Legal Explainer: Arbitrary and Capricious Review

Explains the history and use of judicial arbitrary and capricious review for changes to federal policies.

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WHAT IT DOES

The word “capricious” might conjure mental images of Greek mythology, but the phrase “arbitrary and capricious” defines a very real modern responsibility for federal agency rulemaking. Whenever an agency issues, changes, or repeals a policy, affected parties can challenge this decision in court. Given that regulatory reversals and frequent changes confuse and burden industries, Congress requires federal agencies to be able to demonstrate that these decisions were supported by careful consideration and not arbitrary.

In October 2017, the US Environmental Protection Agency (EPA) proposed a repeal of the Clean Power Plan (CPP) guidelines for power plant greenhouse gas (GHG), which it had adopted 24 months before. The repeal reverses the EPA’s interpretation of the Clean Air Act (CAA) from 15 months prior; under the Obama administration, the EPA included GHGs within the CAA’s regulation of airborne emissions that pose risks to human health and environmental quality. However, the Trump EPA considers GHGs inconsistent with the CAA under the justification that the CAA was primarily designed for localized air pollution. The rapid back-and-forth movement on the CPP presents a legal question about what federal agencies must show for a policy reversal to meet the standards for arbitrary and capricious review.

The arbitrary and capricious standard originally comes from Congress. Although substantially evaluating federal policy is beyond the scope of the court system, the Administrative Procedure Act (APA) requires that courts “hold unlawful and set aside agency action, findings, and conclusions found to be,” among other things, “arbitrary [and] capricious.” By design, this is a minimal standard that requires agencies to show that a “decision was based on a consideration of the relevant factors” and did not involve “a clear error of judgment,” as clarified in Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co. The Supreme Court uses these phrases to guide lower courts in determining whether a federal agency, in changing its policy, has responded to all important considerations without relying on factors that Congress did not intend it to weigh.

If challenged in court, arbitrary and capricious review would apply to the CPP repeal just like any other repeal by a federal agency. The Supreme Court considers the consequences of regulatory changes when weighing the arbitrariness of a decision. Accordingly, the Supreme Court in State Farm found that there should be “at least a presumption” against changing federal policy without a reasonable explanation from the agency.

Although the EPA is conducting a separate rulemaking to consider a replacement for the CPP, it is not committing to a replacement on any timetable – or at all – and notes in the proposed repeal that any future replacement rule would start over with an entirely new analysis. Without a CPP replacement plan, the Supreme Court would either apply a presumption against the repeal, or overturn
substantial precedent, at least implicitly. The Supreme Court might even choose to affirm the D.C. Circuit’s view and require the EPA to demonstrate that the CPP itself is “unreasonable.”

A challenge under the APA would likely turn on legal wording and precedent rather than partisan ideology. Unlike litigation focused on the scope of substantive rights such as privacy or liberty, arbitrary and capricious review is a procedural requirement applied, as uniformly as possible, to regulations affecting a whole spectrum of substantive issues. Any changes to the judicial understanding of arbitrary and capricious review could not easily be applied to on policy alone.

Procedural requirements within the APA also help restrict the focus of these cases to strictly legal questions. Unusually for lawsuits, federal agencies must meet the arbitrary and capricious standard without the opportunity to develop new political theories. During litigation, federal agencies are not permitted to offer new reasons for their decisions and have to use the analysis they already provided during the initial rulemaking process. Further reducing the potential for a politicized decision, the Supreme Court in SEC v. Chenery Corp, emphasized that courts may not supply any retrospective rationales of their own. Courts retain some discretion to uphold reasoning that is almost entirely clear, but judges cannot supplement or substitute the agency’s reasoning with their own in order to defend the repeal.

Finally, arbitrary and capricious review is notable for its legal usefulness. Courts normally grant agencies what is known as "Chevron deference," which allows agencies to interpret their statutory responsibilities without judicial scrutiny as long as these interpretations are reasonable and do not contradict Congress. However, this judicial convention does not supersede the APA. Returning to the example of the CPP, the EPA’s reinterpretation of the CAA is its primary basis for the repeal. Since the CPP derives its mandate from the CAA and regulates GHGs, reading the CAA to exclude GHGs would make repealing the CPP not only reasonable, but necessary. However, the EPA’s decision to change its understanding of the CAA is part of the repeal itself and therefore would have to be included within an arbitrary and capricious review of the repeal as a whole without receiving deference.

PRIMARY AUTHOR

Anna Lukasiewicz

EDITOR(S)

Jack Zhou, Ph.D.

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