Congressional Research Service
Informing the legislative debate since 1914

Legal Sidebar

"Set Aside" and Vacatur Under the Administrative Procedure Act

September 2, 2025

A growing dispute over the scope of judicial remedies permitted under the Administrative Procedure Act (APA) has generated considerable discussion across multiple levels of the federal judiciary. In a 2022 high-profile exchange at the Supreme Court, the solicitor general argued contrary to decades of federal court practice that the APA does not permit a court to "vacate" (i.e., nullify) a regulation of a federal agency. Instead, she asserted, a court may only "set aside" an agency decision as it applies to the specific parties before the court. Chief Justice Roberts responded by calling the solicitor general's position "fairly radical and inconsistent" with "established practice under the APA" and the practice of judges on the U.S. Court of Appeals for the D.C. Circuit—his former posting. On that court, the Chief Justice quipped, judges vacate regulations "five times before breakfast." Justices Kavanaugh and Jackson echoed the Chief Justice's concerns. Justice Gorsuch, however, was not as skeptical. He explained that he did not "have the benefit" of sitting on the D.C. Circuit like the Chief Justice and Justices Kavanaugh, Thomas, and Jackson. In apparent support of the solicitor general, he thought it was odd that Congress would include a sweeping new remedy in Section 706 when, in his view, another section of the APA addresses remedies. The Court's decision in the case, *United States v. Texas*, did not resolve the dispute, leaving for another day whether the APA permits a court to vacate an agency action or simply set it aside.

The lingering questions over the ability of courts to vacate agency actions may become more pronounced given the Court's 2025 decision in *Trump v. CASA, Inc.* The *CASA* decision limited the availability of what are known as nationwide (or universal) injunctions and cast some doubt on the availability of universal remedies—court orders that block government policies in their entirety in general. Vacating an agency action can also have universal effect, and in light of *CASA*, litigants' interest in securing a remedy that approximates the effects of a nationwide injunction may grow at the same time the legal status of vacatur may become more precarious.

Background: Vacatur v. Injunction

Congress enacted the APA in 1946. The enactment was the culmination of more than a decade of legislative attempts to provide standards for the growing number of federal administrative agencies created over the prior six decades. The APA supplies the default procedures for judicial review of agency actions and applies unless another statute supersedes them. Among other provisions, the APA codified a

Congressional Research Service
https://crsreports.congress.gov
LSB11357

cause of action to challenge final agency action that the plaintiff alleges violates the APA. If the plaintiff prevails in court, Section 706 of the APA provides: "The reviewing court shall hold unlawful and *set aside* agency action, findings, and conclusions found to" violate the APA. Disputes over the meaning of "set aside" have driven the controversy over the type of remedy available in a suit against a federal agency pursuant to the APA.

The traditional view of the "set aside" language is that when a court sets aside an unlawful agency action, that action is "vacated." In other words, the action is nullified and drained of all legal effect. Under the traditional view, vacatur operates on the agency action—not on government officials. Accordingly, the agency can no longer enforce the vacated action against anyone, because the vacated action itself lacks legal effect. Some have dubbed this remedy "universal vacatur," because the agency action has no force or effect against any person. The scope of vacatur is defined by the scope of the agency action challenged in court. Some agency actions concern only one person or a small group, others apply to millions of people, but vacatur works the same way regardless of the number of people subject to the agency action. It nullifies the agency action.

For example, regulations issued by the Department of Education restructuring student loan repayment programs can affect millions of borrowers, while an Army Corps of Engineers decision to issue a permit pursuant to the Clean Water Act may affect only a single party—the entity seeking the permit. Both actions may be subject to challenge in federal court pursuant to the APA, and both could be vacated if courts find them unlawful. While the legal effect of vacating each action is the same (the action itself is nullified), the practical effects (in terms of scope of affected parties) are vastly different.

