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Reginald Parker

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ADMINISTRATIVE INTERPRETATIONS

REGINALD PARKER*

For centuries legal theorists have distinguished between *interpretation*, or *construction*, in the narrower sense of the word, and so-called *authentic interpretation*. The latter is interpretation by law.¹ This conception used to be of major importance in continental Europe, when an absolute monarch, as the supreme fountainhead of justice and administration, could not only make the law but also set down its meaning with authentic force.² In our time, however, we prefer to speak of amendatory statutes regardless of whether they, actually or fictitiously, purport to clarify an existing statute or enact new law.³ Modern legislatures, including our Congress, do not clothe their laws in the form of binding "opinions."

Apart from interpretation by the statutory lawmaker itself, however, law may be authentically—i. e., bindingly—construed by an organ on a hierarchical level below that of the legislature. This may be done by a court, or by an administrative agency having *pro tanto* the same power as a court, at least in the Anglo-American countries, where precedents are binding.⁴ The court, in deciding a question of law which lends itself to several constructions, interprets the law with binding force, not only for the parties involved in the litigation that gave rise to the decision, but also for the future. In civil-law countries the court merely decides the issue at bar. Its interpretation of the law has no authority, and is not authentic, except for the litigants.

*Visiting Professor of Law, University of Arkansas.—A revised form of this article will be incorporated in Part Three of the author's forthcoming book, *ADMINISTRATIVE LAW: A TEXT*, which will soon be published by The Bobbs-Merrill Company.

1. BLACKSTONE, COMMENTARIES 58-59, 86; 1 DERNBURG, SYSTEM DES ROEMISCHEN RECHTS 55, 62-63, (8th ed., Sokolowski, 1911), Kelsen, THE LAW OF THE UNITED NATIONS (Preface "On Interpretation") xiii-xvii (1950).

2. The FRENCH CIVIL CODE art. 4, expressly outlaws the prior practice of judges to inquire with the legislator (king, convention, etc.) as to the meaning of a statute. 1 GENY, METHODE D'INTERPRETATION ET SOURCES EN DROIT PRIVE POSITIF 78 (2d ed. 1919); HEINSHEIMER and others, FRANKREICHS CODE CIVIL 2-3 (vol. 1, *Die Zivilgesetze der Gegenwart*, 1932). In Austria the practice of judges to seek authentic interpretation of the civil law from the Emperor prevailed until the 1850's.

3. See CRAWFORD, THE CONSTRUCTION OF STATUTES 622-24 (1940). Amendatory statutes may be retroactive—as the true authentic interpretation always was; DERNBURG, *supra* note 1; cf. Davis, *infra* note 12, at 949—but the modern view holds that in doubt it is not. *Benton v. Wickwire*, 54 N.Y. 226, 229 (1873); *Personnel Finance Co. v. United States*, 86 F. Supp. 779, 785 (D. Del. 1949).

4. The rule that court decisions are binding precedents has been received in international law. See, e.g., STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 38(d).

With us, however, the law is bindingly, or authentically, interpreted by the courts with an effect similar to the above-mentioned binding interpretations, or amendatory laws, of the legislature itself.⁵

Interpretations that are not authentic, on the other hand—like any statutory interpretation or construction in the narrower sense of the word—are not binding. They merely amount to an intellectual process⁶—a logical analysis of the meaning of a given statute, regulation, common-law principle, or the like norm. To be able to interpret the law authentically requires legal authority. This means that only those who are legally authorized to make and interpret the law with binding force can legally do so; a statement which is indeed a tautology. But no authority is needed to construe the law as a matter of personal opinion, however persuasive the interpreter's point of view may be. Everybody is free to express himself and to try to influence others on a point of law.

