CHAPTER IX

RULES AND RULEMAKING

One of the most important developments in administrative law during the late twentieth century was the agencies' growing reliance on rulemaking as a means of formulating policy. Much can be said in favor of this trend. As commentators have argued, the rulemaking process can be more efficient than case-by-case adjudication, because it can resolve a multiplicity of issues in a single proceeding. A clear general rule can produce rapid and uniform compliance among the affected firms or individuals; the scope of an adjudicative precedent may well be harder to define, because its reach will usually depend to some degree on the facts of a particular case. At the same time, rulemaking can provide individuals with important protection. "When a governmental official is given the power to make discretionary decisions under a broad statutory standard, case-by-case decisionmaking may not be the best way to assure fairness. . . . [The use of rulemaking] provides [regulated persons] with more precise notice of what conduct will be sanctioned and promotes equality of treatment among similarly situated [persons]." Dixon v. Love, 431 U.S. 105 (1977). Furthermore, rulemaking proceedings can put all affected parties on notice of impending changes in regulatory policy, and give them an opportunity to be heard before the agency's position has crystallized.

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2. A. THE GROWTH OF RULEMAKING

Administrative rulemaking is not a recent invention; the federal executive departments have issued legally binding rules since the beginning of our national government, and the Administrative Procedure Act as originally passed in 1946 had several provisions dealing with rulemaking procedure. In the 1970s and 1980s, however, the number and significance of decisions being made in agency rulemaking proceedings increased dramatically. Despite the advantages of rules over individual adjudications, the agencies probably would not have made such a marked shift toward rulemaking without some external pressures. From the agency's perspective, writing a general rule is often more difficult than deciding a particular case, and the likelihood of producing an undesirable or unintended result is correspondingly greater. Moreover, general rules are more likely to inspire concerted opposition from those who will be covered by them. An individual case isolates one respondent, generally selected because of questionable actions, for possible sanction, but a general rule can inspire the whole industry (whose members may or may not have engaged in similar actions) to fight—not only before the agency but in the courts, the Congress, and the media as well. In short, promulgating a rule can be more costly to the agency in time, effort, and good will than deciding a series of cases.

The major impetus for agencies to make greater use of their rulemaking authority came from Congress. Regulatory statutes enacted during the

1970s often contained express grants of rulemaking authority, and some of them specifically instructed agencies to proceed by general rule. Moreover, agencies' procedural choices were influenced by the changing nature of the tasks they were

being asked to perform. In the wave of health, safety, environmental, and consumer-protection legislation that burgeoned during the 1970s, Congress created programs under which administrative officials would be responsible for regulating hundreds of thousands of workplaces or pollution sources, or millions of consumer transactions. The agencies could not hope to accomplish these missions unless they were prepared to make liberal use of rulemaking authority.

The courts, too, have encouraged broader use of rulemaking. The dominant view in the federal system is that rulemaking clauses should be construed generously, see Mourning v. Family Pubs. Serv., Inc., 411 U.S. 356 (1973). That is, a rulemaking provision should be regarded as "a necessary and proper clause [that] empowers the Commission to deal with the unforeseen—even if that means straying a little way beyond the apparent boundaries of the Act—to the extent necessary to regulate effectively those matters already within the boundaries." North Am. Telecomms. Ass'n v. FCC, 772 F.2d 1282 (7th Cir. 1985). Sometimes, however, courts decide that an agency has gone too far. For example, in Chamber of Commerce v. NLRB, 721 F.3d 152 (4th Cir. 2013), the Board adopted a rule requiring employers to post notices in workplaces to inform employees of their rights under the National

Labor Relations Act. The Board relied on § 6 of the Act, which empowers the Board to promulgate "such rules and regulations as may be necessary to carry out the provisions of [this Act]." The court held, however, that the posting rule was not "necessary" to implement the Board's specific functions under the Act. See also Contender Farms, LLP v. USDA, 779 F.3d 258 (5th Cir. 2015), in which the court declined to read a broad rulemaking provision as granting substantive authority, where another statutory provision granted rulemaking authority specific to the

issues at hand.

Courts also have been unsympathetic to arguments that an agency's rulemaking authority should be construed narrowly in order to preserve regulated parties' right to a full hearing in adjudicative proceedings in which the rule might be applied. See pp. 293–297 supra. Some courts have even attempted to *force* agencies to use rulemaking, although the weight of authority strongly disfavors such efforts. See pp. 345–350 infra.

The growth of rulemaking gave rise to a searching reexamination of the adequacy of the procedures that agencies followed in adopting rules. Courts and legislatures became more willing to experiment with new variations on the APA's procedural models, as they sought to accommodate traditional rulemaking practices to the new kinds of decisions that agencies were making. Eventually this wave of procedural reform ebbed in significance, at least within the courts. Meanwhile, other innovations emerged, such as e-rulemaking, negotiated rulemaking, and [309]

intensified executive oversight. To this day, the rulemaking process remains one of the most contentious areas of administrative law.

