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LOOKING BACK AT THE YEAR

IN ADMINISTRATIVE AND REGULATORY LAW

Rulemaking Developments in 2020

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Marked by a deadly pandemic and a consequential election, 2020 also produced a number of rulemaking developments, particularly in the courts. The Trump Administration continued to struggle in court in its final year, while it forged ahead with its own regulatory plans, grappled with calls for regulatory flexibility in response to the pandemic, and kicked off new initiatives. There was relatively little action on regulation in Congress, compared to previous years.

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Judicial Developments

Statutory Authority and Other Statutory Matters

The Trump Administration won some agency policy cases in 2020, but the majority were losses. On the wins, in *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020), the Supreme Court held that the Departments of Health and Human Services (HHS), Labor, and Treasury were authorized to allow employers to claim exemptions from the requirement that their health plans cover contraceptive services at no cost. And in another case, a court held that the Department of Education's new grievance procedures regarding sexual harassment did not exceed the agency's authority under Title IX. New York v. Department of Education, 2020 WL 4581595 (S.D.N.Y. 2020).

In many other cases, courts found that agencies lacked statutory authority for their actions. For example, in *Merck & Co. v. Departure of Health & Human Services*, 962 F.3d 531 (D.C. Cir. 2020), the U.S. Court of Appeals for the D.C. Circuit held that HHS did not have authority to require drug makers to post prices in television ads. The agency claimed its authority to administer Medicare and Medicaid supported the rule, but the court held that "a program of such intrusive regulation must do more than identify a hoped-for trickle-down effect on the regulated programs" to fall within that authority.

Numerous other courts came to similar conclusions: the National Highway Traffic Safety Administration was not authorized to reconsider a 2016 penalty for fuel economy violations, *see New York v. National Highway Traffic Safety Administration*, 974 F.3d 87 (2d Cir. 2020); the Securities and Exchange Commission did not have authority to implement a pilot program designed to explore a possible problem in the market, *see New York Stock Exchange LLC v. Securities and Exchange Commission*, 962 F.3d 541 (D.C. Cir. 2020); the State Department did not have authority for policies suspending review and application of visas, *see Gomez v. Trump*, No. 20-1419, 2020 WL 5367010 (D.D.C. Sept. 4, 2020), appeal filed (D.C. Cir. No. 20-5292); the Department of Defense lacked authority to create new, additional hurdles to naturalization based on military service, *see Samma v. Department of Defense*, No. 20-1104, 2020 WL 5016893 (D.D.C. Aug. 25, 2020), appeal filed (D.C. Cir. No. 20-5320); the Department of Education lacked authority to favor private schools when disbursing funding under the Coronavirus Aid, Relief, and Economic Security Act, *see Washington v. DeVos*, No. 20-1119, 2020 WL 5079038 (W.D. Wash. Aug. 21, 2020); and the Department of Labor lacked authority to limit the availability of family leave under the Families First Coronavirus Response Act, *see New York v. Department of Labor*, No. 20-3020, 2020 WL 4462260 (S.D.N.Y. Aug. 3, 2020).

Besides these statutory authority cases, several courts addressed agency interpretations of their governing statutes and found them wanting. For example, the Supreme Court held that an Environmental Protection Agency (EPA) reading of the Clean Water Act "would open a loophole allowing easy evasion of the statutory provision's basic purposes," and the interpretation was thus "neither persuasive nor reasonable." County of Maui v. Hawaii Wildlife Fund, 140 S. Ct. 1462, 1474 (2020). A district court held that HHS had relied on an erroneous interpretation of the Medicaid statute when it barred states from processing payroll deductions for home care workers, in part because

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the rule "appear[ed] contrary to the overall purpose of the Medicaid statute." California v. Azar, No. 19-02552, 2020 WL 6733641 (N.D. Cal. 2020). And a district court held in *Natural Resources Defense Council v. Departure of the Interior*, No. 18-4596, 2020 WL 4605235 (S.D.N.Y. Aug. 11, 2020), that the Department of Interior's new policy allowing unintentional bird killings was unreasonable because it ran counter to the Migratory Bird Treat Act's purpose.

These cases and more are explored in Bethany Davis Noll's forthcoming article in the *Administrative Law Review*, "Tired of Winning."

Reasoned Explanation

The requirement that agencies give good reasons for their policy is generally not a burdensome one, but an agency does have to grapple with reliance interests, explain how its policy is consistent with the governing statute, and explain its reasoning. Three cases this year highlighted these principles.

In *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (2020), the Supreme Court vacated the Trump administration's rescission of the Deferred Action for Childhood Arrivals program on the grounds that the Department of Homeland Security (DHS) failed to address reliance interests. In *Washington v. Department of State*, 443 F. Supp. 3d 1245 (W.D. Wash. 2020), appeal filed (9th Cir. No. 20-35391), plaintiffs won a preliminary injunction with their argument that the Departments of State and Commerce failed to analyze whether the decision to publish 3-D gun files was consistent with the Arms Export Control Act. And a court vacated an HHS rule requiring health insurance issuers to send separate bills for abortion and non-abortion services after holding that HHS had not addressed the costs of the new policy or even identified "some problem that it is solving." California v. Department of Health and Human Services, No. 20-00682, 2020 U.S. Dist. LEXIS 127490 (N.D. Cal. July 20, 2020), appeal filed (9th Cir. No. 20-16802).

Notice-and-Comment Rulemaking

Little Sisters may have made some new law on the notice-and-comment rulemaking front. In that case, the agency published an interim final rule in October 2017, citing good cause to forgo a comment period prior to that rule going into effect, took comments afterwards, and in November 2018 finalized the rule. The Court held that it was irrelevant whether the agency satisfied the good cause standard for the interim final rule because, "formal labels aside," the agency met all the requirements for a notice of proposed rulemaking. Scholars and practitioners have already begun to debate whether the decision will encourage agencies to use interim final rulemaking.

In two other cases, though, agencies hit roadblocks in their use of interim final rules. In one case, the court held that a Department of Agriculture final rule rescinding a policy was not a logical outgrowth of an interim final rule that had merely suspended the policy. Center for Science in the Public Interest v. Perdue, 438 F. Supp. 3d 546 (D. Md. 2020). And in *Capital Area Immigrants' Rights Coalition v. Trump*, 471 F. Supp. 3d 25 (D.D.C. 2020), appeal filed (D.C. Cir. No. 20-5271), a court vacated a Departments of Justice and Homeland Security rule restricting asylum eligibility, holding that citation to a *Washington Post* article about an unrelated immigration issue did not support the concern that there would be a rush of immigrants at the border if the rule went through a notice-and-comment period.

Meanwhile, other agency attempts to skirt notice-and-comment requirements met different fates. In *Natural Resources Defense Council v. Wheeler*, 955 F.3d 68 (D.C. Cir. 2020), EPA had suspended a portion of its hydrofluorocarbons rule after the D.C. Circuit struck down a different portion of the rule. The court explained that the partial vacatur had not affected the suspended portion of the rule and that the agency was required to go through notice-and-comment rulemaking. In *Friends of Animals v. Bernhardt*, 961 F.3d 1197 (D.C. Cir. 2020), the Department of the Interior had previously withdrawn two findings after being sued for violating notice-and-comment requirements. The Department then announced that it would use those findings in individual adjudications. The D.C. Circuit upheld that new policy, holding that the agency had broad authority to follow this procedure.

Cost-Benefit Analysis

Generally, courts are deferential to agencies when reviewing technical matters, such as a cost-benefit analysis. But courts will vacate when there is a fundamental flaw underlying the agency's decision, or when the agency ignored a significant impact of the rule. This year, two decisions upheld agency analyses, but two others did not.

In *California v. Bureau of Land Management*, No. 18-00521, 2020 U.S. Dist. LEXIS 53958 (N.D. Cal. Mar. 27, 2020), appeal filed (9th Cir. No. 20-16157), a court upheld the repeal of an Obama-era rule on hydraulic fracturing, holding that the agency was entitled to prioritize cost reductions when weighing costs and benefits. And in *Becerra v. Azar*, 950 F.3d 1067 (9th Cir. 2020), the Ninth Circuit upheld an HHS rule that required grantees to, among other things, provide abortion care in separate facilities from their funded programs. According to petitioners, the agency had understated the costs of setting up those separate

facilities and the harms that would flow to patients from the rule's additional burdens, but the Ninth Circuit deferred to the agency. Splitting with the Ninth Circuit, the Fourth Circuit found that the agency's analysis of the rule's impacts was arbitrary, stating: "[W]e expect a figure that makes at least some modicum of sense." Mayor of Baltimore v. Azar, 973 F.3d 258 (4th Cir. 2020). And in *California v. Bernhardt*, 472 F. Supp. 3d 573 (N.D. Cal. 2020), appeal filed (9th Cir. No. 20-16793), a district court struck down a repeal of an Interior rule, in part, because it relied on an "interim" model that severely devalued the estimates of damages from greenhouse gases while ignoring the best available science.

Agency Heads

Anne Joseph O'Connell recently highlighted the increasing use of acting heads in her *Columbia Law Review* article "Actings." Courts have now begun striking down rules signed by certain unconfirmed acting agency heads. One court struck down several land management plans after holding that William Perry Pendley, who had been acting director of the Bureau of Land Management for more than 400 days, was serving unlawfully. *See* Bullock v. Bureau of Land Management, No. 20-00062, 2020 WL 6204334 (D. Mont. Oct. 16, 2020). In *Casa de Maryland v. Wolf*, No. 20-02118, 2020 U.S. Dist. LEXIS 166613 (D. Md. Sept. 11, 2020), a district court struck down several new asylum restrictions after holding that Chad Wolf, the acting secretary of DHS, was acting in excess of authority under the agency's succession rules.

Relief

On relief, courts have continued to struggle with the propriety of nationwide district court injunctions. In one case concerning a new asylum restriction, the Ninth Circuit affirmed a nationwide injunction, noting the need for uniform immigration rules. East Bay Sanctuary Covenant v. Barr, 964 F.3d 832 (9th Cir. 2020), stayed 140 S. Ct. 3 (2019). In another case, the Second Circuit limited a lower court injunction to the states within its jurisdiction, after noting the uncomfortable possibility of conflicting and overlapping judgments in different circuits. New York v. Department of Homeland Security, 69 F.3d 42 (2d Cir. 2020).

Administrative Developments

Prior to the COVID-19 pandemic, the main administrative development of 2020 was a suite of actions binding agencies to certain internal processes for rules and guidance documents. For example, in October 2019, President Trump issued Executive Order 13,891, directing agencies to write rules governing process steps for guidance documents. Agencies issued those rules, which commit to public comment on guidance documents, as well as other requirements, throughout 2020. Other agencies issued "rules on rules" that govern internal agency practice, including standards for scientific studies and cost-benefit analysis, and automatic rule sunsets.

In response to the COVID-19 pandemic, agencies provided a wide array of new regulatory flexibilities, including waivers and statements of enforcement discretion, among others. On May 19, 2020, President Trump issued Executive Order 13,924, which directed agencies to consider extending interim regulatory relief provided in response to the COVID-19 pandemic.

Following the loss of the presidential election, a period of "midnight rulemaking" began for the Trump Administration. This phenomenon, which has been studied extensively, is generally marked by an increase in regulatory activity immediately before a presidential transition. While the final statistics will not be available until after January 20, 2021, the Trump Administration is on pace for a large number of midnight rules, all of which fall within the disapproval window for the Congressional Review Act and will be vulnerable to reversal when the Biden Administration takes the reins.

Legislative Developments

The final full year of the 116th Congress wrapped up without enacting a number of proposed bills that would have changed regulatory policy, including pieces of the Regulations from the Executive in Need of Scrutiny (REINS) Act (S.92) and Regulatory Accountability Act (S.3208), as well as new bills such as the Setting Manageable Analysis Requirements in Text (SMART) Act of 2019 (S.1420). The Administrative Conference of the United States offers a helpful summary on its website of the many bills that were introduced in the 116th Congress. *See* ACUS, *Summary of Recent Administrative Law Reform Bills*, https://www.acus.gov/research-projects/summary-recent-administrative-law-reform-bills.

Conclusion

2020 was a year that made news in many different ways. The news on the rulemaking front was no exception. The year offered a slew of new court decisions as well as administrative and legislative actions directed towards addressing the pandemic. And the results of the election at the end of the year likely mean that the coming year will be just as action packed.

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