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An Introduction to Judicial Review of Federal Agency Action

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Summary

The U.S. Constitution vests the judicial power in the Supreme Court and any inferior courts established by Congress, limiting the power of federal courts to the context of "cases" or "controversies." Pursuant to constitutional and statutory requirements, courts may hear challenges to the actions of federal agencies in certain situations. This report offers a brief overview of important considerations when individuals bring a lawsuit in federal court to challenge agency actions, with a particular focus on the type of review authorized by the Administrative Procedure Act (APA), perhaps the most prominent modern vehicle for challenging the actions of a federal agency.

Whether judicial review of agency action is available in federal court turns on a number of factors. Courts must possess statutory jurisdiction to adjudicate a lawsuit, and plaintiffs must generally rely on a cause of action that allows a court to grant legal relief. Disputes must also present "cases" or "controversies" that satisfy the requirements of Article III of the Constitution. Finally, a suit must be presented to a court at the proper time for judicial review.

The APA directs reviewing courts to "compel agency action unlawfully withheld or unreasonably delayed" and to "hold unlawful and set aside agency action, findings, and conclusions" that violate the law or are otherwise "arbitrary and capricious." This review is limited, however, to "final agency action" that is not precluded from review by another statute or legally committed to the agency's discretion.

Pursuant to this mandate, courts are authorized to review agency action in a number of contexts. First, courts will examine the statutory authority for an agency's action and will invalidate agency choices that exceed these limits. In addition, a court may examine an agency's discretionary decisions, or discrete actions with legal consequences for the public. Finally, courts may also review an agency's compliance with statutory procedural requirements, such as the notice-and-comment rulemaking procedures imposed by the APA. This report provides a broad overview of the issues that may be relevant to any number of present and future challenges to agency action in federal court.

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Congress has created numerous federal agencies charged with carrying out a broad array of delegated statutory responsibilities.[1] Agencies administer their delegated authority in a variety of ways, including by promulgating rules and regulations that bind the public,[2] advising regulated parties of an agency's enforcement priorities via guidance documents,[3] bringing enforcement actions against private individuals or corporations for violation of a statute or regulation,[4] and determining whether to grant a benefit[5] or license.[6] These agency actions, in turn, often generate questions about the legitimacy of an agency's decision. Individuals affected by an agency decision can sometimes challenge that action in federal court as violating a legal requirement.

The U.S. Constitution vests the judicial power in the Supreme Court and any inferior courts established by Congress,[7] limiting the power of federal courts to the context of a of a "case" or "controversy."[8] Pursuant to this authority, Congress has established federal courts below the Supreme Court of the United States to hear a variety of cases, both criminal and civil.[9] Federal legislation authorizes courts to adjudicate challenges to actions taken by government officials and agencies in a variety of contexts.[10] Federal courts are, however, courts of limited jurisdiction—they must adhere to limits placed on their authority by Congress and the Constitution.[11] The circumstances under which a federal court will review the actions of a U.S. government agency or official thus involve complicated questions of statutory and constitutional law. This report offers a brief overview of some of the most important issues arising when individuals bring suit in federal court to challenge agency actions.

The Administrative Procedure Act (APA) is perhaps the most prominent modern vehicle for challenging the actions of a federal agency.[12] Enacted in 1946 following the New Deal era, during

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[1] The Constitution creates the offices of the President and Vice President, U.S. CONST. art. II, §1, the Congress, *id*. art. I, §1, and the Supreme Court, *id*. art. III, §1. Congress is authorized "[t]o make all Laws which shall be necessary and proper for carrying into Execution" the authority bestowed on these entities. *id*. art. I, §8, cl. 18. Pursuant to this power, Congress has established federal offices and agencies within the executive, legislative, and judicial branches. *See* CRS Report R43562, *Administrative Law Primer: Statutory Definitions of "Agency" and Characteristics of Agency Independence*, by Jared P. Cole and Daniel T. Shedd.

[2] *See* CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, coordinated by Maeve P. Carey.

[3] *See* CRS Report R44468, *General Policy Statements: Legal Overview*, by Jared P. Cole and Todd Garvey.

[4] *See, e.g.*, Pierce v. SEC, 786 F.3d 1027, 1031 (D.C. Cir. 2015) (denying an individual's petition for review of enforcement actions brought by the Securities and Exchange Commission).

[5] *See, e.g.*, 42 U.S.C. §§301 *et seq*. (authorizing the Social Security Administration to pay benefits to certain disabled individuals).

[6] *See* 5 U.S.C. §558 (imposing certain requirements on agencies when reviewing applications for a license).

[7] *See* U.S. CONST. art. III, §1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); *id*. art. I, §8, cl. 9 (authorizing Congress "[t]o constitute Tribunals inferior to the [S]upreme Court").

[8] *Id*. art. III, §2, cl. 1.

[9] *See* Judiciary Act of 1789, ch. 20, 1 Stat. 73, 73; 28 U.S.C. §41 (establishing circuit courts); *id*. ch. 5 (establishing district courts); *id*. §1331 (providing district courts with "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."); *id*. §1332 (providing district courts with "original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000 ... and is between" diverse parties).

[10] *See infra* "Requirements for Judicial Review."

[11] *See* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978) ("It is a fundamental precept that federal courts are courts of limited jurisdiction. The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded.").

[12] 5 U.S.C. §§551 *et seq*.

which the size of the administrative state was expanded, the statute represents the first government-wide attempt to "systematize" requirements on the actions of federal agencies.[13] The APA functions as the most prominent authorization of judicial review of agency action, including for agency compliance with substantive legal requirements—such as an agency's "organic," or authorizing, statute.[14] In addition, the APA imposes various procedural requirements on federal agencies and authorizes courts to review agency's compliance with these requirements. Accordingly, the focus of this report is largely centered on judicial review of agency actions under the APA.

The report opens with a discussion of the circumstances in which federal courts are empowered to review agency actions[15] and follows with a look at the scope of review authorized by the APA.[16] It then continues by describing the mechanics of a federal court's review of an agency's statutory authority,[17] as well as the standards employed in the review of an agency's discretionary decisions.[18] The report concludes with a brief examination of judicial review of agency compliance with statutorily prescribed procedural requirements.[19]

Requirements for Judicial Review

Not every agency action is necessarily subject to judicial review. Whether judicial review of agency action is available in federal court turns on a number of factors, including constitutional,[20] prudential,[21] and statutory[22] considerations. Courts must possess statutory jurisdiction to adjudicate a lawsuit, and plaintiffs must generally rely on a cause of action that allows a court to grant legal relief. Disputes must also present "cases" or "controversies" that satisfy the

[13] GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 202 (2009).

[14] Drake v. FAA, 291 F.3d 59, 62 (D.C. Cir. 2002) (describing the scope of judicial review permitted by the agency's "organic statute"); *see generally* Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207 (2015) ("The APA has taken on quasi-constitutional status.").

[15] *See infra* "Requirements for Judicial Review."

[16] *See infra* "The Scope of Review Under the Administrative Procedure Act."

[17] *See infra* "Review of Statutory Issues."

[18] *See infra* "Judicial Review of Agency Factual Determinations and Discretionary Decisions."

[19] *See infra* "Review of Compliance with Procedural Requirements." This report does not describe every circumstance in which an agency action may be challenged. For example, it does not address the Freedom of Information Act, 5 U.S.C. §§552-552b, or common law suits for damages against federal officials acting in their individual capacity. S*ee* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). In addition, numerous issues relevant to federal court jurisdiction are not discussed, such as suits against state officers under 42 U.S.C. §1983 and suits between private citizens pursuant to the federal courts' diversity jurisdiction, U.S. CONST. art. III, §2, cl. 1. Discussion of these issues may be found in existing or future CRS products.

[20] U.S. CONST. art. III, §2, cl. 1; *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) ("[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III."); United Pub. Workers of Am. (C.I.O.) v. Mitchell, 330 U.S. 75, 89 (1947) ("As is well known, the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues, concrete legal issues, presented in actual cases, not abstractions are requisite.") (internal quotation marks and citations omitted).

[21] *See* Bennett v. Spear, 520 U.S. 154, 162 (1997) ("In addition to the immutable requirements of Article III, the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing.") (internal citations and quotation marks omitted).

[22] *See, e.g.*, 5 U.S.C. §704 (allowing judicial review of administrative action under the APA only when such action is "final").

requirements of Article III of the Constitution. Finally, a suit must be presented to a court at the proper time for judicial review.

Statutory Jurisdiction

The federal courts are courts of limited jurisdiction.[23] Their authority is restricted to matters entrusted to them by Congress.[24] Consequently, in order to adjudicate a case, a statute must bestow subject matter jurisdiction in a federal court over a particular claim.[25] In addition, suits against the United States are barred absent a statutory waiver of sovereign immunity.[26]

Subject Matter Jurisdiction

As a threshold matter, courts must possess subject matter jurisdiction over a claim to hear a case.[27] Subject matter jurisdiction refers to a court's "power" to hear a case.[28] The Supreme Court has held that the APA itself does not provide subject matter jurisdiction.[29] In other words, when bringing suit under the APA, plaintiffs must rely on a separate statutory provision to establish jurisdiction in court. A variety of statutes authorize jurisdiction in particular courts to review certain types of claims. For example, certain statutes permit review of particular agency actions in the U.S. Courts of Appeals,[30] and some statutes may specify that review occurs in a particular federal appellate court.[31] In addition, 28 U.S.C. Section 1331 bestows upon federal district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."[32] This grant of subject matter jurisdiction authorizes federal courts to hear claims arising under the APA as well as "nonstatutory" and constitutional claims.[33]

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[23] Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978); *In re* Madison Guar. Sav. & Loan Ass'n, 173 F.3d 866, 868 (D.C. Cir. 1999).

[24] Bowles v. Russell, 551 U.S. 205, 212 (2007).

[25] *See* Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583 (1999).

[26] *See* Loeffler v. Frank, 486 U.S. 549, 554 (1988).

[27] Venue for a lawsuit is generally considered proper where the plaintiff or the defendant resides. 28 U.S.C. §1391(e). Some statutes, however, make the District of Columbia the exclusive venue for challenges to agency action. *See, e.g.*, 42 U.S.C. §7607(b)(1) (providing that petitions for review of certain agency actions may be filed only in the United States Court of Appeals for the District of Columbia).

[28] *See* Arbaugh v. Y&H Corp., 546 U.S. 500, 514 (2006); United States v. Cotton, 535 U.S. 625, 630 (2002); Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583 (1999) ("Moreover, courts, including this Court, have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party.").

