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An Overview of the United States Administrative Procedure Act

The Administrative Procedure Act (the APA), enacted by the United States Congress in 1946,[1] establishes a procedural framework to constrain federal administrative agencies. Absent a more specific congressional direction, the APA applies to all federal actors engaging in policymaking and decisionmaking except the President.[2] The APA lays out procedures that such federal actors must follow in resolving adjudications and fashioning rules, as well as the standards of review that federal courts must use when reviewing the agencies' resolution of those adjudications and promulgation of rules and regulations. The APA has been remarkably effective in establishing a framework for ensuring that agency decisionmaking is responsive to public concerns, but the exceptions that it created have become troubling gaps that reviewing courts to date have not successfully closed. In this overview, I will first summarize the procedures imposed on agencies by the APA and then turn to the vulnerabilities in the APA that our system has yet to address effectively. I will then summarize the standards of review that the APA establishes for courts to review agency action, and conclude by tracing the exceptions recognized in the APA in which judicial review is foreclosed or delayed.

As a preliminary matter, in terms of nomenclature, the term "administrative agency"[3] in the United States refers to any federal entity within the executive branch of government, whether denominated an agency, a bureau, a commission, or a department. The key is whether the entity binds those outside the federal government pursuant to a delegation from Congress. The Department of Defense, the Attorney General, and the Securities and Exchange Commission are all administrative agencies within the meaning of the APA, at least when exercising authority delegated from Congress to fashion rules and regulations or to resolve challenges from aggrieved individuals and firms. Although agencies can only exercise the authority granted to them by Congress, Congress has empowered most both to issue rules and resolve disputes through adjudication. Taken as a group, administrative agencies issue far more rules than Congress

[1] Pub. L. No. 79–404, 60 Stat. 237, 5 U.S.C. 551 et seq.
[2] Franklin v Massachusetts, 505 U.S. 788 (1992).
[3] 5 U.S.C. 551(1).

and decide countless more cases than the entire federal judiciary. Indeed, one agency, the Social Security Administration, by itself resolves more cases than are resolved in federal court annually.

The APA divides agency action[4] into four categories, assigning procedures dependent upon the relevant group: Formal Rulemaking; Informal Rulemaking, Formal Adjudication, and Informal Adjudication.[5] This aspect of the Act is happenstance in that there are more than four possible categories of administrative agency action. Yet, the Act has the virtue of prescribing default categories that Congress can rely on unless it decides that a unique structure would be preferable in a specific case.

I. The APA's Procedural Framework

A Rulemaking

The most innovative aspect of the APA is creation of the Informal Rule category, which attempts to spark a dialogue between the agency and the regulated public.[6] First, an agency must publish a proposed rule in the Federal Register, which is a publication readily available to interested firms and public interest groups.[7] Then the agency must allow a sufficient period within which interested parties can submit comments. The comments, now filed electronically, can support the agency's proposed rule, suggest clarifying modifications, or oppose the proposal as wasteful or unneeded. Sometimes a handful of comments are submitted; at other times, there are millions.[8]

The agency then considers the comments, and publishes a final rule (if it so chooses), with a concise statement of the rule's purpose in the Federal Register. Absent an emergency, the rule can go into effect thirty days after publication.[9]

There is no requirement that the agency address the comments that have been submitted. That omission may strike one as surprising until one realizes that the agency, as will be discussed, risks having its rule overturned on judicial review unless the rule is well defended. As a consequence, the agency need not change its proposed rule at all if it is convinced that the comments do not make a persuasive case

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[4] The APA defines agency action to include "the whole or a part of any agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. 551(13).

[5] 5 U.S.C. 553–54, 556–57.

[6] 5 U.S.C. 553.

[7] 5 U.S.C. 553(b). Agency proposals first may be subject to centralized executive branch review pursuant to the White House's oversight. See, e.g., Exec. Order No. 12, 866 (1993).

[8] In the relatively recent rulemaking reversing the Federal Communication Commission's former net neutrality rules, over twenty million comments were received. Millions of those comments have been attributed to outsiders attempting to gain influence. See, e.g., Glenn Fleishman, FCC Chair Ajit Pai Admits Millions of Russian and Fake Comments Distorted Net Neutrality Repeal, Fortune, Dec. 5, 2018.