The traditional view also distinguishes between the remedies of vacatur and injunction. Injunctions are court orders that require parties to a lawsuit to do or refrain from doing something. The traditional view is that injunctions bind people, while vacatur nullifies agency decisions. The legal showing required for each is also different. To secure a permanent injunction, the party seeking the injunction not only must prevail on the merits of the case but must also meet certain criteria, including that the party faces a harm that could not be cured by some other kind of judicial remedy (e.g., money damages) and that the injunction is in the public interest. Vacatur, conversely, can be secured just by proving that the agency action was unlawful. The issuance of an injunction by a court is always discretionary, while the discretion not to vacate is likely more limited. The distinction between the two remedies is bolstered by the fact that under the right circumstances, courts can and do vacate agency actions and issue injunctions.

One area where vacatur and injunctions may overlap, however, is in their scope. Both can have nationwide or universal effect. An order vacating an agency action has the potential to nullify that action for anyone subject to it. Nationwide injunctions, the availability of which was limited by the Court's *CASA* decision, are a subset of injunctions with universal effect, i.e., injunctions against the government that prevent the government from implementing a challenged law, regulation, or other policy *with respect to all relevant persons and entities*, whether or not such persons or entities are parties participating in the litigation.

As with nationwide injunctions, it is the potential universal nature of vacatur that has generated debate over its legality. This debate tends to be most pronounced in cases of broadly applicable regulations. As with nationwide injunctions, some have criticized the ability of a single district court judge to stop the executive branch from implementing its preferred policies by vacating a generally applicable regulation. With the Court's decision in *CASA* limiting the availability of nationwide injunctions, vacatur may be one of the only ways to secure a decision from a court with a universal effect. Many cases brought against the government seeking nationwide injunctions are brought pursuant to the APA, leaving open the possibility that a while a court may no longer be able to issue a nationwide injunction, a court could still vacate the challenged action. It is not yet clear whether courts will respond by issuing more orders vacating agency action, but the Court's decision in *CASA* may mean that the practice of vacating agency actions attracts more legal scrutiny because of its similar effects to the now disfavored nationwide injunction.

The Growing Challenge to Vacatur

Until recently, courts devoted little space in their opinions to expounding the "set aside" language in the APA. Vacatur was, and for many courts still is, considered the obvious and ordinary remedy for a meritorious claim brought pursuant to the APA. The federal courts have likely vacated tens of thousands of administrative actions since the enactment of the APA. To illustrate this point, a significantly debated question over the scope of the APA's remedies was for decades whether a court could remand an agency action *without* vacating it. The two camps that formed in that earlier dispute debated whether the APA's "shall set aside" language *mandated* vacatur in every case where a court found an agency action to be unlawful or instead merely permitted a court to exercise some limited discretion in refraining from vacating a legally deficient agency action. A full discussion of that debate is beyond the scope of this piece. While some still debate its legality, and the Supreme Court has never ruled on it, lower courts have generally accepted the practice of remand without vacatur in some limited circumstances. In cases discussing the availability of remand without vacatur, courts take as a given that the ordinary remedy for a violation of the APA is vacatur.

The Chief Justice's surprise at the solicitor general's arguments about vacatur in the *Texas* oral argument is accordingly all the more understandable. The Department of Justice (DOJ) did not announce its official position on vacatur under the APA until 2018. While a version of this argument appeared as early as 2008 in the government's brief to the Court in the case *Summers v. Earth Island Institute*, the *Texas* oral argument and the government's brief in that case appear to be the first sustained discussion of the issue at the Court.

The debate over the APA's "set aside" language did not appear as an isolated issue either. DOJ's announcement of its litigation policy memo regarding vacatur was packaged with its policy on the far more prominent disputes over the availability of nationwide injunctions. The first six sections of the memo are devoted to reasons why nationwide injunctions should not be available. Questions about that issue were resolved largely in the government's favor in *Trump v. CASA, Inc.* The seventh section of the memo addresses "universal vacatur" (the memo very likely coined the term "universal vacatur"), reprising some of the same arguments DOJ used against nationwide injunctions.

In its memo, DOJ raised several arguments for why the APA does not support the availability of vacatur. An order vacating an agency action that affects people not party to the lawsuit, DOJ argued, violates traditional limits on a court's remedial power. According to this view, federal courts lack the power to provide relief from unlawful activity to people not actually party to the suit challenging that activity, except possibly where the court could not provide relief to the parties to the case without also incidentally providing relief to nonparties. In the case of a broadly applicable regulation, if just a single party harmed by the regulation secures an order vacating the regulation, all similarly harmed people would be relieved of complying with the unlawful rule without being party to the litigation that secured the order vacating the regulation. The effects of vacating a regulation, DOJ argued, exceeds the federal courts' remedial authority granted by the APA. That kind of universal relief was unknown, the memo states, at the time of the adoption of the APA, "suggest[ing] that the APA was not originally understood to authorize courts to issue such broad relief."

