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Adminstrative Law Survey

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ADMINISTRATIVE LAW SURVEY

The majority of federal agency decisions reviewed by the Tenth Circuit during the survey period exhibited significant deference to agency decision-making. Although judicial review of agency decision-making was pervasive, deference to agency decisions permeated all areas of administrative action. Part I of this Article examines the Tenth Circuit's adherence to the Supreme Court's *Chevron* doctrine of deference to an agency's interpretation of its own statute. Part II discusses the distinction between substantive and interpretive rulemaking. Part III discusses the ability of administrative agencies to create rules through adjudicative hearings, rather than informal rulemaking procedures under the Administrative Procedure Act.

I. DEFERENCE TO AGENCY INTERPRETATIONS: *WYOMING V. ALEXANDER*

A. *Background*

The Administrative Procedure Act (APA),[1] numerous organic statutes and the Supreme Court's non-delegation doctrine provide the basis for judicial review of administrative decisions.[2] In devising the appropriate standard of review the APA does not address the level of deference accorded agency interpretation. Prior to 1984, the courts did not take a consistent approach toward the issue of deference.[3] Even the Supreme Court seemed incapable of developing a consistent position. Although one line of cases demonstrated deference to agency decisions,[4] in a separate and equally distinct line of cases the Court construed statutes and gave little or no deference to administrative agency decisions.[5]

Much of the uncertainty ended in 1984 with the Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[6] Without explicitly overruling or disapproving of a single case, the Court defined the level of deference the judiciary should grant administrative agencies practicing rulemaking functions. In *Chevron*, the Environmental Protection Agency (EPA) defined the term "stationary source" in the Clean Air

1. 5 U.S.C. §§ 701 - 706 (1988).

2. Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 307-08 (1986).

3. *See, e.g.*, Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 971 (1992); Claude T. Coffman, *Judicial Review of Administrative Interpretations of Statutes*, 6 W. NEW ENG. L. REV. 1, 3 (1983).

4. *See* Aluminum Co. of Am. v. Central Lincoln Peoples' Util. Dist., 467 U.S. 380, 389 (1984); Blum v. Bacon, 457 U.S. 132, 141 (1982); Udall v. Tallman, 380 U.S. 1, 4 (1965); NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944).

5. *See* Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982); Jewett v. Commissioner, 455 U.S. 305 (1982); United States v. Swank, 451 U.S. 571 (1981); Morton v. Ruiz, 415 U.S. 199 (1974).

6. 467 U.S. 837 (1984).

Act[7] to permit operators of polluting facilities to treat all polluting devices as if they were in a single "bubble."[8] The Natural Resources Defense Council (NRDC) and several other groups challenged the "bubble" definition as contrary to earlier rulings of the EPA.[9] In invalidating the rule, the United States Court of Appeals for the District of Columbia reasoned that the Clean Air Act did "not explicitly define what Congress envisioned as a 'stationary source' "[10] and that the legislative history was "at best contradictory."[11] The court then substituted its own interpretation of the statute for that of the agency.[12]

On review, the Supreme Court reversed and set forth a two-step framework for analyzing an agency's interpretation of a statute. First, courts must determine whether "Congress has directly spoken to the precise question at issue."[13] If Congress addressed the precise question in an unambiguous fashion, the agency and the court have no choice but to give full effect to the plain meaning of the statute.[14] Should the intent of Congress be ambiguous, however, a court may only determine "whether the agency's answer is based on a permissible construction of the statute."[15] In devising the test, the Court relied on congressional intent. An ambiguous statute, the Court reasoned, should be considered as an implicit legislative delegation to the administrative agency giving it the discretion to decide which of several permissible interpretations of the statute to adopt.[16] Under *Chevron* there is no longer a single, correct meaning on every point in a statute, and agencies are the preferred gap fillers.[17]

Although the decision appeared to succinctly resolve much of the confusion over agency deference, the Supreme Court's failure to consistently utilize *Chevron*'s two-step framework raised questions about its precedential value.[18] Likewise, an analysis of appellate court decisions

7. 42 U.S.C. § 7502(b)(6) (1988).

8. *Chevron*, 467 U.S. at 840. This lenient definition of "stationary source" exempted replacements of individual pieces of equipment from the EPA's standards so long as the total emissions level of the facility did not increase above a certain level. *Id.*

9. *Id.* at 841.

10. Natural Resources Defense Council, Inc. v. Gorsuch, 685 F.2d 718, 723 (D.C. Cir. 1982).

11. *Id.* at 726 n.39.

12. Relying on the "purposes of the non-attainment program" and two earlier decisions, ASARCO, Inc. v. EPA, 578 F.2d 319 (D.C. Cir. 1978) and Alabama Power Co. v. Costle, 636 F.2d 323 (D.C. Cir. 1979), the court of appeals found the bubble definition inconsistent with the statute's purpose of ameliorating, rather than merely maintaining, air quality. *NRDC*, 685 F.2d at 726-27.