[9] 5 U.S.C. 553(d).

for modification. Courts will invalidate a rulemaking if an agency fails to comply with these basic APA procedures.[10]

Moreover, courts have imposed three additional procedural requirements not explicitly in the APA to facilitate better communication between the agency and regulated public. First, courts have held that the final rule must be a "logical outgrowth" of the proposed rule. If the proposed rule addresses the problem of pollution from smokestacks, for instance, the final rule cannot address contaminants emitted by cars.[11] Otherwise, the affected public would be shut out of the comment process for they likely would not have been aware that the problem of auto exhaust would be addressed in the rulemaking. The final rule, of course, need not be and should not be identical to the proposal, but the final rule must draw its substance from the proposal, so that the interested public has a chance to weigh in before the final rule. If the final rule is not the "logical outgrowth" of a proposed rule, then a court will remand the rule back to the agency for it to consider whether to reopen the comment period.

Second, if the administrative agency relies for its rule on technical or scientific data, it must release such data to the public. Otherwise, the public could not critique or secondguess the probity of such information. For instance, if a proposed nuclear safety rule relied on findings from a Department of Energy study as to the long-term health impact of nuclear waste, that study must be available to the public.[12] On the other hand, if the technical study is not salient, or is duplicated by other information in the record, courts will not force disclosure. As with the logical outgrowth test, this judge-made disclosure requirement seeks to reinforce the dialogue between the administrative agency and the public. A failure to disclose such a critical study will prompt a reviewing court to remand the case back to the agency for another comment period.

Third, although there is no requirement to respond to comments (and, indeed, that would not be practical), the agency must include in its "concise explanation" of the final rule an explanation for why it rejected any objections to its rule that appear extraordinary, such as the fact that the rule might cause financial havoc.[13] The agency must, in addition, include sufficient information in the record to satisfy the court on review that its final determination was sufficiently reasoned.[14]

The APA also recognizes formal rulemaking, which envisions a much more rigid rulemaking process, resembling adjudication. Indeed, the procedures required by the APA for formal rulemaking are the same as for formal adjudication.[15]

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[10] Congress, in addition, amended the APA to encourage agencies to formulate proposed rules through negotiation with interested parties. 5 U.S.C. 561–70. Because the negotiation process is time consuming, agencies generally propose their own rules with input from affected parties apart from the formal negotiation process. The following discussion of APA procedural requirements apply as much to proposals reached through negotiation as through agency dictat.

[11] For a discussion, see Long Island Care at Home v. Coke, 551 U.S. 174 (2007).

[12] See, e.g., United States v. Nova Scotia Food Products Corp., 568 F.2d 240 (2d Cir. 1977) (rejecting rule because key scientific study not disclosed).

[13] 5 U.S.C. 553(c); See Nova Scotia Food Products, supra.

[14] See text accompanying notes 37–48 infra.

[15] 5 U.S.C. 556–57.

The APA established the role of an Administrative Law Judge (ALJ), a hearing officer who is largely independent from the agency, to preside over the formal process. Although the ALJ (now) must be appointed by the agency head,[16] the ALJ can only be dismissed for "cause," and that "cause" can be reviewed both by a separate independent federal agency and ultimately by the courts.[17] The agency cannot lower the salary of the ALJ; nor can the agency assess the ALJ through a performance evaluation, as it can for other agency officials.[18] The independence of this hearing examiner reflects the APA's effort to ensure parties challenging government action a measure of confidence that the case will proceed in an impartial manner.

The formal rulemaking before the ALJ unfolds as a typical trial. Parties advocating for and against a rule can be represented by counsel, present affidavits and expert testimony, and cross-examine opposing experts. The proponent of any rule must bear the burden of proof, which in practice means a scintilla beyond 50%.[19] The ALJ will then issue a recommended decision. Those disappointed in the outcome can appeal to the agency itself. The agency has the choice to rehear the case or part of the case; moreover, it can review the record and modify or reverse the ALJ's recommendation. As a matter of practice, however, the agency generally affirms the rule determined after the formal hearing.

