Rethinking Remedies

Author : Kathryn Watts

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Nicholas Bagley, *Remedial Restraint in Administrative Law*, **Columbia Law Review** (forthcoming 2017), available via SSRN.

We have all heard the saying that you "don't need a sledgehammer to kill a gnat." Yet, when it comes to fashioning remedies for agencies' transgressions of administrative law principles, the courts often use the equivalent of legal sledgehammers to remedy agency transgressions—no matter how minor the transgressions. This, at least, is the picture painted by Professor Nicholas Bagley in his draft article titled Remedial Restraint in Administrative Law, which will be published in 2017 in the *Columbia Law Review.*

As Professor Bagley's article carefully describes, when a court determines that agency action violates the Administrative Procedure Act (APA), the usual response is for the reviewing court to reflexively invalidate the agency action and to remand to the agency. Administrative law's adherence to this rigid, rule-like approach to remedies—one that generally vacates and remands without pausing to ask how the agency's mistake harmed or prejudiced the complaining party—means that courts "treat every transgression as worthy of equal sanction." (P. 4.) This, in turn, leads to what Professor Bagley perceives as a frequent mismatch between the underlying APA violation and the harshness of invalidating the agency action.

Until I picked up Professor Bagley's piece, I must admit that I had not given the question of remedies in administrative law much sustained or critical thought. And, as it turns out, I am not alone. Indeed, as Professor Bagley describes it, "systematic inattention" plagues remedial questions in administrative law. (P. 2.) This is the main reason why I highly recommend that you read his article. Unless you are unlike most administrative law observers, the article will likely push you to consider issues that you have not carefully thought through before despite their central importance to administrative law disputes.

Second, I also highly recommend reading Professor Bagley's piece because I love how it seeks to brush the dust off of an all but forgotten provision found in Section 706 of the APA. That provision expressly instructs courts to take account of the "rule of prejudicial error" when reviewing agency action. 5 U.S.C. § 706. Despite this textual command found in the APA and despite some recent attention given to the provision in cases like *Shinseki v. Sanders*, courts generally have had little to say about the rule of prejudicial error in administrative law cases. As a result, a great deal of murkiness surrounds the rule of prejudicial error, and we know little about what it means or where it should be applied.

Despite these reasons for strongly encouraging you to read Professor Bagley's thought provoking piece, I must confess that, in the end, I was not convinced by Professor Bagley's central argument, which contends that courts should replace the current rule-like approach to remedies with a much more context-specific, flexible, standard-based approach. For one thing, I am far less confident than Professor Bagley that agencies would not be tempted to cut important procedural corners if they thought that courts might excuse their mistakes (innocent or otherwise) after the fact. In addition, I worry about the potential harm that could be done to administrative legitimacy—specifically, to the public's perception of the quality and legitimacy of the administrative state—if courts develop a variety of flexible standards. Procedural fastidiousness, in my mind, plays a very important role in bolstering public perceptions of agency legitimacy and attending to agencies' democracy deficit.

Furthermore, I also wonder about the messiness that would likely flow from adoption of a more flexible, standard-based approach. Here, my hesitation is rooted in part in lessons that can be gleaned from the courts' fairly convoluted

attempts at defining procedural injury in the context of Article III standing. My hesitation also flows from the complexity and variety of possible APA transgressions. For example, should errors in the rulemaking and the adjudicatory contexts be handled with similar or different remedial rules? And what about substantive and procedural errors?

Finally, my skepticism about Professor Bagley's call for a much more context-specific approach to remedies is also likely fueled by the fact that he leads with *United States v. Texas* as his first of many examples of what he sees as the disconnect between remedy and harm. (Pp. 1, 19-22.) In the *Texas* case, the U.S. Supreme Court upheld by an equally divided Court a nationwide preliminary injunction prohibiting the Department of Homeland Security (DHS) from implementing a deferred action program for certain undocumented immigrants. The DHS program had been preliminarily enjoined after a district court judge in Texas (and later the Fifth Circuit) found that Texas and other states were likely to succeed in claiming that DHS's deferred action program, which was announced in a memo, amounted to a legislative rule that needed to go through notice-and-comment rulemaking under Section 553 of the APA.

In describing *Texas* as a prime example of a case in which the court's remedy is disproportionate to the procedural notice-and-comment transgression, Professor Bagley argues that DHS's failure to publish notice of its proposed program in the Federal Register caused little harm because DHS leaked aspects of its proposed program to the national media. (P. 19.) ("True, the agency never published the proposed policy in the Federal Register as the APA requires. But DHS provided notice in a much more effective manner: it leaked the proposal to the national media."). In addition, Bagley also asserts that Texas and the other challengers cannot complain that they lacked a chance to voice their objections to DHS's deferred action policy because there was lots of political discussion, including media reports, about possible executive action in the immigration realm. (Pp. 20-21.) (citing *CNN* and *Fox News* reports about potential action that the Obama administration might take in the immigration realm). In other words, Professor Bagley seems to suggest that, even if Section 553 of the APA required DHS to follow notice-and-comment rulemaking procedures, invalidation of DHS's policy would be unwarranted because there was lots of general chatter in political channels and in the mainstream media about DHS's plans and thus Texas was not surprised.

This kind of reasoning, in my mind, threatens to eviscerate Section 553 of the APA, allowing informal dialogue between an agency and interested parties to substitute for Section 553's carefully defined procedures. Effectively, it would allow the *LA Times, Fox News*, *CNN* and other media channels to displace the Federal Register as the place where interested parties must look to find—and to learn how and when to comment on—proposed agency rules. That is not consistent with the APA. Nor would it help to bolster the public's perception of the legitimacy of agency decisionmaking.

In the end, despite my own skepticism about the workability and the desirability of Professor Bagley's call for a much more context-specific approach to remedies in administrative law, I highly recommend his article. It is thought-provoking, and it is full of illuminating examples that extend far beyond the *Texas* case. Even though my own perhaps overly cautious instinct is to stick with the status quo for now, I agree with Professor Bagley that the courts are killing gnats with sledgehammers in some cases, and I hope that his article inspires additional brainstorming and debate about possible alternatives to our current one-sized-fits-all approach to remedies.

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