Federal Agencies Need A Uniform Record-Keeping Process

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Law360, New York (July 15, 2019) – The headlines on June 27, 2019, touched on a politically hot-button issue: Whether the Trump administration could add a citizenship question to the 2020 census.[1] But the real star of the show? The administrative record. At the heart of the dispute before the U.S. Supreme Court was whether the compilation of materials turned over by the U.S. Department of Commerce properly supported the agency's position.

The administrative record plays a hugely important part of any challenge to agency action under the Administrative Procedure Act, or APA. Challenges to agency actions under the APA are to be conducted on "the whole record or those parts of it cited by a party."[2] The standard definition of the administrative record is easy enough to state: "all documents and materials that the agency 'directly or indirectly considered'" in reaching a final decision.[3]

Although the administrative record has long formed the basis for challenges to, and defenses of, agency actions under the APA, increasing attention has recently been paid to the administrative record itself, or to the purportedly privileged material in the record.[4] Parties struggle over how administrative records have been prepared, whether the government should enjoy a presumption of regularity in its compilation, and the contents of the administrative record, leading to protracted delays in litigation and time-consuming discovery battles.

For example, in the case regarding the rescission of Deferred Action for Childhood Arrivals,[5] the U.S. Court of Appeals for the Second Circuit ruled that plaintiffs challenging the U.S. Department of Homeland Security's decision were "entitled to discovery as to whether [the agency] had produced a full administrative record."[6] In ordering production and completion of the administrative record, courts often suspend their review of the underlying legality of the agency's action, given that "in order to afford proper judicial review, the APA requires that the [c]ourt examine the whole record."[7]

Disputes over the administrative record, then, can turn a presumptively run-of-the-mill challenge to an agency action into a sprawling discovery battle between an agency and a challenging party. And, with this fight, comes regulatory uncertainty as beneficiaries of a proposed action or industries in line to be regulated wait to see what may become of an agency action, particularly when accompanied with a preliminary injunction or in a pre-enforcement challenge.

The longer a case drags on due to battles over the record, the longer that regulatory uncertainty persists. This delayed resolution of the legality of agency action works to the detriment of those challenging agency review, the agency itself, as well as regulated stakeholders more generally.

Defining the Problem: Administrative Records in Disarray

Given the importance of the administrative records to APA litigation — litigation in which many agencies find themselves frequently engaged — one would think that there are well-established, consistent principles that guide the compilation of the administration record across federal agencies. That assumption, quite surprisingly, is incorrect.

Although several agencies have issued their own guidance on compiling administrative records, there is no set of uniform, centralized standards governing administrative records. Indeed, even agencies frequently tasked with standardizing agency practices — the U.S. Office of Management and Budget, or OMB, and, within OMB, the Office of Information and Regulatory Affairs, or OIRA, for example —have yet to engage in efforts to provide some guidance across the sprawling administrative state.

To its credit, the U.S. Department of Justice, the litigating authority for many executive branch agencies, has made efforts to provide some guidelines. The Environmental and Natural Resources Division released a memorandum in 1999 with general principles for compiling the administrative record, including guidance as to what materials to include, how to search for documents and how to handle privileged materials.[8]

Notably, in a 2008 follow-up publication clarifying the nonbinding nature of the 1999 memorandum, the division stated that "[a]gencies would likely benefit from having their own internal guidance regarding the contents and compilation of the record. An agency's guidance should, of course, be informed by ... the agency's experience and internal procedures."[9]

And as recently as 2017, the division provided updated guidance that "agency deliberative documents … generally are not relevant to APA review."[10] But while the DOJ cautioned agencies to "consider reviewing their existing regulations and guidance for consistency" with its position,[11] the overarching problem remains: There is no standardized blueprint for agencies to follow in compiling their administrative records.

Additional agency-by-agency guidance would compound, not resolve, the problem of the lack of uniformity in how agencies handle administrative records. Several agencies, including the U.S. Department of Energy, the U.S. Department of Interior, the National Oceanic and Atmospheric Administration, or NOAA, and the U.S. Environmental Protection Agency have issued guidance on compiling administrative records, but even these documents may be wildly different from each other.

