



Look Before You Leap!

Suing the United States: A Lawyer's Guide to Injunctive and Declaratory Relief

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The wisdom of the administrative state, which has its roots in the Progressive and New Deal Eras, is much debated today in all three branches of the federal government. Given the stakeholders who benefit from regulation and those who seek to dismantle the regulatory-agency model, there is every reason to think that suits challenging decisions of the United States, including the president and federal agencies, will increase in the coming years for two reasons. Those who benefit from regulation will resist deregulation, in part, by challenging in court an agency's justification for repeal of regulations where repeal is inconsistent with the agency's congressional mandate. Those favoring deregulation will challenge final agency decisions not only to slow or reverse the impact of regulation generally but also to advocate for overturning case law that requires the courts to defer to an agency's interpretation of statutes it implements and its accompanying regulations.

A practitioner involved in suits seeking to restrain or affect the actions of the federal government must appreciate the fact that suing the United States is not like suing a private party. A private defendant is not protected by sovereign immunity and typically is not the beneficiary of constitutional limitations or the limited jurisdiction of the federal courts. This article provides an overview of the many thorny issues that can arise in suits seeking to enjoin the actions or conduct of the sovereign and addresses not only the scope of the Administrative Procedure Act (APA) but also the implicit causes of action the Supreme Court has recognized when the government, including the Executive Office of the President of the United States, acts unconstitutionally or in excess of statutory authority.

The Administrative State Is Under Siege By All Three Branches

*The framers could hardly have envisioned today's vast and varied federal bureaucracy and the authority administrative agencies now hold over our economic, social, and political activities.*¹ —Chief Justice John Roberts

There are more than 400 independent regulatory agencies and federal agencies administering congressional programs within the executive branch.² There are approximately 180,000 pages of regulations in more than 200 volumes in the Code of Federal Regulations.³ Collectively, these agencies comprise what Chief Justice John Roberts, as well as Justices Clarence Thomas and Neil Gorsuch, call the "admin-

istrative state.”⁴ Although housed within the executive branch—sometimes loosely—these agencies exercise legislative power because they promulgate regulations with the force of law, judicial power because they adjudicate enforcement actions and impose sanctions, and executive power because they initiate the enforcement actions they adjudicate. This is an extraordinary amount of concentrated power.

The administrative state with its reams of regulations would leave ... [the framers] rubbing their eyes.⁵ —Associate Justice David Souter

The weakening of the separation-of-powers doctrine was rationalized by a belief that the judiciary would act as a brake on the misuse of concentrated power. That premise is debatable because, although the APA permits those adversely affected by final agency actions to challenge those decisions in court,⁶ the standard of review on factual findings of an agency is highly deferential under the arbitrary-or-capricious standard of review in the act. At the same time, under the *Chevron* doctrine,⁷ the courts defer to the interpretation of an ambiguous statute administered by an agency so long as it is a “permissible” interpretation, even if the court disagrees with it. “*Chevron* is a powerful weapon in the arsenal of agencies,” Chief Justice Roberts wrote.⁸ Under *Seminole Rock*, the courts give the same type of deference to an agency’s interpretation of its own regulations.⁹ And, in *National Cable & Telecommunications Association v. Brand X Internet Services*,¹⁰ the Supreme Court concluded that an agency’s interpretation of an ambiguous statute prevails over a prior interpretation of a court, including the Supreme Court.

The accumulation of all power, legislative, executive, and judiciary, in the same hands, ... may justly be pronounced the very definition of tyranny.—James Madison¹¹

Judicial Branch

Newly confirmed Justice Gorsuch has advocated that *Chevron* be overruled, writing, “The fact is 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. In enlightened theory and hard-won experience under a tyrannical king, the founders found proof of the wisdom of a government of separated powers.”¹² Chief Justice Roberts and Justices Kennedy, Thomas, and Alito are sympathetic to this view.¹³ On the other hand, Justice Scalia, whose seat Justice Gorsuch filled, was a strong advocate of judicial deference to the interpretation of ambiguous statutes by the agencies charged with implementation. Justice Scalia sought to limit the discretion of unelected and politically unaccountable judges.¹⁴ He also believed that there was no separation-of-powers problem because *Chevron* deference is built on the presumption that “when [Congress] left ambiguity in a statute meant for implementation by an agency, [it] understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.”¹⁵ Nothing prevents Congress from displacing that presumption.

