RECENT DEVELOPMENTS

AN IMPORTANT MEMBER OF THE FAMILY: THE ROLE OF REGULATORY EXEMPTIONS IN ADMINISTRATIVE PROCEDURE

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> Sound administrative procedure contemplates waivers, or exceptions . . . . The process viewed as a whole leads to a general rule, and limited waivers or exceptions granted pursuant to an appropriate general standard. This combination of a general rule and limitations is the very stuff of the rule of law, and with diligent effort and attention to essentials administrative agencies may maintain the fundamentals of principled regulation without sacrifice of administrative flexibility and feasibility . . . . [T]he waiver procedure . . . is not necessarily a step-child, but may be an important member of the family of administrative procedures, one that helps the family stay together.[1]

INTRODUCTION

An unusual administrative procedure has been in the news lately: regulatory exemptions (sometimes also referred to as "exceptions," "waivers," "variances," or "adjustments"). For example, in January 2011, the *Washington Post* featured a front-page story that highlighted how Massey Energy "had mastered the art of the regulatory waiver" to "legally circumvent federal mining laws."[2] Likewise, after a Congressional Research Service report detailed how federal agencies "waived a number of regulatory requirements" in the wake of Hurricane Katrina,[3] Chairman Paul R. Verkuil of the Administrative Conference of the United States testified before Congress in 2010, recognizing the potential abuse of "agency authorities and procedures for issuing waivers" during such situations.[4] He then raised some key, unanswered questions about the little-known nature of regulatory exemptions: "What process is required for waivers? . . . Are granting and denying waivers and exemptions rulemaking or adjudication, and what should follow" from that classification?[5] This Recent Development explores the curious nature of regulatory exemptions and attempts to answer the Chairman's questions.

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1. WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

2. Kimberly Kindy, *Longtime Tug of War on Mine Safety*, WASH. POST, Jan. 4, 2011, at A1.

3. *See* CURTIS W. COPELAND, CONG. RESEARCH SERV., RS22253, REGULATORY WAIVERS AND EXTENSIONS PURSUANT TO HURRICANE KATRINA, at CRS-1 (2005).

4. *Administrative Conference of the United States: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 111th Cong. 57 (2010) (statement of Paul R. Verkuil, Chairman, Administrative Conference of the United States).

5. *Id.*

I. WHAT IS THE BASIC IDEA BEHIND EXEMPTIONS?

Any child who has ever received special permission to stay up past his or her normal bedtime to finish watching the Super Bowl, the end of a movie, election results, or some other important event on television understands the basic concept of a regulatory exemption. Occasionally, the governing authority, in this case the parents, will grant an exception from the normal rule that would otherwise control the situation.

While parents undoubtedly possessed this power throughout history, governmental exemption authority can be traced back at least as far as "the royal dispensation power of early English law," which "allowed the king largely unbounded freedom to grant individual subjects permission to disobey a law."[6] This authority continues in the modern administrative state, where regulated parties can request exemptions from legal requirements.

A. What Is the Difference Between Exemptions and Enforcement Discretion?

Exemption authority is similar to "enforcement discretion" or "prosecutorial discretion," which describe an agency's decision not to enforce its regulations in particular situations. Both enforcement discretion and exemptions involve "decisions by governmental officials not to apply the literal terms of the law in an instance where the rights of a private party are affected."[7] But exemptions are more like the royal grant of permission in that they are formal, written, affirmative agency actions. An exemption can also potentially "encompass[ ] procedural and substantive rules as well as decisions outside the enforcement process."[8] Presumably because of the broad manner in which they may be used, exemptions are generally subject to judicial review, albeit under the relatively lenient standards of the Administrative Procedure Act (APA).[9]

Enforcement discretion, on the other hand, encompasses more passive, informal (often unannounced), unilateral agency decisions not to enforce

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6. Jeffery M. Sellers, Note, *Regulatory Values and the Exceptions Process*, 93 YALE L.J. 938, 940 n.8 (1984).

7. *Id*. at 940 n.9.

8. *Id.*

9. Several courts have applied the deferential arbitrary and capricious standard in this context. *See, e.g.*, Honeywell Int'l, Inc. v. Nuclear Regluatory Comm'n, 628 F.3d 568, 578 (D.C. Cir. 2010) (applying this deferential standard to petitioner's challenge to agency denial of exemption); Yetman v. Garvey, 261 F.3d 664, 669 (7th Cir. 2001); W. Neb. Res. Council v. EPA, 793 F.2d 194, 200 (8th Cir. 1986); Rombough v. FAA, 594 F.2d 893, 895–97 (2d Cir. 1979).

existing regulations against private parties that are or could be violating them. Going back to the example of a child's bedtime, parents would exercise enforcement discretion by passively standing back and saying nothing when the child stays up past the normal bedtime. In the federal agency arena, this discretion has a more limited scope and an uncertain duration, as agency officials could change their minds at any moment and decide that the balancing of factors favors taking the delayed enforcement action.

Presumably for these reasons, along with the traditional prosecutorial discretion over law enforcement matters and the difficulty of evaluating an agency's priorities, chances of success, and available resources, the Supreme Court determined that an agency's exercise of enforcement discretion is, unlike its grant of exemptions, generally unreviewable by the courts.[10] Potential exceptions to the unreviewability doctrine remain, however, for those situations where the "substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers,"[11] or where an "agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities."[12]

B. What Are the Bases for Exemptions?

Some statutes provide explicit authority for exemptions,[13] but many others do not. Likewise, some regulations provide explicit authority for exemptions from the rules,[14] while other regulations do not.

