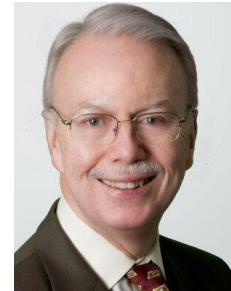


# Understanding DC Circ.'s Agency Rule Withdrawal Debate

By **Steven Gordon** (August 11, 2022)

The Administrative Procedure Act, or APA, requires notice and public comment before an agency repeals an existing rule, or regulation, as well as when it promulgates a new rule. But an agency can withdraw a proposed or draft rule before it takes effect without going through the notice and comment process.



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Exactly "when a rule passes this regulatory point of no return" is the subject of **last month's decision** by the U.S. Court of Appeals for the District of Columbia Circuit in *Humane Society of the U.S. v. U.S. Department of Agriculture*[1] that features a vigorous debate between the majority and the dissent.

The dissent argued that a new rule can be withdrawn without notice and comment until it is published in the Federal Register, but the majority ruled that the point of no return is the earlier time when the Office of the Federal Register, or OFR, makes a regulation available for public inspection before actually publishing it. Accordingly, the court invalidated the agency's withdrawal of a new regulation that had already reached that point.

This issue has significant practical consequences whenever there is a change in administration. Every new presidential administration since Bill Clinton in 1993 has withdrawn regulations awaiting Federal Register publication without going through the notice and comment process. This particular case involved a rule that was withdrawn by the incoming Trump administration in 2017.

## The Majority Opinion

Because the APA doesn't specify when a proposed or draft rule becomes final, the majority turned to the Federal Register Act, the statute that mandates publication of presidential proclamations and agency regulations.

It requires agencies to transmit any regulation that is issued, prescribed or promulgated to the OFR for publication in the Federal Register. Before publication, however, the OFR must make a copy of the regulation available for public inspection.

The act provides that public inspection "is sufficient to give notice of the contents of the document to a person subject to or affected by it." [2] Therefore, the majority concluded that this is the critical point at which a rule becomes valid against the public at large, and so can only be repealed through a new notice and comment process. [3]

To counter the dissent's argument that the Federal Register Act has been superseded by the APA, the majority noted that the Freedom of Information Act — which replaced the public information section of the APA — also contemplates prepublication enforcement of rules against parties with actual notice of the rules. FOIA provides that unpublished rules are not effective "[e]xcept to the extent that a person has actual and timely notice of the terms thereof." [4]

The majority reasoned that this provision is incompatible with the conclusion that an agency prescribes law only by Federal Register publication. And the majority listed specific

examples where agencies currently promulgate substantive rules with effective dates before publication.

The majority highlighted the inconsistency between the government's claimed powers to enforce unpublished rules against persons with actual notice of them, on one hand, and to withdraw those rules without abiding the APA's procedural requirements, on the other hand:

Essentially, the government takes the view that a rule filed for public inspection and awaiting publication exists in a state of superposition like Schrödinger's cat—simultaneously law and not law until the agency publishes or withdraws it.[5]

### **The Dissent**

The dissent argued that the Federal Register Act has been superseded by the APA, reasoning that multiple provisions in the APA "place significant weight on publication for marking the adoption, finality, and eventual effectiveness of a rule." [6] Because "[t]he APA provides no other benchmark for the end of the rulemaking process," "[i]t logically follows that ... an agency's rulemaking discretion continues up until the point of publication." [7]

The dissent pointed to the APA provision that substantive rules cannot have legal effect until at least 30 days after publication, and to the Congressional Review Act, which generally prevents major rules from taking effect until after submission to the U.S. Congress and publication.

It reasoned that these are later enacted and more specific statutes governing the rulemaking process that supersede anything to the contrary in the Federal Register Act. [8]

In sum, the dissent contended, "it makes no sense to cut off agency discretion at public inspection, a point in time that has no legal relevance for generally applicable substantive rules." [9]

### **Observations**

As a matter of statutory construction, the regulatory "point of no return" issue is a close one, with substantial arguments on both sides. As a policy matter, the time of public inspection at the OFR is an arcane dividing line.

Thus, there is intuitive appeal to the dissent's argument that the APA makes publication the point of no return. But that argument is difficult to square with the fact that in 1966, some 20 years after enactment of the APA, Congress amended that statute and provided that an unpublished rule can be enforced against those with actual notice of it.

Adopting the dissent's view that a regulation may be withdrawn up until the time of publication creates a Schrödinger's cat situation where a rule filed for public inspection and awaiting publication could either be law or not law depending on whether the agency chooses to publish and enforce it, or instead withdraw it.

Furthermore, the conclusion that a regulation takes effect before it is published is not completely anomalous. In comparison, a federal law becomes effective when it is signed by the president, or Congress enacts it over the president's veto, before it is delivered to the OFR for publication as a slip law.

Of course, the number of new regulations promulgated each year is generally in the range

of 3,000 to 4,500,[10] whereas the number of new laws enacted each year is a fraction of that. The 117th Congress, which began on Jan. 3, 2021, and will end on Jan. 3, 2023, has so far enacted 166 public laws.[11]

It is unlikely that Congress will devote its attention to this issue anytime in the foreseeable future and amend the APA to specify that publication is the point at which a regulation takes effect.

Thus, the decision in the Humane Society case will remain the governing law, making public inspection at the OFR the point after which a regulation can only be eliminated through a formal repeal process.

This decision might affect some regulations that the Biden administration withdrew when it took office that already had been made available for public inspection by the OFR. Parties adversely affected by the withdrawal of those rules could now bring suit to reinstate them.

Going forward, the practical consequences of this decision will be limited, albeit significant. The OFR's regulations provide that, normally, a document received by 2 p.m. on a workday will be filed for public inspection two workdays later and published in the Federal Register the next workday after that.[12]

So, in most instances, the point of no return adopted by the majority will be one workday earlier than the point advocated by the dissent. The OFR's regulations also specify procedures for expediting public inspection and/or publication in the event of an emergency.[13]

Henceforth, a departing administration that wants to get its midnight regulations on the books will move to ensure that the OFR posts them for public inspection — and incoming administrations will withdraw pending regulations that have not yet passed this milestone.

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[1] --- F.4th ----, 2022 WL 2898893 (D.C. Cir. July 22, 2022).

[2] 44 U.S.C. § 1507.

[3] 2022 WL 2898893 at \*4.

[4] 5 U.S.C. § 552(a)(1).

[5] 2022 WL 2898893 \*5.

[6] *Id.* at \*11.

[7] *Id.*

[8] Id. at \*14.

[9] Id. at \*15.

[10] CRS Report, *Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the Federal Register* (2019), available at <https://sgp.fas.org/crs/misc/R43056.pdf>.

[11] <https://www.congress.gov/public-laws/117th-congress> (last visited August 10, 2022).

[12] See 1 C.F.R. § 17.2(c).

[13] See id. §§ 17.3 - 17.6.