The procedures for formal rulemaking required by the APA do not fit the rulemaking context well. Rulemaking, like legislation, relies on economic, social and political forecasts. Judgments as to the level of pollution that the public will tolerate, for example, are difficult to capture in an adversary proceeding. Moreover, it is difficult to gauge through expert testimony when the technology underlying disposal of nuclear waste will change. Such judgments must be made, but the adversary process is not conducive to forecasting. Accordingly, courts have held that, unless Congress has clearly required agencies to make rules only after a "hearing on the record," agencies have the discretion to fashion rules through the more flexible notice-and-comment rulemaking.[20]

B. Procedures to Shape Adjudication

The APA procedures for formal rulemaking apply to formal adjudication as well. The hearing captures the essentials of typical judicial process: attorney presentations, witness testimony, cross-examination, concluding statements, and then decision by the quasi-independent ALJ, followed by a right of appeal to the agency. In addition, the ALJ may not engage in any *ex parte* communication with the parties pending resolution of the adjudication.[21] The APA formal adjudication covers a wide gamut of

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16 The Supreme Court recently imposed this requirement. See Lucia v. SEC, 138 S. Ct. 2044 (2018).
17 5 U.S.C. 3105; 5 U.S.C. 7521.
18 5 C.F.R. 930.206.
19 5 U.S.C. 556(d).
20 See, e.g., United States v. Florida East Coast Railway, 410 U.S. 224 (1973).
21 5 U.S.C. 554(b).

challenges to government decisions, whether challenges to retain government benefits, to contest discipline of federal employees, or to dispute fines. Those procedural protections readily satisfy the U.S. constitutional protection for Due Process.

In contrast, the APA does not specify *any* procedures for government informal decisions such as eligibility for public housing, government grants, or a decision where to place a federal highway. Such decisions can be challenged afterwards in court, but are not constrained by particular procedures, and there is no formal record for the court to review after the fact.[22] Given that APA procedures do not apply, agency action may in a particular case violate the Constitution's Due Process Clause if a protected liberty or property interest is at stake.[23] Most informal administrative decisions concerning application for grants or permits, however, do not involve property or liberty interests within the meaning of the U.S. Constitution given that the interests at stake are too contingent. Because of the flexibility accorded by the APA to government decision-makers in making such informal decisions, courts generally have construed congressional delegation to agencies to require formal adjudicative proceedings under the APA in any context mandating that the agency confer a benefit or make a decision after a *hearing*,[24] although courts recently have manifested a willingness to defer to reasoned agency decisions concluding that Congress intended agencies in particular contexts to proceed via informal adjudication.[25]

In short, the APA sought to shape administrative agency power by prescribing the procedures that agencies must follow before affecting the rights of firms and individuals in the private sector.[26] Those procedures undoubtedly have contributed to better agency outcomes, and also have afforded litigants at times the means with which to trip up a careless agency in court.

The APA does not dictate to agencies when they should use adjudication as opposed to rulemaking to fashion policy. Most political scientists believe that, when economics, science, or technology underlies agency policymaking, rulemaking is the preferred route. In their view, adjudication is best structured to resolve historical facts, not to assess the more intangible political and social factors that underlie policymaking to govern future conduct. Such forecasting is best set with the input of the affected community, as in the informal rulemaking context. Nonetheless, the Supreme Court has held that Congress has left it up to the agencies to determine whether new policy should be fashioned in adjudication as opposed to rulemaking.[27]

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22 See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

23 See, e.g., Board of Regents v. Roth, 405 U.S. 564 (1972) (setting out test to determine if protected property or liberty interest exists).

24 See, e.g., Seacoast Anti-Pollution League v. Costle, 572 F.3d 872 (1st Cir. 1978).

25 See, e.g., Dominion Energy Brayton Point v. Johnson, 443 F.3d 12 (1st Cir. 2006).

26 Agencies enjoy the discretion to impose procedures on themselves in excess of those required by Congress in the APA, and they are bound by those procedures until changed. Ballard v. Commissioner, 544 U.S. 40 (2005).