Regardless of specific provisions in statutes and regulations, the Supreme Court has said that "an agency's authority to proceed in a complex area [of] regulation by means of rules of general application entails a concomitant authority to provide exemption procedures in order to allow for special circumstances."[15] In fact, in one early case, the U.S. Court of Appeals for the D.C. Circuit suggested that agencies not only *may* but *must* provide exemptions from general rules in special circumstances.[16] A few

10. *See* Heckler v. Chaney, 470 U.S. 821, 831–33 (1985).

11. *Id.* at 833.

12. *Id.* at 833 n.4.

13. *See, e.g.*, 30 U.S.C. § 811(c) (2006) (allowing for modification of any mandatory mining safety standard after a petition, investigation, and hearing).

14. *See, e.g.*, 10 C.F.R. § 50.12 (2011) (giving the Nuclear Regulatory Commission (NRC) power to grant exemptions upon its own initiative or following a petition).

15. United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 755 (1972).

16. *See* WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969) ("The agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances. [Some cases warrant] serious consideration of meritorious

more recent opinions, however, have implicitly disagreed with this earlier approach.[17]

While the Supreme Court later noted that Congress may explicitly restrain agencies from granting exemptions,[18] lower courts affirmed that generally, "limited grounds for the creation of exemptions are inherent in the administrative process," and agencies may use "'equitable' discretion' . . . to afford case-by-case treatment—taking into account circumstances peculiar to individual parties in the application of a general rule . . . or even in appropriate cases to grant dispensation from the rule's operation."[19] The courts have noted agencies' need for "flexibility," and recognize that exemptions "enhance[ ] the effective operation of the administrative process."[20]

II. HOW DO EXEMPTIONS WORK UNDER THE ADMINISTRATIVE PROCEDURE ACT?

The APA defines and governs federal agency action. Therefore, the APA is the natural starting point in determining the nature of regulatory exemptions. Under the APA, an exemption is a form of "relief,"[21] which is a type of final "agency action."[22] Thus, an agency's decision on an exemption is reviewable in court.[23]

But what *kind* of final action is it? As the Department of Justice recognized shortly after the APA's enactment, "the entire Act is based upon a dichotomy between rule making and adjudication."[24] The APA defines "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret,

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applications for waiver, and a system where regulations are maintained inflexibly without any procedure for waiver poses legal difficulties.").

17. *See, e.g.*, Yetman v. Garvey, 261 F.3d 664, 679 (7th Cir. 2001) (holding that agencies have discretion to adopt inflexible no-exemption policies if they have good reasons for doing so); Starr v. FAA, 589 F.2d 307, 312 (7th Cir. 1979) (an agency's "no-exemption policy" is not necessarily unreasonable, and may be quite beneficial).

18. E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112 (1977).

19. Ala. Power Co. v. Costle, 636 F.2d 323, 357 (D.C. Cir. 1979); *see also* W. Neb. Res. Council v. EPA, 943 F.2d 867, 870 (8th Cir. 1991) (holding that "discretionary exemption mechanism[s] . . . 'are inherent in the administrative process'" (citing *Ala. Power Co.*, 636 F.2d at 357)).

20. *Ala. Power Co.*, 636 F.2d at 357.

21. 5 U.S.C. § 551(11).

22. *Id.* § 551(13).

23. *See id.* §§ 701–706.

24. U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 14 (1947) [hereinafter ATTORNEY GENERAL'S MANUAL].

or prescribe law or policy."[25] The APA then defines "adjudication" as the "agency process for the formulation of an order."[26] An "order" is defined as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing."[27]

In addition, "licensing" is the "agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license."[28] Finally, a "license" is "the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission."[29]

It is thus clear that a statutory exemption is a license. But what is a statutory exemption? One federal district court interpreted this provision in passing to mean that where a statute explicitly grants an agency the power to issue exemptions from its requirements in specific cases, those exemptions are statutory exemptions falling under the APA's definition of a license.[30] But no other federal judge has addressed the question, and it remains unsettled. Setting that odd construct aside, the APA definition's limitation to statutory exemptions does not clarify the wide category of regulatory exemptions—those exemptions granted by agencies exercising their inherent authority to make exceptions to general regulations. They are the focus of this Recent Development.

On the one hand, a regulatory exemption could be "an agency statement" of "particular applicability and future effect"; i.e., a rule.[31] But on the other hand, it could also be a "form of permission"; i.e., a license.[32] Or an exemption could be some other form of order.[33]

While some agencies published exemptions in the *Federal Register* between 1994 and 2011, the vast majority of exemptions were placed in the "Notices" section of the *Register*.[34] The Notices section is limited by

25. 5 U.S.C. § 551(4).
26. *Id.* § 551(7).
27. *Id.* § 551(6).
28. *Id.* § 551(9).
29. *Id.* § 551(8).
30. Nuclear Data, Inc. v. Atomic Energy Comm'n, 344 F. Supp. 719, 724 (N.D. Ill. 1972).
31. *See supra* notes 24–25 and accompanying text.
32. *See supra* notes 28–29 and accompanying text.
33. *See supra* notes 26–27 and accompanying text.
34. A February 9, 2012, search at the Government Printing Office's online Federal Digital Systems database for all *Federal Register* "Actions" whose title included "exemption" showed 3,653 entries as "Notices" and only 37 "Rules and Regulations" or "Proposed Rules" entries, plus 342 "Unknown" entries. *See FDsys Advanced Search*, U.S. GOV'T

regulation to "miscellaneous" documents and "information of public interest" not covered by the two "Rules" sections.[35] But the Rules sections, in turn, are limited to items that, if issued, "would have *general* applicability and legal effect."[36] Moreover, the Office of the Federal Register itself advises that agencies place licenses along with any "orders or decisions affecting named parties" in the Notices section of the *Register*.[37] Thus, exemptions issued as an order, license, or rule of *particular* applicability would all belong in the Notices section, and the *Federal Register* provides little assistance in distinguishing between them.

