Essay

Changing the D.C. Circuit's Approach to Changes in Interpretive Rules

*Rebecca Wernicke**

Abstract

In Mortgage Bankers Ass'n v. Harris*, the D.C. Circuit applied a disfavored doctrine for the first time in fourteen years to invalidate an agency's change to an interpretive rule, holding that the agency needed to undertake notice-and-comment rulemaking in order to make the change. The doctrine the court applied, commonly referred to as the* Alaska Hunters *doctrine, requires that agencies use notice-and-comment rulemaking each time they seek to change a definitive interpretive rule. This doctrine has been widely criticized by scholars, who have called it "a mistake" and "a procedural straightjacket" because it creates procedural requirements for agency informal rulemaking not required by the Administrative Procedure Act. For a time, it was avoided by the D.C. Circuit, which regularly narrowed or ignored the doctrine. In* Mortgage Bankers*, however, the court arguably revived and expanded the doctrine by making it applicable even in cases where no reliance on the initial interpretive rule is shown. This eliminated the best policy for the* Alaska Hunters *doctrine and made it more widely applicable. This Essay argues that the best way to address the problem of changes in an agency's interpretive rules is not through additional procedural requirements, but by a more critical substantive review of an agency's changed interpretive rules.*

---

* J.D., May 2014, The George Washington University Law School; B.A. Communications, B.S. Plan II Honors, 2011, University of Texas at Austin. The author would like to thank Professor Todd Peterson for advising me on this Essay, the editors of *The George Washington Law Review* for their help editing the Essay, and her parents for their constant support throughout her education.

TABLE OF CONTENTS

INTRODUCTION

On July 2, 2013, the D.C. Circuit applied a controversial rule, commonly referred to as the *Alaska Hunters* doctrine,[1] to invalidate agency action for the first time in fourteen years.[2] In fact, few cases have faced as much criticism, while having so few supporters, as the

---

1 *See, e.g.*, Brian J. Shearer, Comment, *Out*Fox*ing* Alaska Hunters*: How Arbitrary and Capricious Review of Changing Regulatory Interpretations Can More Efficiently Police Agency Discretion*, 62 AM. U. L. REV. 167, 171 (2012) (citing Jon Connolly, Note, Alaska Hunters *and the D.C. Circuit: A Defense of Flexible Interpretive Rulemaking*, 101 COLUM. L. REV. 155, 156 (2001) (coining the term)).

2 The *Alaska Hunters* doctrine was first used to invalidate agency action in *Alaska Professional Hunters Ass'n v. FAA* (*Alaska Hunters*), 177 F.3d 1030 (D.C. Cir. 1999), and was recently used to do the same in *Mortgage Bankers Ass'n v. Harris*, 720 F.3d 966 (D.C. Cir. 2013), *cert. granted sub nom. Nickols v. Mortgage Bankers Ass'n*, 134 S. Ct. 2820 (2014).

cases establishing the *Alaska Hunters* doctrine[3]—*Alaska Professional Hunters Ass'n v. FAA*,[4] and its predecessor, *Paralyzed Veterans of America v. D.C. Arena L.P.*[5] Scholars have labeled the doctrine these cases established "a mistake"[6] and a "procedural straightjacket."[7] They have argued that it has "no support in statutes, case law, or reasoning,"[8] that it "confus[es] or ignor[es]" the law,[9] and even that it has been effectively overturned by the Supreme Court.[10]

Yet the D.C. Circuit's recent decision in *Mortgage Bankers Ass'n v. Harris*[11] ended the Circuit's trend in narrowing the *Alaska Hunters* doctrine[12] and, instead, arguably expanded it considerably.[13] In effect, the court determined that an agency's definitive interpretive rule can only be altered by notice-and-comment rulemaking,[14] even though interpretive rules are expressly exempted from notice-and-comment rulemaking under the Administrative Procedure Act ("APA").[15] Additionally, the court held that no reliance by impacted parties is necessary for the *Alaska Hunters* doctrine to apply,[16] although reliance had long been discussed by commentators[17] and the court[18] as a necessary

---

3 Richard W. Murphy, Hunters *for Administrative Common Law*, 58 ADMIN. L. REV. 917, 918–19 (2006). Even Professor Richard Murphy has not defended the notice-and-comment requirement imposed by the doctrine—even when claiming to be attempting to defend the doctrine—but has instead supported the principle of "administrative common law" it demonstrates. *See generally id.*

4 Alaska Prof'l Hunters Ass'n v. FAA, 177 F.3d 1030 (D.C. Cir. 1999).

5 Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579 (D.C. Cir. 1997). The *Paralyzed Veterans* decision, in dicta, created the rule first applied in *Alaska Hunters* to invalidate agency action. *See id.* at 586.

6 Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547, 566 (2000).

7 Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 847 (2001).

8 Pierce, *supra* note 6, at 573.

9 Jon Connolly, Note, Alaska Hunters *and the D.C. Circuit: A Defense of Flexible Interpretive Rulemaking*, 101 COLUM. L. REV. 155, 165 (2001).

10 Shearer, *supra* note 1, at 185–86 (arguing that *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), overruled the *Alaska Hunters* doctrine sub silentio).

11 Mortg. Bankers Ass'n v. Harris, 720 F.3d 966 (D.C. Cir. 2013), *cert. granted sub nom.* Nickols v. Mortg. Bankers Ass'n, 134 S. Ct. 2820 (2014).

12 *See, e.g.*, Murphy, *supra* note 3, at 926.

13 *See infra* Part III.A.

14 *Mortg. Bankers*, 720 F.3d at 967.

15 Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706 (2012); *see id.* § 553(b)(3)(A).

16 *Mortg. Bankers*, 720 F.3d at 968 (holding that "there is no discrete reliance element" while noting that reliance may still be considered when determining whether a prior rule was definitive).

17 *See* William S. Jordan III, *News from the Circuits: D.C. Circuit Clarifies Reach of* Alaska Professional Hunters, ADMIN. & REG. L. NEWS, Fall 2009, at 23, 23–24 (suggesting that a recent

element in applying the doctrine. By eliminating the reliance element of the *Alaska Hunters* doctrine and allowing the doctrine to apply even in cases where the initial rule was not longstanding, the D.C. Circuit eliminated the best policy justifications for the controversial doctrine.[19]

Despite these downsides, the *Mortgage Bankers* decision did not simply make a bad doctrine worse. It also exemplified the degree to which the line between interpretive rules, which do not require notice-and-comment rulemaking, and substantive rules, which do,[20] is "fuzzy."[21] The fact that there is a fine line between the two is a better legal justification for the *Alaska Hunters* doctrine than the reliance rationale that existed prior to *Mortgage Bankers*.[22] The decision demonstrated that when an agency can freely choose between two interpretations of a regulation, they are doing something akin to policymaking, and the difference between "interpreting" and "legislating" is only a matter of degree.[23] Thus, it seems justifiable that the court requires the same procedure—notice-and-comment rulemaking—for both.

