GOVERNING FOR IMPACT

Rapid Response: Presidential Memorandum on "Directing the Repeal of Unlawful Regulations"

April 2025
Issue Brief

I. INTRODUCTION

The Trump administration has moved aggressively to slash regulations that it dislikes, the requirements of the Administrative Procedure Act (APA) notwithstanding. In February, President Trump directed agency heads to, "in coordination with their DOGE Team Leads and the Director of the Office of Management and Budget, initiate a process to review all regulations … for consistency with law and Administration policy" within 60 days.[1] Agency lists are due on April 19. At the same time, the administration has repeatedly limited the public's ability to comment on its initiatives, including on matters as salient as immigration[2] and health benefits[3] or as quotidian as the definition of a showerhead.[4]

Most recently, President Trump issued a memorandum on April 9, 2025, directing Executive Branch agencies to repeal regulations that they conclude are unlawful without complying with the APA's notice-and-comment requirements.[5] The memorandum instructs agencies to prioritize evaluating the lawfulness of regulations under ten recent Supreme Court decisions, including *Loper Bright Enterprises v. Raimondo*[6] and *West Virginia v. EPA*.[7] It

[1] *Ensuring Lawful Governance and Implementing the President's "Department of Government Efficiency" Deregulatory Initiative*, Exec. Order 14219 § 2, 90 Fed. Reg. 10583 (Feb. 19, 2025).

[2] *See* Dep't of State, *Determination: Foreign Affairs Functions of the United States*, Pub. Notice 12682, 90 Fed. Reg. 12200 (Mar. 14, 2025) (applying the APA's foreign-affairs exception, *see* 5 U.S.C. § 553(a)(1), to rules regarding immigration).

[3] *See* Dep't of Health & Human Servs., *Policy on Adhering to the Text of the Administrative Procedure Act*, 90 Fed. Reg. 11029 (Mar. 3, 2025) (rescinding agency's fifty-year-old waiver of the APA's exception for public property, loans, grants, benefits, or contracts, *see* 5 U.S.C. § 553(a)(2)).

[4] *See Maintaining Acceptable Water Pressure in Showerheads*, Exec. Order. ___ (Apr. 9, 2025), https://perma.cc/9SYB-RHK3 ("Notice and comment is unnecessary because I am ordering the repeal.").

[5] *See Directing the Repeal of Unlawful Regulations*, Presidential Mem. (Apr. 9, 2025), https://perma.cc/YJF4-LT5X.

[6] 603 U.S. 369 (2024) (eliminating *Chevron* deference to agencies' interpretations of ambiguous statutes).

[7] 597 U.S. 697 (2022) (formally establishing the major questions doctrine). The memorandum also lists *SEC v. Jarkesy*, 603 U.S. 109 (2024) (the Seventh Amendment), *Michigan v. EPA*, 576 U.S. 743 (2015) (consideration of costs), *Sackett v. EPA*, 598 U.S. 651 (2023) (the scope of the Clean Water Act), *Ohio v. EPA*, 603 U.S. 279 (2024) (arbitrary-and-capricious review), *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021) (the Takings Clause), *Students for Fair Admissions v. Harvard*, 600 U.S. 181

also provides that "agency heads shall finalize rules" rescinding "facially unlawful regulations … without notice and comment, where doing so is consistent with the 'good cause' exception in the Administrative Procedure Act."[8]

The President's memorandum suggests that, if a regulation is unlawful, the agency lacks any lawful discretion to maintain it regardless of the agency's policy justifications for the rule—and that, for similar reasons, a rescission of such a regulation could invoke the APA's good cause exception to bypass notice and comment. But every aspect of that theory is subject to challenge, including in lawsuits targeting particular rescissions. First, litigants might challenge the premise that the rule being rescinded is unlawful. Second, even if an existing rule is unlawful in some respects, the agency's decision to repeal the rule *in toto* might still be subject to arbitrary-and-capricious review (if, for example, the agency failed to consider a more limited repeal or other potential alternatives). And third, the good cause exception provides no support for the administration's effort to run roughshod over the APA's notice-and-comment requirements. Litigants might therefore bring a number of claims against rule rescissions implemented under the memorandum.

II. CHALLENGING THE DETERMINATION OF ILLEGALITY

To start, an agency's conclusion that a given rule is unlawful may be subject to challenge. "[A]n order may not stand if the agency has misconceived the law,"[9] which means that "[a]n agency decision cannot be sustained … where it is based not on the agency's own judgment but on an erroneous view of the law."[10] Put differently, "an agency regulation must be declared invalid, even though the agency might be able to adopt the regulation in the exercise of its discretion, if it 'was not based on the [agency's] own judgment but rather on

(2023) (Equal Protection), *Carson v. Makin*, 596 U.S. 767 (2022) (Free Exercise Clause), and *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14 (2020) (same).