13. *Chevron*, 467 U.S. at 842.

14. *Id.* at 842-43.

15. *Id.* at 843.

16. *Id.* at 844.

17. With this newly devised two-step analysis, the Court concluded that the D.C. Circuit should not have addressed whether the "bubble" definition was inappropriate or inconsistent with the policies underlying the statute. *Id.* at 845. Instead, the inquiry should have been "whether the Administrator's view that it is appropriate in the context of this particular program is a reasonable one." *Id.*

18. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 445-448 (1987) (limiting *Chevron* to those situations where an agency must apply a legal standard to particular facts); Merrill, *supra* note 3, at 981 (suggesting the Supreme Court has applied the *Chevron* framework to

reveals a similar lack of consistency in following the *Chevron* framework.[19] In its most recent term, the Tenth Circuit reviewed two administrative agency decisions and specifically addressed the question of deference.[20] In both cases, the court applied the *Chevron* analysis in reaching its decision.

B. *Agency Action*

In *Wyoming v. Alexander*[21] the state sought review of the final decision of the United States Department of Education (DOE) requiring Wyoming to refund federal vocational education funds received under the Vocational Education Act Amendment (VEA).[22] The state obtained the funds pursuant to a federal "grant-in-aid" for vocational education administered by the DOE under the VEA,[23] which allowed states to draw from predetermined grants for local schools on an as-needed basis.[24] A key condition of the VEA, and the subject of the suit, was the requirement that Wyoming, as the receiving state, set-aside ten percent of the total funds it utilized for handicapped students and twenty percent for disadvantaged and non-English speaking students.[25]

The DOE audited Wyoming's use of funds allocated under the VEA in 1984 and found violations of the set-aside requirements.[26] Based upon this report, the Assistant Secretary for Vocational and Adult Education required the state to return $201,922.[27] Although the state admitted to the misapplication of $16,363, it sought review of the Assistant Secretary's ruling before the agency's Education Appeal Board (EAB).[28]

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only half of the cases presenting questions of deference); Linda R. Hirshman, *Postmodern Jurisprudence And The Problem of Administrative Discretion*, 82 NW. U. L. REV. 646, 688-703 (1988) (discussing the failure of *Chevron* to effectuate significant changes in the relationship between courts and agencies).

19. *See* Continental Training Servs., Inc. v. Cavazos, 893 F.2d 877, 885-86 (7th Cir. 1990) (reiterating the *Cardoza-Fonseca* view that *Chevron* does not apply to every case involving agency deference); Union of Concerned Scientists v. NRC, 824 F.2d 108, 113 (D.C. Cir. 1987) (statutory construction issues dictate courts use "traditional tools of statutory construction to ascertain congressional intent"); UAW v. Brock, 816 F.2d 761, 765 (D.C. Cir. 1987) (courts need not defer to agency opinions on ambiguous statutory provisions if the issues involve "a pure question of statutory construction"); Peter H. Schuck & E. Donald Elliott, *To The Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1040-41, 1059 (providing an analysis of decisions which have followed or diverged from the *Chevron* framework); *see also* Hon. Patricia M. Wald et al., *The Contribution of the D.C. Circuit to Administrative Law*, 40 ADMIN. L. REV. 507, 530 (1988) (discussing the D.C. Circuit's increased use of *Cardoza-Fonseca*).

20. In addition to Wyoming v. Alexander, 971 F.2d 531 (10th Cir. 1992), discussed immediately below, the Tenth Circuit also addressed deference towards an agency in Furr's/Bishop's Cafeterias, L.P. v. INS, 976 F.2d 1366 (10th Cir. 1992).

21. 971 F.2d 531 (10th Cir. 1992).

22. 20 U.S.C. §§ 2301 - 2471 (1988 & Supp. III 1992).

23. *Alexander*, 971 F.2d at 533.

24. *Id.* at 534. Pursuant to the VEA, Wyoming was allotted $1,110,314 in 1979 and $1,062,848 in 1980. Of these funds, Wyoming withdrew all but $61,304 in 1979 and withdrew all allotted funds in 1980. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 534-35.

The EAB reviewed the Secretary's decision and, while finding some rulings untenable, held DOE was entitled to a refund of $87,859 for misapplication of funds.[29] The Secretary of Education refused to alter this decision and the state petitioned for review by the Tenth Circuit.[30]

C. *The Tenth Circuit Opinion*

Wyoming did not dispute the facts, but did contest the calculation of the refund. The state contended that the proper interpretation of the set-aside requirement called for thirty percent of every dollar utilized to be applied to the targeted student groups.[31] Wyoming also argued that thirty percent of any remaining, unspent funds at the end of the year should be offset or "credited" against any shortages in the required application to the targeted groups.[32]

In contrast, the EAB interpreted the set-aside restriction to require states to spend allocated funds only on targeted students until the minimum per centum of the total grant was reached.[33] Only then could Wyoming spend the remaining funds on other approved, untargeted student groups.[34]