27 See, e.g., NLRB v. Bell Aerospace, 416 U.S. 267 (1974); SEC v. Chenery Corp., 332 U.S. 194 (1947).

Thus, unlike in many countries, administrative agencies may fashion new policies in an adjudication and apply them without notice to the affected parties. This type of retroactive policymaking can be particularly problematic when the private party has relied on the agency's prior policy. Accordingly, courts have held that, in a context in which the private party can demonstrate that it justifiably relied on the agency's prior policy to its substantial detriment, the new policy articulated in the adjudication can only be applied prospectively.[28]

C. APA Rulemaking Exceptions

In the rulemaking context, however, the APA carves out a number of exceptions excusing the agency from following the procedures for either formal or informal rulemaking. Of greatest importance, when agencies are interpreting prior rules as opposed to making new rules, and when agencies are setting forth general policy as opposed to announcing new binding rules, they need not follow the requirements for rulemaking in the APA.[29] Each exception makes sense in the abstract, but breaks down in application. As a consequence, agencies can exert a powerful impact on firms and individuals without complying with the APA procedural protections.

The difference between interpreting a rule and making a new rule is notoriously slippery. For instance, if the preexisting rule states that the government will reimburse a hospital for the "reasonable costs" of a particular medical procedure and then the agency publishes what it deems to be included within those "reasonable costs," is the agency making a new rule and therefore must proceed through notice and comment under the APA, or is it merely interpreting the old rule? On the one hand, the agency may merely be clarifying what it meant by "reasonable costs;" on the other, it might be fashioning new rules of reimbursement without the input of the regulated community. Challenges to such interpretive rules generally fail as long as the agency disclaims the intent to fashion a new rule and can point to a sufficient nexus between the new interpretation and the regulation or rule being interpreted. Given that a violation of an agency interpretation is not itself a violation of law, the private party can always argue at a subsequent enforcement proceeding or when seeking reimbursement that the agency interpretation was mistaken. Courts review the probity of agency interpretive rules, therefore, when reviewing the agency action ultimately challenged, but rarely review such rules by themselves because they have no binding force. Viewed from that perspective, not much rides on whether the agency's rule is interpretive or is substantive because in both cases private parties eventually will be able to challenge the agency's interpretation. If the agency wishes the new interpretation to be binding, then it must abide by the procedures set out in the APA for rulemaking.

But, the consequences to private parties can be grave. Such parties know that, even if they have a chance to convince a court later that the agency's interpretation is

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[28] Clark-Cowlitz Joint Operating Agency v. FERC, 826 F.2d 1074 (D.C. Cir. 1987); NLRB v. Guy F. Atkinson, 195 F.2d 141 (9th Cir. 1952).

[29] 5 U.S.C. 553(b).

unreasonable, to do so will cost time and resources. It is far easier for parties to shape their own conduct based on what the agencies have advised than to risk losing in court down the road, particularly when courts may defer (to varying extents) to the agency's interpretation of the law and regulations they administer.[30] Indeed, even when agencies change prior interpretations of laws and regulations, courts will not force agencies first to engage in notice and comment rulemaking.[31] Administrative agencies, in this way, can affect conduct significantly without complying with notice and comment procedures in the APA, although they still run the risk that, if challenged in court, the private party may be successful.

For similar reasons, the APA excuses agencies from complying with the APA's rulemaking procedures when promulgating statements of agency policy as opposed to new rules. Such general policies express an agency's intent to follow a particular path in the future, and thus places actors in the private sector on notice of what to expect. Such policies alert private parties that their conduct will be subject to investigation unless they hew to the agency's suggested policy.[32] Once again, as in the interpretive rule context, private actors can later defend their actions on the ground that the agency's articulated policy is inconsistent with prior statutes and rules, but they do so at a significant risk. Indeed, courts will never review agency articulations of policy (unlike interpretive rules) because, as will be discussed *infra,* such announcements do not constitute final agency action.[33] Academics differ on the extent to which agencies circumvent rulemaking by relying on agency statements of policy, as well as interpretive rules. Whatever the frequency, through (re)interpretation of rules and statements of general policy, administrative agencies can shape how individuals and firms act and need not adhere to the APA's procedural requirements for rulemaking.[34]