[8] *See* 5 U.S.C. § 553(b)(B).

[9] *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943).

[10] *Prill v. NLRB*, 755 F.2d 941, 947 (D.C. Cir. 1985); *see, e.g.*, *United States v. Ross*, 848 F.3d 1129, 1134 (D.C. Cir. 2017); *Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1101 (9th Cir. 2007).

the unjustified assumption that it was Congress' judgment that such [a regulation is] desirable.'"[11] Thus, the rescission of a rule predicated on an incorrect conclusion regarding that rule's lawfulness is itself unlawful, even if the agency could have rescinded the rule for policy reasons.

In particular, the administration is likely to swing *Loper Bright* as a cleaver, exposing itself to legal challenge. In overturning *Chevron*, the Supreme Court directed courts to "exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires."[12] Although an agency may believe that a rule is inconsistent with the correct interpretation of a statute, a court may disagree. Moreover, the Court acknowledged that "[i]n a case involving an agency, of course, the statute's meaning may well be that the agency is authorized to exercise a degree of discretion."[13] The Court observed that "Congress has often enacted such statutes," including those that "expressly delegate to an agency the authority to give meaning to a particular statutory term," that "empower an agency to prescribe rules to fill up the details of a statutory scheme," and that authorize an agency "to regulate subject to the limits imposed by a term or phrase that leaves agencies with flexibility," like "'appropriate' or 'reasonable.'"[14] Finally, the Court made clear that it did not "call into question prior cases that relied on the *Chevron* framework," and so "[t]he holdings of those cases that specific agency actions are lawful … are still subject to statutory *stare decisis* despite [the Court's] change in interpretive methodology."[15] *Loper Bright* therefore might not give the administration what it wants.

Applying the other decisions cited in the President's memorandum may also be less cut-and-dry than the administration appears to believe. Among other things, a regulation that has been on the books for years, and which Congress has declined to overturn, seems unlikely to reflect a novel, "transformative expansion in [the agency's] regulatory authority" under the major questions doctrine.[16] And whether a previous rulemaking adequately

[11] *Planned Parenthood Fed'n of Am., Inc. v. Heckler*, 712 F.2d 650, 666 (D.C. Cir. 1983) (Bork, J., concurring) (quoting *FCC v. RCA Communications, Inc.,* 346 U.S. 86, 96 (1953)).

[12] *Loper Bright*, 603 U.S. at 412.

[13] *Id.* at 394.

[14] *Id.* at 394-95 (quotations omitted).

[15] *Id.* at 412.

[16] *West Virginia*, 597 U.S. at 724.

considered costs and substantial comments will inevitably be up for debate.[17] Interestingly, in defending a rule rescission based on these principles, the Trump administration may be forced to take positions that could undermine their affirmative rulemaking efforts. If, for example, the administration asserts that an agency's failure to consider a minor comment rendered a rule unlawful, or that a rule on a particular subject involved a major question, that assertion could well appear in a future lawsuit challenging one of the administration's own rules.

The administration might also try to reframe its concerns about legality in terms of concerns about litigation risk — e.g., that if it attempts to enforce dubious statutes or regulations in court, it will lose and thereby waste its time and resources. But the Supreme Court repudiated a similar repackaging attempt in rejecting the Trump administration's prior effort to eliminate the Deferred Action for Childhood Arrivals program (DACA).[18] More importantly, an agency that predicates a rescission on litigation risk is actually exercising *policy discretion* — it is implicitly (perhaps even explicitly) concluding that the risk of litigation outweighs whatever benefits the rule might provide. But that exposes the agency to the rigors of arbitrary-and-capricious review, and likely strengthens the argument for requiring the agency to provide notice and comment.[19] We turn to those principles next.

[17] *Cf. Ohio*, 603 U.S. 279; *Michigan*, 576 U.S. 743.

[18] *See Dep't of Homeland Sec. v. Regents of the Univ. of Calif.*, 591 U.S. 1, 24 n.4 (2020) ("[G]iven the Attorney General's conclusion that the policy was unlawful … it is difficult to see how the risk of litigation carried any independent weight.").

[19] *Cf. NAACP v. Trump*, 298 F. Supp. 3d 209, 234-35 (D.D.C. 2018) ("[T]his concern does not withstand review under the familiar arbitrary and capricious standard."). Similarly, an agency might assert that, even if a statute does not foreclose its rule, it believes that revoking the rule is more consistent with the statute's text and purpose. But the Supreme Court has held that, "[a]lthough an agency may justify its policy choice by explaining why that policy 'is more consistent with statutory language'" than alternative policies, it must still provide a reasoned justification for its decision. *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 223 (2016) (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 175 (2007)).