[29] Califano v. Sanders, 430 U.S. 99, 107 (1997).

[30] *See, e.g.*, 28 U.S.C. §2342.

[31] *See, e.g.*, 42 U.S.C. §4915 (establishing exclusive jurisdiction in the D.C. Circuit for review of certain rules and regulations promulgated by the Environmental Protection Agency and the Federal Aviation Administration).

[32] *Id.* §1331.

[33] Nonstatutory review of federal agency action is available when an agency action is *ultra vires*, Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 689-90 (1949); Aid Ass'n for Lutherans v. U.S. Postal Serv., 321 F.3d 1166, 1173 (D.C. Cir. 2003), that is, when the agency has plainly violated an unambiguous and mandatory legal requirement. Leedom v. Kyne, 358 U.S. 184, 188-89 (1958); Key Med. Supply, Inc. v. Burwell, 764 F.3d 955, 962 (8th Cir. 2014). While nonstatutory claims are those suits brought without "a specific or a general statutory review provision," see, e.g., Chamber of Commerce v. Reich, 74 F.3d 1322, 1327 (D.C. Cir. 1996); Puerto Rico v. United States, 490 F.3d 50, 59 (1st Cir. 2007), a federal statute nonetheless authorizes subject matter jurisdiction in the federal courts. 28 U.S.C. §1331; Trudeau v. Fed. Trade Comm'n, 456 F.3d 178, 185 (D.C. Cir. 2006) (holding that "[s]ection 1331 is an appropriate source of jurisdiction for" APA, nonstatutory, and constitutional claims).

Sovereign Immunity

In addition to the requirement that a court exercise jurisdiction pursuant to the terms of a federal statute before adjudicating a case, the doctrine of sovereign immunity shields the United States from suits unless immunity has been waived by statute.[34] Absent such a waiver, federal courts lack jurisdiction over lawsuits against the United States.[35] A waiver of sovereign immunity will not be implied from legislative history or the background context of a statute; rather, it must be clearly expressed in the statutory text.[36] Three primary statutes waive sovereign immunity, thereby permitting lawsuits against the United States in federal court under certain circumstances.[37] First, the APA was amended in 1976 to permit individuals aggrieved by agency action to bring suit in federal court against the United States and government employees in their official capacity.[38] However, this statutory waiver does not authorize money damages as a remedy.[39] Second, the Federal Tort Claims Act (FTCA) permits suits to be heard in federal court for certain torts committed by agency employees in the course of their employment.[40] In these cases, the United States is substituted as a defendant for the employee who allegedly committed the tort.[41] Unlike the APA, the FTCA permits money damages as a remedy.[42] Third, the Tucker Act permits suits against the United States for breach of contract and certain other monetary claims that do not arise in tort.[43]

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[34] *See* Loeffler v. Frank, 486 U.S. 549, 554 (1988); Fed. Housing Admin. v. Burr, 309 U.S. 242, 244 (1940); Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907). The application of sovereign immunity in federal courts stems from the English common law tradition, which barred suits against the Crown absent consent. Santana-Rosa v. United States, 335 F.3d 39, 41-42 (1st Cir. 2003) ("This notion derives from the British legal fiction that 'the King can do no wrong.'") (citing Feather v. The Queen, 122 Eng. Rep. 1101, 1205 (Q.B.1865)). While the term does not appear in the Constitution, "it has always been treated as an established doctrine" by the federal courts. United States v. Lee, 106 U.S. 196, 207 (1882).

[35] FDIC v. Meyer, 510 U.S. 471, 475 (1994); United States v. Mitchell, 463 U.S. 206, 212 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction.").

[36] Lane v. Pena, 518 U.S. 187, 192 (1996).

[37] Although less relevant after the passage of general statutes waiving the federal government's sovereign immunity, the Supreme Court has held that, even absent a waiver, individuals may sue government officials for prospective injunctive relief as a result of *ultra vires* conduct. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 689-90 (1949).

[38] 5 U.S.C. §702. Importantly, this waiver may apply to a wider range of lawsuits than are directly authorized by the APA's cause of action, such as "nonstatutory" and constitutional claims. *See Trudeau*, 456 F.3d at 187; *Puerto Rico*, 490 F.3d at 57–58 ; Presbyterian Church (U.S.A.) v. United States, 870 F.2d 518, 525 (9th Cir. 1989) ("On its face, the 1976 amendment is an unqualified waiver of sovereign immunity in actions seeking nonmonetary relief against legal wrongs for which governmental agencies are accountable."); Hostetter v. United States, 739 F.2d 983, 985 (4th Cir.1984); Jaffee v. United States, 592 F.2d 712, 719 (3d Cir.1979); *but see In re* Secs. & Exch. Comm'n *ex rel*. Glotzer, 374 F.3d 184, 190 (2d Cir. 2004) (holding that "the federal government, in enacting the APA, waived its immunity with respect to those 'action[s] in a court of the United States' which seek review of 'agency action'").

[39] 5 U.S.C. §702.

[40] 28 U.S.C. §2679.

[41] *Id.* §2679.

[42] *Id.* §§1346(b), 2671-80.

[43] *Id*. §§1346, 1491; United States v. Navajo Nation, 556 U.S. 287, 290 (2009) (noting that the Tucker Act "waive[s] sovereign immunity for claims premised on other sources of law (e.g., statutes or contracts)"); United States v. Testan, 424 U.S. 392, 398-400 (1976) ("The Tucker Act, of course, is itself only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages.... We therefore must determine whether the two other federal statutes that are invoked by the respondents confer a substantive right to recover money damages from the United States for the period of their allegedly wrongful civil service classifications."); Burkins v. United States, 112 F.3d 444, 449 (10th Cir. 1997) ("The Tucker Act, 28 U.S.C. §§1346, 1491, 'vests exclusive jurisdiction' (continued...)

Cause of Action

Assuming a federal court has jurisdiction over a suit challenging an agency action, in order to challenge the actions of a federal agency, a plaintiff must also demonstrate that he or she posesses a legal right to seek judicial redress.[44] A plaintiff will have a "cause of action" if he or she "is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court."[45] Various statutes explicitly provide such causes of action to enforce legal requirements against federal agencies.[46] Absent a specific statutory framework creating a cause of action, the APA provides a general cause of action for individuals aggrieved by a "final agency action" if "there is no other adequate remedy in a court."[47]

There are other, less common bases for challenges to agency actions. In very limited situations, even lacking an express statutory cause of action, individuals may seek "nonstatutory" review of a agency action that is "ultra vires."[48] In addition, when a federal official owes a plaintiff a "clear nondiscretionary duty,"[49] federal district courts[50] and appellate courts[51] may issue mandamus relief, which is an order compelling an official "to perform a duty owed to the plaintiff."[52] However, the remedy is to be invoked only in "extraordinary circumstances"[53] when "no adequate alternative remedy exists."[54] Finally, the Supreme Court in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* recognized a common law cause of action against federal officers

(...continued)

with the Court of Federal Claims for claims against the United States founded upon the Constitution, Acts of Congress, executive regulations, or contracts and seeking amounts greater than $10,000.").

[44] Trudeau v. Fed. Trade Comm'n, 456 F.3d 178, 188-191 (D.C. Cir. 2006).

[45] *See* Davis v. Passman, 442 U.S. 228, 239 n.18 (1979). *See generally* Harold Bruff, *Availability of Judicial Review*, in A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 5-6 (2015).

[46] *See, e.g.*, 15 U.S.C. §2618 (authorizing individuals to seek judicial review of rules promulgated under the Toxic Substances Control Act); 33 U.S.C. §1369 (authorizing interested person to seek judicial review of agency actions taken under the Clean Water Act).

[47] 5 U.S.C. §704. An agency action is defined as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." *Id.* §551(13).

[48] Commonwealth of Puerto Rico v. United States, 490 F.3d 50, 59 (1st Cir. 2007) ("The basic premise behind nonstatutory review is that, even after the passage of the APA, some residuum of power remains with the district court to review agency action that is ultra vires.") (quoting R.I. Dep't of Envtl. Mgmt. v. United States, 304 F.3d 31, 44 (1st Cir. 2002)); *R.I. Dep't of Envtl. Mgmt*, 304 F.3d at 42 ("As a general matter, there is no statute expressly creating a cause of action against federal officers for constitutional or federal statutory violations. Nevertheless, our courts have long recognized that federal officers may be sued in their official capacity for prospective injunctive relief to prevent ongoing or future infringements of federal rights. Such actions are based on the grant of general federal-question jurisdiction under 28 U.S.C. §1331 and the inherent equity powers of the federal courts.") (citations omitted); Chamber of Commerce v. Reich, 74 F.3d 1322, 1327 (D.C. Cir. 1996) ("If a plaintiff is unable to bring his case predicated on either a specific or a general statutory review provision, he may still be able to institute a non-statutory review action.").

[49] Heckler v. Ringer, 466 U.S. 602, 616 (1984).

[50] 28 U.S.C. §1361 (authorizing mandamus relief against government officials and agencies but not the United States).

[51] *Id*. §1651(a).

[52] *Id.* §1361. Federal courts may also issue declaratory relief—a legal judgement stating the rights and obligation of relevant parties—under the Declaratory Judgement Act. 28 U.S.C. §2201.

[53] Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 34 (1980).

[54] Barnhart v. Devine, 771 F.2d 1515, 1524 (D.C.Cir. 1985).

for damages resulting from violations of constitutional rights.[55] This remedy does not apply to federal agencies.[56]

Constitutional and Prudential Limits on Federal Court Jurisdiction

In addition to statutory prerequisites for judicial review, certain constitutional and prudential considerations limit when courts will entertain a suit in a case challenging agency action. Plaintiffs must demonstrate that they have standing to challenge a federal agency's action and must also bring a lawsuit at the appropriate time.