For one thing, some agencies are subject to varying sources of binding authority that dictate how they must compile their records. For some, regulations and statutes may define the typical contents of a record, or the typical contents of a record in a specific type of action. For example, the text of the Clean Air Act explains that the "record for judicial review shall consist exclusively of the material referred to in" certain provisions of the statute, including rulemaking statements of purpose, significant comments and factual data.[12] And with respect to actions brought under the Comprehensive

Environmental Response, Compensation, and Liability Act, or CERCLA, regulations promulgated by the EPA outline clear requirements for what the agency must include in the administrative record.[13]

For other agencies, internal agency-by-agency guidance documents may provide the best understanding of how the record is compiled, but that guidance can vary along important dimensions such as what types of document must be included in the record and how "deliberative" documents are identified and processed. Take the Department of Interior's guidance, which states that any administrative record presented to the court should "contain the complete 'story' of the agency decision-making process, [including] important substantive information that was presented to, relied on, or reasonably available to the decision-maker."[14]

The NOAA's guidance, on the other hand, states that the administrative record "must include all documents that were directly or indirectly considered by the agency decision-maker" and all documents that relate "to the action under consideration and inform[], or ha[ve] the potential to inform, the decision-maker."[15] The language of these standards is significantly different — what documents might be "reasonably available" to the decision-maker versus what documents might be "directly or indirectly considered." Applying these two standards could quite plausibly produce distinct sets of record documents.

Inconsistent standards for handling deliberative process documents[16] can also create large variations between the administrative records produced by one agency versus another. For example, NOAA's guidance instructs that when materials may be privileged "or otherwise protected … they must be identified for the [a]dministrative [r]ecord and listed on a [p]rivilege [l]og. The [p]rivilege [l]og … [is] then included in the [a]dministrative [r]ecord prepared for the [c]ourt."[17]

On the other hand, the EPA's guidance on administrative records states that "[t]he administrative record does not include materials that solely reflect the internal deliberative processes of decision-making with EPA" for relevance, not privilege reasons.[18] As such, whether agencies even include certain deliberative process materials in a record (privilege log or not) may be entirely different based on which agency is compiling that record.[19]

There is no sound reason for different agencies taking different views on questions such as these. The lack of standardized or even centralized practices among agencies has not gone unnoticed. The Administrative Conference of the United States studied agency administrative records practices in 2013, concluding that agencies have no uniform practice for issues including privileged documents and timing of compilation (some agencies compile records contemporaneously, others after litigation has been filed).[20] It subsequently crafted a recommendation of best practices for agencies compiling records and noted the need for agencies to "issue guidance to aid personnel in implementing" such practices.[21] These recommendations appear to have gone unheeded, at least on an across-the-board basis.

The implications of this disarray stretch beyond the undesirability of a haphazard administrative state. Rather, they pose hardships for practitioners and judges attempting to make sense of agency action. Those considering challenges to agency regulations need clearer guidelines on what to expect in an agency's administrative record. Without such guidelines,

challengers may find themselves surprised by an unexpectedly light or heavy administrative record with little understanding of the agency's process for developing it.[22]

Courts also need to be able to assess a reasonable timeline for agencies to compile or complete a record, a task difficult to do without some guidelines around the process. For example, the U.S. District Court for the District of Columbia requires the agency to file a "certified list of the contents of the administrative record … within 30 days" of filing an answer,[23] while other jurisdictions lack analogous rules. Without guidelines to better understand what happens with administrative records, all parties in an agency action may face uncertainty and protracted litigation.

Agencies, too, would benefit from standardization as it would give courts greater confidence in the process by which administrative records have been compiled, fortifying the presumption of regularity that courts have afforded to agencies — a presumption that has come under attack in recent years.

Proposal: Centralized, Uniform Standards

To address increasingly common disputes over administrative records, a centralized body such as OMB — or within OMB, OIRA — should issue guidance on how federal agencies should compile those records. These entities are already at the heart of managing administrative agencies' processes and procedures, making them particularly apt for this task. OMB's Circular A-4, for example, is an excellent example of this. Providing guidance on regulatory impact analysis statements, the circular is a detailed document clarifying what makes a good analysis and clarifying best practices.[24]

Similar guidance from OMB or OIRA on administrative records could provide critical transparency and regularity, addressing many of the key points on which agencies appear to have no standardized approach: a kitchen-sink versus narrow approach to the contents of the administrative record; how to ascertain what documents were indirectly relied upon the agency in making its decision; how to identify relevant email custodians for email searches; the handling of deliberative process documents; the timing and process of compilation; the relative roles of DOJ lawyers and agency personnel in compiling and reviewing the administrative record; the handling of redactions or privileged materials; whether and how these principles should differ in informal rulemaking versus (formal and informal) agency adjudications; and more.

