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ADMINISTRATIVE LAW

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I. INTRODUCTION

In the foreword to last year's survey issue,[1] Judge Patrick Higginbotham expressed a large degree of doubt as to the general worth of survey articles given his view "that the articles often seem to have trouble finding any clear purchase in the subject matter, and so range from summaries of the court's work in a given area . . . to what are essentially casenotes."[2] Although he did find last year's survey to be of good overall quality,[3] Judge Higginbotham's admonition concerning the entire genre of survey articles provides worthwhile advice for one who has been requested to pen such an article. Accordingly, the ensuing survey article has been crafted in a manner which the author hopes will avoid the pitfalls identified by Judge Higginbotham.

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1. *Fifth Circuit Survey*, 20 TEX. TECH L. REV. 267 (1989).

2. Higginbotham, *Stays of Execution: A Search for Predictability and Rationality*, 20 TEX. TECH L. REV. vii (1989).

3. *Id.*

The vast majority of the administrative law cases considered by the Fifth Circuit Court of Appeals during the survey period[4] involved neither novel issues of administrative procedure nor factual situations of significant precedential value or interest. That is not to say, however, that the Fifth Circuit did not face an unusual array of factual contexts in which administrative law issues presented themselves. Indeed, the Fifth Circuit entertained administrative law appeals on matters ranging from a dispute concerning regulations imposed on the shrimping industry that were designed to reduce sea turtle mortality,[5] to a challenge of the CIA Director's denial of a Freedom of Information Act request for CIA documents relating to the 1985 sinking of the GREENPEACE vessel, *Rainbow Warrior*, in New Zealand.[6] The circuit also reviewed appeals concerning intriguing matters as varied as whether the National Collegiate Athletic Association and Southwest Athletic Conference are governmental bodies for purposes of the Texas Open Records Act,[7] whether the Occupational Safety and Health Administration properly promulgated a new grain dust accumulation standard designed to eliminate or reduce the risk of fires and explosions in our nation's grain elevators,[8] and whether the Railroad Commission of Texas can promulgate regulations requiring a caboose on most trains operating in Texas despite federal statutes to the contrary.[9]

Although the aforementioned cases involved relatively significant issues of substantive law that arose in administrative contexts, the decisions were not unique with respect to either administrative deci-

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4. The survey period ran from June 1, 1988, to May 31, 1989.

5. *See* Louisiana *ex rel.* Guste v. Verity, 853 F.2d 322 (5th Cir. Aug. 1988) (affirming a summary judgment upholding the regulations against attacks that they were arbitrary and capricious and violated certain shrimpers' equal protection rights).

6. *See* Knight v. CIA, 872 F.2d 660 (5th Cir. May 1989) (upholding a summary judgment finding that the documents were exempt from disclosure on national security grounds).

7. TEX. REV. CIV. STAT. ANN. art. 6252-17a (Vernon Supp. 1989). *See* Kneeland v. National Collegiate Athletic Ass'n, 850 F.2d 224 (5th Cir. July 1988), *cert. denied*, ____ U.S. ____, 109 S. Ct. 868, 102 L. Ed. 2d 991 (1989). The court held that the two sports entities were not governmental bodies and, thus, were not subject to the requirements of the Texas Open Records Act. 850 F.2d at 231.

8. *See* National Grain & Feed Ass'n v. OSHA, 866 F.2d 717 (5th Cir. Jan. 1989), *modifying*, 858 F.2d 1019 (5th Cir. Oct. 1988) (ultimately remanding the matter to the agency for reconsideration of the economic feasibility of the new grain dust standard).

9. *See* Missouri Pac. R.R. v. Railroad Comm'n, 850 F.2d 264 (5th Cir. July 1988), *cert. denied*, ____ U.S. ____, 109 S. Ct. 794, 102 L. Ed. 2d 285 (1989) (holding that the caboose regulations were pre-empted by federal statute).

sionmaking or the judicial review of agency actions and, accordingly, are not properly within the province of this segment of the survey. On the other hand, the Fifth Circuit did have the opportunity during the survey period to consider several cases which raised important issues involving (1) agency mechanisms for establishing policy[10] and (2) the jurisdictional contours of federal court review of certain agency actions.[11] This segment of the annual survey will focus on those cases.

II. ESTABLISHING POLICY

A federal agency may establish policy by various means including (1) the promulgation of rules pursuant to the procedures prescribed by section 553 of the Administrative Procedure Act ("APA"),[12] (2) on an ad hoc basis through the adjudication of contested cases,[13] and (3) by setting forth general statements of policy.[14] The Fifth Circuit considered cases during the survey period involving issues concerning each of these methods of establishing policy.

