Should The Public Charge Case Still Have Life?

By **Harvey Reiter**

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As Law360 reporter Mike LaSusa recounted on Feb. 23, questions from the justices during U.S. Supreme Court oral arguments in Arizona v. City and County of San Francisco, California, suggest their skepticism "of some red states' strategy to revive" the public charge rule, a Trump-era rule that made it harder for immigrants to qualify for green cards.

Thirteen states had challenged a decision by the U.S. Court of Appeals for the Ninth Circuit to deny their motion to intervene, which they had filed after (1) the U.S. Department of Justice dropped its appeal of a district court opinion vacating the rule, and (2) the rule had been vacated.

In questioning whether those states had selected the right vehicle to challenge President Joe Biden's abandonment of the rule, however, the justices — and the DOJ — seemed to leave open a very different question.

It is a settled principle of administrative law that an agency may only repeal a rule adopted after notice and comment through another notice and comment rulemaking proceeding.[1] But was the department's decision not to appeal an adverse decision on the merits vacating the rule a circumvention of that principle?

The differences between an appellate decision setting aside an agency rule that the agency chooses not to challenge further, and an agency's decision to repeal its rule, provide solid reasons to answer that question in the negative.

Some brief background about the public charge case will help place the issue in context.

Late in 2019, the U.S. Department of Homeland Security issued the public charge rule, which would have created a strong presumption that a person taking even nominal amounts of noncash assistance — e.g., for food stamps or rental vouchers — over a four-month period during any time in the prior three years would be considered a public charge ineligible for permanent residence status, i.e., a green card.

The rule was immediately challenged as both unlawful and arbitrary and capricious in five different federal district courts by states, counties, cities and immigrant rights groups — in California, Washington state, Illinois, New York and Maryland.[2]

All the courts issued injunctions against the rule, finding plaintiffs likely to succeed on the merits and that they would suffer irreparable harm.[3] Some injunctions were nationwide, while others were limited geographically, but the government was successful in obtaining stays of all of them while the litigation proceeded.[4]

The first of these cases to reach a decision on the merits was issued by U.S. District Judge

Gary Feinerman in the U.S. District Court for the Northern District of Illinois on Nov. 2, 2020.[5] Finding the rule both contrary to law and arbitrary and capricious, he ordered the rule set aside.[6]

The Trump administration appealed that ruling to the U.S. Court of Appeals for the Seventh Circuit in late 2020, but before the case could be argued, the Biden administration notified the Seventh Circuit that it was withdrawing its appeal and the Supreme Court that it was withdrawing its petition for certiorari.[7]

The mandate then issued and DHS announced that, since the rule had been vacated, it would resume evaluating permanent residence applications under its previous public charge rule policy.[8]

There seemed little dispute between the justices, as Justice Amy Coney Barrett stated during oral argument, that "one administration is not obliged to defend the rule adopted by the prior administration."[9] So, what would be left of the public charge rule once the Seventh Circuit appeal had been dropped?

As LaSusa writes in his article, Justice Elena Kagan seemed to suggest that while there was no basis to overturn the Ninth Circuit's decision, "Why don't we just say, you know, you have a good point about circumvention of the [Administrative Procedure Act], go bring an APA action?"[10] And Chief Justice John Roberts similarly questioned "the ease with which a decision in your favor will make it for ... an incoming administration to avoid notice-and-comment review."[11]

Their questions apparently stem from what DOJ counsel reiterated at oral argument: "the federal government doesn't believe district court judges have the authority to issue nationwide vacaturs of federal rules," according to LaSusa.[12]

During the Trump administration, the government enjoyed significant success in trimming back nationwide preliminary injunctions by single federal district court judges in the public charge litigation.[13]

And, spurred on by the skepticism of several members of the court about the wisdom of giving a single district court judge such authority,[14] the DOJ under Attorney General Merrick Garland, faced with a number of red state motions for preliminary injunctions against Biden administration regulations, has continued that general opposition to nationwide injunctions.

The government's position seems to be this: While it believes individual judges lack authority to issue nationwide injunctions, wrongly decided or not, the DOJ had elected not to challenge the district court's ruling. And that decision not to appeal was not for a court to second-guess.[15]

But was Judge Feinerman's ruling a nationwide injunction? In tacitly conceding as much, the department has made two mistakes.