Administrative law experts, including the late Professor Kenneth Culp Davis, have also been stumped by the peculiar question of how to classify regulatory exemptions:

> The same function may come within the Act's definition of rule making and also within the Act's definition of licensing. The disposition of an application to the [Department of Labor's] Wage and Hour Division for an exemption from wage and hour requirements is a rule, because it implements wage fixing for the future, and at the same time it is a license, which the Act defines as "any agency permit, . . . approval, . . . or other form of permission."[38]

Thus, an agency might refer to its regulatory exemptions as rules or it might wish to call them adjudicatory orders. While the Supreme Court long ago held that agencies are generally free to choose either rulemaking or adjudication to make policy,[39] the agency's choice of labeling is not particularly helpful. The D.C. Circuit noted, "We doubt whether the [agency's] wrapping its finding in the mantle of an order can make it an order . . . and the label placed by the agency on its action is normally not conclusive."[40] Similarly, where an order is labeled as a final rule, this "may

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PRINTING OFFICE, http://www.gpo.gov/fdsys/search/advanced/advsearchpage.action (select "Federal Register" from Available Collections and "Add" it as the Selected Collection, then click "Add more search criteria" from the drop-down "Search in" menu; select "Action" and search for "exemption") (last visited Feb. 9, 2012).

35. 1 C.F.R. § 5.9(d) (2011).

36. *Id.* § 5.9(b)–(c) (2011) (emphasis added).

37. *See* NAT'L ARCHIVES & RECORDS ADMIN., OFFICE OF THE FED. REGISTER, FEDERAL REGISTER DOCUMENT DRAFTING HANDBOOK § 3.1 (1998), http://www.archives.gov/federal-register/write/handbook/ddh.pdf.

38. 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 5.02 (1958) (alterations in original).

39. *See* SEC v. Chenery Corp., 332 U.S. 194, 202–03 (1947) (discussing how agencies must employ flexibility in assessing each case on its own and deciding if rulemaking or adjudication is the proper avenue).

40. Sea-Land Serv., Inc. v. DOT, 137 F.3d 640, 647 (D.C. Cir. 1998) (citing Columbia Broad. Sys., Inc. v. United States, 316 U.S. 407, 416 (1942)).

reveal something about the care taken in writing headings . . . but does not alter the clearly adjudicatory nature of the Order itself."[41]

III. WHY DO WE CARE?

In the child's case, how do we classify the permission to stay up late? Is it just like any other day-to-day parental directive (analogous to an informal adjudicatory order)? Is it better seen as a special, one-time-only permission to ignore the normal bedtime rule (a license)? Or do we understand it as, in effect, a new bedtime, at least in limited circumstances, allowing the child to ignore the normal bedtime whenever a special program is on (a rule)?

Perhaps the distinction does not matter in a child's case. But it can make a difference in the modern administrative state. One year after the APA's passage, the Department of Justice recognized that it "prescribes radically different procedures for rule making and adjudication. Accordingly, the proper classification of agency proceedings as rule making or adjudication is of fundamental importance."[42]

For example, agencies must publish notice and take comments before finalizing rulemaking,[43] while informal adjudication can be a much less formal process. Though substantially pared down, informal rulemaking can be even more procedurally fastidious than informal adjudication.[44] Rulemaking is also "typically open to any interested member of the public," while potential intervenors in adjudicatory proceedings must often demonstrate some form of standing before they can participate.[45]

On the other hand, rulemaking is a legislative process, during which an agency, like Congress,

> may act on the basis of data contained in its own files, on information informally gained by members of the body, on its own expertise, or on its own views or opinions. It is not necessary for the regulatory agency to cause to be submitted at hearings evidence that would support its rule-making decisions.[46]

The nature of judicial review of an agency's decision on an exemption may also depend on its characterization as rulemaking or adjudication. For instance, the federal courts of appeal have exclusive jurisdiction only over

41. Goodman v. FCC, 182 F.3d 987, 994 (D.C. Cir. 1999).

42. ATTORNEY GENERAL'S MANUAL, *supra* note 24, at 12.

43. Administrative Procedure Act (APA), 5 U.S.C. § 553(b)–(c) (2006).

44. Gordon G. Young, *Judicial Review of Informal Agency Action on the Fiftieth Anniversary of the APA: The Alleged Demise and Actual Status of* Overton Park*'s Requirement of Judicial Review "On the Record"*, 10 ADMIN. L.J. AM. U. 179, 205 (1996).

45. *Goodman*, 182 F.3d at 994 (citing 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.7 (3d ed. 1994)).

46. Flying Tiger Line, Inc. v. Boyd, 244 F. Supp. 889, 892 (D.D.C. 1965).

certain "final orders" of some agencies.[47] Thus, in a recent case, the Second Circuit held that it lacked jurisdiction over a challenge to an exemption issued by the Nuclear Regulatory Commission (NRC).[48] Therefore, it can make a difference whether regulatory exemptions are rules, orders, licenses, or something else under the APA.

The proper classification of regulatory exemptions also matters because it gives guidance to agencies in drafting rules. For example, if regulatory exemptions are classified as separate, particularized rules that must go through the notice-and-comment process, then agencies may need to be even more careful in how they word their regulations. More specific standards could lead to a need for more exemptions to counter unforeseen circumstances, while broader, more generic standards could obviate this problem.