These two conflicting, although rational, interpretations of the set-aside restriction resulted from the absence of express congressional language on the question.[35] In resolving the dispute, the Tenth Circuit found no previous judicial interpretation of the statute.[36] The court found that, while sparse, the legislative history supported EAB's decision.[37] The court specifically relied on: (1) the title to the VEA section that read "National *Priority* Programs";[38] (2) a Senate Committee statement that "[t]hese particular set-asides were established to provide *a base amount each State must use for programs for students with special needs* . . .";[39] and (3) a Senate Committee statement that, "given the limited amount of federal assistance available, *it is the Committee's intent that scarce dollars will be first devoted to those with greatest needs*."[40] Recognizing the inconclusiveness of the statements, the court noted that "the rationale supporting the EAB's initial decision is not as well developed as it might

29. *Id.* at 535.
30. *Id.*
31. *Id.* at 536-37 n.7.
32. *Id.*
33. *Id.* at 537.
34. *Id.* Technically, the order in which these funds were spent did not matter, but the EAB's rationale directly affected the computation of the refund. In theory, the EAB's interpretation held that if the total grant equaled $100 and at least $30 was spent on targeted groups, how much more of the remaining $70 the state spent on any approved program was not relevant. However, if the state spent only $80 in total, allocating thirty percent, or $24 to targeted students, it had misapplied $6 and would be penalized accordingly. The EAB's interpretation accounted for fines totaling $25,633 more than the interpretation Wyoming asked the court to accept. *Id.*
35. *See e.g.*, S. REP. NO. 882, 94th Cong., 2d Sess. 54 (1976).
36. *Alexander*, 971 F.2d at 537 n.9.
37. *Id.*
38. *Id.* (emphasis in original case) (referencing 20 U.S.C. § 2310 (1988)).
39. *Id.* (emphasis in original case) (referencing S. REP. No. 882, *supra* note 40, at 57).
40. *Id.* (emphasis in original case).

have been."[41]

Aside from the legislative history, the court acknowledged that *Chevron* dictated a "narrow and deferential" standard of review.[42] Although it upheld EAB's interpretation, the court expressed uncertainty as to whether the interpretation was a permissible construction of the VEA statute. The court acknowledged that, absent an unreasonable agency interpretation of a statute, its own view of the proper equitable outcome was irrelevant.[43] The court thus concluded "that the EAB acted within the intent of Congress by holding Wyoming liable for its failure to fulfill its promise to expend on the designated programs the full set-aside amounts."[44]

D. *Analysis*

The various circuit courts inconsistently apply the *Chevron* doctrine.[45] Despite the court's uncertainty with the EAB's actions, the application of the doctrine in *Alexander* illustrates the prevalence of *Chevron* in the Tenth Circuit.

The court alluded that its own view of the best interpretation of the statutory language was not the same as that adopted by the EAB.[46] The court's statements that "[t]he EAB has made a reasonable interpretation of the VEA, to which we *must* defer"[47] and that "[t]he EAB interpretation reasonably and permissibly comports with the *apparent* intent of Congress"[48] may be a veiled indication that, in the court's eyes, the EAB did not make the most correct reasonable interpretation. A court following the *Chevron* doctrine could just as easily have found the EAB's interpretation an unreasonable construction of the statute. For example, the court could have held the state unambiguously requires the interpretation advanced by Wyoming and that, therefore, EAB's interpretation was unreasonable. Such a finding would have justified reversing EAB's decision.

The rationale for a finding of an unreasonable construction of the statute is supported by subsequent congressional action. Prior to 1985, Congress did not specifically outline the process for calculating set-aside refunds.[49] In 1988, however, Congress amended the statute prospectively to address the specific issue presented in *Alexander*. The amendment, as codified, holds that states misappropriating funds "shall be required to return funds in an amount that is proportionate to the extent of the harm its violation caused to an identifiable Federal interest associated with the program under which the recipient received the

41. *Id.* at 537.
42. *Id.* at 536.
43. *Id.* (citing Bennett v. New Jersey, 470 U.S. 632, 646 (1985)).
44. *Id.* at 536-37.
45. *See supra* note 19 and accompanying text.
46. *See supra* text accompanying notes 35-43.
47. *Alexander*, 971 F.2d at 539 (emphasis added).
48. *Id.* at 537 (emphasis added).
49. *Id.* n.8.

award."[50] Wyoming's 1984 violation date precluded application of the 1988 amendment to this case. The purpose of the amendment was presumptively to rectify EAB interpretations that were inconsistent with congressional intent or simply viewed by legislators as unfair or irrational. Regardless of remedial congressional acts regarding the EAB, *Alexander* illustrates the pervasiveness of the *Chevron* doctrine in the Tenth Circuit.