Executive Branch

President Trump has vowed to roll back the regulatory state. The administration’s Executive Order 13771, “Reducing Regulation and

Controlling Regulatory Costs,” requires that for every new regulation, two regulations be repealed. The Trump administration promised to repeal and replace the Affordable Care Act and the Dodd-Frank Wall Street Reform and Consumer Protection Act and its congressionally mandated regulations, such as the Volcker Rule. These initiatives are sure to increase the number of APA suits filed in the coming years, if for no other reason, when an agency repeals a regulation, it must follow the same notice and comment procedures required under the APA to promulgate it. An agency must be able to justify the change in position consistent with the underlying statute.¹⁶ For example, in February 2017, Public Citizen, Natural Resources Defense Council, and the Communications Workers of America sued challenging the two-for-one executive order on its face, alleging that the order “exceeds President Trump’s constitutional authority, violates his duty under the Take Care Clause of the Constitution, and directs federal agencies to engage in unlawful actions that will harm countless Americans, including plaintiffs’ members.”¹⁷ In May 2017, West Virginia, joined by 12 other states, filed an amicus supporting the executive order, arguing that “over the past several years the administrative state has accelerated further the long-term growth of new regulatory burdens” and that the order is based upon “a reasonable, easy-to-administer principle.”¹⁸ The case is in its infancy. Plaintiffs filed an amended complaint in April 2017, and a motion for summary judgment on May 15, 2017.¹⁹

Legislative Branch

Not to be outdone, in the early days of the Trump administration Congress used the Congressional Review Act to repeal a baker’s dozen of regulations approved in the final six months of President Obama’s second term.²⁰ Regulations from the Executive in Need of Scrutiny Act (REINS Act) passed in the House of Representatives in January 2017, and in March 2017, the Senate Committee on Small Business and Entrepreneurship held hearings on the bill. The REINS Act would cause major changes to the regulatory process, including the imposition of a regulatory “cut-go” requirement, which would require an agency to identify a rule or rules that may be amended or repealed to completely offset any annual costs of a new rule to the United States economy.²¹ The repeal would need to take effect before the new rule becomes law.

The Regulatory Accountability Act of 2017 is an omnibus bill that would impose significant regulatory changes. Title I would add at least 50 steps to the regulatory process, including additional procedures and analysis related to any “major rule” or “high-impact rule.”²² It would also include a default provision requiring that any new regulation is the “least costly” to regulated entities. Title II, titled “Separation of Powers Restoration Act” would abolish *Chevron* deference, and Title IV, titled the “All Economic Regulations Are Transparent Act (ALERT),” would add reporting requirements for existing regulations.

The Administrative Procedure Act

A suit under the APA may be brought only in a federal court because § 702 states, in part, that the entitlement to judicial review is limited to “an action in a court of the United States.”²³ The “normal default rule [in an APA suit] is that ‘persons seeking review of agency action go first to district court rather than to a court of appeals.’”²⁴

To maintain a suit against the United States or its federal agencies in federal court, there are four essential ingredients. A plaintiff must establish that (1) the court in which the suit is filed has subject matter jurisdiction, (2) the government’s sovereign immunity from

suit has been waived, (3) the plaintiff has standing (both Article III and prudential), and (4) the suit is based upon a federal cause of action (express or implied). The APA provides the second, third, and part of the fourth ingredient, but not the first. Jurisdiction, the first ingredient, is provided in 28 U.S.C. § 1331, which grants federal district courts “original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”²⁵

The APA Provides a General Waiver of Sovereign Immunity and Presumptive Prudential Standing for Suits in the Federal Courts

A General Waiver of Sovereign Immunity for Suits in the Federal Courts

Section 702 of the APA waives the government’s sovereign immunity for suits seeking equitable relief, stating in pertinent part:

An action in a court of the United States seeking relief *other than for money damages* and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.²⁶

Because § 702’s waiver of sovereign immunity is not restricted to suits under the APA, it effects a *general waiver* of the government’s sovereign immunity regardless of the cause of action. In *Clark v. Library of Congress*, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) held that although the Library of Congress, as an arm of Congress, was not a “federal agency” for purposes of a suit under the APA, the APA nevertheless waived the Library of Congress’ sovereign immunity thereby subjecting it to suit based upon an alleged violation of the First Amendment: “With respect to claims for nonmonetary relief, the 1976 amendments to §702 of the [APA] eliminated the sovereign immunity defense in virtually all actions for nonmonetary relief against a U.S. agency or officer acting in an official capacity.”²⁷

Prudential Standing: ‘Adversely Affected or Aggrieved Party’