IV. ARE EXEMPTIONS "RULES"?

As noted previously, the APA definition of adjudication is "largely a residual one"[49]—agency action other than rulemaking. "Thus, in determining whether a particular agency function is rule making or adjudication, the first rule of construction is to determine whether it falls within the more affirmative and specific definition of 'rule' in [the APA]; if not, it is adjudication."[50]

The eminent Professor Davis is not the only scholar who has suggested that an exemption may be a rule. For example, a recent treatise agreed that the "creation of an exception or waiver of a requirement may itself be a rule, as it has prospective effect to a group of regulated persons."[51] Testimony in a fairly recent congressional hearing also addressed the subject of "waivers from existing statutes and regulations," asking, "Is it rulemaking or adjudication?"[52] The question remains unsettled.

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47. *See* 28 U.S.C. § 2342 (2006) (giving the courts of appeals exclusive jurisdiction over orders issued by the Federal Communications Commission, the NRC, and the Secretary of Agriculture). *But see* Citizens Awareness Network, Inc. v. United States, 391 F.3d 338, 345–47 (1st Cir. 2004) (holding that, in light of 42 U.S.C. § 2239(a)(1)(A) & (b)(1) and the Supreme Court's decision in *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985), "final orders" also encompass some final NRC rules).

48. *See* Brodsky v. NRC, 578 F.3d 175, 182 (2d Cir. 2009).

49. ATTORNEY GENERAL'S MANUAL, *supra* note 24, at 13.

50. Robert W. Ginnane, "*Rule Making*," "*Adjudication*," *and Exemptions Under the Administrative Procedure Act*, 95 U. PA. L. REV. 621, 623 (1947).

51. JAMES T. O'REILLY, ADMINISTRATIVE RULEMAKING § 12:9 (2d ed. 2011).

52. *Administrative Law, Process and Procedure Project: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 109th Cong. 71 (2005) (statement of Jeffrey S. Lubbers, Fellow in Law and Government Program, American University Washington College of Law).

The debate focuses on the term *particular applicability* in the APA definition of a rule,[53] which was added to the APA definition of rule late in the process of drafting the APA.[54] As a footnote in a committee report explained, the phrase was added "in order to avoid controversy and assure coverage of rule making addressed to named persons," and thus, "the definition of 'rule' ended up with the entire emphasis on 'future effect.'"[55]

Although unstated, the particular applicability language could also apply beyond rules addressed to named *persons* to include rules directed at very narrow, specific (or particular) events, companies, or facilities.[56] In this sense, "the issuance of a waiver or an exception simply represents . . . promulgation of a rule applicable to a category of one entity."[57] On the other hand, a rule can probably "be considered to be of 'general applicability' even though it is directly applicable to a class which consists of only one or a few persons if the class is open in the sense that in the future the number of members of the class may be increased."[58]

While some would argue that an agency proceeding focused on a named person or facility seems more in line with the common understanding of adjudication, such proceedings can also be characterized and conducted as rulemaking. As described by the U.S. Court of Appeals for the First Circuit, "what is otherwise rule making does not become adjudication merely because it applies only to particular parties or to a particular situation."[59] Likewise, the number of parties involved "is not conclusive on the question" of whether a proceeding is rulemaking or adjudication.[60] "Just as a class action can encompass the claims of a large group of plaintiffs without thereby becoming a legislative proceeding, an adjudication can affect a large group of individuals without becoming a rulemaking."[61]

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53. 5 U.S.C. § 551(4) (2006).

54. *See* Ginnane, *supra* note 50, at 626–27 (discussing the decision to change the language of the definition of *rule*).

55. *Id.* at 626 (citing H.R. REP. NO. 79-1980, at 49 (1946)).

56. *See, e.g.*, 10 C.F.R. § 63.1 (2011) (stating that the NRC's rules at 10 C.F.R. Part 63 apply only to the Department of Energy's application to construct and operate a high-level radioactive waste repository at Yucca Mountain, Nevada).

57. SIDNEY A. SHAPIRO & ROBERT L. GLICKSMAN, RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH 161 (2003).

58. Statement of the Administrative Conference on ABA Resolution No.1 Proposing to Amend the Definition of "Rule" in the Administrative Procedure Act, 1 C.F.R. § 310.3(a) (1975) ("Thus, for example, smoke emission standards for a particular area are of general applicability even though at the time of their issuance they may, as a practical matter, be applicable to only one plant.").

59. Law Motor Freight, Inc. v. Civil Aeronautics Bd., 364 F.2d 139, 143 n.4 (1st Cir. 1966) (citing DAVIS, *supra* note 38, § 5.02).

60. Anaconda Co. v. Ruckelshaus, 482 F.2d 1301, 1306 (10th Cir. 1973).

61. Goodman v. FCC, 182 F.3d 987, 994 (D.C. Cir. 1999) (citing NLRB v. Bell

Admittedly, courts and scholars have struggled with the "particular applicability" language in the APA's definition of *rule*.[62] For example, then-Professor Antonin Scalia disparagingly remarked that "it is generally acknowledged that the only responsible judicial attitude toward this central APA definition is one of benign disregard."[63] Most commentators therefore focus on other distinctions between rules and adjudications.

The House Committee on the Judiciary attempted to summarize the difference as follows: "'Rules' formally prescribe a course of conduct for the future rather than pronounce past or existing rights or liabilities," while "licenses involve a pronouncement of present rights of named parties although they may also prescribe terms and conditions for future observance."[64]

Representative Francis Walter was Chairman of the House Committee on the Judiciary during the drafting of the APA. He also attempted to explain the difference between adjudication and rulemaking, stating that rules "in form or effect are like the statutes of the Congress," while adjudications are "those familiar situations in which an officer or agency determines the particular case just as, in other fields of law, the courts determine cases."[65] The Supreme Court likewise noted a "distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards . . . and proceedings designed to adjudicate . . . particular cases."[66]

But this conception of administrative rulemaking as a procedure used to determine policy questions while adjudication decides individual cases is not rooted in the text of the APA and has not always withstood Supreme Court scrutiny. One year later, the Court clarified that agencies are "not precluded from announcing new principles in an adjudicative proceeding."[67] In an earlier case, the Court also announced, "Adjudicated cases may . . . serve as vehicles for the formulation of agency policies, which are applied and announced therein. They generally provide a guide to action that the agency may be expected to take in future cases."[68]

Aerospace Co., 416 U.S. 267, 292 (1974)).