A. Rulemaking

The general method by which a federal agency establishes policy affecting members of the public is through the adoption of rules pursuant to the provisions of the APA. Persons affected by those rules may pursue judicial review of the agency action. In *Texas v.*

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10. *See generally* Texas v. Lyng, 868 F.2d 795 (5th Cir. Mar. 1989) (establishing policy by rulemaking); Miranda v. National Transp. Safety Bd., 866 F.2d 805 (5th Cir. Mar. 1989) (adjudication); Tearney v. National Transp. Safety Bd., 868 F.2d 1451 (5th Cir. Apr. 1989) (adjudication), *cert. denied*, ___ U.S. ___, 110 S. Ct. 333, ___ L. Ed. 2d ___ (1989); Panhandle Producers & Royalty Owners Ass'n v. Economic Regulatory Admin., 847 F.2d 1168 (5th Cir. June 1988) (general policy statements).

11. *See* Texas v. United States, 866 F.2d 1546 (5th Cir. Mar. 1989).

12. 5 U.S.C. § 553 (1988). Section 553 sets forth two different procedures for agency promulgation of substantive rules: informal rulemaking involving agency notice and the opportunity for public comment and formal rulemaking in which an agency must conduct an evidentiary hearing. *Id.* The Act requires that an agency follow the informal rulemaking procedures except "[w]hen rules are required by statute to be made on the record after opportunity for an agency hearing . . . ." *Id.* § 553(c). *See* R. PIERCE, S. SHAPIRO & P. VEIKUIL, ADMINISTRATIVE LAW AND PROCESS 315-17 (1985).

13. *See* SEC v. Chenery Corp., 332 U.S. 194 (1947) (holding that it was within agency's discretion to set policy by adjudication).

14. The APA authorizes agencies to issue interpretative rules, agency rules of practice, and general statements of policy without the need for notice and hearing. *See* 5 U.S.C. § 553(b)(A) (1988).

Lyng[15] the Fifth Circuit considered a challenge to certain final rules that had been promulgated by the United States Department of Agriculture ("USDA"); the rules involved a relaxing of a quarantine on the shipment of citrus fruit from Florida to other citrus-producing areas such as Texas.[16] Based on the agency's perception that a quarantine on the shipment of such fruit was no longer necessary, the USDA published proposed regulations in September 1987 in an effort designed to permit shipments of citrus fruit from Florida to other citrus-producing areas.[17] Thereafter, and pursuant to the requirements of the APA, the USDA accepted public comments regarding the proposed relaxation of the quarantine and held multiple public hearings.[18] Several parties submitted comments to the agency that reflected both the occurrence of new outbreaks of the citrus canker in Florida and the significance of these new outbreaks.[19] Based on the comments regarding the significance of the new discoveries of the citrus canker disease, the USDA published a notice indicating its withdrawal of its proposed quarantine relaxation rules.[20] Subsequent to the agency's January 1988 withdrawal of its proposed rulemaking, a special agency task force on the citrus canker disease conducted hearings which elicited testimony reflecting that the previously published USDA lifting of the quarantine could be administered safely, and the task force recommended that the agency implement its prior proposal.[21] After receiving the task force's recommendations, the agency determined in February 1988 to publish its original proposal as final rules.[22]

After the USDA adopted these final regulations concerning the relaxation of the Florida citrus fruit quarantine, the State of Texas filed an action seeking judicial review of the agency's rulemaking

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15. 868 F.2d 795 (5th Cir. Mar. 1989).

16. *See id.* at 796.

17. *See id.* The agency had initially instituted the quarantine as a means of preventing the spread of "citrus canker, a plant disease found in Florida citrus groves and nurseries." *See id.*

18. *Id.*; *see* 5 U.S.C. § 553(c) (1988) (requiring the agency to accept public comments).

19. *See* 868 F.2d at 796.

20. *See id.* The notice of withdrawal also indicated that the agency expected to publish a new proposal in the "near future." *See id.*

21. *See id.*

22. *See id.* The final rules were published at 53 Fed. Reg. 3999 (Feb. 11, 1988). The rules as initially proposed were published at 52 Fed. Reg. 35,105 (Sept. 17, 1987), and the agency's intermediate withdrawal notice was published at 53 Fed. Reg. 140 (Jan. 5, 1988).

procedure, and a Texas citrus organization intervened.[23] These appellants, although conceding that the regulations as finally adopted did not differ significantly from the initial agency proposal,[24] raised a narrow question of law concerning interpretation of the rulemaking procedures required by the APA. Specifically, the appellants contended that subsequent to the agency's withdrawal of its original proposal, the USDA could not adopt the very same regulations as final rules without providing an additional period for public comment.[25] In contesting the agency's action in *Lyng* the appellants did not challenge the adequacy of the procedures followed by the agency with respect to the rules as originally proposed, but contended that the decision to withdraw the proposed rules terminated the initial rulemaking proceeding, thereby "requiring USDA to start from scratch before promulgating final rules."[26]

The Fifth Circuit rejected the appellants' challenge to the agency's rulemaking procedures, holding that the failure to provide a new comment period after the withdrawal of the initially proposed rules "d[id] not, by itself, require invalidation of USDA's final regulations."[27] The court reasoned that although there could be circumstances which might prevent an agency from relying on some previous notice and comment period, "the simple withdrawal of proposed regulations, without more, requires no such result [of invalidating the final rules]."[28] In reaching its conclusion the court examined whether the purposes of the APA's notice and comment requirements had been served in this particular rulemaking and whether the appellants were prejudiced in any fashion by the lack of opportunity to participate in a second round of public comments.[29] The court

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23. *See* 868 F.2d at 796.