Although basic uniformity across agencies is vital on these questions, the guidance need not dictate a one-size-fits-all approach. Given the variety of tasks accomplished by agencies and the sheer breadth of litigation challenges that may be brought against agency action, overly prescriptive guidance may unnecessarily hamstring agencies.

Instead, such guidance would ideally provide general best practices to offer some semblance of consistency while still retaining flexibility. The guidance thus could set default principles that an agency could deviate from where it has good cause to do so. Good cause might include other statutory or regulatory authorities or, in some rare instances, a complex litigating position in a specific case (which would require justification in the litigation itself).

A second-best alternative would be for OMB or OIRA, following in the footsteps of the Administrative Conference of the United States and the DOJ's recommendations, to issue guidance strongly encouraging all agencies to issue their own public guidance documents regarding administrative records. These agency-by-agency guidance documents would then be collected by OMB and publicly docketed, in furtherance of transparency for regulated industries, potential challengers, the public and courts.

Although many issues regarding the administrative state and APA litigation engender controversy, bringing uniformity to administrative records should garner widespread support. For agencies, ensuring regularity and reducing administrative burdens caused by confusion or protracted litigation over the administrative record should be welcome. Furthermore, reviewing courts may get to the merits of a challenge to an agency action more quickly, instead of being bogged down in discovery-fight-like litigation over the record.

And when litigation over the record does occur, judges may use the guidelines as persuasive authority in determining whether the agency's presumption of regularity has been rebutted by an agency challenger. For regulated industries and those challenging agency action, the benefits would be immense: increased transparency and insight into how agencies compile their records and what materials are and are not in the record. They will have guidelines to hold agencies accountable to, thus ideally reducing litigation and regulatory uncertainty.

From splashier, headline-making cases to the run-of-the-mill APA challenges, there is an increasing amount of attention paid to the administrative record. The current state of administrative records is unnecessarily confused, but it need not be.

Uniform, centralized guidance setting forth reasonable principles governing the process and substance of administrative record compilation should go a long way towards improving the process and increasing transparency and consistency for regulated industries, agencies, the public and courts. The administrative record is the heart of agency action and APA litigation, and there is simply no justification for continuing to leave resolution of important record issues to agency-by-agency, ad hoc, inconsistent decision-making.

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[1] Adam Liptak, Supreme Court Leaves Census Question on Citizenship in Doubt, N.Y. Times (June 27, 2019), https://www.nytimes.com/2019/06/27/us/politics/census-citizenship-question-supreme-court.html.

[2] 5 U.S.C. Section 706; Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971) (Judicial "review is to be based on the full administrative record that was before the Secretary at the time he made his decision.").

[3] Oceana, Inc. v. Ross , 290 F. Supp. 3d 73, 77 (D.D.C. 2018).

[4] See, e.g., Jonathan Stempel, White House Cannot Shield Information on Transgender Military Ban, Reuters (Aug. 15, 2018), https://www.reuters.com/article/us-usa-military-transgender/white-house-cannot-shield-information-on-transgender-military-ban-judge-idUSKBN1L0259; Amanda Reilly, Court Rebukes EPA, Orders Ban on Farm Chemical, E&E News (Aug. 9, 2018), https://www.eenews.net/stories/1060093783. See also Jimmy Hoover, High Court Census Ruling Could Escalate Rule Challenges, Law360 (June 28, 2019), https://www.law360.com/articles/1174019/high-court-census-ruling-could-escalate-rule-challenges (describing the potential for increased challenges to other agency actions); Leland E. Beck, Agency Practices and Judicial Review of Administrative Records in Informal Rulemaking, Admin. Conf. United States, at i (May 14, 2013), https://tinyurl.com/pa5kvnc (noting both the increased volume of administrative records and the expanded factors and analyses that agencies are expected to consider in rulemaking).

[5] The Deferred Action for Childhood Arrivals program used prosecutorial discretion to provide individuals who met certain criteria a period of deferred removability and eligibility to request employment authorization. The memorandum authorizing the program was rescinded after the change in administration, and has been the subject of several lawsuits. See Memorandum from Elaine C. Duke, Acting Secretary, Department of Homeland Security, Rescission of Deferred Action for Childhood Arrivals (Sept. 5, 2017), https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca.