62. *See* Ronald M. Levin, *The Case for (Finally) Fixing the APA's Definition of "Rule"*, 56 ADMIN. L. REV. 1077, 1078–79 (2004) (noting how some have focused on "future use" language with regard to the use of "particular applicability" and this has caused confusion).

63. Antonin Scalia, Vermont Yankee*: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 383.

64. H.R. REP. NO. 79-1980, at 20 (1946).

65. 92 CONG. REC. 5648 (1946) (statement of Rep. Walter).

66. United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 245 (1973).

67. NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974).

68. NLRB v. Wyman-Gordon Co., 394 U.S. 759, 765–66 (1969).

Attorney General (and later Supreme Court Justice) Tom Clark attempted to clarify the difference between rulemaking and adjudication by explaining

> Proceedings are classed as rule making under [the APA] . . . because they involve subject matter demanding judgments based on technical knowledge and experience. . . . In many instances of adjudication, on the other hand, the accusatory element is strong, and individual compliance or behavior is challenged . . . .[69]

Adjudications are more "concerned with the determination of past and present rights and liabilities," such as "a decision as to whether past conduct was unlawful," or a "determination of a person's right to benefits under existing law."[70] In such proceedings, parties often fiercely dispute issues of fact.[71] Finally, an early scholar, also a member of the Assistant Solicitor General's office, remarked, "In rule making, disciplinary or accusatory elements are absent," and "the purpose of the proceeding" is "to determine future policy."[72]

These early opinions indicate that rules were intended to pronounce future rights, based on policy decisions and broad technical knowledge and experience. Adjudications were meant to be more individualized, fact-based proceedings, determining past or present rights. Still, as the House Committee on the Judiciary admitted, licenses also prescribe future rights, so there is some potential overlap between rules and certain orders, particularly licenses. Exemptions tend to be individualized, fact-specific proceedings that focus on future rights. So perhaps exemptions can be *either* rulemaking or adjudication.

Although the plain text of the APA's definition section does not provide a compelling answer, one can look deeper into the statute for guidance. For example, the definition of *rulemaking* describes loosened publication requirements for "a substantive rule which grants or recognizes an exemption or relieves a restriction."[73] Further, the Attorney General stated that substantive rules are those "rules, other than organizational or procedural" that are "issued by an agency pursuant to statutory authority and which implement the statute . . . . Such rules have the force and effect of law."[74] Thus, substantive rules, as opposed to interpretive rules, have

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69. SEN. REP. NO. 79-752, at 39 (1945) (statement of Tom C. Clar, Att'y Gen., appendix).

70. ATTORNEY GENERAL'S MANUAL, *supra* note 24, at 14–15.

71. *Id.* at 15.

72. Ginnane, *supra* note 50, at 630.

73. APA, 5 U.S.C. § 553(d)(1) (2006).

74. ATTORNEY GENERAL'S MANUAL, *supra* note 24, at 30 n.3. The Manual also contrasts substantive rules with "interpretative rules" that "advise the public of the agency's

binding legal effect.[75] Any exemption would be an action with legal effect, allowing the recipient not to comply with particular regulatory requirements.

Considering its definition of rule and the above-noted loose publication requirement, the APA clearly implies that an agency may grant an exemption through a rulemaking. The Attorney General also stated that there may be rules "granting or recognizing [an] exemption."[76] A contemporary scholar stated that the publication section referred to "an agency 'rule' which results in permitting or authorizing a person to do something which he would otherwise be prohibited from doing by a statute or by some other rule,"[77] indicating that the APA drafters' definition of an exemption was likely quite similar to the current understanding.

Federal courts have also concluded that agencies may grant exemptions through rulemaking. For example, in *Hou Ching Chow v. Attorney General*,[78] the court held that a rule granted an exemption under the publication subsection.[79] In *Capitol Airways, Inc. v. Civil Aeronautics Board*,[80] the D.C. Circuit recognized agencies' authority to issue "blanket exemptions" from existing regulations through rulemaking.[81] The Civil Aeronautics Board even promulgated rules for granting exemptions that said, "Proceedings for the issuance of exemptions by regulation shall remain subject to the provisions governing rule making."[82]

The cases and provisions show that some exemptions may be and have been granted through rulemaking. Current regulations also include some exemptions issued by rule, such as broad exemptions from the NRC's otherwise-applicable fee rules for regulated entities.[83]

By contrast, many exemptions are granted outside of rulemaking. For example, the NRC found that where existing regulations explicitly authorized exemptions, any exemptions granted pursuant to that scheme were not new, particularized rulemakings, but were rather part of the

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construction of the statutes and rules which it administers," and "statements of policy" that "advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *Id.*

75. *See* Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1108–09 (D.C. Cir. 1993).

76. ATTORNEY GENERAL'S MANUAL, *supra* note 24, at 35–36.

77. Ginnane, *supra* note 50, at 634.

78. 362 F. Supp. 1288 (D.D.C. 1973).

79. *Id.* at 1292.

80. 292 F.2d 755 (D.C. Cir. 1961).

81. *Id.* at 757–58.

82. *See* 14 C.F.R. § 302.400 (1964).