II. The APA and Judicial Review

In addition to review of administrative agency action for conformity to required procedures, the APA establishes a strong presumption for judicial review of agency action, whether in the rulemaking or adjudication context, and it provides a differing standard of review depending on whether the process pursued by the agency was formal or informal.[35] Thus, judicial review may be obtained for denials of licenses and permits, sanctions, and rules, but not over requests to make public particular documents or to challenge the accuracy of press releases. Congress through the APA did not waive

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30 See infra text accompanying notes 51–54.

31 See Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199 (2015).

32 See, e.g., National Mining Ass'n v. McCarthy, 758 F.3d 243 (D.C. Cir. 2014).

33 See infra text accompanying notes 66–67.

34 The APA also exempts rules relating to the military, foreign affairs, and government property. 5 U.S.C. 553(a). Agencies can also ignore the APA rulemaking procedures for internal management matters, and can make exceptions for "good cause shown" if an emergency exists. 5 U.S.C. 553(d).

35 See generally 5 U.S.C. 702; Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).

the federal government's general immunity from damages actions, authorizing only declaratory and injunctive relief.[36] Congress has not established a specialized administrative court and directed instead that federal courts of general jurisdiction (generally, courts of appeals) are to review agency action.

A. Substantial Evidence Standard

With respect to formal rulemaking and adjudication, the APA provides that courts are to review agencies under a "substantial evidence" standard.[37] Courts, pursuant to that standard, study the record of the adjudication or rulemaking to determine if there is "substantial evidence" supporting the agency's decision. Given that the record reviewed resembles that of a trial record – transcripts of witnesses, written submissions by the parties, expert reports, documentary evidence and so on – reviewing courts familiarize themselves with the record to determine whether the agency's conclusion is supported in the record. Judges are not to assess the evidence anew, but rather ascertain if there is sufficient evidence to uphold the agency. Even if courts would have concluded differently based on the record, they are to support the agency if the agency conclusion is credible given the conflicting evidence submitted. When the agency's evidence is based on scientific or technical assessments, the court ensures that the agency's reasoning in relying on particular scientific judgments and for rejecting others does not leave large gaps.

The agency, as discussed, may overrule the ALJ in reaching its decision. Given that the APA envisions that outcome, courts review the decision of agenices, not ALJs. Nevertheless, the ALJ's decision becomes part of the record and therefore is reviewed and considered by the court in determining whether the agency's conclusion is supported by substantial evidence.[38] If the agency has not sufficiently explained why its decision differs from that reached by the ALJ, the court may well deny enforcement.

In any event, courts are not to substitute their own policy judgments for those of the agency. If they find that the agency reasoning is unpersuasive in some manner, they remand the case back to the agency for it to determine whether to defend its action based on some other explanation or reasoning, which would again be subject to judicial review.[39] If they find that the agency decision is unsupportable under any theory, they overturn the agency's fine, denial of benefits, or similar action.

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[36] Congress in Section 553(e) also authorized parties to seek review of an agency's failure to commence a rulemaking or change a prior rule, but the courts defer greatly to agencies when refusing to initiate rulemaking or refusing to change a rule upon such a request under Section 553(e), See, e.g, Mass. v. EPA, 549 U.S. 497 (2007).

[37] 5 U.S.C. 706(2)(E).

[38] See generally Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

[39] For articulation of that rule, see SEC v. Chenery Corp., 318 U.S. 80 (1943).

