) Ron Levin has a similar [Thoreauian](#) admonition, and while “life-changing” may be a little strong, he offers an attractive and pragmatic pathway to decluttering and tidying up the law of interpretive rules.

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