83. 10 C.F.R. §§ 170.11(a) (2010).

existing regulatory scheme.[84] In another case, the Eighth Circuit held that an agency's issuance of a minor exemption from regulatory requirements was explicitly not an exercise of rulemaking authority.[85]

The minor exemption language ties back to the special circumstances terminology used by the Supreme Court when it authorized regulatory exemptions.[86] Perhaps an agency that issues numerous exemptions from its regulations, absent special circumstances, may be engaging in rulemaking or at the least risking a suit alleging that it has unlawfully "'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities."[87]

As the NRC noted, generally "regulatory policy . . . is developed through the rulemaking process without expecting a need for large numbers of exemptions," and it would "exercise its discretion to limit exemptions in any particular area if the 'exceptions' to the rule threaten to erode the rule itself."[88] Exemptions should be based on a "need for *unusual* relief from a rule due to a situation not contemplated when that rule was promulgated."[89] Limited numbers of exemptions issued in unusual circumstances should not require rulemaking.

In some cases, however, large numbers of "exemptions can serve as warning signals that a particular rule may need to be revised" through rulemaking.[90] While "[t]he grant of limited exemptions to a limited number of [applicants] . . . does not pose any special problems," the "repeated issuance of a large number of exemptions which, considered

84. *See* Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 and 2), 51 N.R.C. 90, 97 n.8 (2000) ("Both the provision authorizing the exemption and the regulation from which the exemption has been granted are part of the same regulatory scheme . . . referred to in the facility license and which [the licensee and exemption applicant] continues to have a duty to follow. Thus, the license and the regulations anticipate exemptions—which may be granted without amending the license or modifying the regulations.").

85. W. Neb. Res. Council v. EPA, 943 F.2d 867, 872 (8th Cir. 1991) (citing W. Neb. Res. Council v. EPA, 793 F.2d 194, 199–200 (8th Cir. 1986)).

86. *See* United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 755 (1972).

87. Heckler v. Chaney, 470 U.S. 821, 833 n.4 (1985). *But see* Block v. SEC, 50 F.3d 1078, 1084 (D.C. Cir. 1995) (suggesting that an agency's decision to grant exemptions from regulations rather than take enforcement actions in response to noncompliance is not an abdication of responsibility where interested parties may submit written comments advising the agency to deny exemption requests, and where the agency has recently denied at least one exemption request).

88. Specific Exemptions; Clarification of Standards, 50 Fed. Reg. 50,764, 50,765 (Dec. 12, 1985) (codified at 10 C.F.R. pt. 50).

89. U.S. Dep't of Energy (Clinch River Breeder Reactor Plant), 17 N.R.C. 1, 4 (1983) (emphasis added).

90. Specific Exemptions; Clarification of Standards, 50 Fed. Reg. at 50,765.

together, represent a fundamental alteration of the conceptual nature of the licensing basis, to more than a limited number of plants essentially constitutes a generic change to the regulatory requirements."[91] These "generic changes should be adopted through rulemaking, rather than the case-by-case approach inherent in the regulatory approach embodied in the issuance of exemptions."[92] Likewise, "the granting of a large number of exemptions to a single plant, should not be so extensive that the validity of the original license is called into question."[93]

In at least one case, a federal court has found that excessive use of exemptions amounts to rulemaking; in *Delta Air Lines*, the court confronted a situation where the Federal Aviation Administration granted about 35% of between 800 and 900 yearly applications for an exemption from a specific set of regulatory requirements.[94] The court reasoned, "Under 5 U.S.C. § 553(b), any proposed change in the Regulations must be published in the Federal Register so that the public can be given the opportunity to comment on the proposed change."[95] The court warned that agencies may not attempt to "effectively amend[ ] the Regulations by issuing *pro forma* exemptions."[96] Likewise, the D.C. Circuit recognized a difference between issuing targeted individual exemptions through adjudicatory orders and blanket exemptions from existing regulations through rulemaking.[97] In the latter cases, where an agency issues numerous, permanent, or unusually broad exemptions, it crosses the line into rulemaking.

Scholars have agreed that problems arise when exemptions are used to devise law or policy instead of simply creating an exception to existing law.[98] In these cases, "the rule making process is subverted by ad hoc agency decisions."[99] After all, "The Administrative Procedure Act was adopted to provide . . . that administrative policies affecting individual

91. U.S. NUCLEAR REGULATORY COMM'N, SECY-98-300, OPTIONS FOR RISK-INFORMED REVISIONS TO 10 CFR PART 50, at 7 (1998), http://pbadupws.nrc.gov/docs/ML9928/ML992870048.pdf.

92. *Id.*

93. *Id.*

94. Delta Air Lines, Inc. v. United States, 490 F. Supp. 907, 912–13 (N.D. Ga. 1980).

95. *Id.* at 919.

96. *Id.*

97. Capitol Airways, Inc. v. Civil Aeronautics Bd., 292 F.2d 755, 758 (D.C. Cir. 1961).

98. *See, e.g.*, Alfred C. Aman, Jr., *Administrative Equity: An Analysis of Exceptions to Administrative Rules*, 1982 DUKE L.J. 277, 320–21 n.186 (citing, *inter alia*, William T. Mayton, *The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking*, 1980 DUKE L. J. 103).

99. *Id.* (quoting *Department of Energy Gasoline Allocation Program: Hearings Before the Permanent Subcomm. on Investigations of the S. Comm. on Governmental Affairs,* 96th Cong., 2d Sess. 153–54 (1980) (statement of William T. Mayton, Professor, Emory University).

rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc determinations."[100] Thus, scholars have suggested that when agencies issue "exceptions . . . to a class or to a large number of applicants for more than an experimental period of time (for example, six months),"[101] or need to grant "substantial or numerous"[102] exemptions, they should use rulemaking.

In other words, if a child is allowed to stay up late past bedtime on most nights, it is not a special permission anymore—it is a new bedtime. In these cases, where the exemption has swallowed the rule, the "parent" agency should announce the new bedtime as a new rule rather than simply granting permission each night.