24. *See id.*

25. *See id.* At trial the appellants did not identify any new information that they could provide to the agency in a new comment period but, nonetheless, argued that the APA's requirements must be strictly construed. *See id.* at 797.

26. *See id.* at 797.

27. *Id.*

28. *Id.* The court also observed that the position which the appellants advocated would foreclose an agency from ever being able to reconsider a withdrawal of a previously proposed rule. *Id.* This comment by the court is somewhat gratuitous given that the appellants did not appear to quarrel with an agency's right to reconsider an earlier withdrawal of a proposed rule but, instead, argued that the agency needed to provide a new period for public comment subsequent to such a reconsideration.

29. *Id.* at 798-800.

concluded that the agency had afforded the appellants an opportunity to provide public comments initially; the appellants had indeed provided certain public comments to the agency at that time; and the agency's decision not to allow a second period of public comments had not prejudiced the appellants on the facts of *Lyng*.[30]

The Fifth Circuit's decision in *Lyng* is both eminently reasonable and consistent with the requirements of the APA. Section 553 of the APA provides that after an agency publishes its notice of a proposed rulemaking, "the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation."[31] Hence, this section of the APA operates to permit persons who might be affected by agency rulemaking to have some opportunity to present their views to the agency prior to the final adoption of those rules, but the agency need not authorize oral presentations. In addition, the APA does not generally require that an agency finalize rules based exclusively on the record established by the affected persons' submissions but, instead, requires only that the agency undertake "consideration of the relevant matter presented."[32] Accordingly, given that the agency has only this minimal requirement of considering the information and materials presented subsequent to publishing a proposed rule, the APA does not warrant the hypertechnical interpretation that the *Lyng* appellants urged.[33] Moreover, in *Lyng* the USDA provided the appellants with all the process contemplated by the APA in that (1) the agency provided notice of the proposed rulemaking through the initial publication in the Federal Register, (2) the agency afforded the appellants with an opportunity not only to provide written comments concerning the proposed rulemaking but to participate in oral hearings,[34] and (3) the rules as finally adopted did not differ significantly from those that were originally proposed.[35] Thus, the purposes of the APA's notice and comment provisions were served in this case, and the USDA's actions did not prejudice the *Lyng* appellants.[36]

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30. *Id.* at 800.

31. 5 U.S.C. § 553(c) (1988).

32. *Id.*

33. *See generally* B. SCHWARTZ, ADMINISTRATIVE LAW, 172-74 (2d ed. 1984) (discussing the rulemaking and notice procedures required by the APA).

34. 868 F.2d at 796.

35. *Id.*

36. By way of analogy, compare the analysis employed by the Austin Court of Appeals

Thus, in *Lyng*, the Fifth Circuit confronted an interesting issue with respect to one of the basic methods by which an agency establishes policy: rulemaking pursuant to the notice and comment provisions of the APA. The court's resolution of the issue presented in *Lyng* squares nicely with the purposes underlying the APA's notice and comment provisions. Moreover, the court quite properly reached its conclusion in a narrow fashion, thereby leaving open the possibility of a future challenge by a party who indeed suffers prejudice because of an agency's withdrawal and later adoption of a rule without an additional opportunity for comment.[37]

B. Rulemaking v. Adjudication

Over forty years ago the United States Supreme Court determined in *SEC v. Chenery Corp.*[38] that an agency may rely upon ad hoc adjudication to establish new policy for standards of conduct within the framework of its statutory powers.[39] The Supreme Court has subsequently unanimously reaffirmed this *Chenery* principle.[40] Accordingly, although rulemaking is the preferred form of establishing agency policy, the Supreme Court has firmly established that an agency has the discretion to establish new policy either by rulemaking or through ad hoc adjudication in the context of contested cases.

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in a challenge to state agency rulemaking in which the challengers asserted that there should be a new opportunity for notice and comment any time a final rule differs from the rule as initially proposed:

> Most would agree that [Administrative Procedure and Texas Register Act] § 5(a) should not be construed to impose upon the agency the Sisyphean task of automatically affording a new opportunity for comment simply because the rule, as promulgated by the agency, differs from the rule the agency proposed when the differences resulted from public comments at the hearing.

State Bd. of Ins. v. Deffebach, 631 S.W.2d 794, 801 (Tex. App.—Austin 1982, writ ref'd n.r.e.) (footnote omitted).

