'Public Charge' Case Discovery Denied For Wrong Reasons

By **Steven Gordon**

Steven Gordon

Most challenges to actions by federal agencies are brought under the Administrative Procedure Act. APA claims are adjudicated without a trial or discovery, on the basis of an administrative record that is produced by the agency.

The U.S. Supreme Court has instructed that "courts are to decide, on the basis of the record the agency provides, whether the action passes muster under the appropriate APA standard of review."[1] If the reviewing court cannot evaluate the challenged agency action on the basis of the record before it, the matter is usually remanded to the agency for additional investigation or explanation.[2]

Discovery beyond the administrative record is permitted only in exceptional cases. But does a different rule apply when a constitutional claim is alleged together with (or instead of) an APA claim?

No federal circuit court has yet decided this question, but it has been addressed by some federal district courts. Last month the U.S. District Court for the District of Maryland addressed this issue in a case challenging changes to the U.S. Department of State's criteria for determining whether a visa applicant is likely to be a public charge and thus ineligible for admission to the United States.

In Mayor and City Council of Baltimore v. Trump, the plaintiffs asserted an equal protection claim in addition to an APA claim, alleging that the changes were made to discriminate on the basis of race. They argued that they were entitled to discovery on their constitutional claim and sought to issue document requests and interrogatories to President Donald Trump, the State Department and Secretary of State Mike Pompeo.

The court, after an extended analysis of the issue, refused to authorize this discovery. It left the door open for the plaintiffs to seek discovery under their APA claim after they review the administrative record.[3] The court's decision presents a good occasion for examining this discovery issue.

Discovery With Respect to APA Claims

The Supreme Court has explained that APA review is generally limited to the existing administrative record because "further judicial inquiry into 'executive motivation' represents 'a substantial intrusion' into the workings of another branch of Government and should normally be avoided."[4]

There are a few limited exceptions to this general rule:
[A] reviewing court may consider extra-record evidence where admission of that evidence (1) is necessary to determine whether the agency has considered all relevant factors and has explained its decision, (2) is necessary to determine whether the agency has relied on documents not in the record, (3) when supplementing the record is necessary to explain technical terms or complex subject matter, or (4) when plaintiffs make a showing of agency bad faith.[5]

The first exception covers situations where there is "such a failure to explain administrative action as to frustrate effective judicial review," in which event the court may "obtain from the agency, either through affidavits or testimony, such additional explanations of the reasons for the agency decision as may prove necessary."[6]

Note that this exception does not necessarily permit discovery by the plaintiff. Indeed, "[w]hen there is a need to supplement the record to explain agency action, the preferred procedure is to remand to the agency for its amplification."[7]

The second exception arises when it appears the agency has relied on documents or materials not included in the record. Because the APA provides that judicial review shall be based on the whole record, supplementation is appropriate when it appears that the agency has not provided all of the documents or materials which it actually considered.[8] This exception does not involve any additional intrusion into the workings of the agency, but rather requires full disclosure on the part of the agency.

The third exception involves "cases in which supplementation of the record through discovery is necessary to permit explanation or clarification of technical terms or subject matter involved in the agency action under review."[9] This exception permits discovery on ancillary matters but not as to the agency's actual decision-making process.

The fourth exception permits discovery into "the mental processes of administrative decision-makers" based on a "strong showing of bad faith or improper behavior."[10] This discovery is highly intrusive, and the Supreme Court has emphasized that it requires a strong predicate showing by the plaintiff before it can be authorized.