Modern administrative agencies do a variety of things that cannot always be easily identified as falling into any particular category such as law-making, authentic interpretation, or simple construction of the law. Many agencies are authorized to make law, that is, rules or regulations. Others merely render individual decisions; but inasmuch as these decisions are recognized as having precedential force,⁷ the agency thereby interprets the law authentically, subject, at times, to judicial review. It may be added that every regulation also implicitly interprets the law, *i. e.*, the enabling statute under whose authority the rule is promulgated. It is, however, preferable not to use the term interpretation for what can be classified as lawmaking but rather to continue it to its usual meaning—the clarification, with or without binding force, of some legal point.

Agencies, however, do not only issue regulations (“quasi-laws”) and decisions. They also issue “interpretations,” often called “rulings,” “decisions,” or simply “press releases.”⁸ These interpretations may either be authentic, in which case they must be based on legal authority, or they may be mere opinions on how the law should be construed. Thus, the so-called “Treasury Regulations” contain not only true regulations (legal norms promulgated pursuant to statutory authority),⁹ but also, and closely akin thereto, authentic interpretations (definitions and explanations likewise promulgated

5. The different approach to judicial opinions (“precedents” here, decisions merely binding on the individual litigants there) marks, indeed, the *differentia specifica* between common and civil law. See Parker, *The Criteria of the Civil Law*, 7 THE JURIST 140 (1947).

6. Kelsen, *op. cit. supra* note 1, at xv.

7. As now expressly recognized in *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), 62 HARV. L. REV. 478 (1949), 18 GEO. WASH. L. REV. 492 (1950). And see *United States ex rel. Knauff v. McGrath*, 181 F.2d 839, 841 (2d Cir. 1950) (agency bound by its own “invariable” practice). For a negative application of the principle see *FPC v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 513 (1949) (non-exercise for ten years of certain powers indication that “Commission did not believe the power existed”).

8. *E.g.*, INT. REV. CODE § 23(p)(1) (deduction for pension trust pursuant to Commissioner's rules), and the regulation in U.S. Treas. Reg. 111, § 29.23(p).

pursuant to statutory authority),⁹ and also ordinary interpretations which are mere expressions of the Treasury's opinion on a given provision of the Internal Revenue Code.¹⁰ The Treasury Department apparently does not desire to make it clear whether its "regulations" and "rulings" are binding or not.¹¹

Of course, if there were no judicial supremacy, the difference would be of small consequence, for if an agency were the ultimate and final authority on the making and the interpreting of regulations, its announcement that it will henceforth construe the law in such and such a manner would be as binding as a regulation since it would be authentic interpretation by the regulation maker. Judicial control, however, makes it necessary to draw a line somewhere. The valid regulation and the authentic interpretation are law, but a non-authentic interpretation of the law by an agency is a mere opinion on law. The former is binding—since valid law and "binding" are synonyms—the latter is not. The practical importance of drawing a line between law (regulation or authentic interpretation) and interpretation, then, stands and falls with the doctrine of judicial review of administrative acts including regulations; and the more the doctrine is giving way to administrative finality, the more the distinction between true regulations (including authentic interpretation), and mere interpretation becomes obscured. Courts stress the difference particularly whenever they do not want to adopt an agency's interpretation.¹²

The Administrative Procedure Act includes in its definition of rules statements designed both to interpret and to prescribe law or policy.¹³ Specifically, "statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public" must be published in the Federal Register just like "substantive rules adopted as authorized by law," unless they are addressed to and served upon named persons.¹⁴ However, the rule-making procedure of Section 4 does not apply to "interpretative rules, general statements of policy . . ." ¹⁵ In other words, "interpretations" must be published (unless served personally), but no particular procedure or hearing need precede their formulation.

9. E.g., INT. REV. CODE § 23(m) (allowance for depletion under Commissioner's rules), and the definitions in U.S. Treas. Reg. 111, §§ 29, 23(m)-1.

10. As most provisions of U.S. Treas. Reg. 111.

11. See *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945); *Siomkin v. Fairchild Camera & Instrument Corp.*, 174 F.2d 289, 291-92 (2d Cir. 1949); *United States v. Bonnell*, *infra* note 12; Dwan, *The Federal Administrative Procedure Act and the Bureau of Internal Revenue in THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES* 146-55 (Warren ed. 1947).

12. E.g., *Biddle v. Comm'r*, 302 U.S. 573, 582 (1938); *United States v. Bonnell*, 180 F.2d 145, 148 (9th Cir. 1950) ("regulations," though "re-enacted"—*cf. infra* notes 32-36—held to be not administrative interpretation of statute but rather in excess thereof). And see Davis, *Administrative Rules—Interpretative, Legislative, and Retroactive*, 57 YALE L.J. 919, 922-23 (1948).

13. AD. PROC. ACT § 2(c). Of course an interpretation may also construe a mere regulation rather than a statute. *FPC v. Panhandle Eastern Pipe Line Co.*; *supra* note 7; *Woods v. Colt*, 85 F. Supp. 667 (D. Del. 1949).

14. AD. PROC. ACT. § 3(a).

15. *Id.* § 4(a).

The throwing together of both regulation and interpretation in Sections 2(c) and 3(a) has resulted in relieving the agencies from the otherwise difficult task of distinguishing between either category. No matter what a broadcasting policy announcement of the Federal Communications Commission may be called, and regardless of whether it be based on actual, concrete statutory authority (regulation) or on the mere desire of the Commission to advise the public (non-authentic interpretation), or both, it must now be published pursuant to Administrative Procedure Act, Section 3(a),¹⁶ which thus goes beyond Section 7 of the Federal Register Act.¹⁷ This, in a way, facilitates smooth administration and avoids issues of legal theory.¹⁸

However, the advantages of this apparent simplification are limited. The distinction between regulation and interpretation must be maintained in view of the procedural provision of Section 4. Much depends on the language in which the "rule" is couched. Where it is merely called "statement of policy," "interpretative ruling," or the like, no procedure under Section 4 is necessary.¹⁹ Nevertheless, many agencies, particularly the Bureau of Internal Revenue, choose to use words such as "rule," "regulation," or "ruling" promiscuously for both regulations and interpretations.²⁰ Perhaps this is done in order to be on the safe side in the event the "rule" should not be upheld as a statutorily authorized regulation or, which is practically the same here, an authentic interpretation. In this case the document may still be treated "with great deference" as the agency's opinion on how to construe the law.²¹

Worse yet, no clarity exists as to which interpretations must be published. The language of the Act neither clarifies the meaning of binding, authentic interpretation nor draws any limits whatsoever, which, if taken literally, would mean that every utterance of an agency head relating to the future conduct of business would have to be forwarded to and published in the Federal Register. So far as can be seen, the agencies have confined publication to the more fundamentally important interpretations.²² Even

16. See Caldwell, *The Federal Communications Commission in THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES* 72, 95 (Warren ed. 1947).

17. It applies only to documents having "legal effect." FED. REG. ACT § 6, 49 STAT. 500 (1935), 44 U.S.C. § 301 (1946).

18. "I do not believe I have ever thoroughly understood the distinction between an interpretative rule and other kind of rules. In a sense they are all interpretative of statutory provisions." Caldwell, *op. cit. supra* note 16, at 95. And see Davis, *op. cit. supra* note 12.

19. See, e.g., the Civil Aeronautics Board regulation discussed in Wanner, *Effect of the Administrative Procedure Act Upon the Civil Aeronautics Board in THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES* 132-33 (Warren ed. 1947).

20. *Supra* notes 8-11.

21. See *infra* note 29.

22. Wanner, *op. cit. supra* note 19; Markel, *The Impact of the Federal Administrative Procedure Act on the Federal Food, Drug and Cosmetic Act in THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES* 400-401, 411 (Warren ed. 1947); Caldwell, *supra* note 16, at 91; Davis, *supra* note 12. See also Newman, *Government and Ignorance*, 63 HARV. L. REV. 929 (1950).

this cannot be said, however, in regard to agencies which are not usually engaged in rule making. Thus, the very important, recent detailed announcement of the National Labor Relations Board of the classes of enterprises over which the Board will take jurisdiction has been made public only through the newspapers.²³ The answer is essentially left to the agencies themselves, inasmuch as there is no sanction against non-publication of an interpretation. A regulation not published may not be enforced against a party without knowledge;²⁴ but a mere non-authentic interpretation is never "enforced". The party that does not accept it as correct need not do so regardless of whether or not the interpretation was made public, since it will be for the court to decide which legal view is correct. The courts, however, are giving "great weight" to administrative interpretations, though they be not binding; and unquestionably, this weight is not as great in the case of unpublished interpretations.²⁵ All in all, here as elsewhere, the Administrative Procedure Act, despite the obvious intention of its sponsors, has not clarified the situation.²⁶ Nor has there been any attempt to define the agencies' authority to interpret the law authentically by making decisions in individual cases. In the *Chenery* case, however, the Supreme Court held that agency policy may be formulated and announced through individual decisions.²⁷ This is, indeed, a far cry from the Administrative Procedure Act's demand, well-meant, but inadequately carried out, that general statements of policy be publicly announced in the Federal Register.

Many judicial decisions, old and new, have emphasized the non-binding character of ordinary interpretations, holding that "the construction and interpretation of a statute as applied to justiciable controversies is a judicial function."²⁸ Other decisions, however, have held otherwise. Courts, according to these opinions, should not disregard administrative interpretations

23. NLRB Press Release R-342, 19 U.S.L. WEEK 2147 (Oct. 3, 1950). And see *Rawalt Coal Co.*, 92 N.L.R.B. No. 12 (1950), where the Board, while agreeing that respondent's operations affect commerce, dismissed the case "in accord with our announced policy."

24. FED. REG. ACT § 7, *supra* note 17.

25. *Biddle v. Comm'r*, *supra* note 12.

26. The inadequacy of the Administrative Procedure Act reaches a climax in its attempt to define "rules" against "orders." AD. PROC. ACT §§ 2(c) and (d), which were drawn in such a fashion that it can be said that "any action fits both definitions." Note, 56 *Yale L.J.* 670, 680 (1947). and see Parker, *The Administrative Procedure Act; A Study in Overestimation*, 60 *YALE L.J.* (1951).

27. *Supra* note 7.

28. *Woods v. Benson Hotel Corp.*, 177 F.2d 543, 546 (8th Cir. 1949). And see *Bartels v. Birmingham*, 332 U.S. 126, 132 (1947); *Comm'r v. Flowers*, 326 U.S. 465, 469 (1946); *Overnight Motor Transport Co. v. Missel*, 316 U.S. 572, 580 (1942); *John Breuner Co. v. Comm'r*, 179 F.2d 685, 687 (9th Cir. 1950); *Busch's Kredit Jewelry Co. v. Comm'r*, 179 F.2d 298, 300 (2d Cir. 1950); *Bertoldi v. McGrath*, 178 F.2d 977 (D.C. Cir. 1949); *Siomkin v. Fairchild Camera & Instrument Corp.*, *supra* note 11; *Albright v. United States*, 173 F.2d 339, 340, 345 (8th Cir. 1949); *Aluminum Co. of America v. United States*, 123 F.2d 615, 620 (3d Cir. 1941); *Van Antwerp v. United States*, 92 F.2d 871, 875 (9th Cir. 1937); *Ambassador Co. v. Comm'r*, 81 F.2d 474, 481 (9th Cir. 1936); *Farmers Cooperative Co. v. Birmingham*, 86 F. Supp. 201, 228-29 (N.D. Iowa 1949); *United States v. U.S. Alkali Export Ass'n*, 86 F. Supp. 59, 71 (S.D. N.Y. 1949); *Woods v. Golt*, 85 F. Supp. 667; 673 (D. Del. 1949).

unless "plainly and palpably inconsistent with the law,"²⁹ which of course puts them on the same level as regulations, for they, too, are binding only if not inconsistent with the enabling law. Between these two apparent extremes lies the golden middle: interpretations, which, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Their weight depends "upon . . . the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."³⁰ This seems to be the best description of agency interpretations, since it amounts to saying that for a normative statement to be binding it must be authorized by law;³¹ everything else can be merely persuasive. As we are not prepared to admit the existence in our legal system of a general norm that authorizes agencies to make any law they see fit (in which case any interpretation would in fact be a binding regulation), but rather restricts them to following the doctrine of strict legality, we must accept interpretations as what they are—mere expert guidance.