37. *See* 868 F.2d at 800. One could well imagine instances in which a party might be prejudiced by such an agency action. For example, the agency might wait months or even years to dust off formerly withdrawn rules and adopt them as final rules without the opportunity for further comment. It is none too difficult to contemplate the type of severe prejudice that such an action might engender.

38. 332 U.S. 194 (1947).

39. *Id.* at 202. The Court reasoned that agencies should ordinarily establish policy by means of promulgating rules to the extent possible, but that "any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise." *Id.*

40. *See* NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).

The Fifth Circuit issued two opinions during the survey period involving the *Chenery* principle. In both *Miranda v. National Transportation Safety Board*[41] and *Tearney v. National Transportation Safety Board*,[42] the Fifth Circuit addressed, *inter alia*, arguments that the Federal Aviation Administration ("FAA") had improperly established policy in the context of contested administrative cases without promulgating formal rules. Both cases involved the sanctioning of Southwest Airlines pilots for taxiing their aircraft while passengers were still standing in the aisles.[43] In these cases, the Administrator of the FAA suspended the pilots' airline transport certificates temporarily for violating a Federal Aviation Regulation which provides that "[n]o person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."[44] Although this regulation obviously does not specifically mention taxiing, the National Transportation Safety Board had previously ruled that taxiing with passengers standing constitutes a per se violation of this particular regulation.[45] The pilots urged that the FAA had improperly established a policy relating to taxiing with passengers standing, which, although being tantamount to a rule, was established without the agency proceeding via the APA's rulemaking requirements for establishing such policy.[46] In both cases the Fifth Circuit rejected the pilots' argument given the holdings in *Chenery* and *Bell Aerospace* that an agency has broad discretion to proceed by either the APA's rulemaking procedures or on a case-by-case basis in establishing policy within its ambit of statutory discretion.[47] The court reasoned that "[t]he taxiing rule is not a departure from the general safety requirements set forth in Section 91.9, but is, rather, a specific articulation of what is required by that section."[48]

The Fifth Circuit's holdings in these pilot cases are sound. It cannot reasonably be contended at this late date that an agency is

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41. 866 F.2d 805 (5th Cir. Mar. 1989). This decision actually disposed of two consolidated cases. *Id.* at 806.

42. 868 F.2d 1451 (5th Cir. Apr. 1989).

43. 866 F.2d at 806-07; 868 F.2d at 1452.

44. Federal Aviation Regulations, 14 C.F.R. § 91.9 (1988).

45. *See* 866 F.2d at 807; 868 F.2d at 1452 (both citing Administrator v. Lawson, NTSB Order No. EA-2419 (1986), *reconsideration denied*, NTSB Order No. EA-2466 (1987)).

46. *See* 866 F.2d at 808; 868 F.2d at 1453.

47. 866 F.2d at 808; 868 F.2d at 1453-54.

48. 868 F.2d at 1453.

foreclosed from announcing new principles in the course of an adjudicative proceeding.[49] The Supreme Court has, however, indicated that there may be limits to an agency's discretion to establish policy by means of ad hoc adjudication instead of through rulemaking.[50] In *Bell Aerospace*, the Court identified three possible exceptions in which an agency's discretion might be limited: (1) in a case in which the affected parties have placed substantial reliance on the agency's past decisions that invoked a contrary policy to the one being established,[51] (2) in a case in which the agency has imposed some new liability on individuals for past actions that were taken in good-faith reliance on prior agency pronouncements,[52] or (3) in a case involving the assessment of fines or damages for actions that were not previously so assessed.[53] The only one of these exceptions that is even remotely applicable to *Miranda* and *Tearney* would be the second exception. On the facts of these cases, however, there is no indication that the agency imposed its sanctions on the pilots for actions taken in reliance on prior agency pronouncements. To the contrary, prior to the events leading to the pilots' sanctions, Southwest Airlines provided an interoffice memorandum to its pilots, informing the pilots that the FAA had taken the position that taxiing while passengers are standing in the aisles is a violation of agency regulations.[54] Thus, given that the *Chenery* principle was applicable and none of the *Bell Aerospace* exceptions pertained, the Fifth Circuit properly ruled that the FAA's establishment of policy in the context of adjudicated pilot sanction cases was not improper. Accordingly, these cases serve as worthwhile reminders that agencies have the discretion to establish policy either through rulemaking or on an ad hoc basis through adjudication.

C. Policy Statements

The APA specifically provides that an agency may establish policy without needing to observe the notice and comment procedures

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49. *See* NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974); SEC v. Chenery Corp., 332 U.S. 194, 203 (1947).

50. 416 U.S. at 294-95.

51. *Id.*

52. *Id.* at 295.

53. *Id.*; *see also* Ford Motor Co. v. FTC, 673 F.2d 1008, 1010 (9th Cir. 1981) (holding an adjudication to be an improper basis for establishing policy when the adjudication changed existing law and had widespread application), *cert. denied*, 459 U.S. 999 (1982).