B. Arbitrary and Capricious Standard

In assessing informal agency rulemaking and adjudication, the APA prescribes a standard of "arbitrary and capricious review".[40] Although Congress undoubtedly intended a more deferential standard for courts reviewing informal as opposed to formal agency action, the gap between substantial evidence and "arbitrary and capricious" review has narrowed over time.[41] Courts review agency decisions by combing through the record to ensure that the agency has considered relevant evidence and explained away any obvious evidence that undermines its conclusions. There must be a "rational connection between the facts found and choice made".[42] In reaching their decisions, agencies may not rely on factors that the authorizing legislation has precluded.[43] At times, the reviewing courts will also ensure that the agency considered logical alternative solutions – at least those alternatives evident in the data that the agency in fact assessed.[44] The agency need not consider every relevant alternative possible. As with review of formal agency action, the courts are not to substitute their own views for those of the agency, and are to remand any rulemaking or adjudication if they find the agency reasoning deficient, and allow the agency to reconsider. The Supreme Court has determined that the same review standard should be used when an agency repeals a rule as when it fashions a new one – in each context the agency is changing the status quo and thus must satisfy the APA requirement of reasoned decisionmaking.[45] And, more generally, if an agency in a rulemaking (or adjudication) changes its position, it must at a minimum address the reasons for the change head on.[46]

Review pursuant to the arbitrary and capricious standard has become known as "hard look" review in light of the significant oversight exercised by the federal courts.[47] The hard look review permits courts to supplant the agency's policymaking preferences for their own, but also ensures that agencies exercise significant care in informal rulemaking and adjudication to limit the chance that courts will refuse enforcement of their judgments on review. In the context of informal adjudication, courts rely upon the agency to assemble a record to permit judicial review. The agency is to include all documents that the agency relied upon in reaching its decision, as well as any materials submitted by other parties.[48]

In reviewing both formal and informal agency actions, courts not infrequently must review the agencies' interpretation of relevant constitutional provisions, laws,

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40 5 U.S.C. 706(2)(A).

41 See, e.g., the discussion in Association of Data Processes Service Organizations v. Board of Governors, 745 F.2d 677, 683 (D.C. Cir. 1984).

42 Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 30 (1983).

43 See, e.g., Massachusetts v. EPA, 549 U.S. 497 (2007).

44 See, e.g., Motor Vehicles, supra.

45 Motor Vehicles, supra.

46 See, e.g., FCC v. Fox Television Stations, 536 U.S. 502 (2009).

47 See National Lime Ass'n v. EPA, 627 F.2d 416, 451 n. 126 (D.C. Cir. 1980).

48 Citizens to Preserve Overton Park, supra.

and regulations. The APA provides that agency determinations "contrary to constitutional right" and "not in accordance with law" should be set aside.[49] Courts in the United States have determined that, although no deference should be accorded to agency interpretation of the Constitution, deference should be afforded to agency interpretations of laws and regulations that they administer[50] if 1) the agency reached the interpretation in a relatively formal manner, such as through the process of rulemaking and adjudication (but not in writing a brief or in issuing a policy circular);[51] 2) the court on review deems the laws and regulations interpreted by the agency to be ambiguous; and 3) the agency interpretation of any ambiguous provision is reasonable.[52] As a consequence, courts may determine that there are two or three "reasonable" interpretations of the same provision, and therefore will defer to successive reasonable interpretations, albeit different.[53] Courts thus share their traditional role of law interpretation with agencies, a somewhat unique feature of the United States system.[54]

C. Limitations on Judicial Review

The APA envisions two contexts in which judicial review of adjudications is precluded. From the perspective of individuals or firms challenging government action, preclusion of review removes a critical check against overreaching by the administrative state. Congress, however, provided in the APA first that, as long as a statute makes it clear that review is precluded, no judicial review should be exercised.[55] For instance, in precluding review of minimal financial claims against the government, Congress plausibly sought to avoid the high cost of court litigation for modest claims.[56] At other times, when there is a need for finality, Congress has determined that no judicial review should be allowed. Congress, as an example, precluded review of the discipline meted to certain Veterans Act officials to ensure that appeals not drag out.[57] Moreover, Congress has precluded review when it believes that courts cannot be trusted