III. ARBITRARY-AND-CAPRICIOUS REVIEW

An agency's decision to repeal a rule *in toto* based on purported legal deficiencies may also be arbitrary and capricious under the APA.[20] An agency's action is arbitrary "if the agency has relied on factors which 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."[21] An agency that changes a longstanding policy must also provide a "more detailed justification" if "its new policy rests upon factual findings that contradict those which underlay its prior policy[] or when its prior policy has engendered serious reliance interests that must be taken into account."[22]

The mere fact that a rule is illegal in some respects may not compel its immediate revocation in full. The DACA case explains why. In *Regents*, "the Attorney General advised DHS to rescind DACA, based on his conclusion that it was unlawful," and "[t]he Department's Acting Secretary issued a memorandum terminating the program on that basis."[23] That decision, the Supreme Court explained, was arbitrary and capricious: "deciding how best to address a finding of illegality moving forward can involve important policy choices, especially when the finding concerns a program with the breadth of DACA."[24] Indeed, the Court noted that the Acting Secretary "plainly exercised such discretionary authority in winding down the program," including by "specif[ying] that those DACA recipients whose benefits were set to expire within six months were eligible for two-year renewals."[25]

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[20] *See* 5 U.S.C. § 706(2)(A).

[21] *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 43 (1983).

[22] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

[23] 591 U.S. at 8.

[24] *Id.* at 25.

[25] *Id.* at 26.

Nonetheless, the Acting Secretary "did not appear to appreciate the full scope of her discretion, which picked up where the Attorney General's legal reasoning left off."[26] Although the Attorney General concluded that DACA's immigration benefits were unlawful, "the Attorney General neither addressed the forbearance policy at the heart of DACA nor compelled DHS to abandon that policy."[27] By rescinding DACA in full, the Acting Secretary failed to consider "alternatives … within the ambit of the existing policy."[28] The Acting Secretary also failed to "address whether there was 'legitimate reliance' on the DACA memorandum," which required her to "assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns."[29]

To summarize, *Regents* identifies at least four ways in which a revocation premised on unlawfulness might be arbitrary:

- Failure to consider whether to delay or phase-in a revocation decision, or whether to grandfather existing beneficiaries.
- Failure to consider whether to rescind only the unlawful parts of a rule. (This may be particularly salient where the underlying rule has a severability clause indicating that the agency intended the other parts of the rule stand on their own.)
- Failure to consider reliance interests on the agency's prior policy.
- Failure to consider alternatives to rescission.

This is not an exclusive list; there may be other policy issues an agency is required to consider in effectuating a revocation. And it seems likely that the Trump administration will fail to consider these issues as it rushes out repeal decisions premised on theories of illegality under the auspices of the President's memorandum.

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[26] *Id.*

[27] *Id.* at 28.

[28] *Id.* at 30 (quoting *State Farm*, 463 U.S. at 51).

[29] *Id.* at 30, 33 (quoting *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996)).

IV. NOTICE AND COMMENT

Finally, the Trump administration's view that agencies may invoke the good cause exception to bypass notice and comment before rescinding rules that it believes are unlawful is flimsy at best. Indeed, we are unaware of any prior rescissions which relied upon this rationale to invoke good cause, with the exception of a recent Trump administration interim final rule providing virtually no reasoning.[30]

The APA bars agency action taken "without observance of procedure required by law."[31] In particular, the APA generally requires agencies to provide advance notice and an opportunity for comment before issuing "legislative rules,"[32] which refer to rules that "purport[] to impose legally binding obligations or prohibitions on regulated parties."[33] Agencies must "use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance."[34] Because "an agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked," it "may not alter [such a rule] without notice and comment."[35]

The President's memorandum directs agencies to apply the "good cause" exception to notice and comment, which applies where the agency expressly finds that notice and comment would be "impracticable, unnecessary, or contrary to the public interest."[36] The D.C. Circuit has explained time and again that "the good cause exception is to be 'narrowly construed and only reluctantly countenanced.'"[37] Accordingly, "[t]he good-cause inquiry is

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[30] *See* Dep't of Health & Human Servs., *Unaccompanied Children Program Foundational Rule; Update to Accord with Statutory Requirements*, 90 Fed. Reg. 13554, 13555 (Mar. 25, 2025).

[31] 5 U.S.C. § 706(2)(D).

[32] *See id.* § 553.

[33] *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014).

[34] *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015).

[35] *Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 234 (D.C. Cir. 1992).

[36] 5 U.S.C. § 553(b)(B).

[37] *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012) (quoting *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001), in turn quoting *Tennessee Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1144 (D.C. Cir. 1992)).