54. 866 F.2d at 808; 868 F.2d at 1454.

for promulgating formal agency rules by adopting so-called "general statements of policy."[55] The text of a policy statement might look identical to that of a rule, and might be fully as intricate and detailed. The District of Columbia Circuit has explained, however, that there is a distinction between formally promulgated rules and "mere" policy statements:

> The critical distinction between a substantive rule and a general statement of policy is the different practical effect that these two types of pronouncements have in subsequent administrative proceedings. . . . A properly adopted substantive rule establishes a standard of conduct which *has the force of law*. In subsequent administrative proceedings involving a substantive rule, the issues are whether the adjudicative facts conform to the rule and whether the rule should be waived or applied in that particular instance. *The underlying policy embodied in the rule is not generally subject to challenge before the agency.*
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> A general statement of policy, on the other hand, does not establish a "binding norm." It is not finally determinative of the issues or rights to which it is addressed. *The agency cannot apply or rely upon a general statement of policy as law* because a general statement of policy only announces what the agency seeks to establish as policy. A policy statement announces the agency's tentative intentions for the future. When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement *had never been issued.* An agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of a general statement of policy.[56]

Thus, if an agency has followed the APA's notice and comment procedures for promulgating a rule, that rule will have the force and effect of law in any subsequent administrative proceeding. To the contrary, an agency's policy statement will have no binding effect in any subsequent administrative proceedings, and the agency will have to provide evidence and argument in support of its actions taken pursuant to the policy statement as if the statement were not in existence.

The Fifth Circuit addressed the effect of an agency's employment of a policy statement in a subsequent administrative proceeding in

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55. 5 U.S.C. § 553(b) (1988).

56. Pacific Gas & Elec. Co. v. Federal Power Comm'n, 506 F.2d 33, 38-39 (D.C. Cir. 1974) (emphasis added and citations and footnotes omitted).

Panhandle Producers & Royalty Owners Association v. Economic Regulatory Administration.[57] In *Panhandle Producers*, the Secretary of Energy had issued a general policy statement pertaining to gas imports which stated in part that "parties opposing an import will bear the burden of demonstrating that the import arrangement is not consistent with the public interest."[58] Although the agency had issued this policy statement by publication in the Federal Register, the agency did not follow the APA's full notice and comment procedures required for the promulgation of a rule.[59] In *Panhandle Producers*, the challengers argued, *inter alia*, that the Economic Regulatory Administration had improperly given the policy statement the force of a formally enacted substantive rule.[60] In essence, the challengers urged that the agency could not rely on a mere policy statement for *any* purpose,[61] although the agency had not only relied on the policy statement to allocate the burden of proof in its importation proceedings, but also had cited the policy statement as a basis of authority in its ensuing orders.[62]

In *Panhandle Producers*, the Fifth Circuit determined that the agency had not treated the policy statement as a binding precedent with the force and effect of law or of a formally promulgated rule.[63] The court reasoned that although the agency had relied on the policy statement with respect to the allocation of the burden of proof, the agency had responded "fully to each argument made by opponents of the [import] order, without merely relying on the force of the policy statement."[64] Moreover, the court rejected the challengers' contention that because the policy statement was not a formally promulgated rule, then the agency was bound to ignore it altogether.[65]

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57. 847 F.2d 1168 (5th Cir. June 1988).

58. *See id.* at 1171 (quoting 49 Fed. Reg. 6684, 6685 (1984)). Prior to the issuance of the policy statement, the agency had placed the burden of proof on a gas importer to show that its proposal for gas imports was consistent with the public interest requirements set forth in section 3 of the Natural Gas Act. *Id.*; *see* 15 U.S.C. § 717(b) (1982).

59. 847 F.2d at 1171.

60. *See id.* at 1174.

61. *See id.*

62. *See id.* at 1171-72. By allocating the burden of proof in agency adjudications, this statement of policy may be considered to have much more than a mere procedural impact on the contested cases. *See* W. GELLHORN, C. BYSE, P. STRAUSS, T. RAKOFF, & R. SHOTLAND, ADMINISTRATIVE LAW CASES AND COMMENTS 75 (8th ed. Supp. 1989).

63. 847 F.2d at 1175.

64. *Id.*

65. *Id.*

To the contrary, the court observed that the agency had proceeded on all the issues addressed by the policy statement in a manner which afforded the challengers an opportunity to wage a "complete attack" on the agency's application of the guidelines.[66] Accordingly, the Fifth Circuit concluded that the agency had not given the policy statement undue weight but had, instead, provided a thorough and fair consideration to all arguments raised.[67]

Thus in *Panhandle Producers*, the Fifth Circuit determined that although an agency policy statement does not have the force and effect of law in a subsequent administrative proceeding as does a properly promulgated rule, an agency is not required to act as if the policy statement had never been written. Indeed, the court observed that although "a non-binding policy statement must be considered 'subject to complete attack' before being applied in particular cases [, that] does not mean that such a statement must be ignored *entirely* in those cases."[68] Accordingly, *Panhandle Producers* indicates that although an agency must provide support in any later administrative adjudications for its substantive positions otherwise set forth in the agency's general statements of policy, the agency may employ such policy statements and need not ignore those statements entirely in its future contested proceedings.