The distinction between legislative and interpretive rules is, however, recognized in the APA,[24] and it should continue to be recognized by the court. Thus, rather than require notice-and-comment rulemak-

---

D.C. Circuit opinion clarified the importance of reliance in applying the *Alaska Hunters* doctrine); Ryan DeMotte, Note and Comment, *Interpretive Rulemaking and the* Alaska Hunters *Doctrine: A Necessary Limitation on Agency Discretion*, 66 U. PITT. L. REV. 357, 370 (2004) (listing, as one of the requirements for application of the *Alaska Hunters* doctrine, that "regulated parties must have substantially relied on the interpretation"); Shearer, *supra* note 1, at 181 (interpreting the *Alaska Hunters* doctrine as requiring substantial reliance on a longstanding interpretive rule); *see also* Strauss, *supra* note 7, at 843–47; Connolly, *supra* note 9, at 168–69, 173.

18 *See* Honeywell Int'l, Inc. v. Nuclear Regulatory Comm'n, 628 F.3d 568, 579–80 (D.C. Cir. 2010) (determining that the *Alaska Hunters* doctrine did not apply because the initial agency rule was not "definitive" and because it would have been unreasonable for Honeywell to rely on the initial rule); MetWest Inc. v. Sec'y of Labor, 560 F.3d 506, 511 (D.C. Cir. 2009) ("A fundamental rationale of *Alaska Professional Hunters* was the affected parties' substantial and justifiable reliance on a well-established agency interpretation."); Ass'n of Am. R.Rs. v. Dep't of Transp., 198 F.3d 944, 950 (D.C. Cir. 1999) (discussing how there was no reliance comparable to the reliance in *Alaska Hunters* and finding that the doctrine did not apply).

19 *See infra* Part III.A.

20 *See* 5 U.S.C. § 553(b).

21 Batterton v. Marshall, 648 F.2d 694, 702 (D.C. Cir. 1980) (internal quotation marks omitted); Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 37–38 (D.C. Cir. 1974) (noting the difficulty in distinguishing legislative rules from nonbinding rules such as interpretive rules).

22 *See infra* Part III.B.

23 *See infra* Part III.B.

24 5 U.S.C. § 553(b).

ing whenever an agency changes an interpretive rule, the court should change the level of deference it affords interpretive rules in substantive review. Specifically, the D.C. Circuit should not grant controlling weight to the agency interpretation and should instead only grant deference to the degree warranted under *Skidmore v. Swift & Co*.[25] This standard would better balance the reliance of interested parties with agencies' need for flexibility.

I. Agency Rules Under the APA

The APA defines a rule as "an agency statement . . . designed to implement, interpret, or prescribe law or policy."[26] When an agency promulgates a rule, it must engage in notice-and-comment rulemaking, as described at 5 U.S.C. § 553.[27] If the rule is interpretive, however, notice-and-comment rulemaking is not required.[28] Thus, the APA distinguishes between "substantive rules," more commonly referred to as "legislative rules,"[29] which require notice-and-comment rulemaking, and "interpretive rules," which do not.[30]

A. The Procedural Difference Between Legislative and Interpretive Rulemaking

Notice-and-comment rulemaking, as established by the APA, requires three basic procedural steps[31]: the publication of a "notice of proposed rule making" that describes the proposed rule,[32] the consideration of the responses of interested parties to the proposed rule,[33] and, in issuance of its final rule, a concise statement of the basis and purpose of the rule.[34]

Although these requirements appear rather straightforward, the notice-and-comment rulemaking process has become a "long and costly" endeavor for agencies that can stretch over many years,[35] as additional requirements have been added to the process.[36] For exam-

25 Skidmore v. Swift & Co., 323 U.S. 134 (1944).

26 5 U.S.C. § 551(4).

27 *Id.* § 553.

28 *Id.* § 553(b)(3)(A).

29 *See, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979) (discussing "substantive" rules as being legislative in nature).

30 5 U.S.C. § 553.

31 *E.g.*, Pierce, *supra* note 6, at 549 (citing 5 U.S.C. § 553b).

32 5 U.S.C. § 553(b).

33 *Id.* § 553(c).

34 *Id.*

35 Pierce, *supra* note 6, at 550–51.

36 Peter L. Strauss, *The Rulemaking Continuum*, 41 Duke L.J. 1463, 1470 (1992).

ple, the executive branch requires that certain rules undergo additional analysis and consideration if they have a broad impact,[37] and the courts have required more extensive rationales and supporting data from agencies to uphold legislative rules under review.[38]

Because the notice-and-comment process has become relatively burdensome for agencies, when an agency avoids it by publishing a rule that is interpretive rather than legislative, it saves considerable time and money.[39] Agencies can publish interpretive rules relatively quickly and easily because there are no procedural requirements for enacting them.[40]

If the agency fails to undertake notice-and-comment rulemaking when the rule is in fact legislative, however, it can be challenged by affected parties.[41] Because the APA does not make clear which rules are legislative—therefore requiring notice-and-comment rulemaking—and which are interpretive,[42] courts are left to grapple with that question.

B. Distinguishing Legislative Rules from Interpretive Rules

The process of labeling rules as legislative or interpretive has proven to be fraught with difficulty for courts.[43] Despite this diffi-

---

37 *See* Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 62 (1995). Pierce cites the requirements of Executive Order 12,291, *id.*, which was revoked and replaced by President Clinton's Executive Order 12,866, and further amended by Executive Order 13,563. *See* Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 app. at 473–76 (1988), *revoked by* Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 88–92 (2012); *see also* Exec. Order No. 13,563, 3 C.F.R. 215 (2012), *reprinted in* 5 U.S.C. § 601 app. at 101–02 (2012).

38 *See* Pierce, *supra* note 37, at 65 ("To have any realistic chance of upholding a major rule on judicial review, an agency's statement of basis and purpose now must discuss in detail each of scores of policy disputes, data disputes, and alternatives to the rule adopted by the agency.").

39 *See* John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 914 (2004) (describing how nonlegislative rules offer "a relatively low-cost and flexible way for agencies to articulate their positions"). Notably, "[s]ome believe that the rise of hard-look review has led agencies to rely increasingly upon nonlegislative rules." *See id.* at 914 n.117 (citing Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159, 166–67 (2000)).

40 *See* Strauss, *supra* note 36, at 1468–69 (comparing the physical space occupied by the printed substantive rules of three agencies to the space occupied by the printed interpretive rules of those same agencies to show that agencies often generate many times more interpretive rules than substantive rules).

41 5 U.S.C. § 706(2) (2012).

42 *See id.* §§ 551, 553(b).

43 *See, e.g.*, Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1108 (D.C. Cir. 1993) (describing "[t]he distinction between those agency pronouncements subject to APA notice-and-comment requirements and those that are exempt . . . as enshrouded in considerable smog" (internal quotation marks omitted)); Stoddard Lumber Co. v. Marshall, 627 F.2d 984, 987

culty, the D.C. Circuit established a well-regarded[44] test for making the distinction in *American Mining Congress v. Mine Safety & Health Administration*,[45] called the "legal effects" test.[46] The test aims to determine whether legal obligations exist because of the rule, or whether the rule merely interprets preexisting legal obligations.[47] Notably, however, this test has not created a clear-cut answer to when rules are legislative and when rules are interpretive. This lack of clarity may explain why the D.C. Circuit does not always apply the test when determining whether a rule is legislative,[48] and, more importantly, has seemed to contradict the test at times—holding that an agency's interpretive rules may have "the effect of creating new duties."[49] Additionally, the standard for distinguishing legislative rules from interpretive rules varies from circuit to circuit,[50] although most circuits have adopted a version of the legal effects test.[51]

(9th Cir. 1980) (noting that distinguishing between rules requiring notice-and-comment rulemaking and those that do not "has proved to be quite difficult").

44 *See, e.g.*, Robert A. Anthony, "*Interpretive" Rules, "Legislative" Rules and "Spurious" Rules: Lifting the Smog*, 8 ADMIN. L.J. AM. U. 1, 17 (1994) ("[I]t is the best judicial expression on the subject to date."); Pierce, *supra* note 6, at 560–61 (describing the opinion as having "excellent reasoning" and being "widely praised").

45 Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106 (D.C. Cir. 1993).

46 *Id.* at 1112. The test asks:

> (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule.

Id. Notably, the "legal effects" concept has faced more criticism than the four-part test itself. *See, e.g.*, William Funk, *When is a "Rule" a Regulation? Marking a Clear Line Between Nonlegislative Rules and Legislative Rules*, 54 ADMIN. L. REV. 659, 662 (2002) ("Unfortunately, the binding legal effect test really just restates the conclusion that only legislative rules can be 'legally binding.'").

47 *Am. Mining Cong.*, 995 F.2d at 1110. The language used in the *American Mining Congress* decision suggests a similar standard to the one outlined by the Supreme Court in *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), which describes a substantive rule as one affecting legal rights and obligations. *Id.* at 301–02.

48 *See, e.g.*, Cent. Tex. Tel. Coop. v. FCC, 402 F.3d 205, 214 (D.C. Cir. 2005) (holding that a rule was interpretive and noting that looking at the effect of an agency pronouncement had "no utility" in distinguishing between legislative and interpretive rules "[b]ecause both types of rules may vitally affect private interests" (internal quotation marks omitted)).

49 *Id.* (emphasis omitted) (internal quotation marks omitted).

50 *See generally* Morgan Douglas Mitchell, Note, *Wolf or Sheep?: Is an Agency Pronouncement a Legislative Rule, Interpretive Rule, or Policy Statement?*, 62 ALA. L. REV. 839 (2011) (discussing each circuit's test in detail).

51 David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 288 (2010).

Further, scholars have been largely unsatisfied with these tests. As Professor David Franklin has observed, "it turns out to be maddeningly hard to devise a test that reliably determines which rules are legislative in nature and which are not."[52] Some scholars have offered their own tests as a solution to the confusion that plagues current tests,[53] while others suggest that the current, albeit muddled, state of distinguishing legislative rules from interpretive rules is better than the alternatives.[54]

II. AMENDING INTERPRETIVE RULES AND THE *ALASKA HUNTERS* DOCTRINE

The D.C. Circuit has forgone this distinguishing analysis at times, however, and has still considered whether an agency failed to engage in requisite notice-and-comment rulemaking. In these cases, rather than determining that an interpretive rule was in fact legislative, and therefore required notice-and-comment rulemaking, the D.C. Circuit considered whether an interpretive rule changed a prior interpretive rule, and therefore required notice-and-comment rulemaking.[55]

A. Establishment of the Alaska Hunters *Doctrine*

This concept of requiring agencies to amend interpretive rules through notice-and-comment rulemaking was first introduced in *Paralyzed Veterans*.[56] In the 1997 D.C. Circuit case, the validity of a new Department of Justice ("DOJ") interpretation of a regulation under the Americans with Disabilities Act[57] regarding acceptable lines-of-sight for wheelchair users in arenas was at the center of a dispute between a paralyzed veterans group and an arena.[58] The court found that the regulation was ambiguous, and deferred to the agency's interpretation.[59] It also held that the rule was interpretive, and thus notice-and-comment was not required.[60] The court noted, however, that if

---

52 *Id.* at 278.

53 *Id.* at 289–90. Franklin discusses several scholars who have put forth similar arguments suggesting an alternative test for distinguishing legislative and interpretive rules, and he dubs the alternative the "short cut." *Id.* (citing Funk, *supra* note 46, at 663; Manning, *supra* note 39, at 929; Strauss, *supra* note 36, at 1467–68).

54 *See, e.g.*, Franklin, *supra* note 51, at 324.

55 *See infra* Part III.

56 Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 586 (D.C. Cir. 1997).

57 Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2012)).

58 *Paralyzed Veterans*, 117 F.3d at 580–83.

59 *Id.* at 583–86.

60 *Id.* at 587–88.

the DOJ had initially adopted an interpretation different from its current interpretation, as the arena owners alleged, the change would have required notice-and-comment rulemaking.[61]

The D.C. Circuit first made this concept law in the *Alaska Hunters* decision in 1999.[62] At issue in the case was whether the Federal Aviation Administration ("FAA") was required to use notice-and-comment rulemaking when it applied a regulation for commercial pilots to Alaskan guide pilots.[63] The Alaskan office of the FAA had, for nearly thirty-five years, told guide pilots that they need not comply with the commercial pilot regulations, only the general regulations.[64] These pilots "uprooted their lives, moved across the country, and spent . . . years building up an entire industry in . . . reliance on an agency interpretation,"[65] only to have the FAA change that interpretation by publishing a simple Notice to Operators that interpreted the commercial pilot regulations as applying to guide pilots.[66]

The court found that the principle announced in *Paralyzed Veterans* was applicable to the FAA's change in the interpretation of the regulation for commercial pilots. It held that "[w]hen an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment."[67]

B. Criticism of the Alaska Hunters *Doctrine*

Academic discussion of *Paralyzed Veterans* and *Alaska Hunters* has yielded near universal criticism. The most common critique of the *Alaska Hunters* doctrine is simply that it is not founded in the law. For example, Professor Richard Pierce analyzed each authority cited in the creation of the *Alaska Hunters* doctrine and determined that

---

61 *Id.* at 586–87 ("Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking.").

62 Alaska Prof'l Hunters Ass'n v. FAA, 177 F.3d 1030, 1033–34, 1036 (D.C. Cir. 1999).

63 *Id.* at 1033.

64 *Id.* (discussing how the practice of giving Alaskan guide pilots advice that the commercial regulations did not apply to them began in 1963, appeared to still be the case in 1992, and was only expressly changed with the 1998 publication of a Notice to Operators in the Federal Register by the FAA).

65 Mortg. Bankers Ass'n v. Solis, 864 F. Supp. 2d 193, 207 (D.D.C. 2012) (internal quotation marks omitted), *rev'd sub nom.* Mortg. Bankers Ass'n v. Harris, 720 F.3d 966 (D.C. Cir. 2013), *cert. granted sub nom.* Nickols v. Mortg. Bankers Ass'n, 134 S. Ct. 2820 (2014).

66 *Alaska Hunters*, 177 F.3d at 1030.

67 *Id.* at 1034. The decision relied on 5 U.S.C. § 551(5) for this proposition, which states that "rule making" includes amending a rule. 5 U.S.C. § 551(5) (2012).

the court "misinterpreted each of the three sources it cited in support of the rule it announced."[68] He also suggested that, in doing so, it ignored "a mountain of precedent that contradicts that rule."[69] Professor Richard Murphy labeled the primary rationale of the *Alaska Hunters* doctrine—that changing an interpretive rule effectively amends the legislative rule it interprets—"alchemy."[70] Others have focused their criticism on the potential effects of the doctrine, arguing that it will push more agencies into issuing vague interpretive rules or into interpreting their regulations through adjudication[71] and leave agencies unable to correct mistakes without the burdensome notice-and-comment rulemaking procedure.[72] Notably, despite these criticisms, several other circuits have adopted the D.C. Circuit's *Alaska Hunters* doctrine or discussed it with approval.[73]

C. Narrowing of the Alaska Hunters *Doctrine*

After the D.C. Circuit first applied the *Alaska Hunters* doctrine to invalidate agency action, it repeatedly found it inapplicable, arguably narrowing the doctrine considerably.[74] The court determined that numerous exceptions applied—for example, the initial interpretive

---

68 Pierce, *supra* note 6, at 567.

69 *Id.*

70 *See* Murphy, *supra* note 3, at 928–30.

71 *See, e.g.*, *id.* at 926–27 (noting that agencies would "have an incentive to keep their interpretive stances secret and vague rather than making them clear and public"); Pierce, *supra* note 6, at 571 (noting that agencies would likely resort to adjudications instead of using notice and comment rulemaking); Strauss, *supra* note 7, at 847 (noting that this is likely to "suppress rather than to encourage agency interpretation").

72 *See id.* at 846 (discussing how when lower-level mistakes are made, as in *Alaska Hunters*, agencies will face procedural barriers to correcting them); *see also* Ass'n of Am. R.Rs. v. Dep't of Transp., 198 F.3d 944, 949–50 (D.C. Cir. 1999) (describing the harm of allowing an "agency's initial, often chaotic process of considering an unresolved issue [to] prematurely freeze its thinking into a position that it would then be unable to change without formal rulemaking").

73 *See* Minnesota v. Ctrs. for Medicare & Medicaid Servs., 495 F.3d 991, 996–98 (8th Cir. 2007) (noting that new substantive rules require notice-and-comment proceedings, but finding no new substantive rule); SBC Inc. v. FCC, 414 F.3d 486, 498 (3d Cir. 2005) ("[I]f an agency's present interpretation of a regulation is a fundamental modification of a previous interpretation, the modification can only be made in accordance with the notice and comment requirements of the APA."); Dismas Charities, Inc. v. U.S. Dep't of Justice, 401 F.3d 666, 682 (6th Cir. 2005) ("It is true that once an agency gives a *regulation* an interpretation, notice and comment will often be required before the interpretation of that regulation can be changed."); Shell Offshore Inc. v. Babbitt, 238 F.3d 622, 628–30 (5th Cir. 2001) (adopting the D.C. Circuit's *Alaska Hunters* doctrine); *see also* Riverkeeper, Inc. v. EPA, 475 F.3d 83, 117 (2d Cir. 2007) (citing the *Alaska Hunters* doctrine with approval), *rev'd on other grounds sub nom.* Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208 (2009).

74 *See* Murphy, *supra* note 3, at 926.

rule was not definitive,[75] the initial rule was a policy statement rather than an interpretation,[76] or the initial interpretive rule could be read to be consistent with the later rule.[77] Additionally, three decisions emphasized the role of reliance in *Alaska Hunters* and further suggested that reliance was "critical" to the *Alaska Hunters* doctrine.[78]

III. Revival and Expansion of the *Alaska Hunters* Doctrine: *Mortgage Bankers*

Fourteen years after the *Alaska Hunters* case, the D.C. Circuit, for the second time, invalidated an agency's interpretive rule on the basis that it improperly amended an earlier interpretive rule without notice-and-comment rulemaking.[79] In *Mortgage Bankers*, the D.C. Circuit held that a 2010 Department of Labor ("DOL") Administrator Interpretation ("AI") improperly amended the agency's prior interpretation, announced in a 2006 Opinion Letter, because it failed to use notice-and-comment rulemaking.[80] The 2006 Opinion Letter had interpreted mortgage loan officers as falling within the administrative exemption located at 29 U.S.C. § 213(a)(1) of the Fair Labor Standards Act ("FLSA"),[81] and defined by 29 C.F.R. § 541.[82] The 2010 AI expressly withdrew the earlier interpretation and determined that mortgage loan officers were not exempt employees and were therefore subject to the wage and hour requirements of the FLSA.[83]

Importantly, the court held that the change in interpretation by the DOL was improper regardless of whether the 2006 Opinion Letter was relied upon by the employers who challenged it.[84] Instead, the

---

75 *See, e.g.*, Commodity Carriers, Inc. v. Fed. Motor Carrier Safety Admin., 434 F.3d 604, 607–08 (D.C. Cir. 2006) (holding that an agency adjudication did not interpret the regulation, and, to the extent that it may have, "it was almost immediately contradicted" by another interpretation, and was thus not definitive).

76 *See* Hudson v. FAA, 192 F.3d 1031, 1036 (D.C. Cir. 1999).

77 *See* Air Transp. Ass'n of Am. v. FAA, 291 F.3d 49, 57–58 (D.C. Cir. 2002).

78 *See* MetWest Inc. v. Sec'y of Labor, 560 F.3d 506, 511 (D.C. Cir. 2009); *see also* Honeywell Int'l, Inc. v. Nuclear Regulatory Comm'n, 628 F.3d 568, 579 (D.C. Cir. 2010); Ass'n of Am. R.Rs. v. Dep't of Transp., 198 F.3d 944, 950 (D.C. Cir. 1999).

79 *See* Mortg. Bankers Ass'n v. Harris, 720 F.3d 966, 972 (D.C. Cir. 2013), *cert. granted sub nom.* Nickols v. Mortg. Bankers Ass'n, 134 S. Ct. 2820 (2014).

80 *Id.* at 968, 971.

