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Going Beyond: When Can Courts Look Past the Record in an APA Review?*

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Regulated companies need to understand what material courts can consider when reviewing administrative decisions.

The Administrative Procedure Act generally allows courts to consider only the existing administrative record when reviewing agency decision-making and determining whether agency decisions are arbitrary and capricious.[1] But the Supreme Court recently reminded us that this rule is not absolute by looking beyond the record in *Department of Commerce v. New York* and blocking an agency decision that it found to be based on a "contrived," pretextual rationale.[2]

Regulated companies may be able to ask courts to consider information beyond the administrative record if they can show that the agency acted in bad faith or exhibited improper behavior. A company's ability to present the court with information beyond a record carefully constructed by an agency can be a powerful tool.

The following cases illustrate that a movant may not need to conclusively prove that the agency behaved improperly to convince a court to review evidence beyond the administrative record. To achieve this goal, the evidence must give the court reason to believe there was bad faith or improper behavior.[3] Below is a breakdown of several case examples:

Department of Commerce v. New York Goes Beyond the Record

Department of Commerce v. New York presented the Court with a challenge to Secretary of Commerce Ross's decision to add a citizenship question to the 2020 census.[4] In defense of his decision, the Secretary presented a record showing that the Department of Justice ("DOJ") asked that the question be added so that it could more effectively enforce the Voting Rights Act.[5] However, extra-record discovery revealed that the DOJ's request was not the real reason that Secretary Ross sought to add the question.[6] Extra-record discovery revealed that the Secretary planned to add the question all along and had, in fact, solicited the request for the question from the DOJ.[7] Viewed in that light, the Supreme Court determined that the Voting Rights Act rationale was "contrived" and affirmed the lower court's decision to bar the Department of Commerce from asking the question.[8]

Writing for the majority of a fractured Court, Chief Justice Roberts acknowledged that while "[i]t is hardly improper for an agency head to come into office with policy preferences and ideas . . . and work with staff attorneys to substantiate the legal basis for a preferred policy," the Court "cannot ignore the disconnect between the decision made and the explanation given."[9] The Court noted that to confine itself to the administrative record and ignore the Secretary's extra-record actions would be "to exhibit a naiveté from which ordinary citizens are free."[10]

To understand why this decision is important, observers need to take a deep-dive into the Court's decision. The courts could likely look beyond the administrative record in this case because the district court invoked—perhaps prematurely—an exception to the rule against extra-record discovery established in *Citizens to Preserve Overton Park, Inc. v. Volpe*.[11] This exception gives courts discretion to go beyond the existing administrative record if the

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[1] *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U. S. 519, 549 (1978); Camp v. Pitts, 411 U. S. 138, 142–43 (1973) (per curiam).
[2] *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2559 (2019).
[3] *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).
[4] *Dep't of Commerce v. New York* at 2561.
[5] App. to Pet. for Cert. 548a.
[6] *Dep't of Commerce v. New York* at 2574.
[7] *Id.*
[8] *Id.* at 2575–76.
[9] *Id.* at 2574–75.
[10] *Id.* at 2575.
[11] *Id.* at 2574.

party challenging the agency action makes "a strong showing of bad faith or improper behavior" underlying the agency decision.[12]

When Do Courts Use *Overton Park* to Look Beyond the Record?

While every circuit has recognized the *Overton Park* exception—and most also recognize other, circuit-specific exceptions that allow for a party challenging an agency decision to supplement the record—the overwhelming majority of courts have declined to use *Overton Park's* exception to look beyond the administrative record.[13] In his *Department of Commerce v. New York* dissent, Justice Thomas followed this school of thought. Justice Thomas disagreed that plaintiffs had made a sufficiently "strong showing" of bad faith or improper behavior by Secretary Ross and noted that the Supreme Court "ha[s] never before found *Overton Park's* exception satisfied."[14]

Given the fact that the APA requires courts to defer to agency decision making, the courts' reluctance to embrace *Overton Park* is unsurprising. Nonetheless, some courts have looked beyond the record.

In S*okaogon Chippewa Community v. Babbitt*, for example, the district court allowed the party challenging the agency decision to supplement the record after it made a strong showing of improper behavior underlying a decision of the Department of the Interior.[15] There, three Chippewa Indian tribes applied to the Department of the Interior to convert a greyhound racing facility into an off-reservation casino.[16] When the Department denied the application, citing the "strong opposition of the surrounding communities," the tribes challenged the decision.[17] The tribes argued that the Department's reason was pretextual and pointed to unexplained procedural delays; suspicious communications between opposition tribes, senators, lobbyists, and White House staff; and a draft report from the Indian Gaming Management Staff, which had recommended that the application be approved.[18]

The court initially limited its review to the record because plaintiffs had not proven improper behavior.[19] But it then reversed course and granted the plaintiffs' motion for reconsideration, noting that *Overton Park's* "strong showing" requirement did not—and, logically, could not—require conclusive evidence of improper behavior.[20] Instead, the court was satisfied that the plaintiff had "suppl[ied] sufficient evidence . . . as to raise suspicions that defy easy explanations."[21]

