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Can Courts "Vacate" Administrative Action Under the Administrative Procedure Act? A Concurring Opinion in a Recent Supreme Court Case Questions a Long-Standing Practice

J. Pierce Lamberson and Elbert Lin*

In this article, the authors discuss a recent opinion by Supreme Court Justice Neil Gorsuch that questions whether courts can "vacate" administrative actions under the Administrative Procedure Act.

For many years, courts have taken for granted that they can "vacate" administrative actions—especially regulations—when those actions are found to be inconsistent with the requirements of the Administrative Procedure Act (APA). Indeed, in the U.S. Court of Appeals for the District of Columbia Circuit, the nation's premier administrative law jurisdiction, when a court finds administrative action unlawful, "vacatur is the normal remedy."[1] But a recent concurring opinion from Justice Neil Gorsuch, joined by Justices Clarence Thomas and Amy Coney Barrett, questions whether courts can even "vacate" administrative actions in the first place.[2]

The Case

In 2021, Texas and Louisiana sued the Department of Homeland Security (DHS) after the Biden administration issued new guidelines for immigration enforcement that prioritized the arrest and removal of certain noncitizens over others. The states essentially argued that the guidelines violated federal statutes requiring the DHS to arrest more criminal noncitizens pending their removal.

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The district court agreed. But instead of issuing an injunction to block the guidelines, the court "vacated" them pursuant to Section 706 of the APA.

In challenging the district court's opinion before the Supreme Court, the United States took the unprecedented step of arguing that Section 706 of the APA "does not authorize vacatur."[3] The government said that Section 706's direction that a "reviewing court shall . . . hold unlawful and set aside agency action"—the basis for the vacatur practice—does not pertain to remedies at all. This argument draws heavily on recent scholarship from law professor John Harrison, who has argued that, consistent with how courts act in deciding constitutional challenges to statutes, the "set aside" language in the APA merely instructs reviewing courts to disregard unlawful agency action in the course of reviewing disputes between the parties, and does not authorize a remedy.[4] He supports this view by examining judicial and legislative understandings of the "set aside" language at the time of the APA's passage in 1946, and by observing that the APA addresses remedies not in Section 706, but in Section 703.[5]

Reflecting the novelty of this position, several of the justices expressed shock when the Court heard arguments in the case. Chief Justice John Roberts called the vacatur argument "fairly radical and inconsistent" with what District of Columbia Circuit judges do "five times before breakfast." When the Solicitor General suggested that the lower courts had been getting the issue wrong over the years, the Chief Justice responded with a simple "[w]ow." Justice Brett Kavanaugh picked up on the thread later in the argument, describing the government's position as "radical," "astonishing," and "extreme." Justice Ketanji Brown Jackson also got in on the action, prompting Justice Elena Kagan to suggest the existence of "a kind of D.C. Circuit cartel," because all of the justices resisting the argument were former members of that court.

Concerns Raised

Other members of the Court were less bothered, as Gorsuch's concurrence reflects. While the Court ultimately decided the case on standing grounds and did not address the vacatur argument, Gorsuch voiced many of the concerns with universal vacatur that Harrison has raised. These include that the remedy bears some

resemblance to the practice of issuing nationwide injunctions, that "set aside" in Section 706 could simply describe the judicial practice of disregarding an offensive practice in the course of deciding a dispute, that the "set aside" language does not appear in the remedies section of the APA, and that agency rules are quasi-legislative and courts typically do not "vacate" legislation.

Gorsuch acknowledged that the matter is not "open and shut," but stressed that "the questions here are serious ones." In light of this, he said that "this Court will have to address [the issue] sooner or later," and encouraged the lower courts to express their "considered views" on the issue.

In light of Gorsuch's opinion, and despite the resistance of several members of the Court, it seems clear that this issue is not going away. Three justices appear ready to consider it. Justice Samuel Alito also might be open to hearing the question, if properly presented. In his dissent, he said that the government's position "would be a sea change in administrative law," and hesitated to "reach out to decide" it because the Court did not grant review on it.[6] But he might be willing to entertain it in a later case squarely teeing it up.

The government, for its part, has already pressed the argument in another case before the Court. In its application for a stay of a lower court's vacatur of a 2022 rule regulating "ghost guns," the United States contended that "Section 706(2) does not provide a basis for nationwide vacatur," citing both Harrison and the Gorsuch concurrence.[7] The Court granted the stay, but did not address the vacatur issue.[8]

Conclusion

In the coming years, we should expect to see more action on this issue in both the lower federal courts and the Supreme Court, especially as states and individuals continue to challenge politically sensitive executive actions taken by presidential administrations. The Solicitor General's deployment of the argument, and the reaction it garnered at the Court, has already sparked new scholarly debate,[9] which could influence courts' views on the issue. One thing is certain—any future shifts in the doctrine will have important implications for regulated parties.

On the one hand, if courts cannot vacate regulations, or the vacatur remedy is cabined to limited circumstances, challengers of

administrative action will lose a powerful remedy for forcing the removal of rules that they do not like.

On the other hand, regulated parties that benefit from certain regulations or have significant reliance interests in regulatory policies will no longer be subject to the vagaries of other parties' challenges to regulations. The issue is certainly worth keeping an eye on.

Notes

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1. Allina Health Servs. v. Sebelius, 746 F.3d 1102, 1110 (D.C. Cir. 2014).

2. United States v. Texas, 143 S. Ct. 1964, 1980-85 (2023) (Gorsuch, J., concurring in the judgment).

3. Br. of U.S. at 40-44, United States v. Texas, 143 S. Ct. 1964 (2023).

4. John Harrison, "Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies," 37 Yale J. on Reg. Bull. 37 (2020).

5. *Id.*

6. United States v. Texas, 143 S. Ct. at 1996 (Alito, J., dissenting).

7. Br. of U.S. at 31, Garland v. Vanderstok, No. 23A82, 2023 WL 5023383 (U.S. Aug. 8, 2023).

8. Garland v. Vanderstok, No. 23A82, 2023 WL 5023383 at *1 (U.S. Aug. 8, 2023).

9. *See, e.g.*, Ronald M. Levin, Vacatur, Nationwide Injunctions, and the Evolving APA, 98 Notre Dame L. Rev. 1997 (2023) (arguing that reviewing courts need the option of vacating or enjoining rules on a universal basis and critiquing John Harrison's theories).