81 Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 106 (codified as amended at 29 U.S.C. §§ 201–219 (2012)).

82 *See* Mortg. Bankers Ass'n v. Solis, 864 F. Supp. 2d 193, 196, 198–99 (D.D.C. 2012), *rev'd sub nom.* Mortg. Bankers Ass'n v. Harris, 720 F.3d 966 (D.C. Cir. 2013), *cert. granted sub nom.* Nickols v. Mortg. Bankers Ass'n, 134 S. Ct. 2820 (2014).

83 *See Mortg. Bankers*, 720 F.3d at 968.

84 *Id.* at 969–71.

court determined that reliance is part of "the definitiveness calculus," in that showing reliance (or not being able to show it) may suggest that an agency interpretation was definitive (or not).[85] Thus, the fact that the Mortgage Bankers Association could not show that the initial interpretation was detrimentally relied upon was irrelevant, because the 2006 Opinion Letter was a definitive interpretation.[86] The elimination of the reliance element significantly altered the *Alaska Hunters* doctrine, and may have also altered the legitimacy of the doctrine legally.[87]

A. Elimination of the Reliance Element

The *Mortgage Bankers* case substantially changed the course of the *Alaska Hunters* doctrine, eliminating what many commentators considered to be an essential element to the application of the doctrine, and in turn arguably eliminating the best policy rationale for the controversial rule.

1. Practical Consequences of Mortgage Bankers

Several commentators, relying on later decisions of the D.C. Circuit interpreting the *Alaska Hunters* doctrine, described reliance as an essential element for determining when changes in interpretive rules require notice-and-comment rulemaking.[88] One scholar suggested that the D.C. Circuit's decision in *MetWest Inc. v. Secretary of Labor*[89] clarified that "agencies remain able to develop and change interpretations without notice-and-comment unless prior statements have created the sort of justifiable reliance found in *Alaska Professional Hunters*."[90] This interpretation of the *Alaska Hunters* doctrine would have necessarily limited its application substantially. By setting the standard for justifiable reliance on the substantial and justifiable reliance of the Alaskan guide pilots in *Alaska Hunters*, the D.C. Circuit appeared to be forming a doctrine that would be almost irrelevant in practice because few parties, if any, would come close to showing the same long-term detrimental reliance.[91]

---

85 *Id.* at 970 ("[R]eliance is but one factor courts must consider in assessing whether an agency interpretation qualifies as definitive or authoritative. . . . [S]ignificant reliance functions as a rough proxy for definitiveness.").

86 *Id.* at 967–68.

87 *See supra* Part II.C.

88 *See supra* note 17.

89 MetWest Inc. v. Sec'y of Labor, 560 F.3d 506 (D.C. Cir. 2009).

90 *See* Jordan, *supra* note 17, at 24.

91 *See Mortg. Bankers*, 720 F.3d at 971 n.8; *supra* Part II.A.

Thus, by eliminating this element that was seemingly established by earlier cases such as *MetWest*, the D.C. Circuit broadened the potential class of cases to which the *Alaska Hunters* doctrine could apply significantly. More specifically, *Mortgage Bankers* expanded the application of the *Alaska Hunters* doctrine in two ways.

First, the *Mortgage Bankers* decision made clear that the length of time the initial interpretive rule was in place is irrelevant to the *Alaska Hunters* doctrine. In *Mortgage Bankers*, the Obama Administration narrowed the DOL's view on an exception to the administrative exemption just four years after the Bush Administration had initially issued its Opinion Letter regarding the exemption, expanding the types of jobs subject to wage and hour requirements.[92] By holding that the DOL could not make this change without using notice-and-comment rulemaking, the D.C. Circuit made clear that how long-standing an agency's initial rule had been was irrelevant as to whether or not a court should apply the *Alaska Hunters* doctrine.[93] A few months would seemingly be enough so long as the initial rule was definitive.[94]

Further, because the length of time an initial rule has been in place is irrelevant to whether the *Alaska Hunters* doctrine applies after *Mortgage Bankers*, agency interpretive changes due to changes in administration[95] are now more likely to be subject to the doctrine.

Second, *Mortgage Bankers* showed that the degree of harm suffered by affected parties because of an agency interpretive change is irrelevant to the application of the *Alaska Hunters* doctrine.[96] Prior to *Mortgage Bankers*, the doctrine appeared to not be applicable in cases where affected parties could rather easily change course, preventing the sort of detriment that was caused by the FAA's interpretive

---

92 *Mortg. Bankers*, 720 F.3d at 968.

93 *See id.*

94 Because the D.C. Circuit appears to interpret factors impacting "definitiveness" extremely broadly, I would suggest that it might find an otherwise definitive interpretation that was retracted weeks after publication by an agency to not be definitive, possibly by implementing a reliance calculus as suggested by *Mortgage Bankers* and determining that because no one had the opportunity to rely on the initial interpretation, it was not relied upon. *See Mortg. Bankers*, 720 F.3d at 970. It is, however, very plausible that under the *Mortgage Bankers* decision, even this hypothetical would fall subject to the *Alaska Hunters* doctrine and require notice-and-comment rulemaking.

95 For a discussion of how often administrations changed prior agency interpretations and why, see generally Connor N. Raso, Note, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 YALE L.J. 782 (2010).

96 *See Mortg. Bankers*, 720 F.3d at 970–71.

change in *Alaska Hunters*.[97] The employers represented by the Mortgage Bankers Association could simply alter their pay structure for mortgage loan officers. Additionally, they were specifically protected by the Portal-to-Portal Act,[98] which protects parties from liability for violating the FLSA when they have relied on an agency interpretation.[99] Thus, the cost or harm suffered by the employers would likely be minimal, and would likely be no different than if the agency had adopted the interpretation in its initial 2006 Opinion Letter.

Ultimately, the impact of the *Mortgage Bankers* decision is unclear. Because the D.C. Circuit routinely resisted applying the *Alaska Hunters* doctrine to agency actions for years prior to the *Mortgage Bankers* decision, it is possible that the court will continue its pattern of avoidance[100] and apply the updated doctrine sparingly. The case, however, does have potentially expansive consequences. Agency use of interpretive rules and guidance documents, like those issued by DOL and at issue in *Mortgage Bankers*, is extensive, generally making up—page per page—many times more material than an agency's regulations.[101] This creates significant fodder for those interested in challenging agency action because any significant change to a definitive interpretation can now be challenged. As suggested by past commentators on the *Alaska Hunters* doctrine, in order to avoid legal challenges, agencies may avoid publishing interpretive rules that would be labeled "definitive" or opt for interpreting statutes and regulations through adjudication rather than interpretive rules, making it more difficult for regulated parties to comply with the law.[102]

---

97 *See, e.g.*, MetWest Inc. v. Sec'y of Labor, 560 F.3d 506, 511 (D.C. Cir. 2009) (emphasizing "the feasibility" of compliance with the regulations when determining that notice-and-comment was not required).

