2 Administrative Law Issues In Tribal CARES Act Funds Ruling

By **Steven Gordon** (January 22, 2021)

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Recently, in Shawnee Tribe v. Mnuchin, the U.S. Court of Appeals for the District of Columbia Circuit ruled that the U.S. Department of the Treasury probably shortchanged the Shawnee Tribe in allocating emergency relief funds to Indian tribes under the Coronavirus Aid, Relief and Economic Security Act.[1]

It first held that the department's allocation was reviewable by the courts under the Administrative Procedure Act. It ruled that the department's allocation of funds to the tribe appeared to be arbitrary and capricious, and therefore invalid.

This decision likely will result in millions of dollars of additional funding for the Shawnee Tribe and for the Miccosukee Tribe of Indians, which is similarly situated. More generally, it illuminates two important, and recurring, issues in administrative law — when are discretionary agency decisions exempt from judicial review, and when does an agency's reliance on imperfect data amount to arbitrary and capricious conduct?

The CARES Act appropriated $8 billion for tribal governments to cover expenditures incurred with respect to the COVID-19 pandemic. Congress directed Treasury Secretary Steven Mnuchin to disburse these funds within 30 days.

The act specified that the amount paid to each tribe "shall be the amount the Secretary [of the Treasury] shall determine … that is based on increased expenditures of each such Tribal government . . . and determined in such manner as the Secretary determines appropriate."[2]

The Treasury Department decided that 60% of the $8 billion would be distributed immediately based on population, while the remaining 40% would be distributed later based on employment and expenditures data.

The department sought enrollment data from all 574 federally recognized tribes. In response, the Shawnee Tribe certified that it had 3,021 enrolled members. But the department did not use the tribe-supplied enrollment numbers to distribute the 60% portion of the funds.

Rather, it relied on population data used in connection with the Indian Housing Block Grant program. This data estimates a tribe's population in a geographical formula area based on the number of individuals who consider themselves American Indian or Alaska Native on census forms.

Because the IHBG data does not reflect actual enrollment, federal regulations recognize that a tribe's IHBG population sometimes exceeds its actual enrollment numbers.

The opposite happened with the Shawnee Tribe; the IHBG data reported that the tribe had a formula area population of zero. So although the tribe had over $6.6 million in expenditures in 2019, and although it incurred significant expenses in responding to the pandemic, it received just $100,000 — the minimum payment for tribes with a population of fewer than 37 members.

Twenty-four other tribes also had formula area populations of zero, including the Miccosukee Tribe, which has 605 enrolled members.

The Shawnee Tribe filed suit, contending that it was arbitrary and capricious for the department to use population as a proxy for increased expenditures, to select the IHBG population data rather than other available data, and to refuse to adjust what the tribe deemed errors in the IHBG data.

The district court denied the tribe's motion for a preliminary injunction and dismissed the case, concluding that the secretary's allocation of funds was committed to agency discretion and thus was unreviewable under the APA. The D.C. Circuit reversed.

The allocation of funds was subject to judicial review.

The APA precludes judicial review of agency action that is committed to agency discretion by law. This exclusion encompasses two categories of administrative decisions.

The first is a narrow group of agency decisions that, by their nature, are presumed immune from judicial review, such as an agency's decision to refuse to institute enforcement proceedings.

The second consists of those rare instances in which, although the agency action is presumptively reviewable, the governing statute is drawn in such broad terms that there is no law to apply, i.e., the court would have no meaningful standard against which to judge the agency's exercise of discretion.

The government argued that both of these rationales apply here.

The government analogized the funding provision of the CARES Act to a lump sum appropriation, which is presumptively immune from review. The U.S. Supreme Court has held that "where Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions."[3]

The D.C. Circuit rejected this analogy, reasoning that the CARES Act, unlike a lump sum appropriation, specifies how the funds are to be used and does not leave the secretary any discretion to redirect those funds to different purposes or recipients.

The government also argued that there is no law to apply because the act directs the secretary to allocate funds "in such manner as [he] determines appropriate."

The circuit court acknowledged that "the Secretary would have a point" if this were all that the statute said. But it noted that the statute "says much more," i.e., that the "amount paid to a Tribal government" shall be "based on increased expenditures ... relative to aggregate expenditures ... and determined in such manner as the Secretary determines appropriate to ensure that all amounts available ... are distributed to Tribal governments."[4]

Thus, the secretary's discretion "is limited to 'determin[ing]' a method for allocating funds that is 'based on increased expenditures' and that is 'appropriate to ensure that all amounts available ... are distributed.'"[5] The court concluded that "[t]his is more than enough to provide us with a 'judicially manageable standard' against 'which to judge the [Secretary's] action.'"[6]

The funding allocation to the Shawnee Tribe was arbitrary and capricious.