To maintain suit under the APA, a plaintiff must establish that it possesses both prudential and Article III standing.²⁸ To establish Article III standing a plaintiff must demonstrate: (1) injury in fact, (2) a causal connection between the injury and the conduct complained of, and (3) a showing that the injury can be redressed by a favorable decision.²⁹ In *Federal Election Commission v. Akins*, the Supreme Court concluded that Congress in the APA waived all prudential limitations on standing except for “the zone of interest” test. Under this test, a court examines: (1) what interests the statute was intended to protect, and (2) whether the “plaintiff’s interests affected by the agency action in question are among them.”³⁰ A plaintiff is not required to establish that Congress specifically intended to benefit the plaintiff.³¹ For example, in *Bangura v. Hansen*, the Sixth Circuit found that “because the interest both plaintiffs seek to protect—the preservation of their family unit—is the primary interest the [Immigration and Nationality Act’s] immediate relative visa provisions were designed to protect, both plaintiffs fall within the 8 U.S.C. §1151(a)’s and 1154(a)’s zone of interest” for APA prudential standing purposes. The court came to this conclusion even though it later held that Isatu Bangura’s current husband did not have Article III standing.³²

The APA Provides a Generic Cause of Action in Federal Courts Where There is No Other Adequate Remedy

Generic Cause of Action for Challenging ‘Final Agency Action’ in Federal Court

“The Supreme Court has clearly indicated that the [APA] itself, although it does not create subject matter jurisdiction, does supply a *generic cause of action* in favor of persons aggrieved by agency action.”³³ The APA has been identified “as a route through which private plaintiffs can obtain federal court review” where they otherwise lack a private right of action.³⁴ Section 704 states, however, that when review is sought under the general review provisions of the APA, the “agency action” in question must be “final agency action.” According to § 704, “[a]gency action made reviewable by statute and *final agency action* for which there is no other adequate remedy in a court are subject to judicial review.”³⁵ Two conditions must be satisfied for agency action to be final: (1) the action must mark the consummation of the agency’s decision-making process, and (2) the action must be one by which rights or obligations have been determined or from which legal consequences will flow.³⁶ A court must “also consider whether ‘the process of administrative decision-making has reached a stage where judicial review will not disrupt the orderly process of adjudication.’”³⁷

‘No Other Adequate Remedy’

Because § 704 provides a remedy only where “there is no other adequate remedy,” APA review is unavailable where Congress has provided a “special and adequate review procedure” in another statute.³⁸ “Congress did not intend to permit a litigant challenging an administrative denial . . . to utilize simultaneously both [the express review provision] and the APA.”³⁹ In deciding whether an alternative remedy is “adequate,” “the court must provide the APA “a hospitable interpretation” such that ‘only upon a showing of *clear and convincing* evidence of a contrary legislative intent should the courts restrict access to judicial review.”⁴⁰ A remedy is not “adequate” where it offers only “doubtful and limited relief.”⁴¹ “Congress’ lack of intent to provide a remedy, coupled with the uncertainty of the availability of a remedy in the statute, leads us to conclude that APA review is not precluded.”⁴²

Standards of Review Under §§ 706(2)(A), (B), and (C)⁴³

The Abuse of Discretion Standard

A suit under the APA is a summary proceeding in which the court reviews the administrative record containing all information considered by the federal agency’s decision-maker in arriving at the agency’s final agency action.⁴⁴ Because judicial review under the APA is a summary proceeding, many of the Federal Rules of Civil Procedure do not apply.⁴⁵ There is no discovery because the review is limited to the administrative record and there are no motions for summary judgment because there is no need to determine if there are genuine disputes as to material facts for trial.⁴⁶

After reviewing the administrative record and with the benefit of briefing and argument by the parties, the court is required to uphold an agency’s final decision unless it concludes under § 706(2)(A) that the decision is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Under this standard of review, the court “considers ‘whether the agency has considered all relevant factors and articulated a rational connection between the factors considered and the choice made.’”⁴⁷ Agency action is arbitrary and capricious where:

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 of view or the product of agency expertise.⁴⁸

“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. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”⁴⁹

‘Otherwise Not in Accordance With Law’

An agency’s “legal determinations are reviewed de novo, although substantial deference is given to an agency’s interpretation of [ambiguous] ... statutes and regulations it administers.”⁵⁰ Where Congress empowers an agency to interpret a statute, the courts review an agency’s interpretation of an ambiguous statute under the familiar *Chevron* two-step test.⁵¹ In step one, a court determines whether Congress has directly spoken to the legal question at issue, applying “the traditional tools of statutory interpretation.”⁵² Where the statute is unambiguous, that is the end of the analysis and a court gives effect to congressional intent. However, where the statute is silent or ambiguous, a court goes to the second step of the *Chevron* framework and asks whether the agency’s interpretation is “based on a permissible construction of the statute.”⁵³ Whether the agency’s interpretation is a permissible construction is determined “by reference both to the agency’s textual analysis (broadly defined, including where appropriate resort to legislative history) and to the compatibility of that interpretation with the congressional purposes informing the measure.”⁵⁴ Where the agency provides a “reasonable explanation of how ... [its] interpretation serves the statute’s objectives,”⁵⁵ its interpretation is permissible and the courts defer.⁵⁶

The analysis of the meaning of a statute enforced by a federal agency closely resembles the typical “arbitrary and capricious” deference to an agency’s policy decisions, but is not identical:

Although *Chevron*’s second step largely “overlaps” with arbitrary-and-capricious review under the APA, *Nat’l Ass’n of Reg. Util. Comm’rs v. ICC*, 41 F.3d 721, 726 (D.C. Cir. 1994), the overlap is not complete. We primarily assess the agency’s statutory interpretation to determine whether it is a “permissible” and “reasonable” view of the Congress’ intent. *Chevron*, 467 U.S. at 843-44; see also *Nat’l Ass’n of Reg. Util. Comm’rs*, 41 F.3d at 727 (“although *Chevron*’s second step sounds closely akin to plain vanilla arbitrary-and-capricious style review, interpreting a statute is quite a different enterprise than policy-making” (quotation marks and ellipsis omitted)).⁵⁷

Whether any part of an agency’s final decision is judged under the highly deferential arbitrary-and-capricious standard or the *Chevron* two-step test under the “not in accordance with law” standard may depend upon the level of generality in the statute in question:

When Congress’ instructions are conveyed at a high level of

generality, an agency is not likely to consider its action as an “interpretation” of the authorizing statute, nor is that action likely to be challenged as a “misinterpretation.” (Yet even then, the agency would be expected to assert that a particular decision was shaped by the general policy concerns that animated the legislation.) When, on the other hand, the statute is quite specific, agency action normally is evaluated in terms of how faithfully it follows the more detailed direction; in such cases the question is more obviously whether the agency permissibly interpreted the statute. In any event, the more an agency purports to rely on Congress’ policy choice—as set forth in specific legislation—than on the agency’s generally conferred discretion, the more the question before the court is logically treated as an issue of statutory interpretation, to be judged by *Chevron* standards.⁵⁸

There are circumstances where the Supreme Court will not apply *Chevron*. In *King v. Burwell*,⁵⁹ the Supreme Court addressed whether the Affordable Care Act authorizes tax credits for individuals who enroll in an insurance plan through a federal exchange. The Court noted that the issue involved “billions of dollars in spending each year and affect[s] the price of health insurance for millions of people.”⁶⁰ The Court then concluded that *Chevron* does not apply to questions of “deep economic and political significance,” sometimes referred to as the “major rules doctrine.”⁶¹ The D.C. Circuit, however, recently ignored this exception in *U.S. Telecom Association v. FCC* addressing the FCC’s net neutrality rule that imposed common-carrier status on internet service providers.⁶² In dissenting to the full court’s per curiam decision on petitions for rehearing en banc, Judge Brett Kavanaugh characterized the rule as “one of the most consequential regulations ever issued by any executive or independent agency in the history of the United States.”⁶³ Specifically, expressing the opinion that under the “major rules doctrine,” the regulation was unlawful because it was promulgated without clear congressional authorization.⁶⁴ He found that there was nothing in the 1934 Communications Act, as amended, that “suppl[ies] clear congressional authorization for the FCC to impose common-carrier regulation on internet service providers.”⁶⁵

‘Contrary to Constitutional Right, Power, Privilege, or Immunity’

Challenges that a federal agency acted “contrary to constitutional right, power, privilege, or immunity” are considered by the courts de novo.⁶⁶ The D.C. Circuit has “note[d] that, in contrast with other aspects of [the challenge], which we review deferentially, ... ‘a reviewing court owes no deference to the agency’s pronouncement on a constitutional question.’”⁶⁷ Constitutional questions that arise during APA review, therefore, fall expressly within the domain of the courts,⁶⁸ and where an agency’s proffered interpretation raises serious constitutional concerns” courts “may refuse to defer under *Chevron*.”⁶⁹

‘In Excess of Statutory Jurisdiction, Authority, or Limitations, Short of Statutory Right’