Standing

Article III of the Constitution defines the proper scope of the federal court jurisdiction as limited to adjudicating "cases" and "controversies."[57] The Supreme Court has articulated several legal doctrines emanating from Article III, as well as various prudential considerations, that further limit the circumstances under which the federal courts will adjudicate disputes respecting federal agencies, such as standing, ripeness, and mootness.[58] In particular, the doctrine of standing is a frequent barrier to plaintiffs challenging agency action.[59] The Supreme Court has noted the important separation of powers principles that underlie the doctrine, emphasizing that while the judiciary is authorized to say what the law is,[60] invalidation of congressional legislation or actions of the executive branch should not be taken lightly.[61] Courts must, of course, vindicate individual rights, but the judicial power may not be harnessed into a monitoring role over federal agencies that should be conducted by Congress.[62]

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[55] 403 U.S. 388 (1971). Nevertheless, even if a cause of action is available under *Bivens*, two important affirmative defenses may bar federal officers from being sued. The Supreme Court has recognized that absolute immunity is owed to judges, *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967); prosecutors, *Imbler v. Pachtman*, 424 U.S. 409, 422-23 (1976), legislators, *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951), and the President, *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982), when such officials are acting within the scope of their discretionary duties. And, more generally, executive branch officials may be absolutely immune if performing similar functions. *See, e.g.*, Butz v. Economou, 438 U.S. 478, 512-13 (1978) (concerning officers performing adjudicatory functions). In addition, the doctrine of qualified immunity protects federal government employees performing discretionary functions from being sued in their individual capacity in suits for damages unless their actions violate clearly established constitutional rights. Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982).

[56] FDIC v. Meyer, 510 U.S. 471, 475 (1994).

[57] U.S. CONST. art. III, §2; *see* Massachusetts v. EPA, 549 U.S. 497, 516 (2007) ("Article III of the Constitution limits federal-court jurisdiction to 'Cases' and 'Controversies.'").

[58] Key doctrines emanating from Article III include ripeness, mootness, and the political question doctrine. *See* Allen v. Wright, 468 U.S. 737, 750 (1984) ("All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government." (quoting Vander Jagt v. O'Neill, 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring))). Under the "political question" doctrine, federal courts may also decline to adjudicate cases presenting questions more properly suited to resolution by the political branches. *See* CRS Report R43834, *The Political Question Doctrine: Justiciability and the Separation of Powers*, by Jared P. Cole. *See infra* "Timing of Judicial Review" for a discussion of ripeness and mootness.

[59] *See generally* Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657 (2004) (noting that the Supreme Court has interpeted standing doctrine restrictively to bar certain suits challenging agency inactions).

[60] Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60 (1803).

[61] Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 474 (1982).

[62] Allen v. Wright, 468 U.S. 737, 760 (1984).

In order to satisfy the constitutional requirement of standing, a plaintiff must "demonstrate that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision."[63] A plaintiff must assert more than a generalized interest in governance shared by all citizens and instead must have suffered an injury in fact or invasion of a legally protected interest that is (1) concrete and particularized and (2) actual or imminent.[64] In addition, a "causal connection" between the alleged injury and challenged conduct is required, such that the injury is "fairly traceable to the challenged action of the defendant."[65] Finally, it must be likely, rather than "merely speculative, that the injury will be redressed by a favorable decision."[66] The doctrine of standing often operates to bar suits challenging agency action, for example, when plaintiffs seek to vindicate the public interest but have not suffered a concrete injury traceable to an agency action.[67]

Timing of Judicial Review

A variety of factors also influence when it is proper for a federal court to adjudicate a challenge to agency action. Foremost among these are statutory deadlines and the doctrines of ripeness, mootness, and exhaustion. Many statutes authorizing judicial review of particular agency actions also impose filing deadlines for such challenges.[68] Absent a specific statutory deadline, civil actions against the United States must be filed within six years of when the claim accrued or originated.[69]

A controversy must also be "ripe" for a federal court decision.[70] The doctrine of ripeness derives from Article III limitations on the judiciary's authority, as well as prudential considerations.[71] By avoiding the adjudication of suits prematurely, the doctrine aims to protect courts "from

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[63] Bennet v. Spear, 520 U.S. 154, 162 (1997).

[64] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

[65] *Id*.

[66] *Id*. In addition to constitutional standing requirements, courts have invoked a judicially constructed doctrine of "prudential standing" to limit review of certain types of claims. This includes "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." Allen v. Wright, 468 U.S. 737, 751 (1984). However, in *Lexmark International Inc., v. Static Control Components, Inc.*, a unanimous Supreme Court characterized the "zone of interests" test described above as simply posing the question of whether Congress has created a cause of action that "encompasses a particular plaintiff's claim." 134 S. Ct. 1377, 1387 (2014). In addition, the Court described the rule barring adjudication of generalized grievances as a constitutional requirement because such claims simply do not present a case or controversy under Article III. *Id*. at 1387 n.3. The Court did not decide whether another prudential standing doctrine—the prohibition on raising another individual's legal rights—was more properly understood as a constitutional requirement. *Id.* at 1387 n.3. Given the Court's description of prudential standing principles, the future of the doctrine is disputed. *See* Ernest A. Young, *Prudential Standing After* Lexmark International, Inc. v. Static Control Components, Inc., 10 DUKE J. CONST. L. & PUB. POL'Y 149 (2014) ("[I]nteresting questions arise from the Court's explicit shift away from the traditional rubric of prudential standing. That shift raises a number of questions that are likely to bedevil the lower courts.").

[67] *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727, 735 (1972).

[68] *See, e.g.*, 30 U.S.C. §1276(a)(1) (requiring petitions for review of certain Environmental Protection Agency actions to be filed within 60 days).

[69] 28 U.S.C. §2401.

[70] *But see* Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2347 (2014) (indicating that ripeness was ultimately a question of standing, particularly after the Court's decision in Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S.Ct. 1377, 1386 (2014)).

[71] Nat'l Park Hosp. Ass'n v. Dep't of Interior, 538 U.S. 803, 808 (2003).

entangling themselves in abstract disagreements over administrative policies, and also ... protect[s] the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."[72] In deciding whether a case is ripe, a court considers whether the issues presented in the case are ready for a judicial decision and whether a delay would cause hardship to the parties in the case.[73] For example, a court may require a party to show that an agency's action has "adverse effects of a strictly legal kind" or requires the party to adjust their behavior in some way.[74] In the context of a challenge to an agency rule, for example, the promulgation of a regulation can make a judicial challenge sufficiently ripe when the rule requires parties to comply with new restrictions or risk serious penalties.[75] In contrast, if a regulation does not require parties to alter their day-to-day conduct, judicial review may be more appropriate in the future after application of a rule to parties in a concrete way.[76] Likewise, if "further factual development would 'significantly advance [a court's] ability to deal with the legal issues presented,'" the issue may not be ripe for review.[77]

Federal courts may also decline to hear a case if it is moot.[78] A case is moot if the controversy initially existing at the time the lawsuit was filed is no longer "live" due to a change in the law or in the status of the parties involved;[79] an act of one of the parties that dissolves the dispute can render the case moot as well.[80]

Finally, a court might deny review because a party failed to exhaust its administrative remedies before suing in federal court.[81] Among other things, the doctrine of exhaustion seeks to avoid unnecessary litigation by requiring the full development of a record before a court examines a case.[82] However, the Supreme Court has held that in suits brought under the APA, federal courts lack the power to require parties to exhaust their administrative remedies if no statute or agency rule requires such exhaustion.[83] Nonetheless, where the APA does not apply, exhaustion requirements could preclude immediate challenges to federal agency action.

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[72] Abbott Labs. v. Gardner, 387 U.S. 136, 148-49 (1967).

[73] *Id.* at 149.

[74] Ohio Forestry Ass'n., Inc. v. Sierra Club, 523 U.S. 726, 733 (1998).

[75] *Abbott Labs.*, 387 U.S. at 152-53.

[76] Toilet Goods Ass'n, Inc. v. Gardner, 387 U.S. 158, 164 (1967) (denying review of an agency regulation until it was applied in a particular circumstance, in part, because the plaintiff's primary conduct was not affected); Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 58 (1993) (holding that a challenge to agency regulations was not ripe because the rule "impose[d] no penalties for violating any newly imposed restriction, but limit[ed] access to a benefit created by the Reform Act but not automatically bestowed on eligible aliens").

[77] Nat'l Park Hosp. Ass'n v. Dep't of Interior, 538 U.S. 803, 812 (2003) (quoting Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 82 (1978)).

[78] CRS Report RS22599, *Mootness: An Explanation of the Justiciability Doctrine*, by Brian T. Yeh. *See, e.g.*, Ass'n v. U.S. Dep't of Interior, 251 F.3d 1007, 1010 (D.C. Cir. 2001) (party's challenge to agency rules moot because new rules applied).

[79] Liner v. Jafco, 375 U.S. 301, 306 n.3 (1964).

[80] *See* De Funis v. Odegaard, 416 U.S. 312, 319 (1974) (holding that a challenge to a law school's admission standards was moot because the student has already been admitted, was entering his final term, and would remain in school regardless of the resolution of the case).

[81] McCarthy v. Madigan, 503 U.S. 140 (1992). This doctrine often derives from prudential considerations but is also sometimes required by statute. *See generally* Avocados Plus Inc. v. Veneman, 370 F.3d 1243, 1247-48 (D.C. Cir. 2004).

[82] *Avocados Plus*, 370 F.3d at 1247; Portela-Gonzalez v. Sec'y of the Navy, 109 F.3d 74, 76 (1st Cir. 1997) ("We agree with the district court that [the plaintiff] impermissibly failed to exhaust her administrative remedies.").

[83] Darby v. Cisneros, 509 U.S. 137, 146-47 (1993).

The Scope of Review Under the Administrative Procedure Act

The APA permits judicial review of final agency actions. However, the statute sets important limits on particular matters and entities that qualify for judicial examination under its terms.

Reviewability of Agency Action

As discussed above, the APA contains a waiver of the sovereign immunity of the United States under certain circumstances,[84] providing a cause of action for individuals aggrieved by agency actions to seek judicial review of an agency's decision.[85] The APA directs reviewing courts to "compel agency action unlawfully withheld or unreasonably delayed" and to "hold unlawful and set aside agency action, findings, and conclusions" that are:

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
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> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [concerning formal rulemaking[86] and adjudicatory proceedings] or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.[87]

As a result, courts are generally authorized to direct an agency to comply with the law and can invalidate actions that are inconsistent with the agency's statutory authority. Courts may also review an agency's compliance with statutory procedural requirements, such as notice-and-comment rulemaking procedures imposed by other provisions of the APA.[88] In addition, a court may examine an agency's discretionary decisions, such as a denial of a rulemaking petition, and invalidate actions that are arbitrary or capricious.[89]

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[84] *See supra* "Sovereign Immunity."

[85] *See supra* "Cause of Action."

[86] *See infra* note 213.

[87] 5 U.S.C. §706. 5 U.S.C. §553(e) also provides interested parties the right to petition a government agency to issue, amend, or repeal a rule. This provision requires agencies that deny such a petition to provide a brief statement of their reasons for that decision. An agency's denial is judicially reviewable, *see* Massachusetts v. EPA, 549 U.S. 497, 527 (2007), but the scope of that review "is 'extremely limited' and 'highly deferential.'" *Id*. (quoting Nat'l Customs Brokers & Forwarders Assn. of Am., Inc. v. United States, 883 F.2d 93, 96 (D.C. Cir. 1989)).

[88] 5 U.S.C. §553.

[89] Courts may overturn decisions that are unsupported by substantial evidence in formal proceedings, although review of an agency's factual findings in other circumstances is governed by the "arbitrary-and-capricious" standard. *See* Assoc. of Data Processing Serv. Orgs., Inc. v. Bd. of Govs. of the Fed. Res. Sys., 745 F.2d 677, 684 (D.C. Cir. 1984). *See infra* note 172.

Limits of Review Under the APA

Judicial review under the APA is limited to examining final agency action that is not committed to agency discretion or precluded from review by a different statute.[90] Consequently, defining terms such as "agency," "action," "final," and "committed to agency discretion" is important in understanding when courts will hear a challenge to the decisions of a federal agency.

What Is an "Agency"?

The scope of review authorized by the APA is limited. The statute imposes restrictions on the types of actions courts may review. For example, a federal court is limited to reviewing the actions of a federal *agency*, which is defined as an "authority of the United States."[91] This definition generally includes all executive branch agencies, including the independent regulatory agencies, but specifically excludes Congress and the judiciary,[92] as well as courts martial, military commissions, and military authorities in times of war or in the field.[93] Notably, the Supreme Court has held that the definition of agency in the APA does not encompass the President,[94] although lower courts had held that entities within the Executive Office of the President may qualify as agencies.[95]

What Constitutes Agency "Action"?

Review under the APA is also limited to agency *action*. Agency "action" is defined as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."[96] Courts thus may review a wide variety of issues, including agency rules, denials of licenses and permits, and sanctions issued against private parties.[97] However, it is important to note that this definition is not comprehensive—courts will deny review if the agency's challenged conduct does not fit within the statutory definition.[98] For example, some courts have denied requests for review of agency publications and press releases, as those documents do not necessarily qualify as rules, orders, or sanctions within the meaning of the APA.[99]

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[90] Block v. Cmty. Nutrition Inst., 467 U.S. 340, 345 (1984).

[91] 5 U.S.C. §551(1). *See generally* CRS Report R43562, *Administrative Law Primer: Statutory Definitions of "Agency" and Characteristics of Agency Independence*, by Jared P. Cole and Daniel T. Shedd.

[92] This exemption would appear to apply to not only Congress and the courts directly but also agencies within the legislative and judicial branches. Congressional agencies include, for example, the Government Accountability Office; judicial agencies include the Federal Judicial Center and the Judicial Conference of the United States.

[93] 5 U.S.C. §551(1).

[94] Franklin v. Massachusetts, 505 U.S. 788, 801 (1992). However, the Court ruled that the President is still subject to constitutional claims arising outside of the APA. *Id.* (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)).

[95] Meyer v. Bush, 981 F.2d 1288, 1300 (D.C. Cir. 1993) (quoting Sierra Club v. Andrus, 581 F.2d 895, 902 (D.C. Cir. 1978)); *see also* Swann v. Walters, 620 F. Supp. 741 (D.D.C. 1984); United States v. Wall, 670 F.2d 469 (4th Cir. 1982).

[96] 5 U.S.C. §551(13).

[97] *Id.* §551(4) (defining a "rule" for purposes of the APA); *id.* §551(8) (defining "license") *id.* §551(10) (defining "sanction").

[98] *See, e.g.*, Hearst Radio v. FCC, 167 F.2d 225, 227 (D.C. Cir. 1948) ("Broad as is the judicial review provided by the Administrative Procedure Act, it covers only those activities included within the statutory definition of 'agency action.'").

[99] *See, e.g.*, Indus. Safety Equip. Ass'n, Inc. v. EPA, 837 F.2d 1115, 1118-19 (D.C. Cir. 1988); *see also* Trudeau v. Fed. Trade Comm'n, 456 F.3d 178, 189 (D.C. Cir. 2006) (noting that "we have never found a press release of the kind at (continued...)

"Final" Agency Action

Review under the APA is also limited to *final* agency action.[100] The Supreme Court has articulated two requirements for an agency's action to qualify as final. First, the action may not be tentative or interlocutory in nature, but must represent the "'consummation' of the agency's decisionmaking process."[101] Second, it must be an action "by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'"[102] This principle limits the judicial review of a variety of agency "actions" that do not have a final, legally binding consequence. For example, this restriction may bar judicial review of an agency's recommendation to the President to take certain actions, at least as long as that recommendation does not legally bind the President.[103] The finality requirement can also, at times, serve to shield certain agency guidance documents from judicial review if such guidance does not legally bind the public.[104] On the other hand, individuals are not necessarily required to wait for an enforcement action to be brought against them to challenge an agency's determination. Some actions, such as the issuance of binding regulations, may qualify as final agency action that is subject to judicial review before an enforcement action is brought against a third party.[105]

Statutory Preclusion of Review

Judicial review of agency action under the APA is unavailable in two important situations: (1) when a statute precludes review and (2) when the agency's action is legally comitted to an agency's discretion. The Supreme Court has interpreted the APA as establishing a "basic presumption of judicial review" of agency decisions absent another statute that clearly precludes review in federal court.[106] Some statutes expressly preclude judicial review of agency actions.[107] In other situations, review may be precluded by implication.[108] Determining whether another statute precludes review under the APA may include an examination of that statute's "express language[,] ... the structure of the overall statutory scheme, its objectives, its legislative history,

(...continued)

issue here to constitute 'final agency action' under the APA"). *See also* Barry v. SEC, No. 10-cv-4071, 2012 U.S. Dist. LEXIS 30547, *19 (E.D.N.Y. March 7, 2012) ("The press release is therefore not 'final' action subject to review under the APA.").

[100] 5 U.S.C. §704. Some courts have wrapped this requirement into the ripeness inquiry, concluding that a claim is not ripe if it does involve final agency action. *See, e.g.*, Los Alamos Study Grp. v. U.S. Dep't of Energy, 692 F.3d 1057, 1065 (10th Cir. 2012); Dietary Supplemental Coal., Inc. v. Sullivan, 978 F.2d 560, 562 (9th Cir. 1992).

[101] Bennett v. Spear, 520 U.S. 154, 178 (1997) (quoting Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948)).

[102] *Id.* (quoting Port of Bos. Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71 (1970)).

[103] Dalton v. Specter, 511 U.S. 462, 469-70 (1994); Franklin v. Massachusetts, 505 U.S. 788, 798(1992).

[104] The situations in which guidance documents constitute final agency action are disputed. *Compare* Nat'l Mining Assoc. v. McCarthy, 758 F.3d 243, 247 (D.C. Cir. 2014) (ruling that a guidance document did not constitute final agency action) *with* Appalachian Power Co. v. EPA, 208 F.3d 1015, 1022-23 (D.C. Cir. 2000) (concluding that a guidance document was final agency action); *see also* U.S. Army Corps of Engineers v. Hawkes Co., 136 S. Ct. 1807, 1815 (2016) (holding that a jurisdictional determination by the U.S. Army Corps of Engineers constituted final agency action).

[105] *See, e.g.*, Abbott Labs. v. Gardner, 387 U.S. 136, 152-53 (1967).

[106] *Id.* at 140.

[107] Johnson v. Robison, 415 U.S. 361, 365 (1974) (reviewing a statute, 38 U.S.C. s 211(a), which expressly barred judicial review of decisions of the Administrator of the Veterans Administration).

[108] *See, e.g.*, Block v. Cmty. Nutrition Inst., 467 U.S. 340, 345 (1984).

and the nature of the administrative action involved."[109] In some cases, judicial review may be precluded because it would contradict congressional intent, such as by disrupting or impeding the intended swift operation of a complex regulatory framework.[110] However, in the context of lawsuits alleging constitutional violations, courts have read preclusion provisions narrowly to preserve a federal court's role of reviewing constitutional claims.[111]

Committed to Agency Discretion

Finally, review under the APA is unavailable if the agency's action is legally committed to the agency's discretion.[112] The Supreme Court has noted that an agency's action is committed to its discretion when a statute's terms are so broad that there simply is "no law to apply" in evaluating its requirements.[113] In other words, if "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion," then judicial review is unavailable.[114] A prominent example of a matter usually committed to an agency's discretion is the decision not to initiate an enforcement action against a third party.[115] The Supreme Court has noted that the decision to initiate an enforcement action involves a "complicated balancing of a number of factors which are peculiarly within [an agency's] expertise" and is "generally committed to an agency's absolute discretion."[116] Similarly, the Court has held that an agency's decision to allocate funds from a lump-sum appropriation is committed to an agency's discretion, because the whole purpose of such an appropriation is to grant the agency flexibility to spend funds.[117] Likewise, the Court has held that the decision by the Director of the Central Intelligence Agency (CIA) to discharge an employee for reasons in the "interests of the United States" is committed to agency discretion, a ruling based in part on the overall structure of the relevant statute directing the CIA to gather and protect intelligence sources.[118]

Review of Statutory Issues

Once a court finds that it has jurisdiction to hear a challenge to an agency's action, one relevant consideration will be whether the challenged action complies with the law. The APA authorizes courts to "set aside" agency action that is "in excess of statutory jurisdiction, authority, or

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[109] *Id.* at 345.

[110] *Id.* at 346-47. In addition, judicial review may be precluded in one court because the statute establishes a comprehensive scheme that funnels review into a particular court in specific circumstances. Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 208-09 (1994); Elgin v. Dep't of Treasury, 132 S. Ct. 2126, 2133-34 (2012).

[111] *See* McNary v. Haitian Refugee Ctr. Inc., 498 U.S. 479, 498 (1991) (holding that a statutory preclusion provision did not deprive courts of constitutional challenges to agency conduct); Johnson v. Robison, 415 U.S. 361, 367 (1974) (holding that a statutory preclusion provision did not deprive courts of constitutional challenges to the statutory scheme).

[112] 5 U.S.C. §701.

[113] Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971).

[114] Heckler v. Chaney, 470 U.S. 821, 830 (1985).

[115] *See* CRS Report R43708, *The Take Care Clause and Executive Discretion in the Enforcement of Law*, by Todd Garvey.