The Court's decision in *CASA* lends some support to DOJ's arguments. In *CASA*, the Court held that nationwide injunctions that benefit nonparties "likely exceed the equitable authority that Congress has granted to federal courts." The Court in *CASA* based its decision on an interpretation of the Judiciary Act of 1789, which provides the federal courts with their general remedial power. The Court determined that universal injunctions were unknown at the time the Judiciary Act was enacted. Rather, at the time, courts typically provided relief only to the parties to the case. Thus, the Act did not provide authority to the federal courts to issue universal injunctions. Only in situations where it is otherwise impossible to remedy

the plaintiffs' harm completely can courts craft injunctions that incidentally benefit nonparties. The Court held that this "complete relief" principle has "deep roots" in the law governing injunctions.

The *CASA* decision does not decide the fate of vacatur under the APA, but it does cast doubt on its availability. Despite the exchange in the *Texas* case, the Court has never addressed the meaning of "set aside" in the APA. Nonetheless, the Court's statements in other cases about how to interpret the APA may shed some light on how the Court might approach the question of the availability of vacatur. In *Loper Bright Enterprises v. Raimondo*, a case about the standard of review courts apply when evaluating agency interpretations of statutes, the Court held that Section 706 of the APA codified existing judicial review practices at the time. Whether courts vacated agency action before the enactment of the APA is an ongoing debate in legal scholarship. The continued viability of vacatur may turn on how the Supreme Court answers that question.

Complementing its statutory interpretation argument, DOJ's memo on universal relief argued that as a practical matter, a single district court judge should not have the power to interrupt executive branch policy unilaterally and that reading the APA to grant district court judges this power encourages various undesirable consequences for the judiciary. For example, DOJ argued that universal relief encourages litigants to search for the friendliest court ("forum shopping") or judge ("judge shopping"), because each district judge has the power to veto national policy. Vacatur also limits what is known as "percolation" within the federal courts—the notion that it is better for different courts to evaluate the legality of the same agency action to ensure a thorough ventilation of the legal issues before a higher court decides those issues. As noted above, vacatur nullifies an agency action, meaning other courts would subsequently not have the opportunity to address the legality of the agency action after the first court vacated the action.

The Nature of Vacatur and the "Appellate Model"

What exactly is vacatur is a persistent theme in debates over whether the APA authorizes courts to vacate agency actions. Traditionally, courts understood vacatur to be a judicial remedy—that is, an action a court takes to redress a legal wrong. As explained above, under the traditional view, after a court issues an order vacating an agency action, the prevailing party is no longer required to comply with the unlawful agency action. That court action redresses the legal wrong that the unlawful agency action imposed on the party challenging the agency action (and potentially nonparty beneficiaries subject to the agency action). Some have taken the position that vacatur is a remedy and as such should be limited by the same principles limiting injunctions. Most importantly for those taking this view is that vacatur (like injunctions) should be limited to providing relief only to the parties before the court (rather than to all parties subject to the agency action).

DOJ and some scholars and justices, however, have argued that vacatur is not a remedy at all. Rather, when a court "sets aside" an agency action, it simply ignores it in its determination of the rights and obligations of the parties. They argue that a different section of the APA—5 U.S.C. § 703—defines the remedies available to include injunctions, declaratory judgments, or other traditional forms of nonmonetary relief. The result of this argument is that if vacatur is not a remedy, then courts are left with injunctions as the primary remedy to redress unlawful agency actions. According to *CASA*, except in some narrow circumstances, injunctions must be party-specific, meaning the injunction must be tailored to provide relief to the prevailing party and no broader. Were this interpretation of the APA to prevail in court, courts would no longer be able to vacate agency actions in such a way as to nullify them for all persons subject to those actions. Courts would accordingly disregard (set aside) the agency action in determining whether an injunction (or some other remedy) should issue.