1. B. THE TYPES OF ADMINISTRATIVE RULES

The APA divides agency action into the broad categories of adjudication and rulemaking, and creates different procedural models within each category. Thus, to find out what procedures the APA requires an agency to use in promulgating a particular rule or standard, one must first make sure that the decision in question

is a rule, and then determine what type of rule it is.

1. *Rules Defined.* According to the APA, a rule is "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy" or to establish rules of practice. 5 U.S.C. § 551(4). Any other agency action is an adjudicative "order." Id. § 551(6). These definitions, however, are often taken less seriously than one might expect, because they differ significantly from the usual understanding of the two terms.

The APA's reference to rules of "particular applicability," which seems contrary to the very idea of a rule, is something of an historical anomaly. It is designed to preserve the traditional understanding that ratemaking proceedings (that is, those concerned with the approval of "tariffs" or rate schedules filed by public utilities and common carriers) should be regarded as rulemaking 310

proceedings rather than adjudications. In most instances, however, rules can be identified by the fact that they apply to a general *class* of persons or situations. Indeed, the premise that rules tend to be general in their applicability is at the heart of the policy justifications for the distinction between rulemaking and adjudication in administrative procedure. See pp. 221–224 supra.

Another source of difficulty is the language in § 551(4) indicating that rules must be of "future effect." Although the vast majority of administrative rules do concern future standards of conduct, agencies occasionally issue rules that are intended to operate retroactively. In Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988), the Court held that a statute will not be construed to authorize an agency to issue retroactive

legislative rules "unless that power is conveyed in express terms." This holding rests on the potential for unfairness that exists when officials impose liability for an act that was legal when it was done. The Court did not suggest, however, that when Congress *has* authorized retroactive regulations (see, e.g., 26 U.S.C. § 7805(b) (tax rulings)), the agency's pronouncement is not a "rule" for APA purposes. To be sure, a concurring opinion in *Georgetown* did assert that § 551(4) bars retroactive rules. That reasoning is flawed, however, because the APA language is merely a definition, not an enabling provision. Thus, a holding that a retroactive rule is not a "rule" for APA purposes would not prevent the agency from issuing such rules, but rather would *permit* the agency to issue them *without the safeguards of APA rulemaking* [311]

procedures—surely an anomalous result, in light of the distinctive potential for abuse that inheres in retroactive lawmaking.

In practice, therefore, the primary factor distinguishing a rule from an adjudicative order is the "general applicability" of the former. This distinction corresponds to the usage that administrative lawyers commonly employ: An agency action that is addressed to *named parties* is an adjudication (except in ratemaking cases); an action that is addressed to a *category* of persons or situations is a rule.

2. *Binding and Nonbinding Rules.* The most important and familiar type of rule is the *legislative* rule (sometimes called a regulation or a substantive rule). It has several distinctive characteristics. It has "the force and effect of law" and is always "rooted in a grant of [quasi-legislative] power by the Congress." Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979). A valid legislative rule conclusively settles the matters it

addresses, at least at the administrative level. Of course, to say that such a rule has "the force and effect of law" does not mean that it is immune from judicial review; courts can entertain challenges to the rule on various grounds. See pp. 115–125 supra. It does mean, however, that unless the rule is overturned by a court (or rescinded by the agency), it is binding on both private parties and the government itself. This *binding effect* is the chief identifying feature of a legislative rule: its nature and purpose is to alter citizens' legal rights in a decisive fashion.

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Of course, not all agency pronouncements that fit within the APA's broad definition of "rule" are legislative rules. The courts have explored the boundaries of the narrower term in the course of applying the APA's rulemaking provisions. The APA generally requires that the issuance of rules be preceded by a public procedure, usually a notice-and-comment process, but it exempts "interpretative rules, general statements of policy, [and] rules of agency organization, procedure, and practice" from this command. 5 U.S.C. § 553(b)(A). Congress excluded interpretive rules and policy statements (which are sometimes collectively known as "guidance documents") from the APA's procedural obligations because they are *not* legislative rules. Thus, in order to determine whether a given rule was issued in compliance with the APA, courts must regularly distinguish legislative rules from those more informal pronouncements. This has never been an easy task. During the 1970s some courts maintained that an agency is obliged to allow notice and comment before issuing any rule that has a "substantial impact" on the public. See, e.g., Pickus v. U.S. Bd. of Parole, 507 F.2d 1107, 1112 (D.C. Cir. 1974). This test subsequently fell out of favor, because it was too much at odds with the language of the APA: