PRRAC

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PREPARING FOR EXECUTIVE AGENCY ACTION UNDER TRUMP: AN ADMINSTRATIVE PROCEDURE ACT PRIMER

We are living under a presidential administration bent on both deregulation and civil rights rollbacks. In the first six months, early rhetoric about the "deconstruction of the administrative state"[1] has taken concrete form with the issuance of two executive orders: the "Two-for-One/Cost-Cap E.O." and the "Regulatory Reform Agenda E.O.," which together instruct agencies to identify regulations and guidance to rescind or modify. Other dimensions of the landscape include non-enforcement of our anti-discrimination laws, budget cuts impairing program oversight, and external, undefended attacks on civil rights regulations in the courts. At the same time, we know that the Administration may use the executive agencies to swiftly enact new policies of its own devising.

As the civil rights community faces an Administration likely to use executive agency power aggressively and push the limits of legal action, an important tool in our collective arsenal will be administrative law. Shaped largely by the Administrative Procedure Act (APA) and its interpretation thus far in the courts, this body of law restrains executive agency action. It enables the public to enforce the constitutional balance of powers and procedures for transparent reasoning, and to ensure that substantive statutes are followed. While the APA still cuts agencies a wide swath of deference in their activities, understanding this law and how to use it will be of great use to advocates as we fight to protect our civil rights gains.

THE APA AND AGENCY ACTIVITIES: UNDERSTANDING THE LANDSCAPE

The APA sets out procedural requirements that agencies must follow when issuing regulations or guidance, as well as the legal standards used by courts in reviewing a range of agency activities. (These standards have been largely developed through case law.) Both of these depend on the type of action (or inaction) that the agency is engaging in: for instance, issuing or rescinding regulations, issuing or rescinding guidance, or setting non-enforcement policies.

Agency Rulemaking

Agencies may issue both "legislative rules" (known more colloquially as "regulations") and "interpretive rules" (known as "guidance"). The APA does not draw a clear line between the two. The definition – while still blurry – has been gradually shaped by court holdings. The general principle is that a legislative rule binds the public and has the force of law, while interpretative rules clarify existing policies, set general agency policies, or set agency procedures. In practice, the distinction matters because agencies can more fluidly issue, rescind, or amend guidance: there are fewer procedural requirements for guidance in comparison to those required for regulations, and less availability of judicial review.

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[1] See, e.g., Philip Rucker and Robert Costa, "Bannon vows a daily fight for 'deconstruction of the administrative state'" Washington Post, Feb. 23, 2017, available at www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html?utm_term=.1146729d862d.

Issuing Regulations

Except for relatively rare instances where other statutes specify that "formal rulemaking" (requiring additional procedures such as hearings) must be used, the APA requires that regulations be issued through the "informal rulemaking" process. This is otherwise known as notice-and-comment rulemaking. The APA prescribes the following procedures for notice-and-comment rulemaking: (1) publication of a notice of proposed rulemaking (NPRM) in the Federal Register; (2) solicitation of public comments, and (3) publication of the final rule. Using this process, the agency documents the underlying authorities and decision-making rationale that supports the regulation. Should it fail to do this adequately, it may leave the regulation vulnerable to challenge using the APA (as discussed below). The notice-and-comment process has several effects: it slows down the pace of agency action; it requires agencies to provide justifications for policy changes; and it allows the public to contribute to the administrative record that may later be used in litigation.

Modifying or Rescinding Regulations

Just as when an agency issues a regulation, it must undergo notice-and-comment rulemaking when it modifies or rescinds a regulations. It may not simply reverse the rule without this process. As with the issuance of new regulations, this means that policy changes occur at a more deliberate pace, with opportunity for public comment and record-building.

Issuing, Modifying, or Rescinding Guidance

The APA's treatment of guidance (or "interpretive rules" or "statements of policy") is different than that of regulations. Although guidance documents are still published in the Federal Register, no notice-and-comment process is required. Because guidance does not create new legal rights or obligations for the public, agencies are enabled to more swiftly and fluidly enact or withdraw such documents. Furthermore, court review of guidance is more limited than that of regulations.

An agency's withdrawal or modification of guidance is treated the same way as its issuance of guidance,[2] with little required process and or ability for review. However, it is possible to challenge policies that have the effect of a regulation but are issued in the form of guidance or amendments to guidance, on the grounds that these were issued without adequate process.[3]

Executive Orders

The APA does not directly govern Executive Orders, which can be used or repealed with no process. Executive Orders are, of course, still restrained by the Constitution and existing law.[4] An executive order may implicate the APA where it directs agencies to undertake activity through which they would act counter to their statutory obligations or otherwise themselves violate the APA.[5]

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[2] See *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015).
[3] See *Hudson v. FAA*, 192 F.3d 1031, 1034 (D.C. Cir. 1999).
[4] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) ("holding that the seizure order was not within the constitutional power of the President.").
[5] A lawsuit of this nature was brought against the Two-for-One Executive Order by NRDC, Public Citizen, and Earthjustice; complaint available at www.citizen.org/sites/default/files/complaint-public-citizen-nrdc-cwa-v-donald-trump.pdf.

Enforcement Policies

Agencies have substantial discretion in setting enforcement policies, priorities, and procedures. This discretion has been recognized by the courts, which are reluctant to review agencies' enforcement decisions. In limited scenarios, however, enforcement decisions can be challenged.[6] *Heckler v. Chaney*, a foundation case holding that agencies have a presumption of "absolute discretion" in the area of enforcement, also stated that this presumption may be overcome "where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." or when an agency has "consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities."[7] Jurisprudence in this area, however, remains fairly undeveloped, with advocates as of yet lacking strong positive examples they can follow or cite.

CHALLENGING REGULATIONS: LAYING THE GROUNDWORK

As noted above, the public may use the APA to challenge agency actions. A threshold question is whether the action at issue is a "final action": agencies' issuance, modification, or rescinding of regulations are "final actions" and subject to review, but similar activity involving guidance ("interpretative rules" or "statements of policy") has been held not subject to review. The exception is where the plaintiff can show that it has the characteristics of a legislative rule and ought to have been issued as such.

APA Challenges

The APA specifies the grounds on which agency action may be challenged (i.e., the scope of review). Under Section 706 of the APA, [8] a party can challenge final agency action that is:

> (a) "unlawfully withheld or unreasonably delayed": in such instances, a party may bring a petition for rulemaking, but courts are generally deferential to agencies unless there is a statutory deadline.[9]
>
> (b) "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law": courts apply this standard in scrutinizing the administrative record to determine whether an agency has engaged in reasoned decision-making in its rulemaking (see record discussion below).
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> (c) "contrary to constitutional right, power, privilege, or immunity": enables challenges on constitutional grounds.
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> (d) "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right": in making this determination, the court will follow *Chevron* doctrine and (within limitations) defer to agency interpretation of the statute.[10]

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[6] See Daniel T. Shedd & Todd Garvey, *A Primer on the Reviewability of Agency Delay and Enforcement Discretion*, Congressional Research Service (Sept. 4, 2014), https://fas.org/sgp/crs/misc/R43710.pdf.
[7] See *id.* at 30, citing *Heckler v. Chaney*, 470 U.S. 821, 838 (1985).
[8] 5 U.S.C.A. § 706(1)-(2).
[9] See Daniel Shedd, *Administrative Agencies and Claims of Unreasonable Delay: Analysis of Court Treatment*, Congressional Research Service (2011), available at https://fas.org/sgp/crs/misc/R43013.pdf.
[10] *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

(e) "without observance of procedure required by law": for instance, failure to follow the notice-and-comment requirements. Suits in this category may also be brought when the agency final rule is not a "logical outgrowth" of the proposed version.[11]

Notice-and-comment and the Rulemaking Record

When a court reviews agency action, its review is based on the "administrative record" or "rulemaking record." With limited exceptions, it does not look to outside information or conduct discovery in assessing whether the agency's decision was arbitrary and capricious. For this reason, advocates who anticipate bringing legal challenges to agency rulemaking are advised to take seriously the notice-and-comment process and the opportunity to build the record.

In anticipation of potential review, the agency will document its reasoning and the statutory authority, data, and policy grounds that underlie its decision when issuing a final rule. If it is unable or fails to do so, a court may find its action unlawful as based on the rulemaking record. Case law provides that "an agency rule would be arbitrary and capricious if the agency has relied on factors that Congress has not intended it to consider, 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."[12]

If a rulemaking is challenged in court, the agency must compile and submit the record as the basis for review.[13] It may not withhold information contrary to its decision. The record includes information "known to the decision-maker," including the rulemaking docket—that is, the comments submitted by the public in response to the rulemaking. During the notice-and-comment process, advocates may shape the content of the record by providing evidence supporting their arguments for or against the agency's proposed action.

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[11] Courts will hold that if interested parties "should have anticipated" the change from the proposed rule to the final rule, then the final rule is a logical "outgrowth." *CSX Transportation v. Surface Transportation Board*, 584 F.3d 1076 (D.C. Cir. 2009).

[12] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*,463 U.S. 29, 30 (1983).

[13] See Leland Beck, *Agency Practices and Judicial Review of Agencies in Informal Rulemaking* (2013), Administrative Conference of the United States, *available at* www.acus.gov/sites/default/files/documents/Agency%20Practices%20and%20Judicial%20Review%20of%20Administrative%20Records%20in%20Informal%20Rulemaking.pdf.