49 5 U.S.C. 706(2)(A)–(B).
50 Adams Fruit Co. v. Barrett, 494 U.S. 638, 649 (1990).
51 United States v. Mead Corp., 533 U.S. 218 (2001). This step is known as *Chevron* Step Zero.
52 Chevron U.S.A. v. NRDC, 467 U.S. 837 (1984). These steps are known as *Chevron* Steps One and Two.
53 National Cable & Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967 (2005).
54 Courts at times have also reviewed delegation from Congress to agencies to ensure that Congress has articulated some principle for the agencies to base their actions on instead of completely leaving it up to the agencies to fashion rules on their own. ALA Schechter Poultry v. United States, 295 U.S. 495 (1935). The Court has not recently struck down a delegation on excessive delegation grounds, but several members of the Court have written to revivify the doctrine. See Gundy v. United States, 588 U.S. (2019) (Gorsuch, J., dissenting).
55 5 U.S.C. 701(a)(1).
56 See, e.g., United States v. Erika, 456 U.S. 201 (1982). (upholding limitation of review in Medicare Act).
57 Veterans Access, Choice and Accountability Act of 2014, Pub. L. No. 113–146, § 707, 128 Stat. 1754, 1798–99 (Aug. 7, 2014).

to secondguess agency determinations in light of the sensitive and complex security calculations involved.[58]

When review is precluded, disappointed litigants can assert that the lack of meaningful judicial review has robbed them of Due Process rights guaranteed under the Constitution, but the Constitution does not require judicial review of administrative adjudications (at least if constitutional questions are not involved) as long as the adjudication respects the basic elements of Due Process, such as notice of the charges and an opportunity to respond. Congress can relegate individuals and firms to administrative adjudication solely. And, no procedures are required in the absence of a constitutionally protected liberty or property interest.

More controversially, Congress can also implicitly preclude judicial review when it provides no meaningful standard of judicial review.[59] In other words, when Congress vests administrative actors with unfettered discretion, courts presume that Congress intended the actors to exercise such discretion without judicial interference. On the one hand, the greater the discretion, the more difficult it would be for courts to review agency action without secondguessing that discretion.[60] On the other hand, when agency actors possess such wide discretion, the need for some review to prevent arbitrary decisions may be at its highest. Congress in the APA determined that, when it delegated such open ended authority to agencies, then courts presumptively should leave that decisionmaking to agency heads unless courts can discern from the framework of the statute a meaningful standard for review. For instance, when Congress vested the decision over whether to remove a CIA employee in the CIA Director, it provided that the Director was free to remove any employee "in his discretion (…) whenever he should deem such termination necessary or advisable in the interests of the United States".[61] The Court held that no standard could be discerned from the statute and thus that review was implicitly precluded under the APA. Courts, however, have been reluctant to permit preclusion of *constitutional* issues arising from such otherwise discretionary actions.[62]

Courts also have held that agency decisions *not to enforce* particular laws presumptively are not entitled to review.[63] In essence, agencies enjoy a type of prosecutorial discretion that courts will not disturb unless Congress directs so plainly. Courts have also held that, when Congress provides an agency with lump sum appropriations without specifying how the funds should be spent, judicial review should again be precluded.[64]

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[58] Congress in the APA itself exempts rulemaking in the military context, 5 U.S.C. 553(a), and adjudications in that context as well, 5 U.S. C. 554(a). Moreover, Congress does not permit review of torts "arising from combatant activities" even though otherwise waiving the federal government's immunity from tort suit.

[59] 5 U.S.C. 701(a)(2).

[60] In the face of that discretion, no liberty or property interest exists under U.S. law that would trigger Due Process protections.

[61] Webster v. Doe, 486 U.S. 592 (1988).

[62] See id. See also Johnson v. Robison, 415 U.S. 361 (1974).

[63] Heckler v. Chaney, 470 U.S. 821 (1985).

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

D. Timing of Review

With respect to the timing of review, the APA does not mandate exhaustion of administrative remedies, although many organic statutes establishing agencies include such a prescription.[65] The APA does, however, direct that judicial review extends only to "final" agency action to ensure that judges not intervene until the agency has committed to a particular course of action.[66] For instance, if the agency issues a provisional decision or a letter to a regulated entity advising it of what the agency believes the law requires in a particular circumstance, there has been no final decision.[67] Statements of agency policy, as discussed earlier, are not therefore subject to judicial review. The finality requirement pertains to both adjudication and rulemaking.