III. A THORNY JURISDICTIONAL PROBLEM

The paths of federal agency regulation, state agency regulation, and private parties' actions at times become intertwined, and the federal courts are then called upon to provide the necessary guideposts to traverse such terrain.[69] In *Texas v. United*

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66. *Id.*

67. *Id.* The court relied on a comparable analysis by the District of Columbia Circuit in Panhandle Producers & Royalty Owners Ass'n v. Economic Regulatory Admin., 822 F.2d 1105, 1110-11 (D.C. Cir. 1987).

68. 847 F.2d at 1175 (emphasis in original). *Accord* Independent Petroleum Ass'n v. Economic Regulatory Admin., 870 F.2d 168, 172 (5th Cir. Mar. 1989).

69. For example, the Fifth Circuit recently encountered General Motors Corp. v. EPA, 871 F.2d 495 (5th Cir. Apr. 1989), which involved a private party's appeal of the EPA's disapproval of an order issued by the Texas Air Control Board. The state's order had temporarily authorized the private party to exceed relevant air pollution limits imposed by certain state rules, which the state had promulgated pursuant to federal statute. *Id.* at 495-96. The intriguing part of *General Motors* was that the EPA disapproved this state order several months after the order had expired by its own terms. *Id.* at 496. In an opinion that primarily

States[70] the Fifth Circuit considered a regulatory dispute between Texas and the Interstate Commerce Commission ("ICC") concerning their conflict over the regulation of a private entity's shipments of carpet from Georgia to a Texas warehouse and then from the warehouse to final destinations across Texas and neighboring states.[71] Specifically, E & B Carpet Mills, a division of Armstrong World Industries, was engaged in shipping carpet from Georgia to a warehouse in Arlington, Texas.[72] E & B desired to transport carpet from this Arlington warehouse to its customers pursuant to interstate trucking rates regulated by the ICC instead of paying higher intrastate trucking rates regulated by the Texas Railroad Commission.[73] Obviously, Texas, along with various state-licensed transport carriers, wanted E & B to use local carriers at the higher intrastate rates.[74] The parties were in agreement that any carpet shipped from Georgia to Texas which E & B had designated at the time of departure as being intended for delivery to a specific customer constituted carpet traveling solely in interstate commerce until reaching that customer;[75] the parties referred to such carpet as "sidemarked."[76]

The primary dispute in *Texas v. United States*, however, centered on carpet that E & B shipped from Georgia to the Arlington warehouse but then stored in the warehouse for several months prior to shipment to the ultimate customers.[77] The parties referred to this stored carpet as "non-sidemarked."[78] The dispute in this case arose when E & B employed Reeves Transportation Company, an interstate

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focused on the statutory purposes of a section of the federal Clean Air Act, 42 U.S.C. § 7413(d)(2) (1982), the Fifth Circuit concluded that the agency had no authority to disapprove the expired state order, and that the order appealed from was not a final action subject to direct appeal from the agency pursuant to 42 U.S.C. § 7607(b)(1) (1982). *Id.* at 503-04. As the court so aptly observed, "Common sense suggests that something is amiss when an agency purports to disapprove an expired order after the fact." *Id.* at 504.

70. 866 F.2d 1546 (5th Cir. Mar. 1989).

71. *See id.* at 1548.

72. *See id.*

73. *See id.*

74. *See id.* The court observed that "[s]hippers, truckers, state regulators, and federal agencies have litigated similar wrangles over 'hub-and-spoke' distribution systems for at least sixty years." *Id.* (citing Public Service Comm'n v. Wycoff, 344 U.S. 237 (1952); Atlantic Coast Line R.R. v. Standard Oil, 275 U.S. 257 (1927)).

75. *See* 866 F.2d at 1549.

76. *Id.*

77. *Id.* at 1549.

78. *See id.*

trucking firm, to transport such "non-sidemarked" carpet from the Arlington warehouse to E & B's customers at interstate rates subsequent to E & B marking this carpet as having been shipped as "storage-in-transit."[79]