V. ARE EXEMPTIONS "LICENSES"?

Although some large or frequently granted exemptions are best classified as rules, this does not necessarily mean that more infrequent exemptions must be characterized the same way. The APA generally divides agency action into rulemaking or adjudication, so presumably these other exemptions are issued through some form of adjudication. In a recent report forwarded to Congress, the Chair of the American Bar Association's Governmental Affairs Office assumed without discussion that "[a]n agency's grant of exemption from a rule to a particular person would be an adjudication."[103] But what type of adjudication would it be?

Following Professor Davis's suggestion,[104] perhaps these exemptions are licenses, a special type of adjudication under the APA. Recall that a license is "the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission."[105]

Many exemptions are similar to licenses in that they are case-specific and allow the recipient to do something it could not have done without the

100. Morton v. Ruiz, 415 U.S. 199, 232 (1974).

101. Aman, *supra* note 98, at 322.

102. *See* Sellers, *supra* note 6, at 945 (citing NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764 (1969) (holding that "rules of general application" should be generated through rulemaking and not adjudication)).

103. *The 60th Anniversary of the Administrative Procedure Act; Where Do We Go from Here: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 109th Cong. 23 (2006) (report of the American Bar Association (ABA) that accompanied Recommendation 114, adopted by the ABA House of Delegates on Feb. 14, 2005).

104. *See* DAVIS, *supra* note 38, § 5.02 (noting that exemptions defy classification and may resemble rulemaking or licensing).

105. 5 U.S.C. § 551(8) (2006).

exemption. In that sense, they are an agency-granted "form of permission."[106] In fact, as noted previously, at least one court held that where an exemption is granted pursuant to a specific statutory authority, it is always a statutory exemption falling under the definition of a license.[107] And courts have also held that limited exemptions are "not consistent with the concept of a 'rule'" when they are subject to conditions and do not change "the agency's substantive interpretation or implementation" of its implementing statutes.[108]

There do not seem to be any reported cases where a court classified a standard regulatory exemption as a license, however. To the contrary, several courts have rejected the argument that exemptions are licenses. In one early case, for example the D.C. Circuit rejected an exemption applicant's request for a licensing hearing on the grounds that the exemption was not a license.[109] Likewise, the Ninth Circuit contrasted an "exemption proceeding," where "a hearing is not always required," with a "licensing proceeding."[110]

Perhaps "the grant of a license is a broader form of permission" than that granted by an exemption.[111] While licenses and exemptions generally say that specified conduct is lawful, laws and regulations also arguably spell out permissible conduct. On the other hand, licenses inform their recipients that specified conduct is presumptively lawful under the existing regulatory structure, while exemptions tell their recipients that their conduct is acceptable but would likely violate existing general rules and regulations.

But if many regulatory exemptions are not licenses, what exactly *are* they?

VI. ARE EXEMPTIONS SIMPLY INFORMAL ADJUDICATORY "ORDERS"?

While on some level it makes intuitive sense to classify exemptions as licenses or site-specific, particular rules, the modern administrative state has largely adopted another approach. "Most agencies grant or deny exceptions by using either formal or informal adjudicatory procedures."[112]

106. *Id.*

107. Nuclear Data, Inc. v. Atomic Energy Comm'n, 344 F. Supp. 719, 724 (N.D. Ill. 1972).

108. Ass'n of Irritated Residents v. EPA, 494 F.3d 1027, 1033 (D.C. Cir. 2007).

109. Cook Cleland Catalina Airways, Inc. v. Civil Aeronautics Bd., 195 F.2d 206, 207 (D.C. Cir. 1952).

110. Island Airlines, Inc. v. Civil Aeronautics Bd., 363 F.2d 120, 124 (9th Cir. 1966).

111. Kelley v. Selin, 42 F.3d 1501, 1518 (6th Cir. 1995) (comparing licenses to NRC design certifications for reactors, "a narrower procedure that approves designs in theory").

112. Aman, *supra* note 98, at 321.

For example, one district court stated that where an agency's decision to issue an exemption "rest[s] on considerations peculiar to each individual case," the agency's "action in deciding whether to waive its [requirements] is more in the nature of an adjudication than of rule-making."[113]

The APA allows for two distinct types of adjudication—informal and formal.[114] As described by the Attorney General, informal adjudications "constitute the vast bulk of administrative adjudication and are truly the lifeblood of the administrative process."[115] In fact, informal action has been estimated to encompass over 90% of agency activities.[116] On the other hand, formal adjudications, which follow hearing-specific procedures set forth in the APA, only take place when "required by statute,"[117] and when exemptions are discussed in statute, these statutory exemptions are licenses under the APA. Therefore, standard regulatory exemptions do not need to "be adjudicated 'after opportunity for agency hearing'"[118] and are issued through informal procedures. The result of informal adjudications is a simple order,[119] which is not as specific a device as a license.

The Ninth Circuit hinted at this outcome when it stated that a hearing is not always required in an exemption proceeding.[120] The Seventh Circuit agreed that an exemption proceeding is an example of an informal situation where normally no hearing is required.[121] In these informal exemption cases, an agency is not required to "carry out extensive waiver

113. Nuclear Data, Inc. v. Atomic Energy Comm'n, 344 F. Supp. 719, 723 (N.D. Ill. 1972); *see also* Keller Commc'ns, Inc. v. FCC, 130 F.3d 1073, 1076–77 (D.C. Cir. 1997); Int'l Union v. Fed. Mine Safety & Health Admin., 920 F.2d 960, 964 (D.C. Cir. 1990) (stating that agency's exercise of power to "exempt mines from . . . interim [safety] standards" was an example of "case-by-case adjudication"); Basic Media, Ltd. v. FCC, 559 F.2d 830, 833 (D.C. Cir. 1977) (finding that where there are "particular cases of hardship," agencies may make individual dispensations or grant exceptions through case-by-case adjudication); Turro v. FCC, 859 F.2d 1498, 1499–1500 (D.C. Cir. 1988) (noting only two uses of exemptions).