'meticulous and demanding,'"[38] and "the onus is on the [agency] to establish that notice and comment" should not have been provided.[39] Ultimately, the "good cause" exception is "an important safety valve to be used where delay would do real harm. It should not be used, however, to circumvent the notice and comment requirements whenever an agency finds it inconvenient to follow them."[40]

Applying these principles, the D.C. Circuit has rejected the argument that "notice and comment requirements do not apply to 'defectively promulgated regulations.'"[41] Such a theory "would permit an agency to circumvent [those] requirements of § 553 merely by confessing that the regulations were defective in some respect and asserting that modification or repeal without notice and comment was necessary to correct the situation."[42] It would also "ignore the fact that the question whether the regulations are indeed defective is one worthy of notice and an opportunity to comment."[43]

Indeed, neither of the two good cause grounds cited by the administration — "unnecessary" and "contrary to the public interest" — seem applicable. Notice and comment is usually unnecessary only for rules that are "'routine determination[s], insignificant in nature and impact, and inconsequential to the industry and to the public.'"[44] "Bald assertions that the agency does not believe comments would be useful cannot create good cause to forgo

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[38] *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014) (quoting *N.J. Dep't of Envtl. Prot. v. EPA*, 626 F.2d 1038, 1046 (D.C. Cir. 1980)).

[39] *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 801 n.6 (D.C. Cir. 1983)).

[40] *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214 (5th Cir. 1979) (footnote omitted).

[41] *Nat'l Treasury Emps. Union v. Cornelius*, 617 F. Supp. 365, 371 (D.D.C. 1985) (quoting *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 447 n.79 (D.C. Cir. 1982), *aff'd sub nom. Process Gas Consumers Grp. v. Consumer Energy Council of Am.*, 463 U.S. 1216 (1983)).

[42] *Id.*

[43] *Id.* However, notice and comment may not be required where a court has held the agency's rule to be unlawful and/or vacated the rule. *See, e.g.*, *Ctr. for Biological Diversity v. Zinke*, 369 F. Supp. 3d 164, 180 (D.D.C. 2019), *aff'd sub nom. Friends of Animals v. Bernhardt*, 961 F.3d 1197 (D.C. Cir. 2020); *Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 26 (D.D.C. 2013), *judgment entered*, 301 F.R.D. 14 (D.D.C. 2014), *and aff'd*, 601 F. App'x 1 (D.C. Cir. 2015). That circumstance is distinguishable, as "'it is emphatically the province and duty of the judicial department to say what the law is,'" *Loper Bright*, 603 U.S. at 385 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

[44] *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 755 (D.C. Cir. 2001) (quoting *South Carolina v. Block*, 558 F. Supp. 1004, 1016 (D.S.C. 1983)).

notice and comment procedures."[45] And the "public interest" prong is "is met only in the rare circumstance when ordinary procedures — generally presumed to serve the public interest — would in fact harm that interest."[46] The question is not, as the administration seems to believe, whether retaining a purportedly unlawful rule is contrary to the public interest, but instead whether *providing notice and comment before rescinding that rule* is contrary to the public interest. The exception is only "appropriately invoked when the timing and disclosure requirements of the usual procedures would defeat the purpose of the proposal."[47] The President's memorandum provides no basis for such a conclusion, and it is unlikely that agencies following the memorandum will be able to substantiate it.

Along similar lines, the administration might assert that its failure to provide notice and comment, even if unlawful, constitutes harmless error under the APA.[48] The argument might go like this: if a rule is unlawful, comments could not possibly have made any difference to the agency's decision to rescind it. Yet that argument falls well outside the Supreme Court's recent articulation of a paradigmatic case for application of the harmless error rule — "[w]hen it is clear that the agency's error had no bearing on the procedure used or the substance of the decision reached."[49] And the D.C. Circuit has "not been hospitable to government claims of harmless error in cases in which the government violated § 553 of the APA by failing to provide notice."[50] For the reasons explained above, the failure to provide an opportunity for comment is far from harmless — particularly where comments might well shed light on whether a rule is unlawful, and how the agency might best respond to any unlawfulness.

[45] *Action on Smoking & Health*, 713 F.2d at 800.

[46] *Mack Trucks*, 682 F.3d at 95.

[47] *Id.*

[48] *See* 5 U.S.C. § 706 (requiring courts to take "due account … of the rule of prejudicial error").

[49] *FDA v. Wages & White Lion Investments, L.L.C.*, 604 U.S. ----, 2025 WL 978101, at *24 (2025).

[50] *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1109 (D.C. Cir. 2014).

V. CONCLUSION

This analysis is necessarily preliminary, and the availability of any particular legal challenges will likely depend on how an agency implements the memorandum in rescinding a purportedly unlawful rule. However, litigants might have a number of options in challenging this latest attempt by the Trump administration to shred the APA's requirements.