It has wrongly conflated the court's obligation to set aside an unlawful agency rulemaking with an injunction that, by definition, blocks enforcement of the rule. And it has ignored that in APA cases, the statute draws no distinction between the obligations and powers district courts and circuit courts of appeal have in disposing of the merits of challenges to final agency action.

The Supreme Court has recognized a distinction between stays of agency rules and preliminary injunctions similar to the distinction between merits decisions of unlawfulness and preliminary injunctions. Under Title 5 of the U.S. Code, Section 705, a reviewing court may grant a stay of an agency's orders.

But while the standards for granting preliminary injunctions and stays are comparable,[16] the nature of the relief provided is quite different:

Both can have the practical effect of preventing some action before the legality of that action has been conclusively determined. But a stay achieves this result by temporarily suspending the source of authority to act — the order or judgment in question — not by directing an actor's conduct. A stay "simply suspend[s] judicial alteration of the status quo," while injunctive relief "grants judicial intervention that has been withheld by lower courts."[17]

Whether a district court or a circuit court renders a decision on the merits rejecting final agency action as unlawful or arbitrary and capricious, the APA similarly commands the court to set aside the rule or order.[18]

To be sure, there are limited instances in which the court will remand an agency decision without vacatur,[19] but vacatur is the norm[20] and setting aside or vacating final agency action is not enjoining its operation, it is rendering it a nullity.

Even where a court remands without vacatur because an agency has acted arbitrarily, there is no requirement that the agency reopen its rule for further notice and comment unless the agency adds new material to the record on remand and the new material was of such "central relevance to the rule that the rule would have been significantly changed if such error had not been made," as noted in the 2004 D.C. Circuit case, West Virginia v. EPA. [21]

In this respect, the district court's obligations are indistinguishable from that of a circuit court of appeals. Section 706 of the APA governs the obligations of the reviewing court. Like a circuit court, when a district court hears an APA case, it "sits as an appellate tribunal," as noted in American Bioscience Inc. v. Thompson, in 2001 in the U.S. Court of Appeals for the District of Columbia Circuit.[22]

Judge Feinerman's decision, therefore, was an appellate decision by a reviewing court. It cannot be said, moreover, that the agency failed to defend the public charge rule. The Cook County plaintiffs appealed the rule to Judge Feinerman and the DOJ vigorously defended the rule. But it lost.

Some agency actions are directly reviewable by the circuit courts of appeal — for example, rulings by the Occupational Safety and Health Review Commission, the Federal Communications Commission and the Federal Energy Regulatory Commission.

And it is not at all unusual for the agency — whether during a single administration or when administrations change — to accept the appellate decisions when they lose. Indeed, it is the unusual case when the agency would seek rarely granted rehearing en banc or Supreme Court review.

The latter course, in fact, will require approval of the solicitor general. When it loses, the agency, to this author's knowledge, has never claimed that the invalidated rule is invalid only as applied to the parties that sought judicial review.

And it is even more doubtful that after an agency's rule is struck down by a circuit court of appeals that a party that had never intervened to defend the rule while its fate was still in doubt would be allowed to intervene to defend the rule after it had been vacated.[23]

That, however, is effectively what the states in the public charge case would seek even though they had ample opportunity to (1) participate in the agency rulemaking proceeding to support what was first a proposed rule or (2) intervene in the district court proceedings to defend the rule. They did neither of those things.

If states were permitted to intervene in the Illinois district court case and revive the public charge rule after a merits decision, it would open the door to parties to intervene in and revive circuit court cases whenever the losing agency failed to take the case further. Would a case finally be dead once rehearing en banc was denied, or would the losing agency have to seek certiorari?

To be sure, when parties file complaints in federal district court to challenge agency rules under the Administrative Procedure Act, they can do some forum shopping. And, as a result, it is possible that there may be conflicting decisions on the very same agency case by different district court judges. That is unlike the statutory scheme for review of FCC, FERC or Occupational Safety and Health Administration orders in the circuit courts of appeal.

If cases are filed in multiple circuit courts, they are ultimately transferred to a single circuit court that will hear the case.[24] But the answer to this problem is not to create an artificial distinction between unappealed merits decisions by district court judges and their circuit court counterparts — or worse to allow post-judgment interventions in circuit court cases when the agencies do not take their appeals as far as possible.