Finally, although parties routinely obtain judicial review immediately after an adjudication, at times, they must await agency application of newly promulgated rules before obtaining judicial review. Courts have declined so-termed pre-enforcement review when they are uncertain as to how the agency will interpret and/or apply the new rule. For one example, when the Food & Drug Administration promulgated a rule authorizing agency inspection of pharmaceutical factories, it did not specify how long agency inspections would last, whether production had to stop, and at what times such inspections would take place. The Supreme Court held that challenge to the rule was "unripe" because the courts could yet tell whether the rule was arbitrary and whether its enforcement would violate the privacy rights of the owners.[68] Ripeness generally depends on the fitness of the issues for judicial decision and the hardship to the parties if they must await further developments before obtaining a court challenge. However, agency rules generally specify how they are to be enforced so judicial review need not be delayed,[69] and the availability of that pre-enforcement review provides a significant check on administrative power.

Conclusion

After almost seventy-five years, the APA reflects a productive legislative effort to establish a framework to limit, channel, and review administrative agency action. Although gaps remain, the APA has helped in large measure to assure agency accountability to the public.

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65 Darby v. Cisneros, 509 U.S. 137 (1993).

66 5 U.S.C. 704.

67 See generally Bennet v. Spear, 520 U.S. 154 (1997).

68 Toilet Good Ass'n v. Garner, 387 U.S. 158 (1967).

69 As in U.S. jurisprudence generally, litigants must demonstrate that there is a "case or controversy" to seek judicial review. In essence, only those parties suffering a particular or individualized harm from agency action can obtain judicial review. Accordingly, those solely with ideological objections to agency action cannot seek judicial review. See, e.g., Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990).

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Streszczenie

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Ogólna charakterystyka amerykańskiej ustawy o postępowaniu administracyjnym

Od prawie 75 lat amerykańska ustawa o postępowaniu administracyjnym z 1946 r. (Administrative Procedure Act; dalej: APA) tworzy proceduralne ramy działalności dla większości podmiotów administracji federalnej w Stanach Zjednoczonych. APA reguluje tryb działalności normotwórczej i tryb podejmowania rozstrzygnięć przez podmioty administracji federalnej, jak również dostarcza sądom federalnym wzorca kontroli działalności podmiotów administracji federalnej. W konsekwencji APA stał się niezwykle efektywną platformą zarówno do wyrażania przez opinię publiczną „niepokojów" w dziedzinach objętych działalnością podmiotów administracji federalnej, jak i do reagowania przez administrację federalną na te „niepokoje". Z drugiej jednak strony, ustanowienie przez Kongres pewnych wyjątków w APA, doprowadziło do powstania luk w regulacji, czego efektem jest niewystarczająca ochrona przedsiębiorstw i jednostek, w szczególności przed aktami polityki administracyjnej i aktami o charakterze interpretacyjnym, dotyczącymi żywotnych interesów przedsiębiorstw i jednostek, których to aktów podmioty te nie mogą bezpośrednio zakwestionować.

Summary

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An Overview of the United States Administrative Procedure Act

For almost seventy-five years, the Administrative Procedure Act (APA) in the United States has set a procedural framework within which most federal administrative agencies must act. The APA lays out procedures that federal actors must follow in fashioning rules and in resolving adjudications, as well as the standards of review that federal courts must use when reviewing the agencies' resolution of those adjudications and promulgation of rules. As a consequence the APA has been remarkably effective in ensuring that agency decisionmaking is responsive to public concerns and that the public has an outlet for voicing those concerns. Nonetheless, some

of the exceptions carved out by Congress in the APA have created problematic gaps, failing to protect the regulated public adequately, particularly from agency policy statements and interpretations of statutes and regulations, which private firms and individuals cannot challenge directly but may affect their livelihoods.

Słowa kluczowe: sądowa kontrola administracji, prawotwórstwo, rozstrzygnięcia, uczciwa procedura, organ administracji
Keywords: judicial review, rulemaking, adjudication, due process, administrative agency