II. SUBSTANTIVE V. INTERPRETIVE RULEMAKING: *ROCKY MOUNTAIN HELICOPTERS, INC. V. FAA*

A. *Background*

In *Rocky Mountain Helicopters, Inc. v. FAA*,[51] the Tenth Circuit had no difficulty deciding whether a rule promulgated by an agency was substantive or interpretive. The court's ease in making this decision, however, should not downplay the confusion that often surrounds this question and the important ramifications of interpretive rules on affected parties.

In the Administrative Procedure Act, Congress recognized a difference between substantive and interpretive rules.[52] Substantive rules are those that create or change rights, duties or obligations.[53] Interpretive rules, in contrast, simply explain and clarify existing laws. They represent an agency's statement of its construction of the rule.[54] Although substantive rules, prior to adoption, require notice and comment procedures defined by the APA,[55] interpretive rules do not.[56] The notice and comment requirement allows interested parties to express their views to the agency and to influence the decision-making process. This requirement adds the "elements of openness, accountability, and legitimacy" to the rulemaking process.[57]

An interpretive rule requires only that the agency publish its decision in the *Federal Register* after adoption.[58] An interested party has no right to participate in the decision-making process. The difference in procedural approach between substantive and interpretive rules arises out of practical necessity. Congressional delegation of the administra-

50. 20 U.S.C. § 1234b(a)(1) (1988).

51. *Id.*

52. 5 U.S.C. § 553 (1988). *See also* 2 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 7.8-.13 (2d ed. 1978).

53. 5 U.S.C. § 553 (1988); Michael Asimow, *Nonlegislative Rulemaking And Regulatory Reform*, 1985 DUKE L.J. 381, 383; Peter J. Henning, *An Analysis Of The General Statement Of Policy Exception To Notice and Comment Procedures*, 73 GEO. L.J. 1007, 1009 (1985).

54. Asimow, *supra* note 53, at 383; Kevin W. Saunders, *Interpretive Rules With Legislative Effect; An Analysis And A Proposal For Public Participation*, 1986 DUKE L.J. 346, 346.

55. 5 U.S.C. § 553(b) - (c) (1988).

56. The APA specifically exempts "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(3)(A) (1988).

57. Asimow, *supra* note 53, at 402; *see* Henning, *supra* note 53, at 1012.

58. 5 U.S.C. § 552(a)(1)(D) (1988).

tion of statutes to agencies implicitly requires gap-filling measures.[59] In theory, this interpretive power does not create difficulties for interested parties because agency findings merely clarify existing law and unfavorable interpretations can be challenged in court.[60] Under *Chevron*,[61] both types of rules receive equal deference[62] and, as a result, they often have the same practical impact.[63] Although not legally binding on parties, an interpretive rule generally represents the agency's final position, invoking deference by the courts.[64] The importance of the distinction between substantive and interpretive rules arose last year in the Tenth Circuit.

B. *Agency Action*

Rocky Mountain Helicopters operates an emergency medical evacuation service on call both day and night.[65] In 1989, Rocky Mountain notified the FAA of its intent to use night vision enhancement devices (night vision goggles) in its operations.[66] Night vision goggles are used primarily in military operations.[67] The local Flight Standards District Office (FSDO) of the FAA prohibited use of the goggles and notified Rocky Mountain that its operations specifications would be amended accordingly.[68] Upon Rocky Mountain's protest, the FSDO reaffirmed its position after consulting both regional and national FAA personnel.[69] Rocky Mountain submitted written arguments about the amendment but contended that the FAA impaired its ability to respond by failing to be specific about the grounds for the decision.[70] Rejecting the arguments, the FSDO amended Rocky Mountain's operating specifications as proposed.[71]

In response, Rocky Mountain filed for reconsideration with the

59. *See* Morton v. Ruiz, 415 U.S. 199, 231 (1974); *see also* Asimow, *supra* note 53, at 385; Saunders, *supra* note 54, at 350.

60. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); Saunders, *supra* note 54, at 346 n.5.

61. Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) (*see supra* text accompanying notes 16-21 for reiteration of the *Chevron* test); Saunders, *supra* note 54, at 356.

62. Asimow, *supra* note 53, at 389. The author states "[b]ecause both legislative and interpretive rules frequently explain the meaning of language, there is no obvious way to determine whether an agency with legislative rulemaking power has made 'new law' or interpreted 'existing law.'" *Id.* at 394 (citation omitted). *See also* Note, *A Functional Approach to the Applicability of Section 553 of the Administrative Procedure Act to Agency Statements of Policy*, 43 U. CHI. L. REV. 430, 434-35 n.24 (1976); General Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (the distinction between interpretive and substantive rules is "enshrouded in considerable smog"), *cert. denied*, 471 U.S. 1074 (1985).

63. Asimow, *supra* note 53, at 384.

64. *Id.* at 385. *See also supra* the text accompanying notes 7-20 discussing *Chevron* test of deference to agency decisions.