Rather, the better course would be to reform the appeals process so that multiple district court cases challenging the same agency rulings are consolidated, randomly, in a single district court.

Five district court judges found challenges to the Trump-era public charge rule likely unlawful and arbitrary and capricious under the APA. And one said so in a merits ruling that the Biden administration, as was its right, chose not to appeal.

Since then, DHS has launched a new public charge rulemaking proceeding where Arizona and other states are free to file comments that the agency will be obligated to consider.[25] Let's hope that in the meantime the courts finally put the former rule to a merciful death.

Correction: A previous version of this article misidentified the 2004 U.S. District Court decision in West Virginia v. EPA. The error has been corrected.

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[1] Action on Smoking and Health v. Civil Aeronautics Board, 713 F.2d 795, 798-801 (D.C. Cir. 1983). See also American Fed'n of Gov't Employees v. NLRB, 777 F.2d 751, 759 (D.C. Cir. 1985).

[2] Public Charge Ground of Inadmissibility, Notice of Proposed Rulemaking, 87 Fed. Reg. 10470, 10586 (Feb. 24, 2022).

[3] Id.

[4] Id. The author was counsel to plaintiffs Immigrant Law Center of Minnesota, City of Gaithersburg, Md., the Jewish Community Relations Council, Maryland State Senator Jeff Waldsteicher and the Jewish Council for Public Affairs, which brought their own suit challenging the rule in Maryland federal district court. City of Gaithersburg et al. v. Dept. of Homeland Security, No. 8:19-cv-2851-PWG (D. Md. 2019).

[5] Id. at 10587, citing Cook County v. Wolf, 2020 WL 6393005 (N.D. Ill. Nov. 2, 2020).

[6] Id.

[7] Id.

[8] Id.

[9] Arizona et al. v. City and County of San Francisco, et al., No. 20-1775 Oral argument transcript, p. 18, lines 15-17 (Feb. 23, 2022) (Oral Argument).

[10] LaSusa, supra.

[11] La Susa, supra.

[12] Id.

[13] 87 Fed. Reg. at 10586.

[14] See, e.g., Dept. of Homeland Security v. New York, 140 Sc. Ct. 599 (Gorsuch, concurring).

[15] Oral Argument, Tr., p. 50, line 11-25; p. 50, lines 17-21 (agreeing that "the Northern District of Illinois erred when it issues a nationwide injunction"); p. 76, line1- p. 77, line 9.

[16] Nken v. Holder, 556 U.S. 418, 428–29; 129 S. Ct. 1749, 1758 (2009).

[17] Id.

[18] Under the APA, a "reviewing court" is directed to "hold unlawful and set aside agency action ... found to be… arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S. Code § 706(2)(A).

[19] See, e.g., Black Oak Energy, LLC v. FERC, 725 F. 3d 230, 244 (D. C. Cir. 2013) (recognizing that remand without vacatur would be appropriate when it is "plausible that the [agency] can redress its failure of explanation on remand while reaching the same result.").

[20] Where remand without vacatur would be "futile," vacatur is clearly the proper

remedy. Fogg v. Ashcroft, 254 F. 3d 103, 111 (D. C. Cir. 2001). That was certainly so in the Cook County case. There, Judge Feinerman found the Public Charge Rule not only arbitrary, but DHS's definition of public charge violative of its plain meaning. That is, there is nothing the agency could do to correct its error on remand.

[21] West Virginia v. EPA, 362 F.3d 861, 869 (D. C. Cir. 2004).

[22] Am. Bioscience, Inc. v. Thompson, 269 F.3d 1077, 1083 (D.C. Cir. 2001).

[23] As a practitioner, this author has moved to intervene numerous times over the years on behalf of clients both to support an agency's orders and to support petitioners challenging the rule. One of the reasons for intervening to support the agency is to give the intervening party the ability to seek further review in the event the agency decides not to do so. And the circuit court rules grant parties moving to intervene thirty days to do so following the filing of a petition for review. FRAP Rule 15(d).

[24] See 28 U.S.C. § 2112(a)(3).

[25] Oral argument transcript, p. 46, lines 15-21.