Following *Babbitt's* lead, the district court in *United States v. Sanitary District of Hammond* also allowed extra-record discovery; in that case extra-record discovery was allowed after the party that challenged an EPA decision made a sufficient showing of bad faith.[22] In that case, an EPA official recused herself from a dispute to avoid the appearance of partiality.[23] But suspicions were later raised when the official, without explanation, reinstated

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[12] *Overton Park* at 402.
[13] *See, e.g., Iowa League of Cities v. EPA*, 711 F.3d 844, 864 n.13 (8th Cir. 2013); *Town of Winthrop v. FAA*, 535 F.3d 1, 14 (1st Cir. 2008); *Citizens for Alts. v. Dep't of Energy*, 485 F.3d 1091, 1096 (10th Cir. 2007); *Yale-New Haven Hosp. v. Leavitt*, 470 F.3d 71, 81–82 (2d Cir. 2006); *Greene/Guilford Envtl. Ass'n v. Wykle*, 94 F. App'x 876, 878 (3d Cir. 2004); *PPG Indus., Inc. v. Harrison*, 587 F.2d 237, 244–45 (5th Cir. 1979), *rev'd*, 446 U.S. 578 (1980); *Ohio Valley Envtl. Coal., Inc. v. McCarthy*, No. 3:15-0271, 2016 U.S. Dist. LEXIS 61600, at *19–23 (S.D.W. Va. May 10, 2016); *McCrary v. Gutierrez*, 495 F. Supp. 2d 1038, 1043 (N.D. Cal. 2007); *Gibbs v. Dep't of Agric.*, No. 3:02-CV-547, 2003 U.S. Dist. LEXIS 26431, at *7–8 (E.D. Tenn. Sept. 11, 2003); *Coleman Am. Moving Servs., Inc. v. Weinberger*, 716 F. Supp. 1405, 1413 (M.D. Ala. 1989); *Alschuler v. Dep't of Hous. & Urban Dev.*, 515 F. Supp. 1212, 1229–30 (N.D. Ill. 1981).
[14] *Dep't of Commerce v. New York* at 2579.
[15] *Sokaogon Chippewa Cmty. v. Babbitt*, 961 F. Supp. 1276 (W.D. Wis. 1997).
[16] *Sokaogon Chippewa Cmty.* at 1278.
[17] *Id.*
[18] *Id.* at 1281–84.
[19] *See id.* at 1278, 1280.
[20] *Id.* at 1281.
[21] *Id.* at 1285.
[22] *United States v. Sanitary Dist. of Hammond*, 2012 WL 6599919 (N.D. Ind. 2012).
[23] *Sanitary Dist. of Hammond* at 9.

herself after she received poignant, critical questions from her chosen successor's counsel.[24] The court allowed extra-record discovery to reveal any potential impropriety behind the official's decisions.[25] The court noted that while it had "not f[ound] that bad faith or improprieties in fact influenced the [decision]," the defendant had made "a 'strong showing' that the evidence of record 'suggests' that bad faith or improprieties 'may have influenced the decision maker.'"[26]

Key Takeaways

A court's decision to go beyond the record—as explained by the lower court in *Department of Commerce v. New York*—is most often "based on a combination of circumstances that [when] taken together, [are] most exceptional."[27] Observers may note that the Court's decision to go beyond the record in *Department of Commerce v. New York* seems to conflict with the Court's decision in *Trump v. Hawaii.*[28] Perhaps the two decisions can be reconciled. In *Trump v. Hawaii*, the state of Hawaii and three U.S. citizens challenged Presidential Proclamation No. 9645—colloquially referred to as the "travel ban"—which placed elevated immigration restrictions on eight countries, six of which were predominantly Muslim.[29] The plaintiffs argued that the President's extra-record statements showed that the national security justifications behind the ban were, in fact, pretext for the Proclamation's true animus: religious discrimination. Given the nature of then-Candidate Trump's public statements, the case seemed to present the Court with the opportunity to consider evidence of pretext that went beyond the record.[30]

Trump v. Hawaii, unlike *Department of Commerce v. New York*, did not involve any agency decision-making. It instead involved a challenge leveled directly at the Executive itself on a matter squarely within its traditional province: national security. This distinction compelled the Court to defer to the Executive and limited the Court's consideration of extra-record material.[31] Thus, the Court applied a rational basis review and found that even if the challenging party could demonstrate pretext, the President's non-religious justifications rationally supported the entry restrictions.[32]

Ultimately, *Department of Commerce v. New York* reminds us that an administrative record may be permeable under the right circumstances. And although the "strong showing" bar remains high, perhaps courts will now be more apt to allow extra-record discovery when reviewing agency decision-making. That willingness could enable companies to more effectively challenge agency decisions based on pretextual reasoning—reasoning that would not be reflected in the administrative record.

[24] *Sanitary Dist. of Hammond* at 14.
[25] *Sanitary Dist. of Hammond* at 35.
[26] *Id.*
[27] *New York v. Dep't of Commerce*, 345 F. Supp. 3d 444, 453 (S.D.N.Y. 2018).
[28] *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).
[29] *Trump v. Hawaii* at 2405–06.
[30] *Id.* at 2417.
[31] *Id.* at 2418–20.
[32] *Id.* at 2420.

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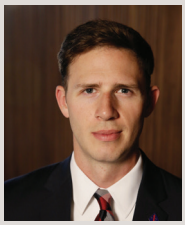

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