The regulatory dispute in this matter turned upon whether the shipments of carpet that had remained in the Arlington warehouse for some months were interstate or intrastate in nature.[80] The court observed that "both Texas and the ICC covet[ed] jurisdiction to adjudicate the meaning of 'interstate' transportation in the first instance."[81] The case meandered down an intricate procedural path. First, Texas initiated an investigation of Reeves, the interstate shipper,[82] but before any state court proceedings began, Armstrong World Industries, E & B's parent, sought a declaratory judgment from the ICC that the contested shipments were interstate in character.[83] Texas, nonetheless, began a state court prosecution against Reeves and, in addition, intervened in the ICC proceedings.[84] The ICC denied Texas' request for a stay of the federal agency proceedings, pending the outcome of the state court prosecution, and ruled that the shipments were interstate in character.[85] Thereafter, Armstrong sought an injunction in federal district court to bar Texas from pursuing its state court prosecution against Reeves.[86] The ICC then intervened on Armstrong's side,[87] but the district court denied the injunction.[88] While Armstrong's federal court action was pending, however, Texas, together with several private shippers and the Alabama Public Service Commission, requested that the ICC reopen its proceedings that had declared the shipments of carpet from Arlington to be interstate in

79. *See id.* E & B affixed this "storage-in-transit" mark on such carpet to take advantage of Reeves' interstate trucking tariff so that the carpet stored in the warehouse would be considered as remaining "in transit" even though it was sitting in a Texas warehouse, "so that the Dalton [Georgia]-to-Arlington-to-customer journey [would be] regarded as one, continuous trip." *See id.*

80. *Id.* at 1548.

81. *Id.*

82. *See id.* at 1550.

83. *See id.* Section 554(e) of the APA permits agencies to issue declaratory orders to terminate controversies or remove uncertainty. 5 U.S.C. § 554(e) (1988).

84. *See* 866 F.2d at 1550.

85. *See id.*

86. *See id.* Armstrong also sought money damages pursuant to 42 U.S.C. § 1983 (1982). *See id.*

87. *See id.*

88. *See id.*

character.[89] The agency denied this motion.[90] Texas thereafter appealed the original ICC determination that the shipments were interstate in character to the Fifth Circuit.[91]

The Fifth Circuit's cogent analysis of the complex factual and procedural scenario set forth above involved several important issues of administrative procedure. First, Texas contended that the court did not have jurisdiction over the matter because the ICC's declaratory order was allegedly not reviewable because it was not a final agency action.[92] This placed Texas in the intriguing position of appealing an agency order to the Fifth Circuit while maintaining, *inter alia*, that the court lacked jurisdiction to consider the appeal.[93] This contradiction arose because Texas sought a judicial holding that the ICC's declaratory order construing the scope of the interstate shipping certificate was merely advisory, not final and subject to judicial review.[94] Accordingly, if the court had found the agency's declaratory order to be merely advisory, then — at least in theory — the order would have had no preclusive effect in the state court prosecution action. The Fifth Circuit determined, however, that the agency's declaratory ruling that the carpet shipments from the Arlington warehouse were interstate in character had settled rights and removed uncertainty as contemplated by section 554(e) of the APA.[95] Thus, the court opined that the declaratory order was final and reviewable — provided that the agency had the jurisdiction in the first place to issue the order.[96]

Perhaps the most significant administrative law issue involved in *Texas v. United States* centered on whether the ICC had jurisdiction initially to issue the declaratory order sought by the carpet company. Along with its finality argument, Texas contended that the ICC lacked jurisdiction to issue its initial declaratory order.[97] The Fifth

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89. *See id.*
90. *See id.*
91. *Id.*
92. *Id.* at 1550-51.
93. *Id.* at 1548-49.
94. *Id.* at 1551.
95. *Id.*; *see supra* note 83.
96. *Id.* Hence, the finality issue turned on the court's resolution of the intertwined jurisdictional issue.
97. *Id.* Texas also argued that the ICC was biased and that the ICC had received improper *ex parte* communications from Armstrong. *Id.* at 1554. The Fifth Circuit summarily rejected

Circuit resolved this jurisdictional dispute by determining that the ICC has primary jurisdiction to adjudicate the scope of an ICC shipping certificate and, accordingly, that it was within the ICC's jurisdiction for that agency to determine whether these particular shipments were interstate or intrastate in character.[98]

In reaching its conclusion concerning the jurisdictional issue in *Texas v. United States*, the Fifth Circuit relied on the Supreme Court's decision in *Service Storage & Transfer Co. v. Virginia*.[99] In *Service Storage*, Virginia had commenced a criminal action against a trucker that had been transporting goods from a Virginia initiation point, to a spot in West Virginia, and then back to a Virginia destination.[100] Prior to the completion of the Virginia criminal proceeding, the trucker sought and obtained an ICC order construing the trucker's federal certificate as authorizing the contested travel.[101] The Virginia court convicted the trucker, but the Supreme Court reversed holding that such interpretations of trucking certificates should be made in the first instance by the agency "upon whom Congress has placed the responsibility of action."[102]

In *Texas v. United States*, Texas attempted to distinguish *Service Storage* by urging that the contested shipments from the Arlington warehouse were on their face intrastate in nature, whereas the shipments in *Service Storage* definitely crossed state lines.[103] The Fifth Circuit rejected this argument observing that "[b]y directing attention to the character of the shipments involved, Texas invites us to decide the jurisdictional issue by prejudging the substantive."[104] The Fifth Circuit indicated that the Supreme Court in *Service Storage* had expressly stated that interpretations of federal trucking certificates should be made by the issuing agency,[105] and the panel observed further that judgments about the merits of a claim relate "to the proper disposition of the claim, rather than to jurisdictional authority

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both of these arguments, which had stemmed from the collateral litigation in which the ICC had sought a federal court injunction to preserve its jurisdiction to decide the character of the contested shipments in the matter. *Id.* at 1554-55.