98 Portal-to-Portal Act of 1947, Pub. L. No. 80-49, 61 Stat. 84 (codified as amended at 29 U.S.C. §§ 251–262 (2012)).

99 29 U.S.C. § 259(a)–(b)(1) (2012); *see* Mortg. Bankers Ass'n v. Solis, 864 F. Supp. 2d 193, 208 (D.D.C. 2012) (noting that "if the employer proves that the [failure to pay overtime] was in good faith in conformity with and in reliance on any written administrative . . . interpretation, then the employer shall [not] be subject to any liability or punishment" (alterations and omission in original) (internal quotation marks omitted)), *rev'd sub nom.* Mortg. Bankers Ass'n v. Harris, 720 F.3d 966 (D.C. Cir. 2013), *cert. granted sub nom.* Nickols v. Mortg. Bankers Ass'n, 134 S. Ct. 2820 (2014).

100 *See supra* Part II.C.

101 *See* Strauss, *supra* note 36, at 1469 (describing the difference between shelf space occupied by certain agencies' legislative rules and interpretive rules, including ratios of 1:20 for the IRS's rules and 1:240 for the FAA's); Raso, *supra* note 95, at 806 tbl.1 (listing the ratio of guidance documents to legislative rules issued during different years of a presidency, with averages ranging from 2.3 to 11.4).

102 *See supra* Part II.B.

2. *Policy Consequences of* Mortgage Bankers

In addition to expanding the universe of cases to which the *Alaska Hunters* doctrine applies, by eliminating the reliance element the D.C. Circuit eliminated the best policy rationale for a doctrine that few commentators see as founded in the law. The notice-and-comment process is valuable because it puts interested parties on notice for potential agency actions that might affect them and because it allows those parties to weigh in on the ultimate outcome.[103] Thus, although few scholars have endorsed the D.C. Circuit's legal basis for the *Alaska Hunters* doctrine, they have often validated the concern it addresses—the harm caused to parties, like the Alaskan guide pilots who justifiably relied on an agency's interpretative rule that the agency changed.[104] Further, the notice-and-comment process would have at the very least provided the pilots advanced notice of the interpretive change and an opportunity to challenge it.

The *Mortgage Bankers* case, however, is not a case where the value of additional procedural requirements was clear. The decision seems to simply impose extra procedure with little benefit. As noted above, the harm caused to interested parties because of their reliance was minimal, if any existed at all. This suggests that there is little reason to treat an interpretive rule differently from an amendment to an interpretive rule when there is not substantial and justifiable reliance from interested parties.

B. *The Upside of* Mortgage Bankers

This Essay does not aim to defend the *Alaska Hunters* doctrine as correct under the APA or Supreme Court precedent. It does, however, argue that by clearly eliminating the element of reliance from the *Alaska Hunters* doctrine, the doctrine begins to look less like a judicially created protection for justifiable reliance interests from agency flip-flops and more like a mislabeling of rules falling near the blurry line between interpretive and legislative.

As noted by several earlier commentators, the *Alaska Hunters* doctrine pre-*Mortgage Bankers* lay in substantial conflict with the Supreme Court's decision in *Vermont Yankee Nuclear Power Corp. v.*

---

103 Although agencies are not required to consider all comments submitted, they must respond to significant comments. *See* Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 553 (1978) ("Comments must be significant enough to step over a threshold requirement of materiality before any lack of agency response or consideration becomes of concern." (internal quotation marks and alteration omitted)).

104 *See* Jordan, *supra* note 17, at 24.

Natural Resources Defense Council, Inc.,[105] which prohibited reviewing courts from adding additional procedural requirements to agency rulemaking.[106] In *Alaska Hunters* the D.C. Circuit appeared to be adding procedural requirements to protect the interests of the Alaskan guide pilots, in direct contravention of *Vermont Yankee*.[107] In *Mortgage Bankers*, however, the D.C. Circuit's understanding of the *Alaska Hunters* doctrine relied on the assumption that a change in an interpretive rule effectively amends the legislative rule.[108] Regardless of whether that understanding is in error, so long as the D.C. Circuit relied on that understanding as the rationale for its imposed notice-and-comment procedure rather than focusing on protecting reliance interests, the court's error is limited to that misunderstanding. Thus, after the *Mortgage Bankers* decisions, the *Alaska Hunters* doctrine, at the very least, can be read as not imposing procedural requirements prohibited by *Vermont Yankee*, but instead as failing to understand the APA's distinction between interpretive and legislative rules.

Further, the interpretative rules at issue in *Mortgage Bankers* fall closer to the blurry line distinguishing legislative rules from interpretive rules than the FAA regulation at issue in *Alaska Hunters*. Professor John Manning has described how the distinction between legislative rules and interpretive rules collapses into a difference of degree.[109] Quoting Judge Posner's analysis, he notes that agency legislative rulemaking is the process of creating "'reasonable but arbitrary . . . rules that are consistent with the statute or regulation . . . but not derived from it, because they represent an arbitrary choice among methods of implementation.'"[110]

Under this logic, whenever an agency can make a choice between two interpretations because the statute or regulation it interprets is ambiguous, it is "legislating" rather than "interpreting" and must use notice-and-comment rulemaking.[111] The *Mortgage Bankers* decision

---

105 Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519 (1978); *see, e.g.*, Murphy, *supra* note 3, at 927–28.

106 *See Vt. Yankee*, 435 U.S. at 524 ("Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose [additional procedural requirements] if the agencies have not chosen to grant them.").

107 *See* Murphy, *supra* note 3, at 927–28 (describing the doctrine as appearing "to fly in the face" of *Vermont Yankee*).

108 *See* Mortg. Bankers Ass'n v. Harris, 720 F.3d 966, 967 (D.C. Cir. 2013), *cert. granted sub nom.* Nickols v. Mortg. Bankers Ass'n, 134 S. Ct. 2820 (2014).

109 *See* Manning, *supra* note 39, at 924.

110 *Id.* at 922 (quoting Hoctor v. USDA, 82 F.3d 165, 170 (7th Cir. 1996)).