[116] *Heckler*, 470 U.S. at 831–32; *see also* Cass Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 675–83 (1985).

[117] Lincoln v. Vigil, 508 U.S. 182, 192 (1993).

[118] Webster v. Doe, 486 U.S. 592, 601 (1988). The *Webster* Court did preserve the plaintiff employee's ability to bring constitutional claims in federal court, ruling that the statute did not preclude such suits. *Id.* at 604-05.

limitations, or short of statutory right" or otherwise "not in accordance with law."[119] Courts thus must often interpret the meaning of statutory provisions to determine if the agency's actions accord with its statutory authority or contradict a legal mandate. This means that courts will invalidate agency actions that contravene the meaning of a governing statute.[120]

Chevron Deference

Courts have developed a number of doctrinal tests for conducting this inquiry, with varying amounts of judicial "deference" given to an agency's interpretation of the relevant statute. When reviewing a challenge to an agency's interpretation of a statute that it administers and has the force of law, courts apply the two-step framework outlined by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.[121] Pursuant to that rubric, at "step one," courts examine "whether Congress has directly spoken to the precise question at issue."[122] If so, "that is the end of the matter," and courts must enforce the "unambiguously expressed intent of Congress."[123] In the case of silence or ambiguity in the statute, however, "step two" requires courts to defer to a reasonable agency interpretation, even if the court would have otherwise reached a contrary conclusion.[124] This deference is appropriate in certain circumstances because Congress has delegated "authority to the agency to elucidate a specific provision of the statute"[125] and an agency may possess significant expertise concerning the law's administration.[126] Some commentators have noted that agency statutory interpretations are more likely to be upheld if the doctrine applies, particulary if the court reaches *Chevron*'s second step.[127]

In addition to sanctioning an agency interpretation that may depart from a court's reading of a statute, the *Chevron* doctrine permits agencies to shift their interpretations over time, provided that its new interpretation is a reasonable construction of the statute.[128] While a judicial finding

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[119] 5 U.S.C. §706(2)(A), (C).

[120] *See, e.g.*, Brown v. Gardner, 513 U.S. 115, 120 (1994) (invalidating a Department of Veterans Affairs regulation for violating the clear meaning of a statute). Closely related to this inquiry is an agency's compliance with procedural requirements contained in the APA or another statute. *See infra* "Review of Compliance with Procedural Requirements."

[121] 467 U.S. 837, 842-43 (1984); *but see* Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 598 (2009) (arguing that *Chevron*'s two steps ultimately merge into a single reasonableness inquiry).

[122] *Chevron*, 467 U.S. at 842.

[123] *Id*. at 842-43.

[124] *Id*. at 843.

[125] *Id*. at 843-44.

[126] *Id*. at 865.

[127] Kent Barnett & Christopher Walker, Chevron *in the Circuit Courts*, 115 MICH. L. REV. (forthcoming) (manuscript at 6) (finding that between 2003 and 2013, in cases where circuit courts applied *Chevron* deference to agency statutory interpretations, the agency prevailed approximately 25% more often than when *Chevron* did not apply); Orin S. Kerr, *Shedding Light on* Chevron: *An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J.REG. 1, 31 (1998) (determining that in 1995 and 1996 courts that reached step two of the *Chevron* test "upheld the agency view in 89% of the applications."); *but see* David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 138 (2010) ("[C]ourts do not, in the end, discern the differences among these various doctrines, frequently do not distinguish among the doctrines in application, and probably do not really care which standard of review they apply most of the time."); Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 85 (2011) (reviewing various studies examining agency win-rates and concluding that "doctrinally-based differences in outcome are barely detectable").

[128] *See generally* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 514 (2009) (holding that, when agency actions fall within the APA's arbitrary-and-capricious standard, courts should not apply "more searching review" simply because an agency changed course).

that Congress clearly spoke to an issue "displaces a contrary agency construction," a finding of ambiguity, in contrast, may permit an agency to alter its interpretation as a result of changed circumstances.[129]

Limits to *Chevron* Deference

Chevron does not apply to every agency interpretation of a statute. The Supreme Court has noted that the *Chevron* doctrine applies where Congress has delegated to the agency the authority to "speak with the force of law" and the relevant interpretation was "promulgated in the exercise of that authority."[130] An important factor in determining whether the doctrine applies—an inquiry sometimes referred to as *Chevron* "step zero"[131]—is the formality of the procedures used when issuing the interpretation. The Court has explained that if an agency has been conferred the power to engage in formal adjudications[132] or notice-and-comment rulemaking, this likely evidences congressional intent to delegate the authority to speak with the force of law.[133] In contrast, "interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law," are generally not accorded *Chevron* deference.[134] However, an agency's interpretation may sometimes warrant *Chevron* deference in circumstances with less procedural formality than that used in notice-and-comment rulemaking.[135] Courts may examine the "interstitial nature" of the issue, the agency's expertise, "the importance of the question to the administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time" to determine whether *Chevron* supplies the appropriate lens through which to review the agency's interpretation.[136]

In addition, the Court has declined to apply *Chevron* deference in certain cases that present "extraordinary" questions. For example, in *King v. Burwell*, the Court upheld the Internal Revenue Service's determination[137] that the Affordable Care Act "allows tax credits for insurance

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[129] Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) ("Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction."). The Court has indicated that the analysis at *Chevron* step two, examining whether the agency's construction is reasonable, largely overlaps with arbitrary-and-capricious review. Judulang v. Holder, 132 S. Ct. 476, 483 n.7 (2011); *see also* Arent v. Shalala, 70 F.3d 610, 616 n.6 (D.C. Cir. 1995) ("The *Chevron* analysis and the 'arbitrary, capricious' inquiry set forth in *State Farm* overlap in some circumstances, because whether an agency action is 'manifestly contrary to the statute' is important both under *Chevron* and under *State Farm*.").

[130] United States v. Mead Corp., 533 U.S. 218, 226-27, 229 (2001).

[131] *See* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191 (2006) (defining step zero as a threshold inquiry into whether *Chevron* deference applies to an agency's interpretation of a statute). For a critical analysis of the merits and application of the *Mead* doctrine, see Adrian Vermeule, *Introduction:* Mead *in the Trenches*, 71 GEO. WASH. L. REV. 347, 361 (2003).

[132] *See infra* note 215.

[133] *Mead*, 533 U.S. at 229-30.

[134] Christensen v. Harris Cty, 529 U.S. 576, 587 (2000).

[135] Edelman v. Lynchburg College, 535 U.S. 106, 114 (2002).

[136] Barnhart v. Walton, 535 U.S. 212, 222 (2002). Pursuant to this multi-factor analysis, lower federal courts have sometimes applied *Chevron* deference to agency interpretations arrived at through less formal means than notice-and-comment rulemaking. *See, e.g.*, Mylan Labs., Inc. v. Thompson, 389 F.3d 1272, 1279-80 (D.C. Cir. 2004) (granting *Chevron* deference to an FDA decision letter); Davis v. EPA, 348 F.3d 772, 780 n.5 (9th Cir. 2003) (giving *Chevron* deference to an agency interpretation reached through informal adjudication).

[137] *See* Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377, 30,385 (May 23, 2012) (codified at 26 C.F.R. pts. 1, 602).

purchased on any Exchange created under the Act."[138] The Court noted that *Chevron* deference is predicated on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in statutory gaps.[139] But the Court noted that whether such tax credits were available was a question of "deep 'economic and political significance'" that was "central to th[e] statutory scheme."[140] If Congress had wanted to delegate that determination to the agency, the Court explained, it would have done so explicitly.[141] Because the statute did not expressly delegate that decision to the agency, the Court gave no deference to the agency's interpretation and analyzed the statute independently of the agency's position.[142] The Court's opinion reaffirms a principle enunciated in a prior case, *FDA v. Brown & Williamson.*[143] In that case, the Food and Drug Administration (FDA), after years of "having expressly disavowed any such authority since its inception," asserted for the first time in 1996 jurisdiction to regulate tobacco products.[144] In reviewing the agency's interpretation, the Court noted that "[i]n extraordinary cases ... there may be reason to hesitate before concluding that Congress has intended" to implicitly delegate authority to an agency to fill in statutory gaps.[145] The Court noted that the FDA asserted jurisdiction to regulate an industry constituting a significant portion of the American economy and concluded that "Congress could not have intended to delegate a decision of such economic and political significance to an agency" without doing so expressly.[146]

When *Chevron* does not apply in a case, courts may give statutory interpretations by agencies less deference.[147] This is not to say, however, that agency interpretations necessarily receive no weight at all. The Court indicated in *Skidmore v. Swift & Co*. that when an agency interprets a "highly detailed" "regulatory scheme" and the agency has "the benefit of specialized experience,"[148] then the court accords the agency's interpretation "a respect proportional to its 'power to persuade.'"[149] In other words, a court applying *Skidmore* deference accords an agency's interpretation of a statute a certain amount of respect or weight correlated with the strength of the agency's reasoning.[150] Courts will give consideration to the agency's interpretation, the "weight" of which "will depend upon the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give

[138] 135 S. Ct. 2480, 2495-96 (2015).

[139] *Id*. at 2488-89. *See* Linda D. Jellum & Richard Murphy, Developments in Administrative Law and Regulatory Practice: Judicial Review 3-9 (2015) (on file with CRS).

[140] *Id*. at 2489 (quoting Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2444 (2014)).

[141] *Id*. Further, the Court found it "especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort." *Id*.

[142] *See also* Utility Air Regulatory Group (UARG) v. EPA, 134 S. Ct. 2427, 2444, 2449 (2014) (applying *Chevron* but rejecting one of EPA's interpretations as unreasonable "because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization").

[143] *Brown & Williamson*, 529 U.S. at 159.

[144] *Id.* at 145-46. The agency reasoned that nicotine is a "drug" within the meaning of the Food, Drug, and Cosmetic Act. *Id*. at 131. *See* 21 U.S.C. §§301 *et seq*.

[145] *Brown & Williamson*, 529 U.S. at 159.

[146] *Id*. at 160.

[147] *Mead*, 533 U.S. at 234-35. The Court has declined to adopt *Chevron* deference for a variety of agency actions that do not carry the force of law. *See, e.g.*, Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125 (2016) (procedurally defective regulation);Wos v. E.M.A. ex rel Johnson, 133 S. Ct. 1391, 1402 (2013) (opinion letter); Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 487-88 (2004) (internal guidance memorandum).

[148] *Mead*, 533 U.S. at 235.

[149] *Id*. at 235 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

[150] *Skidmore*, 323 U.S. at 140.

it power to persuade."[151] At bottom, *Skidmore* deference recognizes an agency's "power to persuade" based on its "body of experience and informed judgment," but it does not require that agency interpretations be "controlling on the courts."[152]

Finally, when courts review the legal interpretations of an agency regarding its compliance with statutes it does *not* administer or the Constitution, such review can be more stringent: Courts sometimes review such matters de novo, or without any deference at all to the agency's interpretation.[153] For example, judicial review of an agency's compliance with the APA's procedural provisions,[154] certain Freedom of Information Act provisions,[155] and the Constitution[156] may be conducted de novo because those legal requirements are not entrusted to the discretion of any particular agency.

Review of Agency Interpretations of Regulations

Courts will also examine an agency's interpretation of its own regulations. Just as ambiguities arise in statutory provisions that agencies implement, similar uncertainties sometimes accompany agency regulations.[157] Supreme Court doctrine, reiterated in *Auer v. Robbins*, instructs courts to defer to an agency's interpretation of its own regulations unless the agency's position is "plainly erroneous."[158] Functionally, "*Auer* deference" to an agency's interpretation of a regulation seems to operate in a similar fashion as does *Chevron* deference.[159] So long as the agency's

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[151] *Id.* Predicting differences in outcomes based on these types of review can be difficult. For example, while de novo review does not require a court to give any deference to an agency interpretation of a statute, it seems unlikely that, even absent *Skidmore* deference, a reviewing court would refuse outright to consider an agency's view on a matter challenged by a plaintiff. *See* Melissa F. Wasserman, *Deference Asymmetries: Distortions in the Evolution of Regulatory Law*, 9 TEX. L. REV. 625, 638-39 (2015); Zaring, *supra* note 127, at 161 ("So while in theory, *de novo* review is a very different standard from that of reasonableness, in practice it is difficult to see how courts would be able to ignore reasonable agency interpretations in reaching their conclusions.").

[152] *Skidmore*, 323 U.S. at 140; *see generally* Peter L. Strauss, *"Deference" is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 COLUM. L. REV. 1143 (2012).

[153] *See* Freeman v. DirecTV, Inc., 457 F.3d 1001, 1004 (9th Cir. 2006) (explaining that de novo review requires the court to "review the matter anew, the same as if it had not been heard before, and as if no decision previously had been rendered"); Zaring, *supra* note 127, at 146 ("De novo review is appropriate when agencies are interpreting laws that they do not have a special responsibility to administer, like the Constitution, the APA, or Title VII.").

[154] Sorenson Commc'ns Inc. v. FCC, 755 F.3d 702, 706 (D.C. Cir. 2014) ("[A]n agency has no interpretive authority over the APA."); Envirocare of Utah, Inc. v. Nuclear Reg. Comm'n, 194 F.3d 72, 79 n.7 (D.C. Cir. 1999) (noting that "when it comes to statutes administered by several different agencies—statutes, that is, like the APA and unlike the standing provision of the Atomic Energy Act—courts do not defer to any one agency's particular interpretation"); Reno-Sparks Indian Colony v. EPA, 336 F.3d 899, 910 n.11 (9th Cir. 2003) ("This Court reviews de novo the agency's decision not to follow the APA's notice and comment procedures.").

[155] Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Justice, 164 F. Supp. 3d 145, 155-56 (D.D.C. 2016) ("FOIA, of course, affords complainants who bring suit under Section 552(a)(4)(B) a de novo review of the agency's withholding of information.").

[156] *See, e.g.*, Emp'r Sols. Staffing Grp. II, L.L.C. v. Off. of Chief Admin. Hearing Officer, 833 F.3d 480, 484 (5th Cir. 2016).

[157] *See* Cass Sunstein & Adrian Vermeule, *The Unbearable Rightness of* Auer, Forthcoming, U. CHI. L. REV. at 1 (January 16, 2016), *available at* http://ssrn.com/abstract=2716737.

[158] Auer v. Robbins, 519 U.S. 452, 461 (1997). Commentators also refer to the doctrine as *Seminole Rock* deference. *See, e.g.*, Scott H. Angstreich, *Shoring Up* Chevron*: A Defense of* Seminole Rock *Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49, 54 (2000) (describing the Court's application of "*Seminole Rock* deference"). In *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), a pre-APA case, the Court concluded that an agency's interpretation of its own ambiguous regulation was controlling unless "plainly erroneous." *Id.* at 413-14.

[159] Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1339 (2013) (Scalia, J., concurring in part and dissenting in part) (continued...)

interpretation of its regulation is reasonable,[160] courts must give that interpretation "controlling weight."[161] Importantly, *Auer* deference can extend to a broader scope of agency interpretations than does *Chevron* deference, including positions developed without formal procedures, such as statements made during the course of litigation.[162] That said, *Auer* deference is not applicable to all agency interpretations of a regulation. For example, if an agency regulation simply "parrot[s]" or "paraphrase[s]" the relevant statutory language, then the agency possesses no special authority to interpret the regulation.[163] *Auer* deference also does not apply "when the agency's interpretation is plainly erroneous or inconsistent with the regulation."[164] However, whether an inconsistent agency interpretation of its own regulation receives *Auer* deference appears to be unresolved.[165]

In recent years, a number of Justices signaled some disapproval of the doctrine and a willingness to reconsider the practice in an appropriate case.[166] However, the only evidence of *Auer*'s

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("In practice, *Auer* deference is *Chevron* deference applied to regulations rather than statutes."). Some courts have remarked that the degree of deference to agency regulations may be greater than to agency statutory interpretations. *See* Capital Network Sys., Inc. v. F.C.C., 28 F.3d 201, 206 (D.C. Cir. 1994) ("Reviewing courts accord even greater deference to agency interpretations of agency rules than they do to agency interpretations of ambiguous statutory terms."). However,distinguishing between the two doctrines may be difficult analytically. Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 584 (D.C. Cir. 1997) ("It would seem that there are few, if any, cases in which the standard applicable under *Chevron* would yield a different result than the 'plainly erroneous or inconsistent' standard set forth in Bowles v. Seminole Rock & Sand Co.") abrogated on other grounds by Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199 (2015).

[160] *See* Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 149-51 (1991).

[161] *Bowles*, 325 U.S. at 414; *see* Decker, 133 S. Ct. at 1339-40 (Scalia, J., concurring in part and dissenting in part) ("The agency's interpretation will be accepted if, though not the fairest reading of the regulation, it is a plausible reading—within the scope of the ambiguity that the regulation contains.").

[162] *See Auer*, 519 U.S. at 462 ("Petitioners complain that the Secretary's interpretation comes to us in the form of a legal brief; but that does not, in the circumstances of this case, make it unworthy of deference."); Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261, 277-282 (2009) (granting *Auer* deference to an agency interpretation within an internal memorandum); Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 171 (2007) (concluding that *Auer* deference applied to an agency interpretation within an internal memorandum generated "in response to this litigation"). *But see* Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2167 (2012) (declining to apply *Auer* deference where the agency relied on an interpretation of a regulation to impose liability on a firm for conduct occurring well before the interpretation was announced).

[163] Gonzales v. Oregon, 546 U.S. 243, 256-57 (2006).

[164] Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2166 (2012).

[165] *Compare* Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 515 (1994) (noting that an interpretation that contradicts a prior interpretation receives less deference than an view held consistently), *with* Long Island Care, 551 U.S. at 170-71; ("But as long as interpretive changes create no unfair surprise ... the change in interpretation alone presents no separate ground for disregarding the Department's present interpretation.").

[166] *See* Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1339 (2013) (Scalia, J., concurring in part and dissenting in part) (arguing for the elimination of *Auer* deference); *id*. at 1338-39 (Roberts, C.J., concurring, joined by Alito, J.) (declaring that "[i]t may be appropriate to reconsider [*Auer* deference] in an appropriate case"); Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1213 (2015) (Thomas, J., concurring) (questioning the constitutionality of *Auer* deference); *id*. at 1210-11 (Alito, J., concurring in part and concurring in the judgment) ("I await a case in which the validity of *Seminole Rock* may be explored through full briefing and argument."); *id*. at 1213 (Scalia, J., concurring) ("I would therefore restore the balance originally struck by the APA with respect to an agency's interpretation of its own regulations, not by rewriting the Act in order to make up for *Auer*, but by abandoning *Auer* and applying the Act as written."). While some Justices appear poised to overrule *Auer* if given the chance, others may be more inclined to simply cabin the scope of the doctrine. For example, Chief Justice Roberts indicated that he is willing to reconsider *Auer* deference in *Decker*, 133 S. Ct. at 1338-39, but joined the Court's majority opinion in *Mortgage Bankers*, which listed qualifications of when *Auer* deference is appropriate but appeared to accept the doctrine's validity. *Mortgage Bankers*, 135 S. Ct. at 1208 n.4.

potential demise emerges primarily from concurring or dissenting opinions.[167] Consequently, while some Justices certainly do wish to reconsider the doctrine, it is unclear whether a majority might be assembled in the future to cabin the scope of *Auer* deference or eliminate it altogether.[168]

Judicial Review of Agency Factual Determinations and Discretionary Decisions

In addition to statutory review of agency actions, another important basis for judicial review under the APA concerns an agency's factual determinations and certain discretionary decisions. Courts are authorized to "hold unlawful and set aside agency actions, findings, and conclusions found to be arbitrary, capricious, [or] an abuse of discretion."[169] This "catch-all" provision of the APA applies to factual determinations made during "informal" proceedings,[170] such as notice-and-comment rulemaking,[171] and most other discretionary determinations an agency makes.[172]

The seminal Supreme Court decision elaborating this standard, *Motor Vehicle Manufacturers Association v. State Farm Auto Mutual Insurance Co*., explains that the scope of this review is "narrow," as "a court is not to substitute its judgment for that of the agency."[173] However, courts will invalidate agency determinations that fail to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[174] When reviewing that determination, courts must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[175] In general, the Court noted, an agency decision is arbitrary

> if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[176]

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[167] *See supra* text accompanying note 166.

[168] On May 16, 2016, the Court denied certiorari to a petition that called for the Court to overrule Auer. Justice Thomas issued an opinion dissenting from the denial that restated his and Justice Scalia's objections to the doctrine. *See* United Student Aid Funds, Inc. v. Bible, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from a denial of certiorari).

[169] 5 U.S.C. §706(2)(A).

[170] *See* Assoc. of Data Processing Serv. Orgs., Inc. v. Bd. of Govs. of the Fed. Res. Sys., 745 F.2d 677, 684 (D.C. Cir. 1984). *See infra* note 211.

[171] 5 U.S.C. §553.

[172] Agency factual findings made during formal proceedings are reviewed under a substantial evidence test, 5 U.S.C. §706(2)(E), under which the agency's findings will be upheld if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951) (quoting Consolidated Edison Co. v.NLRB, 305 U.S. 197, 229 (1938)). Lower courts appear to agree, however, that the difference in the amount of necessary supporting evidence between this standard and factual findings made during informal proceedings is nominal, *Data Processing*, 745 F.2d at 684. Although formal proceedings must be supported with evidence found within the record, decisions in informal proceedings can be supported with any evidence an agency possessed when it made its determination. *See* Safe Extensions, Inc. v. FAA, 509 F.3d 593, 604 (D.C. Cir. 2007).

[173] 463 U.S. 29, 43 (1983).

[174] *Id*. at 43 (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)).

[175] *Id*. (quoting *Burlington Truck Lines*, 371 U.S. at 168).

[176] *Id*. Courts and commentators often refer to this doctrine as "hard look" review. *See, e.g.*, Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 763 (2008) ("In its seminal decision in *Motor Vehicle Manufacturers Association v. State Farm Auto Mutual Insurance Co*., the Court entrenched hard look (continued...)

Given the broad scope of federal agency actions that are subject to judicial review, whether an agency decision is arbitrary and capricious is largely a situation-specific question. Importantly, the Supreme Court has clarified that it is not arbitrary and capricious for agencies to change their policies. In *FCC v. Fox Television Stations, Inc.*, the Supreme Court held that review under the arbitrary-and-capricious standard is not heightened or more stringent simply because an agency's action alters its prior policy.[177] An agency must acknowledge such change when it occurs, but so long as the agency's action is permissible under its authorizing statute and supported by good reasons, agencies are not required to show that new policies are better than old ones.[178] In other words, an agency may be authorized to pursue a range of policy outcomes under its statutory authorization, and courts may not scrutinize such change more strictly than other agency decisions.[179]

In general, the arbitrary-and-capricious standard requires an agency to demonstrate that it engaged in reasoned decisionmaking when reaching its determination.[180] Importantly, courts "must judge the propriety of [an agency's] action solely by the grounds invoked by the agency," and they may not create their own justifications to support an agency's decision beyond the reasons presented by the agency.[181] Further, courts require agencies to provide the "essential facts upon which the administrative decision was based"[182] and explain what justifies their determinations with actual evidence beyond a "conclusory statement."[183] An agency's failure to provide an adequate explanation for its decision will typically result in remand or invalidation of its decision.[184] Among other things, this requirement plays an important role in judicial review of agency regulations. Thus, an agency's failure to explain its reasoning in response to significant

(...continued)

review and clarified its foundations.").

[177] 556 U.S. 502, 514 (2009). The Court's holding that review under the arbitrary-and-capricious standard is not more stringent simply because an agency changes course arguably contrasts with *Skidmore*'s teaching that an agency's consistent interpretation may be more persuasive than an altered one. One way to reconcile the two cases might be that in the former situation, an agency change is not detrimental to its validity, while in the latter, an agency's consistency renders its position more likely to be upheld than otherwise; that is, a modification to an agency position does not render an agency decision suspect, but a consistent legal interpretation might be an indication that the interpretation is valid. Another possible explanation for the difference in the Court's assessment of the relevance of agency consistency might be to distinguish review of an agency's discretionary policy choice in *FCC v. Fox* from review of an agency's legal interpretation of a statutory provision in *Skidmore*. For a discussion of these cases and the complicated question of judicial review of agency changes, see Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. Rev. 112, 135-67 (2011). *But see supra* note 137 (noting that whether an agency's change in an interpretation of its own regulations receives less deference than a consistent interpretation appears unsettled).

[178] *Id*. at 514-15.

[179] *Id*. That said, courts still must adequately explain changes when an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account." *Id*. at 515. This requirement, however, does not stem from the change itself; rather, it derives from the need for a "reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Id*. at 516.

[180] *State Farm*, 463 U.S. at 52 ("In this case, the agency's explanation for rescission of the passive restraint requirement is *not* sufficient to enable us to conclude that the rescission was the product of reasoned decisionmaking.") (emphasis in original); Petroleum Commc'ns, Inc. v. FCC, 22 F.3d 1164, 1172 (D.C. Cir. 1994).

[181] SEC v. Chenery, 332 U.S. 194, 196 (1947).

[182] United States v. Dierckman, 201 F.3d 915, 926 (7th Cir. 2000) (quoting Bagdonas v. Dep't of the Treasury, 93 F.3d 422, 426 (7th Cir. 1996)).

[183] Allied-Signal, Inc. v. Nuclear Reg. Comm'n, 988 F.2d 146, 152 (D.C. Cir. 1993).

[184] *See, e.g.*, Williams Gas Processing-Gulf Coast Co., L.P. v. FERC, 475 F.3d 319, 329 (D.C. Cir. 2006).

comments raised during notice-and-comment rulemaking will be considered arbitrary and capricious.[185]

Beyond those circumstances in which courts find that an agency failed to provide an adequate explanation for its decision, courts may also find the decision itself to be arbitrary and capricious.[186] For example, courts will invalidate agency actions that are the product of "illogical"[187] or inconsistent reasoning.[188] In addition, courts will find an agency action to be arbitrary and capricious if the agency simply failed to consider an important factor relevant to its action, such as the policy effects of its decision[189] or vital aspects of the problem in the issue before it.[190] Likewise, courts may invalidate or remand a determination to the agency if the agency decision failed to consider regulatory alternatives that would similarly serve the agency's goals[191] or provide "less restrictive, yet easily administered" options.[192] It bears mention that courts are particularly deferential to agencies' expertise when making predictive judgments based on scientific or technical determinations.[193]

Because of the wide range of statutory authorities and agency missions, what counts as a relevant factor that must be considered by an agency when reaching a decision can be context specific. An illustrative case is *Judalong v. Holder*, where the Supreme Court found the Board of Immigration Appeals' (BIA's) policy for deciding whether resident aliens may apply for relief from removal to be arbitrary and capricious.[194] The Court noted that the relevant factors for the BIA to consider were the "purposes of the immigration laws or the appropriate operation of the immigration system."[195] Because the agency failed to root its determination in consideration of such factors and instead based its policy on an "irrelevant comparison between statutory provisions" unconnected to the merits of a removal decision or the administration of immigration laws, the Court held that the agency's determination was arbitrary and capricious.[196]

Other examples[197] of agency actions found to be arbitrary and capricious include

- failing to consider circumstances that "warrant different treatment for different parties";[198]
- reaching a conclusion that contradicts the underlying record;[199]

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[185] Ass'n of Private Sector Colls. & Univs. v. Duncan, 681 F.3d 427, 449 (D.C. Cir. 2012); Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin., 626 F.3d 84, 94 (D.C. Cir. 2010).

[186] *See* Lisa Schultz Bressman & Glen Staszewski, *Judicial Review of Agency Discretion*, A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 209-25 (2d ed. 2015).

[187] Am. Fed'n of Gov't Emps., Local 2924 v. Fed. Labor Relations Auth., 470 F.3d 375, 380 (D.C. Cir. 2006).

[188] Venetian Casino Resort, L.L.C. v. EEOC, 530 F.3d 925, 934 (D.C. Cir. 2008).

[189] Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt., 698 F.3d 1101, 1124 (9th Cir. 2012).

[190] Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin., 429 F.3d 1136, 1147 (D.C. Cir. 2005).

[191] Office of Commc'n of United Church of Christ v. FCC, 779 F.2d 702, 714 (D.C. Cir. 1985); Wilderness Watch, Inc. v. U.S. Fish & Wildlife Serv., 629 F.3d 1024, 1039 (9th Cir. 2010).

[192] Cin. Bell Tel. Co. v. FCC, 69 F.3d 752, 761 (6th Cir. 1995).

[193] Balt. Gas & Elec. Co. v. NRDC, 462 U.S. 87, 103 (1983); Zero Zone, Inc. v. U.S. Dep't of Energy, 832 F.3d 654, 668 (7th Cir. 2016); Nat. Res. Def. Council v. U.S. Nuclear Regulatory Comm'n, 823 F.3d 641, 649 (D.C. Cir. 2016).

[194] Judulang v. Holder, 132 S. Ct. 476, 484 (2011).

[195] *Id*. at 485.

[196] *Id*.

[197] *See* Bressman & Staszewski, *supra* note 185, at 434-35 (offering numerous examples of agency actions found to be arbitrary and capricious).

[198] Petroleum Commc'ns, Inc. v. FCC, 22 F.3d 1164, 1172 (D.C. Cir. 1994).

- justifying "its decision on a premise the agency itself has already planned to disrupt";[200]
- taking rulemaking action that undercuts another simultaneous rulemaking by the same agency;[201]
- "fail[ing] to provide any coherent explanation for its decision";[202]
- contradicting the "expert record evidence" without explanation;[203]
- failing to consider a relevant and important factor in making a decision;[204]
- issuing a rule that was based on "pure political compromise, not reasoned scientific endeavor";[205]
- failing to "exercise sufficiently independent judgement" by deferring to private parties;[206] and
- utilizing a model for studying risk that was inconsistent with the underlying data.[207]

Review of Compliance with Procedural Requirements

In addition to authorizing judicial review of agency actions, the APA also imposes various procedural requirements that agencies must follow depending on the type of agency action. The APA makes two important distinctions in categorizing the actions of an agency. First, it distinguishes between rulemaking—the agency's process for promulgating and repealing a rule[208]—and adjudications—the agency's "process for the formulation of an order."[209] A rule applies generally to a group of individuals or the public, while an adjudication is an individualized decision.[210] Second, the APA distinguishes between formal and informal proceedings.[211] Formal proceedings are subject to more stringent procedures than informal proceedings and are required when the agency's decision must be made "on the record."[212]

(...continued)

[199] Tucson Herpetological Soc. v. Salazar, 566 F.3d 870, 879 (9th Cir. 2009).

[200] Portland Cement Ass'n v. EPA, 665 F.3d 177, 187 (D.C. Cir. 2011).

[201] Office of Commc'n of United Church of Christ v. FCC, 707 F.2d 1413, 1441-42 (D.C. Cir. 1983).