The claim that vacatur is not a remedy has come to support both the argument that the APA does not authorize vacatur and arguments that it does. The latter argument relies on analogizing the relationship between agencies and courts to the relationship between trial courts and appellate courts. This view is

sometimes referred to as the "appellate model" of administrative law, whereby courts have power to review and if necessary nullify agency action much as an appellate court might do to a decision by a trial court.

There are a number of ways in which the current practice of the federal courts fits the appellate model. For instance, in APA cases, as in appeals of trial court decisions, a court's review is restricted to the record compiled before the agency. According to some scholars, another way is the court's power to vacate an agency action. Courts have used the term "vacate" or other similar terms such as "overturn" or "annul" for centuries to refer to the action of nullifying a lower court's or subordinate tribunal's order. Courts vacating orders of lower tribunals are typically courts of review—that is, they are appellate courts reviewing the work of some lower courts or tribunals. The federal courts began adopting the appellate model to review actions of administrative agencies at the beginning of the 20th century just after Congress enacted the first statute codifying judicial review of decisions of the Interstate Commerce Commission (the first modern administrative agency). The statute, known as the Hepburn Act, authorized courts to "set aside, annul, or suspend" decisions of the commission. Between the early 1900s and the enactment of the APA in 1946, Congress created a number of new agencies and authorized courts to "set aside" agency decisions contrary to law. On some accounts the APA was enacted to codify the then-well-established appellate model. Regardless of the intent of the drafters of the APA, federal courts have applied the appellate model to cases brought pursuant to the APA. Vacatur in this account is just one instantiation of the appellate model. Seen through the lens of the appellate model, vacatur is not a remedy; it is a determination by an appellate court of the legality of the agency's action. Like the relationship between trial courts and appellate courts, how to implement the appellate court's decision is up to the agency. As a non-remedial action, vacatur would not be subject to the same constraints imposed on injunctions.

Complete Relief and Regulatory Beneficiaries

As a general rule, a court may not issue an injunction that provides relief to nonparties unless, in order to provide complete relief to the plaintiff from the harm caused by the defendant, the court's order must also incidentally provide relief to nonparties. Whether vacatur must be limited to party-specific relief largely depends on whether vacatur is a remedy that should be guided by the same principles that injunctions are. If this view were adopted by the courts, orders vacating agency actions could reach only as far as the parties before the court, unless broader relief were required to provide complete relief to those parties. For example, were a single bank to successfully challenge a regulation setting capital requirements for all banks, a court could direct the agency not to enforce the regulation against only the bank that was party to the case. Challenges under the APA, however, are often brought by parties for whom complete relief can be secured only by vacating an action in its entirety. This is commonly the case when beneficiaries of a regulation challenge that regulation for not being stringent enough (e.g., fishermen challenging wastewater discharge regulations as too permissive). In that situation, at least one scholar argued, a court could not issue a party-specific order vacating the action because the defendant agency does not regulate the plaintiffs in such cases. Justice Kavanaugh raised this issue in a concurring opinion in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*. In his opinion, Justice Kavanaugh contended that courts must retain the ability to vacate agency actions in their entirety. Otherwise, plaintiffs who benefit from regulations would effectively be deprived of any remedy.

Considerations for Congress

Debates over the availability of vacatur in APA suits have occurred primarily in court and in the pages of law reviews. Congress, however, could intervene in the debate though legislation. Congress could amend the relevant portions of the APA to clarify the remedies available to prevailing parties in suits pursuant to

the APA. At least one bill introduced in the 119th Congress proposes to limit orders vacating agency actions to only the parties before the court. Congress could also amend the APA to make clear that the APA permits (or potentially requires) a court to vacate an agency action in its entirety when the court finds the action to be unlawful. For instance, Congress could amend the APA to specifically authorize courts to "vacate" actions in their entirety. Another approach with some historical pedigree would be to authorize courts to "annul" agency actions. As noted above, "annul" was one of the terms used in the 1906 Hepburn Act. "Annul" and "vacate" are considered synonyms in some cases. In the absence of congressional intervention, the meaning of "set aside" will likely remain contested unless and until the Supreme Court adjudicates the matter.

Author Information

Benjamin M. Barczewski
Legislative Attorney

Disclaimer