111 *See id.* at 923–24; Murphy, *supra* note 3, at 929 ("[O]nce an agency has promulgated its own regulation, a change in the interpretation of that regulation is likely to reflect the agency's

demonstrated that, at times, rules that the D.C. Circuit considers interpretive may in fact allow agencies to make a choice between two alternatives, and therefore be something more akin to policymaking.[112] The 2006 Opinion Letter initially interpreting the administrative exemption described at 29 C.F.R. § 541.203(b) describes the job duties of a hypothetical mortgage loan officer and concludes that the employee falls within the administrative exemption, whereas the 2010 AI describes very similar job duties, yet reaches the opposite conclusion.[113] The district court determined that the 2010 interpretation was not inconsistent with the regulations,[114] but would likely have found the same for the 2006 interpretation[115]—which suggests that the regulations were ambiguous and that a choice between the two interpretations was primarily a policy choice.[116]

So why not simply label this sort of rule legislative? First, if an agency is "legislating" any time it exercises policy discretion between two choices, the interpretive rule category might be subsumed, because interpretive rules always address some ambiguity in the rule they interpret—and rarely will the resolution of such ambiguities not involve some policy choice. Second, occasions in which an agency flip-flops by changing an interpretive rule might alert the courts to the exercise of policymaking discretion in places where it might be difficult to see otherwise. For example, the DOL's 2006 Opinion Letter on its own might appear to simply be interpretive—only in light of the later 2010 AI interpretation do both look like the exercise of policy

---

reassessment of wise policy rather than a reassessment of what the agency itself originally meant." (internal quotation marks omitted)).

112 *Mortg. Bankers*, 720 F.3d at 968.

113 *Compare* Opinion Letter from the Wage & Hour Div., U.S. Dep't of Labor, FLSA 2006-31 (Sept. 8, 2006) [hereinafter 2006 Opinion Letter], *available at* http://www.dol.gov/whd/opinion/FLSA/2006/2006_09_08_31_FLSA.pdf, *with* WAGE & HOUR DIV., U.S. DEP'T OF LABOR, ADMINISTRATOR'S INTERPRETATION NO. 2010-1 (2010) [hereinafter 2010 AI], *available at* http://www.dol.gov/whd/opinion/adminIntrprtn/FLSA/2010/FLSAAI2010_1.pdf.

114 Mortg. Bankers Ass'n v. Solis, 864 F. Supp. 2d 193, 209–10 (D.D.C. 2012), *rev'd sub nom.* Mortg. Bankers Ass'n v. Harris, 720 F.3d 966 (D.C. Cir. 2013), *cert. granted sub nom.* Nickols v. Mortg. Bankers Ass'n, 134 S. Ct. 2820 (2014).

115 The primary difference between the 2006 and 2010 interpretations was whether a mortgage loan officer's primary duty was sales, with the 2006 Opinion Letter considering working with customers and assessing their financial information to not be sales work, *see* 2006 Opinion Letter, *supra* note 113, whereas the 2010 AI considered that same work to be sales, *see* 2010 AI, *supra* note 113. Particularly because the regulation specifically mentions financial services employees as ordinarily being subject to the administrative exemption unless the employee's duties are primarily sales, 29 C.F.R. § 541.203(b) (2013), it seems likely that both interpretations would be accepted by the court.

116 Consideration of the different administrations that adopted each interpretation further supports the conclusion that the interpretations were both policy choices.

discretion.[117] Further, because the APA assumes that there is some distinction between interpretive rules and legislative rules, one should be recognized,[118] even if the difference is simply a matter of degree.[119] Therefore, rather than address problems through further blurring of the lines between legislative and interpretive rules, the D.C. Circuit should instead overturn *Alaska Hunters* and re-evaluate the substantive review it applies to agency interpretive rules where an agency has changed its interpretation over time.

IV. Addressing the Problem Through Substantive Review

This Essay outlines a possible solution to the problem of agency interpretive rule flip-flops.[120] Rather than addressing the problem through an unconvincing interpretation of the APA to require the agency to use notice-and-comment rulemaking, the D.C. Circuit should more stringently review the interpretive rule.

A. The Current Standard of Review for Interpretive Rules

The D.C. Circuit, while outlining its test for distinguishing legislative rules from interpretive rules in *American Mining Congress*, suggested a "pay me now, or pay me later" regime; agencies must use notice-and-comment rulemaking before promulgating a legislative rule or face a more stringent review from the courts later on.[121] Yet that regime does not exist in reality. Instead, interpretive rules are often afforded as much or more deference by the D.C. Circuit as those promulgated using notice-and-comment rulemaking.[122] For example,

---

117 *See supra* note 116 and accompanying text.

118 *See* Murphy, *supra* note 3, at 928 ("Still, the distinction between interpretation and substance is built into the APA's rulemaking provisions, which necessarily casts doubt on efforts to blur it out of existence.").

119 *See* Manning, *supra* note 39, at 924.

120 There is a good argument to be made that there is no real problem with agency flip-flops with interpretive rules, or not one that the courts should address—particularly in light of the fact that the D.C. Circuit has found that the rule addressing the problem applies so rarely. *See* Mortg. Bankers Ass'n v. Harris, 720 F.3d 966, 969 n.4 (D.C. Cir. 2013), *cert. granted sub nom.* Nickols v. Mortg. Bankers Ass'n, 134 S. Ct. 2820 (2014). This argument, however, is beyond the scope of this Essay, which assumes that there is at least some role for courts in this area.

121 Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1111 (D.C. Cir. 1993) (describing how agency rules that do not undergo notice-and-comment rulemaking "will be more vulnerable to attack").

122 *See, e.g.*, Mistick PBT v. Chao, 440 F.3d 503, 511 (D.C. Cir. 2006) (citing Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)) ("This Court affords great deference to an agency's interpretation of its own regulation: under well-recognized precedent, we can reject the Secretary's interpretation only if it is plainly erroneous or inconsistent with the regulation." (internal quotation marks omitted)). Although the D.C. Circuit often invokes the *Seminole Rock*

in *Mortgage Bankers* the district court reviewed the agency's interpretive rule under the narrow arbitrary and capricious standard,[123] and in *Paralyzed Veterans* the D.C. Circuit said that the agency interpretation should be overturned only if "plainly erroneous or inconsistent with the regulation" it interprets.[124] The arbitrary and capricious standard requires deference to agency action only when an agency "'entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise,'"[125] and the plainly erroneous standard essentially upholds the agency interpretation unless an alternate one is compelled.[126]

B. Applying Skidmore *to Interpretive Rules*

The D.C. Circuit should end its practice of giving substantial deference to interpretive rules and instead apply *Skidmore* to determine the appropriate amount of deference that should be afforded to interpretive rules. Under *Skidmore*, an agency interpretation should be given deference appropriate according to the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade."[127] Under this standard, an interpretation is given weight according to its power to persuade, and a court may decide to give the interpretation substantial deference or none at all.[128] By applying *Skidmore* to agency interpretive rules—specifically those where the agency has changed its interpretation—the D.C. Circuit would af-

---

decision as guiding the standard of review for an agency's interpretation of its own regulations, an analysis of occasions in which the *Seminole Rock* standard is applied by the Supreme Court revealed that from 1984 to 2006 it (or its equivalent) was only used in "7.1% of eligible cases." William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretation from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1103–04 (2008).

123 Mortg. Bankers Ass'n v. Solis, 864 F. Supp. 2d 193, 202, 208 (D.D.C. 2012), *rev'd sub nom.* Mortg. Bankers Ass'n v. Harris, 720 F.3d 966 (D.C. Cir. 2013), *cert. granted sub nom.* Nickols v. Mortg. Bankers Ass'n, 134 S. Ct. 2820 (2014).