The D.C. Circuit proceeded to the merits and ruled that the Shawnee Tribe is entitled to a preliminary injunction because it likely will prevail on its APA claim that its funding allocation is arbitrary and capricious.

The court concluded that the IHBG formula area population data is, at least with respect to some tribes, an unsuitable proxy for increased expenditures.

It noted that the secretary had requested population data from the U.S. Department of Housing and Urban Development for three tribes that did not participate in the IHBG program, yet had failed to do the same for the Shawnee Tribe, which also does not participate in the program.

Further, the secretary did not explain why he failed to seek alternative information for the Shawnee Tribe or the 24 other tribes with no IHBG population.[7]

The government contended that granting relief to the tribe would force the secretary "to create a whole new methodology based on a different data set with other flaws, or to make individualized determinations for each tribe, risking further delay of the distribution of funds."[8]

But the court noted that the tribe sought to enjoin distribution of only $12 million of the remaining funds. And it was unmoved by the prospect that the secretary might have to revise his methodology.

Consider the implications of the court's decision.

The D.C. Circuit's decision demonstrates how narrowly courts construe the APA exclusion for decisions that are committed to agency discretion by law. This exclusion is not triggered simply because a statute confers broad discretion on an agency. So long as a court can discern some limits on the discretion conferred, the agency's action is reviewable under the APA.

The circuit noted that its ruling followed the Supreme Court's decision last year upholding judicial review of the questions for the 2020 census, notwithstanding that the Census Act authorizes the U.S. secretary of commerce to "take a decennial census of population in such form and content as he may determine."

The Supreme Court inferred a limit on the secretary's discretion from the purpose of the Census Act; it reasoned that:

> By mandating a population count that will be used to apportion representatives, the Act imposes "a duty to conduct a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census and the apportionment."[9]

The D.C. Circuit did not have to infer a limit on funding allocations under the CARES Act; it simply read the statute closely in order to discern applicable limits in the statutory language.

Perhaps more significantly, the D.C. Circuit's decision clarifies the limits on an agency's

discretion to utilize imperfect data in making decisions. The courts have long recognized that an agency action based on imperfect information can nonetheless be reasonable and lawful.

Even if the agency relies on a model that is somewhat simplistic and makes assumptions that do not perfectly reflect reality, it "is arbitrary only if we conclude that the model bears 'no rational relationship' to the reality it purports to represent."[10]

Likewise, the existence of a flaw in the agency's model renders it use arbitrary "only if there is no rational relationship between the model chosen and the situation to which it is applied."[11]

But how does this standard actually work in practice? When do flaws in the data on which an agency chooses to rely become so significant as to render their use arbitrary and capricious?

The Fifth Circuit has ruled that "[a]n agency's choice to proceed on the basis of 'imperfect' information is not arbitrary and capricious unless 'there is simply no rational relationship' between the means used to account for any imperfections and the situation to which those means are applied."[12]

This indicates that an agency must make an effort to account for known imperfections in the data it chooses to use, and that the means chosen to deal with the imperfection(s) must also be rational. The D.C. Circuit's decision that the IHBG population data is an unsuitable proxy with respect to some tribes reaches essentially the same conclusion.

The court was unwilling to second-guess the agency's decision to rely generally on the IHBG data rather than data provided by the tribes, themselves. But the IHBG data produced a markedly imperfect and anomalous result as to the Shawnee Tribe and a small group of other tribes, and the agency made no effort to correct it. This was arbitrary and capricious.

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[1] Shawnee Tribe v. Mnuchin, ___ F.3d ___, 2021 WL 28207 (D.C. Cir. 2021).

[2] 42 U.S.C. § 801(c)(7).

[3] Lincoln v. Vigil, 508 U.S. 182, 192 (1993).

[4] Shawnee Tribe v. Mnuchin, 2021 WL 28207, at *4.

[5] Id.

[6] Id.

[7] See id. at *5.

[8] Id. at *6.

[9] Dep't of Commerce v. New York, ––– U.S. ––––, 139 S. Ct. 2551, 2568-69 (2019) (citation omitted).

[10] Am. Iron and Steel Inst. v. E.P.A., 115 F.3d 979, 1005 (D.C. Cir. 1997).

[11] Id.

[12] Texas Oil & Gas Ass'n v. E.P.A., 161 F.3d 923, 935 (5th Cir. 1998).