

Gene Scalia Comments to Third Draft Recommendation

All references are to the 10/27 Otis/Morrison draft.

Preamble:

Page 2, line: Can we characterize policy statements as something short of “essential”? “Important””

P. 2, line 28: I suggest we be less definitive that policy statements are more accessible to those without counsel. In truth, sometimes they favor the cognoscenti, versus those outside of Washington D.C. who try to understand their obligations by looking at the substantive law and rules.

P. 6, line 110: It’s inapt to characterize a policy statement as being “applied” in adjudication or enforcement, since it lacks force of its own. “Followed” is better.

Recommendation:

Policy statements cannot bind an agency either. I don’t believe we capture that currently. It could be added to Recommendation 1: “An agency should not use a policy statement to create standards binding on the public *or agency*,”

Rec. 3: This recommendation (and the recommendation as a whole) would benefit from clarity regarding the opportunity to “appeal.” Suggested addition is italicized: “For example, an agency may require officials at one level to follow the approach described in a policy statement while authorizing officials at a higher level to *reverse those subordinate officials* and to act in ways different from that described in the document when appropriate.”

Rec. 5: It’s clearer if we say that statements may use mandatory language to describe “*an existing* statutory or regulatory requirement.”

Rec. 8(c): This is confusing and perhaps simply warrants discussion. If an agency believes a policy statement reflects the “right policy,” why does that counsel flexibility? Indeed (and adding to the confusion), the next sentence suggests the opposite—codify it as a legislative rule.