65. *Rocky Mountain Helicopters*, 971 F.2d at 546.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

FAA's Director of Flight Standards Service,[72] asserting that the FAA had violated the notice and comment requirement of the APA because the amendment constituted substantive rulemaking.[73] Citing safety concerns regarding night vision goggles, the Director denied Rocky Mountain's request for reconsideration.[74] Rocky Mountain appealed the decision.

C. *The Tenth Circuit Opinion*

The Tenth Circuit had to decide whether the FAA's rulemaking procedure regarding Rocky Mountain Helicopters was substantive or, as the FAA argued, interpretative and a "reasonable interpretation of . . . existing statutes."[75] Specifically, FAA argued that since the APA does not require notice and comment procedures when an agency promulgates interpretive rules, it was under no duty to allow Rocky Mountain the opportunity to contribute to the decision-making process.[76] Rocky Mountain argued that it was entitled to the benefit of notice and comment procedures because the FAA has substantive rulemaking authority.[77]

The Tenth Circuit utilized definitions of substantive versus interpretive rulemaking drawn from its earlier holding in *Knutzen v. Eben Ezer Lutheran Housing Center*.[78] The court began its analysis by defining a substantive rule as one "promulgated pursuant to a direct delegation of legislative power by Congress [that] changes existing law, policy, or practice."[79] An interpretive rule is one which either is "made by an agency having no authority to issue a substantive rule"[80] or, if issued by an agency with the requisite authority to issue a substantive rule, "attempts to clarify an existing rule but does not change existing law, policy, or practice."[81] The court noted, however, the existence of other approaches: "whether [the] rule affects individual rights and obligations,"[82] "whether [the] rule depends on a statute for substantive meaning or is in itself substantive,"[83] "whether [the] rule will create new law,

72. *Id.* FAA agency decisions may be appealed to the agency director. 14 C.F.R. § 135.17(d) (1992).

73. *Rocky Mountain Helicopters*, 971 F.2d at 546; *see supra* text accompanying notes 52-57.

74. *Rocky Mountain Helicopters*, 971 F.2d at 546. The FAA based its decision on 14 C.F.R. § 91.13(a) (1989) prohibiting the careless or reckless operation of an aircraft, and 14 C.F.R. § 135.17(d) (1989) allowing the amendment of a licensee's operations specifications for safety reasons. *Rocky Mountain Helicopters*, 971 F.2d at 546.

75. *Id.*

76. *Id.*

77. *Id.*

78. 815 F.2d 1343 (10th Cir. 1987).

79. *Rocky Mountain Helicopters*, 971 F.2d at 546 (citing Knutzen v. Eben Ezer Lutheran Hous. Ctr., 815 F.2d 1343, 1351 (10th Cir. 1987)).

80. *Id.* at 547.

81. *Id.* at 546-47.

82. *Id.* at 547 n.2 (citing Morton v. Ruiz, 415 U.S. 199, 232 (1974)).

83. *Id.* (citing Rochna v. NTSB 929 F.2d 13, 15 (1st Cir. 1991)).

rights, or duties,"[84] "whether [the] rule [is] issued in [the] form of an explanation,"[85] and "whether [the] rule has substantial impact on those it affects."[86]

The court acknowledged the viability of Rocky Mountain's claim by noting that the FAA's substantive rulemaking authority was "undisputed."[87] Given the FAA's powers, the court reasoned that the "determinative question here is whether prohibiting the use of night vision goggles constitutes a change in existing law, policy, or practice."[88]

Rocky Mountain asserted that the FAA's determination changed existing law, policy, or practice since the FAA had not previously prohibited the use of night vision goggles in civil aviation.[89] Rocky Mountain relied on the fact that, although night vision goggles were not previously used in civil aviation, the FAA had not specifically prohibited them.[90] Spending little time analyzing Rocky Mountain's rationale, however, the court simply stated that "[n]ight vision goggles . . . have never been allowed in civil aviation."[91] Surprisingly, this brief conclusive statement comprised the court's entire rationale. The court thus held that the FAA's actions did not change existing law, policy, or practice.[92]

D. *Analysis*

Although it had little difficulty reaching a decision, the court acknowledged that the confusion afflicted not only agencies and parties affected by agency rulemaking, but also the courts. The court recognized numerous variant styles of judicial determination of the substantive-versus-interpretive question and noted that "[t]his lack of a uniform approach may attest to the difficulty of the determination."[93]

The court's recognition of the confusion surrounding the determination of a rule's substantive or interpretive nature reflects the view that "the distinction between the two types of rules is 'enshrouded in considerable smog.' "[94] Moreover, the APA provides no explicit solution.[95] That substantive and interpretative rules often have the same practical effect on the public compounds the problem.[96] The original justifica-

84. *Id.* (citing General Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984), *cert. denied* 471 U.S. 1074 (1985)).

85. *Id.* (citing Batterton v. Marshall, 648 F.2d 694, 705 (D.C. Cir. 1980)).

86. *Id.* (citing 2 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.16 (2d ed. 1979)).

87. *Id.* at 547. *See* 49 U.S.C. §§ 1348, 1421 (1988 & Supp. III 1992).

88. *Rocky Mountain Helicopters*, 971 F.2d at 547.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* The Tenth Circuit vacated the FAA's decision and remanded the case back to FAA, however, for its failure to demonstrate that the factual findings underlying its interpretation were supported by substantial evidence. *Id.* at 547-48.

93. *Id.* at 547 n.2; *see supra* text accompanying notes 85-89.

94. La Casa Del Convaleciente v. Sullivan, 965 F.2d 1175, 1177 (1st Cir. 1992) (quoting General Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984), *cert. denied* 471 U.S. 1074 (1985)).

95. Henning, *supra* note 53, at 1008.

96. Asimow, *supra* note 53, at 384.

tion for allowing interpretive rulemaking—that it does not affect one's rights, duties or obligations—is often a moot point. Since courts are inclined to give deference to agency decisions, a challenge of an interpretive rule, such as Rocky Mountain's, is likely to be fruitless.

The Tenth Circuit's deference to agency proclamations of a rule as substantive or interpretive is unlikely to change in the future. The imposition of notice and comment requirements on all rulemaking would discourage agencies from making any interpretive rules. The argument that the additional workload and costs and decreased efficiency would encourage agencies to proceed only in an ad hoc manner is well reasoned.[97] Although some interested parties will be detrimentally excluded from participation in agency decision-making, the overall efficiency of interpretive rules and the expected undesirable agency reaction to mandatory notice and comment requirements argues for the continuance of interpretive rulemaking. The Tenth Circuit's brief analysis in *Rocky Mountain* illustrates courts' continuing acceptance of interpretive rules.

III. RULEMAKING THROUGH ADJUDICATION: *NUNEZ-PENA V. INS*

A. *Background*

An administrative agency's ability to make rules flows from a congressional delegation of legislative power.[98] In the landmark 1947 ruling *SEC v. Chenery Corp.*,[99] the Supreme Court held that a federal administrative agency may announce new rules of law in an adjudicatory hearing and apply those rules to the parties before it.[100] *Chenery* became the first Supreme Court case to expressly validate the development of rules in what resembled a common law approach.

Under the APA agencies make rules through either quasi-legislative or adjudicatory procedures.[101] The APA, however, does not provide detailed guidelines for the specific use of either set of procedures.[102] In *Chenery*, the Supreme Court held that the choice of utilizing rulemaking or adjudicative procedures "lies primarily in the informed discretion of the administrative agency."[103]

Adjudicatory and quasi-legislative rules differ significantly. Quasi-legislative rulemaking promulgates rules of "general or particular applicability and future effect"[104] and requires an agency to follow notice and

97. *See* Pacific Gas & Elec. Co. v. Federal Power Comm'n, 506 F.2d 33, 48 (D.C. Cir. 1974) (agencies often have the choice of proceeding in an ad hoc manner or by issuing policy statements); Asimow, *supra* note 53, at 386; Henning, *supra* note 53, at 1013; Saunders, *supra* note 54, at 369.

98. Ron Beal, *Ad Hoc Rulemaking In Texas: The Scope Of Judicial Review*, 42 BAYLOR L. REV. 459, 463 (1990).

99. 332 U.S. 194 (1947).

100. *Id.* at 202-04.

101. 5 U.S.C. § 553, 554 (1988).

102. Edward R. Leahy, Comment, *Rule-Making And Adjudication In Administrative Policy Making: NLRB v. Wyman-Gordon Co.*, 11 B.C. INDUS. & COM. L. REV. 64, 69 (1969).

103. *Chenery*, 332 U.S. at 203.

104. 5 U.S.C. § 551(4) (1988).

comment procedures.[105] Adjudicative procedures require an adversary proceeding, including notice of the issues, responsive pleading, a hearing and a decision.[106] Adjudicatory rules do not require notice and comment procedures.[107] Standing requirements and the lack of notice and comment prohibit other interested parties from affecting the decision-making process. Theoretically, an adjudicative rule binds only the parties to the action.[108] Since agencies are likely to follow past decisions in a stare decisis manner, however, these "adjudicative decisions take on the status of rules."[109] Although adjudicative rules are considered precedent without specific application to nonparty individuals, "there will be many instances when compliance is expected without further order."[110] Individual case decisions may create either narrow or broad precedential effects.[111]

Quasi-legislative rules have the force of law,[112] while adjudicative rules have the effect of precedent.[113] Agencies may use precedent to distinguish, modify or overrule prior decisions.[114] Subsequently, a nonparty to an agency hearing may be penalized for failing to comply with a prior adjudicative rule.[115] In 1992, the applicability of an adjudicative rule to a nonparty arose in the Tenth Circuit.

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105. *Id.* § 553(b) - (c); *see supra* text accompanying notes 52-57.

106. 5 U.S.C. §§ 554, 556, 557 (1988 & Supp. III 1991). Section 554 grants to private parties the right to adjudication and outlines the required elements of notice to such hearings and the opportunities for presentation provided to the parties. Section 556 outlines government representation and the powers of agency employees at such hearings and assigns the burden of proof. Section 557 addresses initial decisions, agency review of decisions and the record. *Id.*

107. *See* Southwestern Bell Tel. Co. v. Public Util. Comm'n, 745 S.W.2d 918 (Tex. Ct. App. 1988) (discussing when ad hoc rulemaking is a justifiable exception to the general requirement of notice and comment rulemaking); Ron Beal, *Ad Hoc Rulemaking: Texas Style*, 41 BAYLOR L. REV. 101, 128 (1989); Russell L. Weaver, *Chenery II: A Forty-Year Retrospective*, 40 ADMIN. L. REV. 161, 167 (1988). The ability of agencies to create rules without notice and comment procedures has evoked much criticism. *See* Arthur E. Bonfield, *The Federal APA And State Administrative Law*, 72 VA. L. REV. 297, 326-34 (1986); J. Skelly Wright, *The Courts And The Rulemaking Process: The Limits Of Judicial Review*, 59 CORNELL L. REV. 375, 376 (1974).

108. Leahy, *supra* note 102, at 71-72; Beal, *supra* note 98, at 464.

109. Weaver, *supra* note 107, at 200; *see* NLRB v. Wyman-Gordon Co., 394 U.S. 759, 765-66 (1969) (ad hoc rules serve as a guide for future agency decisions); Beal, *supra* note 101, at 464. *But see*, James C. Thomas, *Statutory Construction When Legislation Is Viewed As A Legal Institution*, 3 HARV. J. ON LEGIS. 191, 191-93 (1966).

110. Weaver, *supra* note 107 at 204; *see* Mehta v. INS, 574 F.2d 701, 705 (2d Cir. 1978) (relief denied because petitioner should have been aware of previous agency decision and responded accordingly); Saint Francis Memorial Hosp. v. United States, 648 F.2d 1305, 1311 (Ct. Cl. 1981) (previous agency interpretation of regulation applies to present case).

111. Weaver, *supra* note 107, at 200-01.

112. United States v. Nixon, 418 U.S. 683, 695-96 (1974); Sims v. Heckler, 725 F.2d 1143, 1146 (7th Cir. 1984).

113. NLRB v. Wyman-Gordon Co., 394 U.S. 759, 765-66 (1969); Ruangswang v. INS, 591 F.2d 39, 44 (9th Cir. 1978); American Mach. Corp. v. NLRB, 424 F.2d 1321, 1329-30 (5th Cir. 1970).

114. Weaver, *supra* note 107, at 202-03; Beal, *supra* note 98, at 464.

115. Weaver, *supra* note 107, at 202-03.

B. *Facts: Nunez-Pena v. INS*[116]

In 1987 Ruben Nunez-Pena, a resident alien of the United States, was convicted of illegally using a telephone for drug trafficking and falsifying tax returns to hide drug profits.[117] He was paroled after serving almost two years in prison.[118] The Immigration and Naturalization Service (INS) moved to deport Nunez-Pena.[119] Found deportable by an immigration judge, his application for waiver of deportation was denied.[120] The Board of Immigration Appeals (BIA) reviewed the petitioner's claim under section 212(c) of the Immigration and Nationalization Act (INA).[121] Pursuant to this section, the BIA balanced " 'the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented in his behalf.' "[122] The BIA required the petitioner to " 'introduce additional offsetting favorable evidence, which in some cases may have to involve unusual or outstanding equities,' " in support of his petition to remain in the United States.[123] The BIA affirmed the INS decision ordering Nunez-Pena deported.[124]

C. *The Tenth Circuit Opinion*

Nunez-Pena argued that the BIA improperly required him to meet the "unusual or outstanding equities" test.[125] Normally, the BIA bases its deportability decision on a balance between the alien's undesirability as a resident and the humanistic hardships of deportation.[126] The BIA also uses the unusual or outstanding equities test in cases involving serious criminal acts.[127] Nunez-Pena claimed he was not subject to the outstanding equities rule because the INS had devised it through adjudication and not rulemaking.[128] The court acknowledged that, although other circuits had recognized the outstanding equities principle,[129] the precise argument had not been previously considered.[130]

The Tenth Circuit, by deferring to the agency's application of the outstanding equities rule, upheld the use of adjudicative rules by the

116. 956 F.2d 223 (10th Cir. 1992).
117. *Id.* at 224.
118. *Id.*
119. *Id.* The INS acted pursuant to 8 U.S.C. § 1251 (a)(11) (1988).
120. *Nunez-Pena*, 956 F.2d at 224.
121. *Id.* at 225. This portion of the INA has been utilized for both exclusion and deportation proceedings. *Id.*
122. *Id.* (quoting *In re* Marin, 16 I. & N. Dec. 581, 584 (BIA 1978) (interim dec.)).
123. *Id.* (quoting *In re* Buscemi, 19 I. & N. Dec. 628, 633 (BIA 1988) (interim dec.)).
124. *Id.* at 224.
125. *Nunez-Pena*, 956 F.2d at 225; *see supra* text accompanying note 123.
126. *Id.*
127. *Id.*
128. *Id.*
129. *See* Cordoba-Chaves v. INS, 946 F.2d 1244, 1246-47 (7th Cir. 1991); Blackwood v. INS, 803 F.2d 1165, 1168 (11th Cir. 1986).
130. *Nunez-Pena*, 956 F.2d at 225.