98. *Id.* at 1554-55.
99. 359 U.S. 171 (1959).
100. *See id.* at 172-73.
101. *See id.* at 177.
102. *Id.*
103. *See* 866 F.2d at 1552.
104. *Id.*
105. *Id.*

to dispose of the claim at all."[106] Thus, on the jurisdictional issue the Fifth Circuit held that the Supreme Court's decision in *Service Storage* governed this particular dispute and that the ICC had the primary jurisdiction to determine the nature of the trucking shipments.[107]

The Fifth Circuit's jurisdictional holding in *Texas v. United States* appears eminently sound and indeed controlled by *Service Storage*. The decision, however, involves an interesting application of the doctrine of primary jurisdiction in that by finding that the ICC had primary jurisdiction to consider the character of the trucking shipments in this matter,[108] the court effectively preserved its jurisdiction to review the merits of the agency's declaratory order. The courts do not typically employ the doctrine of primary jurisdiction in such a manner. Instead, the courts tend to invoke the doctrine to dispose of a judicial action rather than to preserve the ability to review the merits of the matter.[109] Thus, when a court determines that a matter raised before the court is within the primary jurisdiction of an agency, it will typically dismiss the action in favor of review by the agency.[110] The Fifth Circuit here, however, properly affirmed the ICC's initial jurisdiction over the matter and then confronted the merits of the agency's decision to characterize the contested shipments as being interstate in character.[111]

With respect to the merits of the ICC's ruling in this matter concerning the nature of the carpet shipments, the panel's views diverged. The majority held that the agency's determination that the shipments were interstate in character was reasonable,[112] but Judge Higginbotham could not find that the shipments to other destinations in Texas of the carpet which had remained in the Arlington warehouse for some months could reasonably be considered interstate in char-

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106. *Id.* The Fifth Circuit also relied on its earlier decision in Merchants Fast Motor Lines, Inc. v. ICC, 528 F.2d 1042, 1045 (5th Cir. 1976), in which the court had explained that if the trucking company involved in that dispute had believed that particular traffic on a route from Dallas to El Paso had been intrastate in nature, the proper forum for such complaint was the ICC.

107. *Id.* at 1554.

108. *Id.*

109. *See, e.g.*, United States v. Western Pac. R.R., 352 U.S. 59 (1956); R. PIERCE, S. SHAPIRO & P. VERKUIL, ADMINISTRATIVE LAW AND PROCESS 206-07 (1985).

110. *Id.*

111. 866 F.2d at 1553.

112. *Id.* at 1556.

acter.[113] Such a division of views is permissible and none too surprising, however, given the nature of the scope of review applicable to the case. Indeed, although the panel was divided on whether the agency's interpretation of the nature of the carpet shipments was reasonable, all three judges concurred that the Supreme Court's decision in *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*[114] controlled the court's scope of review.[115]

Thus, the Fifth Circuit traversed the jurisdictional terrain in *Texas v. United States* and applied the proper scope of judicial review, but divided on the merits of the agency's action.[116] The opinions are ripe with excellent analysis of certain key issues of federal administrative procedure and are worthy of close scrutiny.

IV. CONCLUSION

This article has focused on a handful of administrative law decisions rendered by the Fifth Circuit during the survey period that involved both the means by which a federal agency may establish substantive policy and certain jurisdictional problems. It has not been the author's intent to canvas all of the myriad decisions by the circuit involving reviews of agency decisionmaking. Instead, the focus has been on cases involving important applications of significant principles of administrative law. A review of these cases by the practitioner in this area of law should prove to be a worthwhile endeavor.

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113. *Id.* at 1569 (Higginbotham, J., dissenting in part).

114. 467 U.S. 837 (1984). In *Chevron*, the Supreme Court determined that when Congressional intent is unclear, a court should

> 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 ambiguous 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.

Id. at 863-64. In *Texas v. United States*, the agency interpreted the nature of the carpet shipments based on its authority to regulate interstate commerce pursuant to 49 U.S.C. § 10521 (1982 & Supp. IV 1986). That statute is silent concerning the interstate or intrastate character of carpet shipments such as those present in *Texas v. United States*. Thus, *Chevron* required the court to determine whether the agency interpretation was reasonable or permissible. Accordingly, the panel members in *Texas v. United States* applied the scope of review required by *Chevron* even though they diverged in their conclusions on the merits.

115. 866 F.2d at 1556, 1562-63.

116. *Id.*