114. 5 U.S.C § 554(a) (2006).

115. U.S. DEP'T OF JUSTICE, FINAL REPORT OF ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 35 (1941).

116. Warner W. Gardner, *The Informal Actions of the Federal Government*, 26 AM. U. L. REV. 799, 799 (1977).

117. 5 U.S.C. § 554(a).

118. E. Airlines v. Civil Aeronautics Bd., 185 F.2d 426, 428 (D.C. Cir. 1950), *vacated as moot*, 341 U.S. 901 (1951) (per curiam).

119. *See* Rombough v. FAA, 594 F.2d 893, 895 n.4, 896 (2d Cir. 1979) (an agency's decision on an exemption is a final agency order because it "imposes an obligation, denies a right, or fixes some legal relationship" (citing Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 112–13 (1948))).

120. Island Airlines, Inc. v. Civil Aeronautics Bd., 3 63 F.2d 120, 124 (9th Cir. 1966).

121. Starr v. FAA, 589 F.2d 307, 311 (7th Cir. 1978).

proceedings."[122] In the absence of these more extensive procedures, agencies normally decide regulatory exemptions in "*ad hoc* waiver proceeding[s]."[123] Some scholars have also agreed that "[t]he quasi-judicial requirements of 'formal adjudication' . . . generally do not apply to exceptions processes."[124]

Interestingly, when Congress added the Congressional Review Act[125] to Title 5 of the United States Code in 1996, its definition of rule,[126] for the purposes of that Act, incorporated most of the APA's definition, excluding rules of particular applicability. But more importantly, the Act's sponsors published a "detailed explanation and a legislative history,"[127] and one sentence near the end of that explanation indicated a belief that particularized rules were different from other agency actions outside the Act's definition of *rule*.[128] The latter category included, separately, licenses and exemptions.[129] Although it did not directly interpret the APA, this brief statement of Congressional intent is additional evidence that regulatory exemptions could be considered something other than rules or licenses under the APA. The only remaining category is simple adjudicatory orders.

CONCLUSION: IT IS THE AGENCY'S CHOICE?

Shortly after its passage, Justice Robert Jackson noted that the APA "contains many compromises and generalities and, no doubt, some ambiguities."[130] Unfortunately, ever since the Act's passage, the status of regulatory exemptions was one of those ambiguities.

As noted previously, the APA's definition of an adjudicatory order is a residual one, covering agency action other than rulemaking.[131] Applying this definition, agency functions should therefore generally be considered rulemaking if they fall within that broad category and adjudication only if they are not rulemaking.[132] And regulatory exemptions do seem to fit the APA's definition of *rules* when that definition's somewhat nebulous

122. Indus. Broad. Co. v. FCC, 437 F.2d 680, 683 (D.C. Cir. 1970).
123. Turro v. FCC, 859 F.2d 1498, 1500 (D.C. Cir. 1988).
124. Sellers, *supra* note 6, at 941 n.12.
125. *See* 5 U.S.C. §§ 801–808 (2006).
126. *Id.* § 804(3).
127. 142 CONG. REC. S3683 (daily ed. Apr. 18, 1996) (statement of Sen. Nickles).
128. *Id.* at S3687.
129. *Id.*
130. Wong Yang Sung v. McGrath, 339 U.S. 33, 40–41 (1950).
131. *See supra* notes 24 & 27 and accompanying text.
132. *See supra* note 50 and accompanying text.

particular applicability criterion is taken seriously[133] But even when that term is ignored, as Justice Scalia advised, exemptions may still be classified as rules when a significant number are issued so that they take on the spirit of rulemaking.[134]

On the other hand, Justice Hugo Black explained that

> so long as the matter involved can be dealt with in a way satisfying the definition of either 'rule making' or 'adjudication' under the Administrative Procedure Act, that Act . . . should be read as conferring upon the [agency] the authority to decide, within its informed discretion, whether to proceed by rule making or adjudication.[135]

Although regulatory exemptions may be classified as rules, they can and have also been issued as adjudicatory orders. And in accordance with "bedrock administrative law," agencies can exercise "informed discretion" in choosing whether to resolve matters through rulemaking or adjudication.[136] According to the Supreme Court, agencies are allowed to choose whether to engage in rulemaking or adjudication.[137]

Thus, agencies are not precluded from exercising informed discretion and choosing to issue particularized exemptions through rulemaking. But most agencies issue regulatory exemptions by orders issued through the informal adjudication process rather than as rules following the APA rulemaking process. These adjudications are not procedurally distinct from many other routine federal agency decisions.

This fact would not surprise most parents, who would not consider special decisions on their child's bedtime to be any different from the other general supervisory decisions they make each day. But to the extent that agencies issue broad and numerous regulatory exemptions, or parents constantly make special exceptions to their children's normal bedtime, they creep closer to effectively exempting the old rules and times out of existence and making new rules. Thus, federal agencies should make these de facto rule changes using the regular notice-and-comment rulemaking process.

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133. *See supra* note 25 and accompanying text.

134. *See supra* note 63 and accompanying text.

135. NLRB v. Wyman-Gordon Co., 394 U.S. 759, 772 (1969) (Black, J., concurring).

136. Nat'l Cable & Telcomms. Ass'n v. FCC, 567 F.3d 659, 670 (D.C. Cir. 2009) (citing SEC v. Chenery Corp., 332 U.S. 194, 203 (1947)).

137. NLRB v. Bell Aerospace Co., 416 U.S. 267, 292–94 (1974).