[202] Fox v. Clinton, 684 F.3d 67, 80 (D.C. Cir. 2012).

[203] Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin., 626 F.3d 84, 93 (D.C. Cir. 2010).

[204] Dep't of State v. Coombs, 482 F.3d 577, 581 (D.C. Cir. 2007).

[205] Midwater Trawlers Coop. v. Dep't of Commerce, 282 F.3d 710, 720 (9th Cir. 2002).

[206] Tex. Office of Pub. Util. Counsel v. FCC, 265 F.3d 313, 327-28 (5th Cir. 2001).

[207] Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin., 494 F.3d 188, 206 (D.C. Cir. 2007).

[208] 5 U.S.C. §551(4).

[209] *Id.* §551(7).

[210] *Compare* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445-46 (1915) (rule applying broadly) *with* Londoner v. Denver, 210 U. S. 373, 385 (1908) (individualized decision).

[211] 5 U.S.C. §§556, 557. The APA mandates certain procedures when agencies conduct formal and informal adjudications, *id.* §§556-57 (formal adjudications); *id.* §555 (informal and formal adjudications), as well as formal and informal rulemaking. *id.* §§556-57 (formal rulemaking); *id.* §553 (informal rulemaking).

[212] 5 U.S.C. §554.

According to the APA, every agency action falls into these categories, resulting in four types of agency decisions. First, although such instances are rare, an agency may conduct a "formal rulemaking," in which it provides a formal, public hearing before promulgating a regulation.[213] Second, and much more commonly, an agency may engage in informal rulemaking, in which it offers the public notice and an opportunity to comment on the proposed rule.[214] Third, an agency may conduct a "formal adjudication" in which it provides a trial-type hearing for a particular individual before an administrative law judge.[215] Finally, an agency may make a decision subject to the "informal adjudication" procedures of the APA. Agencies enjoy substantial discretion under this standard to formulate their own procedures, subject to the requirements of the Due Process Clause of the Fifth Amendment.[216] These categories of agency actions are shown in **Table 1**.

Table 1. Types of Agency Actions

Agency Action	Characteristics	Example
Formal Rulemaking	Rulemaking proceeding with a formal hearing that permits parties to conduct cross-examination. The decisionmaker is barred from ex parte contacts, and the agency's decision must be supported by substantial evidence.	The Marine Mammal Protection Act requires regulations made by the Secretary of Commerce concerning marine mammals be made on the record. 16 U.S.C. §1373(d).
Informal Rulemaking	Agency must give the public notice and an opportunity to comment on the proposed rulemaking.	After notice and comment period, Department of Labor promulgates a regulation requiring certain firms to pay workers overtime wages.
Formal Adjudication	Individualized decision with a formal hearing that permits parties to conduct cross-examination. The decisionmaker is barred from ex parte contacts, and the agency's decision must be supported by substantial evidence.	After denying an individual benefits under the Black Lung Benefits Act, agency provides an administrative law judge to oversee a formal hearing reviewing the case.
Informal Adjudication	No hearing requirement; parties compelled to appear are entitled to counsel; agencies are generally free to formulate their own proceedings subject to requirements of the Due Process Clause.	The Environmental Protection Agency orders a waste facility to correct its practices.

Source: Created by CRS.

Importantly, agency actions can be challenged for failing to comply with "procedure[s] required by law."[217] Consequently, assuming that a court is otherwise authorized to adjudicate a case,[218] individuals aggrieved by agency conduct may challenge an agency's failure to comply with the procedures mandated by the APA or another statute.

[213] *Id*. §§556-57.

[214] *Id*. §553.

[215] *Id*. §§554, 556-57.

[216] *Id*. §555.

[217] *Id*. §706(2)(D).

[218] *See supra* "Requirements for Judicial Review."

For example, before engaging in "informal" rulemaking under Section 553 of the APA, agencies must provide the public with advance notice and an opportunity to meaningfully comment on the proposed rule.[219] Such regulations are often referred to as "legislative rules."[220] However, "nonlegislative" rules, such as interpretive rules and policy statements, are exempt from this requirement.[221] Federal courts will thus remand or invalidate an agency document issued without notice-and-comment procedures if a court concludes that it qualifies as a legislative rule.[222] Courts doing so will sometimes review the issue de novo, refusing to grant any deference to the agency because Congress has not granted the agency authority to administer the APA.[223] In addition, the APA's "good cause" provision permits agencies to bypass these requirements if compliance would be "impracticable, unnecessary, or contrary to the public interest."[224] For example, in 2004, the D.C. Circuit upheld on security grounds the Federal Aviation Administration's rule, promulgated without notice and comment, covering the suspension and revocation of pilot certificates.[225] The court accepted the agency's contention that the regulation was necessary to protect the public against security threats, ruling that the "legitimate concern over the threat of further terrorist acts involving aircraft in the aftermath of September 11, 2001," supported the good cause finding.[226] Nonetheless, the appropriate standard of review for determining what constitutes "good cause" under the APA is unsettled.[227]

Similarly, parties may challenge the procedures used in agency adjudications. When conducting "formal" or "on the record" adjudications, agencies must provide trial-type procedures during the hearing before the agency.[228] While agencies are generally free to choose between utilizing rulemaking or adjudications to set policy,[229] certain legal requirements nevertheless apply to adjudications.[230] Formal adjudications require trial-like procedures and must be conducted before an administrative law judge (ALJ) or agency head; informal adjudications have fewer procedural

[219] 5 U.S.C. §553.

[220] *Id*. §553. More stringent requirements apply when agencies conduct "formal rulemaking," *id*. §§556-57, as opposed to informal rulemaking under 5 U.S.C. §553. The most common process for issuing rules is under the latter category. *See* CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, coordinated by Maeve P. Carey.

[221] 5 U.S.C. §553.

[222] *See* Gen. Elec. Co. v. EPA, 290 F.3d 377, 382 (D.C. Cir. 2002) (ruling that a guidance document issued by the EPA that advised the public of how to engage in risk assessments in order to comply with EPA regulations qualified as a legislative rule); Chamber of Commerce v. Dep't of Labor, 174 F.3d 206, 212 (D.C. Cir. 1999) (holding that a directive issued by the Occupational Safety and Health Administration that specified that certain industries would be subject to inspection absent adoption of specific procedures was a legislative rule); Syncor Int'l Corp. v. Shalala, 127 F.3d 90, 95-96 (D.C. Cir. 1997) (ruling that an FDA document notifying the public that certain industries must comply with statutory requirements that were previously exempt was a legislative rule).

[223] *See, e.g.*, Meister v. Dep't of Agric., 623 F.3d 363, 370 (6th Cir. 2010); Reno-Sparks Indian Colony v. EPA, 336 F.3d 899, 909 n.11 (9th Cir. 2003); Warder v. Shalala, 149 F.3d 73, 79 (1st Cir. 1998).

[224] *Id.* §553(b)(3)(B).

[225] Jifry v. F.A.A., 370 F.3d 1174, 1179-80 (D.C. Cir. 2004).

[226] *Id*. at 1180.

[227] *See generally* CRS Report R44356, *The Good Cause Exception to Notice and Comment Rulemaking: Judicial Review of Agency Action*, by Jared P. Cole.

[228] 5 U.S.C. §§554, 556-57.

[229] SEC v. Chenery, 332 U.S. 194, 209 (1947).

[230] 5 U.S.C. §§554, 556-557.

requirements and need not take place before an ALJ.[231] An agency's choice to adjudicate an issue with informal procedures rather than formal ones may be challenged as violating the APA.[232]

Importantly, the Supreme Court has consistently ruled that courts may not add to the procedural requirements imposed on agencies in the APA.[233] Agencies enjoy discretion to develop and apply their own procedures that supplement the APA's requirements, but courts lack authority to impose additional requirements upon agencies.[234] In the past, lower federal courts had required agencies to adopt additional procedures not spelled out in the text of the APA.[235] In the context of informal rulemaking, the Supreme Court's 1978 decision in *Vermont Yankee Nuclear Power Corporation v. Natural Resource Defense Council, Inc*. ruled that courts may not require agencies to utilize additional procedures beyond those mandated by the APA's notice-and-comment requirements.[236] Likewise, the Court's 2015 decision in *Perez v. Mortgage Bankers Association* held that courts may not require agencies to undergo notice-and-comment rulemaking if the APA exempts the agency action from those requirements.[237] In other words, the APA "sets forth the full extent of judicial authority to review executive agency action for procedural correctness."[238]

Conclusion

The Constitution confers Congress with expansive authority to define the jurisdiction of federal courts, determine the types of agency actions subject to judicial review, and subject agencies to certain procedural requirements when implementing their statutory authority. Important constitutional limits also determine when a federal court may render a decision. The circumstances in which federal courts will review the actions of agencies are thus informed by complicated statutory, constitutional, and prudential considerations. Perhaps the most prominent of such statutes, the APA, subjects a broad scope of agency decisions to judicial review, subject to important limitations. Judicial interpretation of the APA's provisions consequently plays a central role in determining what types of agency actions are subject to review in federal court. These developments are, nonetheless, subject to future modification by Congress, which enjoys authority to alter the APA or any other statute to shape the contours of judicial review of agency action.

[231] *See* 5 U.S.C. §§554, 556-57 (formal adjudications); *id*. §555 (informal and formal adjudications),

[232] *See* Dominion Energy Brayton Point, LLC v. Johnson, 443 F.3d 12, 16-17 (1st Cir. 2006) (applying *Chevron* to determine whether the EPA may choose to utilize informal adjudicatory procedures); Chem. Waste Mgmt., Inc. v. EPA, 873 F.2d 1477, 1483 (D.C. Cir. 1989) (same).

[233] *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1203 (2015); Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 548 (1978).

[234] *Vermont Yankee*, 435 U.S. at 544 (noting "the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure").

[235] *Perez*, 135 S. Ct. at 1206 (describing D.C. Circuit doctrine formulated by *Paralyzed Veterans of America. v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997), whereby courts require agencies that change certain interpretive rules to undergo notice-and-comment rulemaking); *Vermont Yankee*, 435 U.S. at 535-36 (describing the D.C. Circuit's ruling in the case below).

[236] *Vermont Yankee*, 435 U.S. at 548.

[237] *Perez*, 135 S. Ct. at 1203.

[238] FCC v. Fox Television Stations, Inc., 556 U.S. 502, 513 (2009).

Author Information

Jared P. Cole
Legislative Attorney

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