



# Notice-and-Comment is Not Required for Changes Made to Interpretive Rules

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On March 9, 2015, Justice Sotomayor, writing on behalf of the majority, overturned the Paralyzed Veterans doctrine, which requires federal agencies to use a notice-and-comment process before making a significant revision to an interpretive rule, holding that the doctrine is contrary to the Administrative Procedure Act ("APA"). *Perez v. Mortgage Bankers Assn.*, 575 U.S. \_\_\_\_ (2015).

## The Supreme Court's Decision

The issue before the Supreme Court in *Perez* was whether the rule announced in *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997) -- requiring an agency to use notice-and-comment procedures if it intends to make a significant departure from a prior interpretation of a regulation -- is consistent with the APA.

The Supreme Court answered in the negative, reasoning that while agencies are required to use a notice-and-comment process when promulgating legislative rules, the plain language of the APA states that notice-and-comment procedures do not apply to interpretive rules. The Court concluded that the exemption for interpretive rules applies regardless of whether an agency is promulgating, amending, or repealing an interpretive rule. Moreover, the Supreme Court opined that courts cannot impose procedural requirements beyond those set forth by the APA. The Court explained that the role of the judiciary is to enforce the APA in accordance with its clear terms, not to impose additional restrictions on the actions of administrative agencies, concluding that imposing additional procedural requirements to ensure procedural fairness and/or limit the power of administrative agencies is the province of the legislature, not the courts.

There were several concurring opinions, in which the concurring Justices, while supporting the conclusion of the majority, registered their objection to the precedent established in earlier decisions of the Court granting deference to an agency's interpretation of its own regulations. In their concurrences, Justices Alito, Scalia, and Thomas strongly suggested that the Court needed to revisit and potentially overturn its previous

rulings on deference to agency interpretive rules.

## Implications

The decision has potentially significant impacts, including:

- **Increases Agency Freedom to Modify Interpretive Rules.** The decision will impact all agencies that are subject to the APA. The *Perez* decision bolsters the increasing trend of federal agency reliance on interpretive rules to guide regulated entities and persons by allowing significant departures from an agency's prior interpretations without undergoing a notice-and-comment process. It should be noted, however, that interpretive rules still need to withstand judicial review for reasonableness. For example, courts may find an abrupt reversal of an agency's interpretation upon which parties had previously reasonably relied to be arbitrary and capricious, and therefore not subject to judicial deference. In other words, the Supreme Court's decision in *Perez* speaks to the procedural requirements associated with interpretive rule adoption and amendment, but leaves the substantive checks on those actions untouched.
- **Opens the Door to a Future Challenge to the Deference Afforded to Interpretive Rules.** Justices Alito, Scalia, and Thomas submitted concurrences in which they supported the majority's conclusion but called into question the deference courts currently afford agency interpretations. As Justice Alito noted, this issue was not before the Court. However, all three Justices stated that the Court needs to review and potentially overrule existing Supreme Court precedent that established deference to agency interpretation, which according to Justice Scalia "ha[s] revolutionized the import of interpretive rules' exemption from notice-and-comment rulemaking."
- **Amplifies Importance of the Definition of an Interpretive Rule.** The Supreme Court's decision in *Perez* did not address several questions about interpretive rules and, notably, the Supreme Court did not analyze the definition of an interpretive rule or comment on the scope of current case law on that subject. This is significant because the line between a "mere" interpretive rule and a legislative rule requiring notice-and-comment is murky at best. Due to the procedural hurdles, agencies are incentivized to classify their actions as interpretive rather than legislative such that some legislative rules may be masquerading as agency interpretations in contravention of the APA. And, the Supreme Court's decision in *Perez* will make such line even more important moving forward.

While the Supreme Court's decision in *Perez* clarifies one issue of administrative law, it invites further analysis and review of other interpretive rule issues that, until the Court has an opportunity to review them, will likely be the subject of active debate.