[6] Batalla Vidal v. Nielsen , 279 F. Supp. 3d 401, 417 (E.D.N.Y. 2018) (discussing Second Circuit docket order).

[7] See, e.g., Order Granting Motion to Compel, Kalispel Tribe of Indians v. United States Dep't of Interior, No. 2:17-cv-00138-WFN, at 3 (E.D. Wash. Mar. 8, 2018), ECF No. 51.

[8] U.S. Dep't of Justice, Env't and Nat. Res. Div., Guidance to Federal Agencies on Compiling the Administrative Record (Jan. 1999), http://environment.transportation.org/pdf/programs/usdoj_guidance_re_admin_record_prep.pdf.

[9] Memorandum from Ronald J. Tenpas, Assistant Atty Gen., to Selected Agency Counsel, Re: "Guidance to Federal Agencies on Compiling the Administrative Record (Dec. 23, 2008).

[10] Memorandum from Jeffrey H. Wood, Acting Assistant Atty Gen., to Selected Agency Counsel, Administrative Record Compilation in Light of In re Thomas E. Price, Ninth Cir. (Oct. 20, 2017).

[11] Id.

[12] 42 U.S.C. § 7607(d)(7)(A).

[13] 40 C.F.R. §§ 300.800-.825. The Department of Energy also issued its own specific information brief on administrative records under CERCLA actions. Dep't of Energy, Office of Env't, Safety and Health, Administrative Records Under CERCLA/RCRA (Jan. 2006), https://public.ornl.gov/sesa/environment/guidance/cercla/admin.pdf.

[14] Memorandum from David L. Bernhardt, Deputy Solicitor, to Assistant Secretaries, Dirs. of Bureaus and Offices, Standardized Guidance on Compiling a Decision File and an Administrative Record at 2 (June 27, 2006) (emphasis added), https://www.fws.gov/midwest/endangered/permits/hcp/pdf/DecFileAdminRecordGuidance.pdf.

[15] Memorandum from Louis J. Schiffer, Gen. Counsel, to Assistant Adm'rs, National Oceanic and Atmospheric Administration Guidelines for Compiling an Agency Administrative Record at 6-7 (Dec. 21, 2012) (emphases added), https://www.gc.noaa.gov/documents/2012/AR_Guidelines_122112-Final.pdf.

[16] The deliberative process privilege protects internal deliberations of agency policymakers, with the rationale that certain confidentiality may "ensure[] frank and open discussion among government officials." Michael Ray Harris, Standing in the Way of Judicial Review: Assertion of the Deliberative Process Privilege in APA Cases, 53 St. Louis U. L.J. 349, 351 (2009). In practice, the privilege has been criticized for "shield[ing] documents from a court properly tasked with reviewing the lawfulness or reasonableness of government rulemaking." Id. at 353. Proponents of the privilege point to the importance of a degree of protection for agency decisionmakers. In essence, it "has generated the most controversy and greatest number of disputes over agencies' exclusions from administrative records." Daniel J. Rohlf, Avoiding the 'Bare Record': Safeguarding Meaningful Judicial Review of Federal Agency Actions, 35 Ohio N.U. L. Rev. 575, 595 (2009).

[17] Memorandum from Louis J. Schiffer, supra note 15, at 8.

[18] Env't Prot. Agency, EPA's Action Development Process, Administrative Records Guidance 5 & n.4 (Sept. 2011), https://www3.epa.gov/ogc/adminrecordsguidance09-00-11.pdf.

[19] The Department of Justice's 2017 memo suggests that the EPA has the winning viewpoint on this issue as it states its position that "agency deliberative documents … generally are not relevant to APA review." Memorandum from Jeffrey H. Wood, supra note 10, at 1.

[20] Beck, supra note 4, at ii.

[21] Admin. Conf. of the United States, Recommendation 2013-4: The Administrative Record in Informal Rulemaking 10 (June 14, 2013), https://tinyurl.com/y5xf6ulc.

[22] See Rohlf, supra note 16, at 576 (describing agencies' shift during the Bush Administration from an "'everything-but-the-kitchen-sink' approach to compiling records" to "narrow[] interpret[ations of] what constituted the records").

[23] D.D.C. Local Rule 7(n).

[24] U.S. Dep't of Transp., Circular A-4, Regulatory Analysis (Sept. 17, 2003), https://www.transportation.gov/sites/dot.gov/files/docs/OMB%20Circular%20No.%20A-4.pdf.