THE ADMINISTRATIVE PROCEDURE ACT: AN INTRODUCTION

Gillian Metzger, Columbia Law School[1]

The Administrative Procedure Act (APA) is the statutory constitution of administrative government. It sets out the default rules that govern how federal agencies act and how they can be challenged, and embodies important administrative law norms, such as procedural regularity and reasoned decision-making.

This overview summarizes the historical and current context of the APA; the statute's key features, in particular its procedural requirements for agency action; and potential grounds for challenging agency action under the APA.

1. The APA: History and Current Context

It is helpful to first understand the APA in its historical context, because there are disconcerting parallels to our contemporary situation. The APA was the end result of a highly political movement for administrative reform over the course of the New Deal. On one side was the private bar in the form of the American Bar Association, representing the interests of their business clients, attacking New Deal agencies for acting arbitrarily and wielding absolute power free from procedural or judicial constraints. The National Labor Relations Board was a particular target.

On the other side were FDR and the New Deal agencies, many recently created and granted broad power by Congress, insisting on the need for administrative authority and flexibility to deal effectively with the economic fallout from the Depression. A prime example of FDR's strong executive views was his proposed legislation consolidating regulation and budget powers under executive agencies, instead of independent agencies. This legislation also would have given the president extensive reorganization authority—something that should sound familiar today.

Initially, conservative and business forces brought constitutional challenges against New Deal measures and opposed FDR politically, as with the Liberty League. But as the Court started to uphold measures and FDR continued in power, the opposition turned to administrative reform. These reform measures, which came to be embodied in the Walter-Logan bill that passed both houses of Congress in 1940, were in reality about limiting administrative government, using the imposition of substantial procedural requirements across all agencies and expanded judicial review.

FDR vetoed the bill, having preemptively asked his attorney general to form a committee to research administrative procedure. That committee compiled detailed reports on how agencies

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actually operated and ended up recommending against a single administrative code. Then World War II intervened. By the time Congress returned to the question, the existence of administrative government was no longer under threat, but there was also more public concern about controlling administrative power, and more support for a general code. That code, adopted in 1946, was the APA.

The contemporary relevance of this background is that we are today seeing an attack on the administrative state of the level that occurred in 1930s.

Some of the fundamental constitutional challenges brought against administrative action—such as attacks on administrative adjudication or legislative delegations as unconstitutional—are surfacing again in the courts.

We are also again seeing legislation that would significantly cut back on administrative governance. The Regulatory Accountability Act, which contains many recent proposals, passed the House. This is the contemporary equivalent of Walter-Logan – it would impose extensive hearing and other obligations on agencies, particularly for big ticket rules. It also seeks to intensify judicial scrutiny of agency action, provides for congressional review of new regulations, and other measures.

We also have President Trump's anti-regulatory Executive Orders, in particular "Reducing Regulation and Controlling Costs" ("two for one"),[2] the "Comprehensive Plan for Reorganizing the Executive Branch"[3] and "Enforcing the Regulatory Reform Agenda,"[4] which orders agencies to establish reform taskforces; his anti-administrative appointees; and his agency-slashing budget proposals.

We are at a moment where the fundamental structure of administrative governance is under attack, and there is a real question about the extent to which the regime enacted by the APA will continue. This also means that it is important for progressives to consider not only immediate actions to challenge new developments, but also what the impact may be on administrative power over the long term.

2. What are Key Features of the APA Regime?

The APA contains two main sets of requirements.[5] One set governs procedure, and the other set governs judicial review.

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[2] Available at: www.whitehouse.gov/the-press-office/2017/01/30/presidential-executive-order-reducing-regulation-and-controlling.

[3] Available at: www.whitehouse.gov/the-press-office/2017/03/13/presidential-executive-order-comprehensive-plan-reorganizing-executivehttps://www.whitehouse.gov/the-press-office/2017/03/13/presidential-executive-order-comprehensive-plan-reorganizing-executive.

[4] Available at: www.whitehouse.gov/the-press-office/2017/02/24/presidential-executive-order-enforcing-regulatory-reform-agenda

[5] Procedural and judicial review are what the APA is known for today. There were other important provisions in the APA as enacted: one was a precursor of the Freedom of Information Act (FOIA)requiring that agencies publish materials they rely on or that formulate policies; others created and protected Administrative Law Judge (ALJ) independence.

i) Procedural requirements

On the procedural front, the APA divides the world into "rulemaking" and "adjudication." It does this definitionally, by providing that everything that isn't rulemaking is adjudication.[6] As a result, although the APA adopts a broad definition of rulemaking, the scope of what counts as adjudication is vast and highly varied. The APA's two procedural categories are further subdivided into "formal" and "informal" versions. That is, we have formal and informal rulemaking; and formal and informal adjudication. Each of these entails different procedural requirements under the terms of the APA.

Notably, the APA functions to set defaults: it can be trumped by the substantive statute under which the agency is acting. Some substantive statutes, for instance, impose a hybrid form of rulemaking that combines informal rulemaking (described further below) with hearings.

a) Formal rulemaking

Formal rulemaking has been largely a dead letter since the 1960s, though one effect of the Regulatory Accountability Act would be to revive it. Formal rulemaking essentially imposes an adjudicatory frame onto rulemaking, such that a rule must be based on evidence in the record, entailing findings and other trial-like procedures. This process is hugely resource intensive.[7] This type of rulemaking currently is imposed only where required by other statute.[8]

b) Informal ("notice and comment") rulemaking; process for creating or revoking regulations, and exceptions

Informal rulemaking is generally known as "notice and comment rulemaking." This is the standard form of rulemaking today. For such rulemaking, agencies are required to publish an advance notice of proposed rulemaking that includes "either the terms or substance of the proposed rule or a description of the subjects and issues involved," so that the public may is "given an opportunity to participate in the rulemaking through submission of written data, views, or arguments."[9] Following formulation of the rule, there is also centralized regulatory review under OIRA and the White House (required by executive orders).[10]

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[6] The APA provides that "adjudication" means "agency process for the formulation of an order," where an "order" means "the whole or a part of a final disposition…of an agency in a matter other than rule making but including licensing." It defines "rule making" as "agency process for formulating, amending, or repealing a rule" and a "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency..." 5 U.S. Code §551(5)-(7). See also Attorney General's Manual on the Administrative Procedure Act (1947) at 14-15. As discussed below, agencies may also issue or rescind memoranda or guidance that is not subject to the same procedural requirements as rulemaking.

[7] 5 U.S.C. §§556-57.

[8] 5 U.S.C. §553(c).

[9] 5 U.S.C. §553 (b)-(c).

[10] See, e.g., Exec. Order No. 12,866 (1993).

Unless the substantive statute that authorizes the regulation provides otherwise, the APA imposes the same procedural requirements on repeals of existing rules as adoption of new rules.[11] In order for the Trump administration to repeal an Obama administration rule that was promulgated using notice and comment, then, it must go through notice and comment again.[12]

On the other hand, the APA exempts some rules even from notice and comment procedures. [13] One ground for this is when there is good cause; another is where the agency is promulgating statements of policy, interpretive rules, or procedural rules.[14] Policy statements and interpretations are often referred to as "guidance." Importantly, since guidance isn't subject to notice and comment requirements, it can be much more easily repealed—as evident in the example of the transgender bathroom guidance.[15]

c) Formal adjudication

Formal adjudication involves a hearing before an administrative law judge (ALJ), then an appeal, often to the agency head. This process is typical of independent regulatory agencies, such as the NLRB and SEC. Formal adjudication applies only if the statute requires hearing and decision on the record.

d) Informal adjudication

Informal adjudication is, essentially, everything else. Here there is very little required – only a brief explanation of the basis for denial. Substantive statutes, however, may impose additional procedural requirements. Agencies also have developed more elaborate procedures by regulation, and some additional procedures can be required by due process.

ii) Judicial review

The APA makes most final agency action judicially reviewable, with some limitations. One cannot challenge action made unreviewable by statute or committed to agency discretion, with certain categories of action that are presumptively unreviewable, such as individual enforcement

[11] See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.,*463 U.S. 29 (1983) (vacating the rescission of an air bags rule because the same process is required for rescinding regulations as for passing them).
[12] Note, however, increased uses of the Congressional Review Act under President Trump to rescind rules legislatively. The CRA was adopted in 1996 to replace the invalidated legislative veto. Under the CRA, legislation that would disapprove a rule is fast-tracked, and can't be filibustered; and if a rule is disapproved, the agency may not readopt it in substantially similar form without legislative authorization.
[13] For those enacting the APA, the reason for the internal policy statement exemptions was to encourage agencies to engage in crystallizing and then publicizing their policies. The fear was not that agencies were formulating law and policy; it was actually seen as an important check on arbitrary agency action. The concern instead was that they were doing so in secret. But courts over time have taken a different view, and treated such internal law with much more skepticism. This seems unlikely to change soon.
[14] 5 U.S.C. §553; see
[15] See *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015)(holding that because an agency does not have to go through notice and comment to issue an interpretive rule, it also does not have to go through notice and comment to amend or repeal that interpretive rule).

decisions.[16] Plaintiffs must also meet standing requirements.[17] The most common types of legal challenges under the APA are summarized in the next section.

3. What are the typical kinds of challenges made under the APA, and what are some of the leading decisions on how it should be read?

Section 706 of the APA sets out a number of different challenges that might arise from agency action or an agency's failure to act. For example, one can challenge agency action as unconstitutional, outside of the agency's statutory authority, arbitrary and capricious, or for violating various procedural requirements. Some challenges are more particular to the world of administrative law, such as arbitrary and capriciousness challenges to an agency's reasoning.

A full discussion of each type of challenge is beyond the scope of this overview, but several of the more common types of challenges are discussed below.

i) Agency actions that fail to comply with governing procedures

Agency actions are frequently challenged for not complying with governing procedures.[18] For example, one may challenge a rule on the grounds that an agency has provided inadequate notice. Courts have read the notice requirement broadly, and there are often challenges saying the agency didn't disclose underlying studies it relied upon, or that it changed course so much over the rulemaking that commenters could not have predicted the final rule and were not able to comment effectively.

A very common challenge is that the agency failed to use notice and comment procedures at all. The form of this challenge is usually to claim that what the agency is calling a policy statement or an interpretive rule is really a legislative rule because it has legal force and effect, and had to be issued using notice and comment.

Two important U.S. Supreme Court decisions on procedural challenges are *Vermont Yankee v. NRDC* in 1978,[19] and *Perez v. Mortgage Bankers* in 2015.[20] Both rejected efforts by lower courts—actually, the D.C. Circuit—to impose additional procedures (such as witness cross-examinations) on rulemaking when these procedures are not required by the APA (or by the substantive statutes or the Constitution). On the other hand, lower courts have read some of the procedures imposed by the APA broadly, and *Vermont Yankee* and *Perez* aren't read as calling those decisions into question.

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[16] See 5 U.S.C. §§701-706, pertaining to judicial review of agency actions and the exceptions; note finality requirement in 5 U.S.C. §704. See also *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971)(reaffirming the presumptive reviewability of agency decisions); cf *Heckler v. Chaney*, 470 U.S. 821 (1985)(setting limitations on reviewability of agency inaction, in holding that decisions not to enforce are committed to discretion).

[17] See 5 U.S.C. §702.

[18] 5 U.S.C. §706(2)(D)(review of agency rules that are "without observance of procedure required by law").

[19] *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978).

[20] *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015).

ii) Agency reasoning; "arbitrary and capricious" review

The Court has sanctioned judicial scrutiny of the agency's reasoning and explanations for its decisions that at times can be quite searching. This comes up in challenges against agency decisions as "arbitrary and capricious."[21] The arguments in such challenges are that an agency's actions are arbitrary and capricious because, for example, they are unsupported by evidence, or the agency failed to respond to comments, or the actions are poorly reasoned.

Arbitrary and capricious review is sometimes called the "reasoned decision-making requirement," and it is the default requirement of the APA that applies across the board. Here the leading case is *State Farm*, the famous airbag case, which described the test as: requiring an agency 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."[22] The Court added: "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors that 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."[23]

State Farm is known for the rigor of its inquiry, also known as a "hard look" variety of arbitrary and capricious review. This form of scrutiny can be quite searching, as by requiring an agency to find data rather than simply say it can't confirm because the data lacking, et cetera.

Yet it is important to note that courts are often more lenient in their review. Courts often invoke language from *State Farm* and other cases emphasizing that "the scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency."[24] Under this more lenient version, courts will excuse agencies for incomplete reasoning, and are more accepting of uncertainty and the importance of giving agencies room to make policy choices.

Arbitrary and capricious review, then, covers a wide range. One factor that matters significantly in determining whether a court is more rigorous in review or weaker is the agency's credibility and care. If a court thinks an agency is cutting corners, ignoring relevant factors and evidence, poor analysis pushing an ideological agenda without regard to facts, it can get more searching. This is particularly true at a court such the D.C. Circuit, which hears a large volume of administrative law cases, and so where agencies are frequent repeat players. Another factor is politics and the extent to which judges are sympathetic to the underlying agency decision.[25]

A third factor that can affect the strength of arbitrary and capricious review is whether the agency is changing policy. This is particularly so if the agency has a history of flipping policy,

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[21] 5 U.S.C. §706(2)(A).
[22] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*,463 U.S. 29, 30 (1983)
[23] *Id. at* 43
[24] See, e.g., *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1132 (9th Cir. 2011).
[25] See, e.g., Thomas J. Miles & Cass R. Sunstein, Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron, 73 U. CHI. L. REV. 823, 870-71 (2006).

which happens with changing party control of the executive branch. The Court has been inconsistent recently in its review of agency policy changes. In a case from 2009 involving the FCC's single expletive rule, *FCC v. Fox Broadcasting*,[26] the Court argued that agencies should be free to change policy and suggested no additional scrutiny, other than the agency needs to acknowledge its changing course. Other times, as in *Encino Motorcars*[27] from last term or *Perez v. Mortage Bankers*[28] from the term before, the Court has seemed to sanction a more searching inquiry and be more suspicious of change, emphasizing reliance concerns.

As we are likely to see significant changes in policy ahead, this is an area where the courts may be receptive to challenges. Yet it is also important to bear in mind that there are benefits in agencies being able to change policy, provided they adhere to the underlying statutes and the Constitution.

iii) Agency actions that exceed statutory or regulatory authority

The APA also authorizes suit against agency actions for exceeding constitutional, statutory or regulatory authority.[29] Here, the leading doctrines are *Chevron* and *Auer* doctrine.

Chevron[30] famously sets out the framework for reviewing agency statutory interpretation pursuant to authority delegated from Congress. This doctrine takes a two step form. First, courts determine if the statute speaks to the question the agency took up, and if so whether it is ambiguous on that point. In making that determination the courts do not defer to the agency at all. If the court concludes the statute is ambiguous, however, then it should defer to a reasonable interpretation by the agency charged with implementing it. This second step is where deference enters, and overlaps extensively with arbitrary and capricious review – in fact, the Court has indicated that it's the same inquiry. Note that agencies are only entitled to deference when interpreting the statutes they administer.[31]

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[26] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-15 (2009) ("We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review…To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position").

[27] *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2120 (2016) (explaining agencies are free to change their policies but in doing so "must be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account'") (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

[28] *Mortg. Bank.*, 135 S. Ct. at 1209 (an agency's change in policy may be "arbitrary and capricious" where it "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").

[29] 5 U.S.C. §706(2)(B) ("contrary to constitutional right, power, privilege, or immunity"); 5 U.S.C. §706(2)(C)("in excess of statutory jurisdiction, authority, or limitations, or short of statutory right").

[30] *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

[31] *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990).

Auer[32] in turn mandates deference for agency interpretations of their own rules. It is akin to *Chevron* for agency regulatory interpretations, but sometimes described in even more deferential terms —"plainly erroneous or inconsistent with the regulation."[33]

In recent years, *Auer* has come in for attack by a number of conservative justices and judges as unconstitutional and at odds with the APA. We are also seeing similar complaints against *Chevron*, including a forceful attack by Neil Gorsuch prior to his confirmation. Gorsuch has described *Chevron* as "no less than a judge-made doctrine for the abdication of the judicial duty," and has said that "Chevron and Brand X permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design."[34]

This is strong stuff. My own view is that the impact of *Chevron* and other deference doctrines varies a great deal, because the *Chevron* framework actually contains within it considerable room for courts to exercise independent judgement and not defer. For example, Justice Antonin Scalia was famous for very robust inquiries at Step 1. Courts sometimes say Chevron doesn't apply, for example if displaced by a substantive federalism canon or the growing "major question" doctrine (essentially, that the court is faced with too significant a question for it to defer).

Nonetheless, judicial deference has been a focal part of conservative administrative law criticism. We may see a more formal pull back in *Auer*, and probably more of an incremental cutback on *Chevron*—and perhaps a more dramatic change if the proposed Separation of Powers Restoration Act passes.

iv) Agency failure to act

It is also worth noting that the APA expressly authorizes challenges to agency failure to act.[35] One can thus petition an agency for a rulemaking, and then challenge its failure to regulate. In practice this is often hard to do. Courts are leery about second guessing agency priority-setting, and can require lengthy evidence of delay, particularly in the absence of a statutory deadline.

v) Nonenforcement decisions and policies

Even harder to challenge are individual nonenforcement decisions, which are presumptively unreviewable.[36] Courts have been willing to allow challenges to nonenforcement policies,

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[32] *Auer v. Robbins*, 519 U.S. 452, 461 (1997) ("Because the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation'" (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).
[33] *E.g.*, *City of Idaho Falls v. F.E.R.C.*, 629 F.3d 222, 228 (D.C. Cir. 2011) (internal quotations omitted).
[34] *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring).
[35] 5 U.S.C. §706(1) ("compel agency action unlawfully withheld or unreasonably delayed").
[36] See *Heckler v. Chaney*, 470 U.S. 821, 832-33 (1985) ("[A]gency's decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2). For good reasons, such a decision has traditionally been 'committed to agency discretion,' and we believe that the Congress enacting the APA did not intend to alter that tradition").

however, as with DAPA,[37] and judicial review of underlying policy stressed in the Hawaii and Maryland immigration decisions.

vi) Presidential action and executive orders

The APA also is limited when it comes to targeting specifically presidential action. The Court has held that the APA doesn't apply to the President, and in many contexts – e.g., rulemaking – courts tend simply to ignore White House involvement. To be clear, one may challenge an executive order, as in *Youngstown Steel*,[38] but must bring suit against another executive official. Administrative law as yet lacks a good analytic basis for assessing presidential involvement and when that involvement may transgress legal bounds.

[37] See *Texas v. United States*, 809 F.3d 134, 146 (5th Cir. 2015), *as revised* (Nov. 25, 2015), *aff'd by an equally divided court*, 136 S.Ct. 2271, *reh'g denied*, 137 S. Ct. 285 (2016) ("DAPA 'provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. The action at least can be reviewed to determine whether the agency exceeded its statutory powers'" (quoting *Heckler v. Chaney*, 470 U.S. 821, 832 (1985)).

[38] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).