Discovery With Respect to Constitutional Claims

Most federal district courts have concluded that a plaintiff who challenges agency action on constitutional grounds is not entitled to discovery beyond the administrative record, unless one of the narrow exceptions under the APA applies. Their analyses have been based on the fact that the APA explicitly authorizes judicial review of agency action that is "contrary to constitutional right, power, privilege, or immunity."[11]

Some courts have ruled that the APA limitations on discovery must apply to constitutional claims as a matter of statutory interpretation, at least where the constitutional claim overlaps the APA claims.[12] Other courts have reasoned that the APA's restriction of judicial review to the administrative record would be nullified if a plaintiff could circumvent it by simply alleging a constitutional claim.[13]

Even where no APA claim has been asserted, one court reasoned that it was obligated to analyze constitutional claims under the APA procedure because "distinguish[ing] between a 'stand-alone constitutional challenge' and an 'APA challenge,' ... would run afoul of Congress's intent."[14]

As one court recently observed, "[t]here appears to be a common thread running through these cases: when a constitutional challenge to agency action requires evaluating the substance of an agency's decision made on an administrative record, that challenge must be judged on the record before the agency."[15] That court reached the same conclusion in the case before it but "decline[d] to adopt any bright line or categorical rule."[16]

In contrast, a few courts have treated constitutional claims differently and have permitted plaintiffs to submit evidence that was not part of the administrative record, or have

permitted limited discovery. Their rationales have varied.

One court reasoned that, because it had a duty to independently assess a constitutional claim without relying on agency findings or rulings, the plaintiff could file affidavits outside of the administrative record.[17] But a court's duty to evaluate the evidence independently does not imply that discovery beyond the confines of the administrative record is necessary to develop the relevant facts.

More recently, another court permitted limited discovery on constitutional claims after concluding that evidence of prior agency practice, which would not necessarily be included in the administrative record compiled for review of a specific case, might be relevant to deciding those claims.

Because plaintiffs had "set out with reasonable specificity the facts they hope[d] to obtain through discovery and how those facts would help them advance their claims," the court authorized the discovery.[18] This ruling, however, appears to be consistent with established APA jurisprudence which authorizes supplementation of the administrative record when it is inadequate to permit effective judicial review.

In another case, a court permitted extra-record discovery on a pro se plaintiff's due process claim that the agency decision-maker was biased. Notably, the court also found that this discovery was justified with respect to the plaintiff's APA claim, as well, because of the agency's sudden, unexplained change in position on granting a permit to plaintiff.[19]

This decision has been construed as permitting extra-record discovery on a constitutional claim that attacks an agency's decision-making process, as opposed to the substance of a decision.[20] But such constitutional claims do not necessarily justify any discovery beyond the administrative record.

A constitutional challenge to an agency process or procedure, for example, normally would involve undisputed facts. And discovery into the mental processes of agency decision-makers to support a claim of bias is permissible only where there is a strong showing of bad faith or improper behavior.

The Baltimore Court's Analysis of the Discovery Issue

The Baltimore court surveyed the welter of cases addressing the discovery issue and decided to adopt "a flexible approach, tailored to the facts and claims of the case."[21] It concluded that, "on the particulars of this case, the APA does not preclude discovery on plaintiff's constitutional challenge."[22] Instead, "equal protection principles, not the APA, supply the governing legal framework for assessing whether plaintiff is entitled to discovery at this time."[23]

Utilizing this framework, the court reasoned that traditional equal protection analysis does not apply to actions pertaining to the entry of foreign nationals. Under the Supreme Court's decision in the travel ban case, it was required to uphold the changes to visa criteria so long as they are plausibly related to the government's stated objective. Thus, review of the administrative record was all that was necessary to resolve the equal protection claims, and plaintiffs were not entitled to discovery on those claims.[24]

While the court's decision to deny discovery was clearly correct, its analytical approach is more questionable. The court did not persuasively demonstrate that "equal protection principles," rather than the APA, should control the discovery issue.

The court noted that the Supreme Court's decision in Webster v. Doe[25] contemplates discovery in support of a constitutional claim. In Webster, the court concluded that plaintiff's APA claim was not reviewable, but ruled that he could pursue his constitutional claims and could seek discovery on those claims.

However, while Webster demonstrates that a plaintiff is entitled to some discovery with respect to a constitutional claim, Webster "does not address the question whether discovery is necessary when the agency produces an administrative record documenting the basis for its decision, let alone the circumstances that would justify such discovery."[26] Therefore, Webster does not illuminate whether a plaintiff who makes a constitutional claim is limited to the administrative record.