Prominent among the factors which enhance the weight of an official interpretation has been the so-called re-enactment doctrine whereby, if Congress re-enacts without change a provision which was administratively interpreted, the interpretation is thus incorporated, as it were, in the congressionally re-enacted statute.³² This theory vests re-enacted administrative interpretations with authentic force. However, the courts have adopted this doctrine with varying degrees of enthusiasm.³³ It has been rejected, for instance, where the statute was re-enacted "with no direct evidence whatsoever that Congress was aware" of an agency's (incorrect, as the court held) con-

29. *Boske v. Comingore*, 177 U.S. 459, 467-69 (1900). And see *FPC v. Panhandle Eastern Pipe Line Co.*, *supra* note 7 (interpretation by silence); *Bowles v. Seminole Rock & Sand Co.*, *supra* note 11; *FTC v. Bunte Bros.*, 312 U.S. 349, 352 (1941); *Woods v. Oak Park Chateau Corp.*, 179 F.2d 611, 613 (7th Cir. 1949); *Woods v. Macken*, 178 F.2d 510, 513 (4th Cir. 1949); *Roberts v. Comm'r*, 176 F.2d 221 (9th Cir. 1949); *Continental Oil Co. v. Jones*, 80 F. Supp. 340, 344 (W.D. Okla. 1948), *aff'd*, however, in more reticent language, 176 F.2d 519, 523 (10th Cir. 1949); *Caldwell*, *op. cit. supra* note 16, at 95.

30. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *Flour Mills of America, Inc. v. RFC*, 179 F.2d 965, 968-69 (Em. App. 1950). And see *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933); *Edward's Lessee v. Darby*, 12 Wheat, 206, 210 (U.S. 1827); *Continental Oil Co. v. Jones*, 176 F.2d 519, 523 (10th Cir. 1949); *Fred Wolferman, Inc. v. Gustafson*, 169 F.2d 759, 763 (8th Cir. 1948); *Anderson v. Arvey Corp.*, 84 F. Supp. 55, 63 (E.D. Mich. 1949); *Davis*, *op. cit. supra* note 12, at 936-39.

31. See *KELSEN, GENERAL THEORY OF LAW AND STATE* 152 *et seq.* (1945); *KELSEN, THE LAW OF THE UNITED NATIONS*, *supra* note 1, at xv.

32. E.g., *Helvering v. Reynolds Tobacco Co.*, 306 U.S. 110 (1939); *Helvering v. Winnill*, 305 U.S. 79 (1938); *Hartley v. Comm'r*, 295 U.S. 216 (1935); *United States v. Cerecedo Hermanos*, 209 U.S. 337 (1908); *United States v. Falk*, 204 U.S. 143 (1907); *Keystone Automobile Club v. Comm'r*, 181 F.2d 402, 405-6 (3d Cir. 1950); *Woods v. Oak Park Chateau Corp.*, and *Roberts v. Comm'r*, *supra* note 29; *Aluminum Co. of America v. United States*, *supra* note 28; *Davis*, *op. cit. supra* note 12, at 939.