INS. The court reiterated the *Chenery*[131] holding that an agency has the discretion to proceed by general quasi-legislative rule or by individual ad hoc rulemaking through adjudication.[132] Additionally, the court noted that " '[a]djudicated cases may and do . . . serve as vehicles for the formulation of agency policies, which are applied and announced therein.' "[133] The court upheld the outstanding equities standard since "[a]n agency 'is not precluded from asserting new principles in an adjudicative proceeding.' "[134]

The Tenth Circuit did note that the agency's use of adjudicative rulemaking could violate an individual's rights where the INS added an element to a regulation which had been specifically eliminated during prior rulemaking,[135] or where undue hardship resulted to those relying on previous rules when the INS had abruptly changed its rule.[136] The court reasoned that Nunez-Pena had adequate notice of the outstanding equities standard since it had been formulated and applied in adjudications well before his petition.[137]

D. *Analysis*

Criticism of adjudicative rulemaking centers on the lack of public participation in the rulemaking process and on the lack of notice of new rules. Adjudicative proceedings, like their judicial counterparts, only permit parties to the action to participate.[138] This precludes other interested parties, although affected by a new rule, from participating in the decision-making process. The lack of a requirement for APA notice and comment procedures in adjudicative rulemaking insulates agencies from public participation.

A party's lack of notice of what specific adjudicative precedent may be applied to its particular case is troubling. Since adjudicative rules are easily distinguished and amended, a party may have difficulty preparing their case since "black letter" law does not arise from adjudicative precedent.[139] Subsequently, a party to an adjudicative hearing may find itself in violation of an amended rule that previously did not encompass its operations.

Judicial review of agency action also encourages agencies to use ad-

131. SEC v. Chenery Corp., 332 U.S. 194 (1947); *see supra* text accompanying notes 98-103.

132. *Nunez-Pena*, 956 F.2d at 225. The Tenth Circuit has generally followed *Chenery*. *See*, Nevada Power Co. v. Watt, 711 F.2d 913, 927 (10th Cir. 1983); NLRB v. American Can Co., 658 F.2d 746, 758 (10th Cir. 1981). *But see* First Bancorp v. Board of Governors, 728 F.2d 434, 438 (10th Cir. 1984).

133. *Nunez-Pena*, 956 F.2d at 225 (quoting NLRB v. Wyman-Gordon, 394 U.S. 759, 765 (1969)).

134. *Id.* (quoting NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974)).

135. *Id.* (referring to Patel v. INS, 638 F.2d 1199, 1202 (9th Cir. 1980)).

136. *Id.* (referring to Ruangswang v. INS, 591 F.2d 39, 43-44 (9th Cir. 1978)).

137. *Id.*

138. Weaver, *supra* note 107, at 165. *See generally* NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969) (agencies should balance the positive and negative attributes of quasi-legislation and adjudication in selecting a decision-making process).

139. Beal, *supra* note 98, at 473.

judicative rulemaking. Agencies find that: (1) rules promulgated through quasi-legislative procedures are more susceptible to judicial scrutiny; (2) adjudicative rules can be amended or overruled more easily than quasi-legislative rules; and (3) adjudicative rules can be retroactive in application.[140] Simply stated, adjudication offers a safer means of rulemaking for an agency.

The Tenth Circuit, or any other court for that matter, is unlikely to restrict application of adjudicative rules, notwithstanding the criticism aimed at the rules. Ad hoc rulemaking allows flexibility, responsiveness and creativity in solving the daily intricacies of administration. The drafters of quasi-legislative rules cannot practically anticipate all possible circumstances. Ambiguity and vagueness in statutes allows agencies to mold decisions under varying circumstances to effectuate fairness. The Supreme Court has stated that "not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations."[141] *Nunez-Pena* illustrates the Tenth Circuit's deference to an agency's choice of rulemaking procedures and the force of law given to adjudicative rules.

IV. CONCLUSION

During 1992, the Tenth Circuit favored judicial review of administrative agency decision-making. Although judicial review provided checks against agency discretion, deference to agency decision-making dominated. This deference permeated all areas of administrative decision-making, including an agency's interpretation of its own statute, an agency's determination of whether it was creating substantive law or simply interpreting it and the relatively unfettered ability of agencies to create rules through adjudicative hearings.

John C. Haas

140. Leahy, *supra* note 102, at 75.
141. SEC v. Chenery Corp., 332 U.S. 194, 202 (1947).