Another Supreme Court decision, however, does illuminate this issue. In U. S. v. Carlo Bianchi & Co., the court stated that, "in cases where Congress has simply provided for [judicial] review [of agency actions], without setting forth the standards to be used or the procedures to be followed, this Court has held that consideration is to be confined to the administrative record and that no de novo proceeding may be held."[27]

Thus, unless Congress has provided otherwise, judicial review of all administrative actions is presumptively confined to the administrative record.

In summary, Congress has specifically provided for judicial review of constitutional claims under the APA, and has limited that review to the administrative record.

Further, all judicial review of agency action, whether or not under the APA, is presumptively limited to the administrative record. In these circumstances, no reason appears why constitutional claims should be exempt from the discovery restrictions of the APA.

The established APA jurisprudence allows discovery beyond the administrative record in unusual situations where it is necessary to permit effective judicial review. No court has yet made a convincing case that constitutional claims are different from other challenges to agency action and require a separate set of rules regarding discovery.

The Baltimore court correctly perceived that the nature of the constitutional claim may affect what evidence is needed to resolve that claim, and so may bear on whether the existing administrative record is adequate. But the legal framework governing discovery is provided by the APA.

Steven D. Gordon is a partner at Holland & Knight LLP.

[1] Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985).

[2] Id.

[3] Mayor and City Council of Baltimore v. Trump, 2019 WL 6970631 (D. Md. 2019).

[4] Department of Commerce v. New York, 139 S.Ct. 2551, 2573 (2019).

[5] San Luis & Delta-Mendota Water Authority v. Locke, 776 F.3d 971, 992 (9th Cir. 2014) (internal quotation marks and citations omitted).

[6] See Public Power Council v. Johnson, 674 F.2d 791, 793-94 (9th Cir. 1982) (quoting Camp v. Pitts, 411 U.S. 138, 143 (1973)).

[7] Id. at 794.

[8] See Portland Audubon Soc. v. Endangered Species Comm., 984 F.2d 1534, 1548 (9th Cir. 1993).

[9] Public Power Council v. Johnson, 674 F.2d at 794.

[10] Department of Commerce v. New York, 139 S.Ct. at 2573-74 (quoting Citizens to Preserve Overton Park Inc. v. Volpe, 401 U.S. 402, 420 (1971)).

[11] 5 U.S.C. § 706(2)(B).

[12] See Chiayu Chang v. U.S. Citizenship & Immigration Servs., 254 F. Supp. 3d 160, 161-62 (D.D.C. 2017).

[13] See Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv., 58 F.Supp.3d 1191, 1237–38 (D.N.M. 2014); Harvard Pilgrim Health Care of New England v. Thompson, 318 F.Supp.2d 1, 10 (D.R.I. 2004).

[14] Ketcham v. U.S. Nat'l Park Serv., 2016 WL 4268346, at *1–2 (D. Wyo. 2016).

[15] Bellion Spirits LLC v. United States, 335 F.Supp.3d 32, 43 (D.D.C. 2018).

[16] Id.

[17] Rydeen v. Quigg, 748 F.Supp. 900, 903-06 (D.D.C. 1990).

[18] Carlsson v. U.S. Citizenship and Immigration Services, 2015 WL 1467174, at *12 (C.D. Cal. 2015).

[19] Grill v. Quinn, 2012 WL 174873 (E.D. Cal. 2012).

[20] See J.V. v. Cissna, 2019 WL 2224851, at *2 (N.D. Cal. 2019).

[21] Mayor and City Council of Baltimore v. Trump, 2019 WL 6970631, at *8.

[22] Id.

[23] Id. at *9.

[24] See id. at *10-11.

[25] 486 U.S. 592 (1988).

[26] Jiahao Kuang v. U.S. Dept. of Defense, 2019 WL 293379, at *2 (N.D. Cal. 2019).

[27] U. S. v. Carlo Bianchi & Co., 373 U.S. 709, 715 (1963).