124 Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 584 (D.C. Cir. 1997) (internal quotation marks omitted). Notably, the standard applied in *Paralyzed Veterans* has been related to the one in *Mortgage Bankers*. *See* Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) (citing *Seminole Rock* for the plainly erroneous standard).

125 *Mortg. Bankers*, 864 F. Supp. 2d at 202 (quoting Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

126 *See Thomas Jefferson*, 512 U.S. at 512.

127 Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

128 *See* United States v. Mead Corp., 533 U.S. 218, 228 (2001).

ford substantially less deference to these agency interpretive rules, and possibly none at all.[129] Additionally, consideration of factors including whether the interpretation is longstanding[130] and the formality of the agency's procedure in adopting the rule might further suggest that cases involving agency flip-flops on interpretive rules should be granted little or no deference.[131]

Recently, the Supreme Court has adopted such an analysis when reviewing an agency's interpretive rule. In *Christopher v. SmithKline Beecham Corp.*,[132] the Supreme Court addressed whether courts should defer to an agency regarding the agency's interpretation of ambiguous regulations.[133] The Court noted that deference may be inappropriate "when the agency's interpretation conflicts with a prior interpretation" and that affording deference in the case at bar "would seriously undermine the principle that agencies should provide regulated parties fair warning of the conduct a regulation prohibits or requires."[134] The case involved a situation somewhat analogous to *Mortgage Bankers*—at issue was whether a DOL interpretation of pharmaceutical sales representatives as nonexempt, outside salesmen under the FLSA should be afforded controlling deference.[135] But the Court determined that the DOL's prior actions suggested that in the

---

129 *See* Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1256, 1271 & tbl.1 (2007) (finding that the majority of circuit court decisions, and the Supreme Court since 2001, have applied *Skidmore* as a "sliding-scale" of deference). Professor Hickman's and Professor Krueger's research, however, which carefully analyzed the 450 federal appellate decisions applying *Skidmore* deference, showed that a court's finding that an agency interpretation was inconsistent with an earlier interpretation was not dispositive in determining the degree of deference to grant the agency interpretation—in almost half of the cases where inconsistency existed "the court accepted the agency's position." *Id.* at 1261, 1286.

130 *See id.* at 1289–90. Whether an interpretation is longstanding is not one of the factors specifically mentioned as part of the *Skidmore* standard, but Hickman and Krueger suggest that is has "become grafted onto modern *Skidmore* applications." *Id.* Certainly, in cases involving changes in interpretive rules by agencies, the length of time the initial or later interpretive rule was in place is likely to be relevant to the degree of deference the court grants. *See* Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2168–69 (2012) (considering the very recent change in the DOL's interpretation and deciding not to defer to the agency).

131 *See Christopher*, 132 S. Ct. at 2169 (noting that "there was no opportunity for public comment").

132 Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156 (2012).

133 *See id.* at 2166 (considering whether the court should defer to the agency's interpretation under *Auer v. Robbins*, 519 U.S. 452 (1997)).

134 *Id.* at 2166–67 (internal quotation marks and alteration omitted) (citing Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 515 (1994); Gates & Fox Co. v. Occupational Safety & Health Review Comm'n, 790 F.2d 154, 156 (D.C. Cir. 1986) (Scalia, J.)).

135 *Id.* at 2165. The Second and Ninth Circuits had split on whether affording controlling deference to the agency interpretation was appropriate. *Id.*

past it considered these sales representatives to be exempt employees, and thus it had changed its interpretation of the regulation as applied to pharmaceutical sales representatives.[136] The Court then concluded that controlling deference was inappropriate on the basis of this change and considered the appropriate level of deference under *Skidmore*.[137] The Court ultimately held that the agency was entitled to no deference and that the DOL's interpretation was wrong.[138]

C. Benefits of Applying Skidmore *to Interpretive Rules*

By applying the *Skidmore* analysis to interpretive rules, the D.C. Circuit could better protect parties from agency flip-flops while not running afoul of the APA. Applying the *Skidmore* factors would likely leave many changed interpretive rules entitled to no deference. This might encourage agencies to adopt more formal procedures in adopting changes to interpretive rules—although not necessarily notice-and-comment rulemaking. It would also give agencies the ability to change an interpretation that was clearly incorrect without notice-and-comment rulemaking, because, even if a court did not defer to the agency's interpretation, it would presumably reach the same conclusion regarding the interpretation and uphold the "corrected" interpretation. Further, where reliance is at issue, a court would be less likely to afford the agency deference because of the required consideration of the consistency and longstanding nature of the agency's interpretation, possibly requiring the relied-upon interpretation to be reinstated.

Additionally, applying *Skidmore* to agency interpretive rules would realize the "pay now or pay later" regime the D.C. Circuit envisioned in *American Mining Congress*.[139] Currently, legislative rules, adopted through notice-and-comment rulemaking, are typically afforded deference in accordance with *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[140] Because "*Skidmore* is less deferential than *Chevron*,"[141] agencies would actually have to "pay later" when they do not use notice-and-comment to announce a rule, by being subject to a more searching review by the court.[142]

---

136 *Id.* at 2169. Notably, the DOL's interpretation was only announced in an amicus brief, and that interpretation was not an express reversal of an earlier one—the agency had simply never announced an interpretation before doing so in the brief. *Id.*

137 *Id.* at 2168–69.

138 *Id.* at 2170, 2174.

139 *See supra* note 121 and accompanying text.

140 Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

141 Hickman & Krueger, *supra* note 129, at 1250.

142 The Supreme Court has suggested that arbitrary and capricious review can, in some

CONCLUSION

The D.C. Circuit's *Mortgage Bankers* decision substantially altered the *Alaska Hunters* doctrine and established a broad rule requiring that an agency engage in notice-and-comment rulemaking any time it seeks to alter a definitive interpretive rule. This decision eliminated what many considered to be an essential element of the *Alaska Hunters* doctrine: reliance. By eliminating the reliance element, the court arguably eliminated the best policy rationale for the doctrine. Because the doctrine is one widely considered to have little support in the law, the D.C. Circuit should eliminate it and instead address agency changes in interpretive rules through substantive review—specifically by adopting the *Skidmore* standard to review agency interpretive rules.

This substantive review of changes in interpretive rules would better balance the interests of affected parties and the agency's interest in flexible rulemaking. Under this review, parties' reliance on longstanding interpretive rules may come back into consideration, and formalized procedures by agencies would be incentivized. Conversely, agencies would be able to correct prior erroneous interpretations without running the risk of their actions being overturned, and they likely would be able to alter interpretive rules so long as they are thorough and their reasoning is sound.

---

ways, be more searching than *Chevron*, *see* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005), but generally *Chevron* is considered to be more searching, *see, e.g.*, Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How* Chevron *Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 685–86, 701, 703 (2007).