33. *Pacific Power & Light Co. v. FPC*, 184 F.2d 272, 275 (D.C. Cir. 1950), holds that "at best the re-enactment of statutes is a nebulous foundation for statutory construction."

struction of a statute,³⁴ or simply because the law was "plain."³⁵ Nor has the re-enactment theory prevented agencies, with the approval of the courts, from later promulgating interpretations which differed from, and altered, the "re-enacted" construction.³⁶ Other reasons for attaching preponderant weight to administrative interpretations exist where the interpretation was made contemporaneously with the statute by those familiar with the legislative intent,³⁷ or where it is one of long standing.³⁸

Summarizing the above, concededly confusing, picture, we must remind ourselves that it reflects a situation peculiar to administrative law. The Congress makes and amends, but does not interpret, the law. The judiciary makes law as well as interprets both its own and statutory law, but it does not issue non-authentic interpretations, such as policy statements. The administrative-executive branch of the government, on the other hand, indulges in all these acts. Some of them are regulations, plainly designated and published as such; others are mere non-authentic interpretations whose character as not binding statements can be ascertained from the fact that they are not published in the Federal Register,³⁹ though under the Administrative Procedure Act every interpretation, authentic or not, is supposed to be published; yet other administrative acts cannot readily be identified as either binding or not. They are, indeed, published in the Register, and, therefore, ought to be, and often are, statements which are intended to serve as a "guidance of the public." They make reference to some statutory authority, but that does not establish their character either, for both regulation and authentic, as well as non-authentic, interpretation have just that in common that they all either implement, or construe, law. Finally, those agencies which decide individual administrative cases thereby also interpret the law. The Administrative Procedure Act has not been able to delimit these many categories in an orderly fashion. Perhaps that Act is a modern proof of the holding of the Historic School

34. *Kristensen v. McGrath*, 179 F.2d 796, 802 (D.C. Cir. 1949); *Pacific Power & Light Co. v. FPC*, *supra* note 33. And see *United States v. Missouri Pacific R.R.*, 278 U.S. 269 (1929); *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1946). See also *Helvering v. Clifford*, 309 U.S. 331 (1940), where an interpretation was rejected by the Court despite the fact that Congress specifically considered both statute and existing administrative interpretation and yet turned down a proposed amendment.

35. *Biddle v. Comm'r*, *supra* note 12; *Helvering v. Clifford*, *supra* note 34; *United States v. Bonnell*, *supra* note 12; *Chattanooga Automobile Club v. Comm'r*, 182 F.2d 551, 555 (6th Cir. 1950) (not Treasury Regulation but mere "ruling").

36. *Helvering v. Wilshire Oil Co.*, 308 U.S. 90 (1938).

37. *White v. Winchester Country Club*, 315 U.S. 32 (1942); *Norwegian Nitrogen Products Co. v. United States*, *supra* note 30; *Edward's Lessee v. Darby*, *supra* note 30; *Davis*, *op. cit. supra* note 12, at 936.

38. *Comm'r v. Flowers*, *supra* note 28; *Boehm v. Comm'r*, 326 U.S. 287, 292 (1945); *Helvering v. Winnill*, *supra* note 32; *Smythe v. Fiske*, 90 U.S. 374, 382 (1874); *Comm'r. v. Nubar*, 185 F. 2d 584, 587 (4th Cir. 1950); *Flour Mills of America, Inc. v. RFC*, *supra* note 30; *Davis*, *op. cit. supra* note 12, at 937.

39. In order to be binding an agency regulation or interpretation must be published in the Register. FED. REG. ACT. § 7, *supra* note 17.

of Law⁴⁰ that a time, in order to be "ripe" for the codification of law, must have reached a high level in the science of that law. That time, seemingly, has not yet arrived.⁴¹

40. FRIEDRICH KARL VON SAVIGNY, VOM BERUF UNSRER ZEIT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT (3d ed. 1840). There exist several English translations. For a good recent evaluation see KOSCHAKER, EUROPA UND DAS RÖMISCHE RECHT 258-59 (1947). See also Parker, Book Review, 42 AM. J. INT'L L. 975 (1948).

41. For further proof one need only compare the Administrative Procedure Act with its generalities that rarely spell out a specific rule of law with, say, the Negotiable Instruments Acts or the Restatement of Torts with their finely spun, detailed statements. Parker, *op. cit. supra* note 26.