Claims that an agency in rendering a final agency action has acted “in excess of statutory jurisdiction,” unlike constitutional claims, are reviewed de novo applying the *Chevron* two-step analysis in the same way claims that an agency acted “not in accordance with law” are reviewed. As the Ninth Circuit stated in *Northwest Environmen-*

tal Advocates v. EPA, “we must ‘set aside agency action’ that is ‘in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.’ This standard requires the application of *Chevron*.”⁷⁰ There, environmental advocates challenged an EPA regulation that exempted certain marine discharges from permitting requirements in the Clean Water Act. Applying *Chevron*, the court found that the statute unambiguously prohibited any discharge of pollutant from a point source without a permit and, therefore, the regulation was invalid as *ultra vires*.⁷¹

Only Equitable Relief is Available Under the APA

The APA waives sovereign immunity for equitable relief only.⁷² Section 702 provides that where there is no adequate remedy a person may pursue “any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction.”⁷³ Nothing, however, precludes a court from awarding equitable relief that results in the payment of money. In *Bowen v. Massachusetts*, Massachusetts brought an action seeking review of a decision of the Department of Health & Human Services that denied the state reimbursement under Medicaid for certain expenses related to people residing in state-owned facilities. The Supreme Court held that (1) the federal district court, not the U.S. Court of Federal Claims, had jurisdiction to review the disallowance decision; and (2) the district court had the power to grant complete equitable relief, even though the result of injunctive relief involved monetary reimbursement.⁷⁴

Limitations on the Review of Final Agency Action

The APA Does Not Apply to Presidential Actions

The APA does not address, in one way or the other, whether the final decisions of the president are subject to APA review. The act defines “agency,” among other things, as “each authority of the government of the United States, whether or not it is within or subject to review by another agency, but does not include—(A) the Congress; (B) the courts of the United States.”⁷⁵ The president is not mentioned in the exclusions. Nevertheless, in *Franklin v. Massachusetts*, the Supreme Court concluded that the president is not an “agency” for purposes of the APA:

Out of respect for the separation of powers and the unique constitutional position of the president, we find that textual silence is not enough to subject the president to the provisions of the APA. We would require an express statement by Congress before assuming it intended the president’s performance of his statutory duties to be reviewed for abuse of discretion.⁷⁶

The Court held that an APA action relating to the Secretary of Commerce’s transmission of a report on the census for the president’s review and approval must be dismissed because the act of transmission was not “final agency action” within the meaning of the APA and the president’s decision to approve and send it on to Congress was unreviewable.

Just recently, part of the complaint filed by Muslim residents of the United States challenging President Trump’s Executive Order 13780 (EO-2) restricting refugee admissions and entry of aliens from Iran, Libya, Somalia, Sudan, Syria, and Yemen was dismissed because the APA does not apply to the issuance of an executive order. Plaintiffs argued that all or parts of the order exceed the President’s

statutory or constitutional authority and, in any event, as a whole, it creates an unconstitutional stigma on people from these countries based on their status as Muslims.⁷⁷ The district court noted that EO-2 was significantly different than the first executive order on the same subject, because it:

... removes Iraq from the list of designated countries whose nationals are covered by the [first] order [EO-1], eliminates the indefinite suspension of all refugees from Syria, exempts otherwise covered persons who are located in the United States or who had appropriate travel documents as of the date on which EO-1 was issued, provides a list of categories where otherwise covered persons qualify for consideration of a waiver, and removes any religious-based preferences for waivers. The order also contains substantially more justification for its national security concerns and the need for the order, including why each particular designated country poses specific dangers.⁷⁸

Addressing a third count that alleged EO-2 constitutes unlawful agency action under the APA, the court held that the plaintiffs failed to establish a likelihood of success on the merits because the definition of “agency” in the APA is not broad enough to include the Office of the President.⁷⁹

The APA Does Not Apply Where ‘Statutes Preclude Judicial Review’

Section 701(a) provides that the APA does not apply “to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law,” and, accordingly, before the waiver of sovereign immunity in § 702 applies, a party must demonstrate that the agency action is not exempt under § 701(a).⁸⁰

The issue can be straightforward where a statute expressly precludes judicial review under the APA. For example, § 410(a) of Title 39 precludes review by exempting the U.S. Postal Service from judicial review under the APA: “No federal law dealing with public or federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of Chapters 5 and 7 of Title 5 [the APA], shall apply to the exercise of the powers of the Postal Service.” Similarly, provisions of the Export Administration Act provide that “functions exercised under this act are excluded from the operation of” specific sections of the APA, including the right to judicial review for people “adversely affected or aggrieved by agency action” and “final agency action for which there is no other adequate remedy in a court.”⁸¹

In other situations, the courts have concluded that APA review is precluded under § 701(a)(1) by implied preclusion.⁸² In *High Country Citizens Alliance v. Clarke*, the Tenth Circuit concluded that the presumption of reviewability is not sacrosanct and can be overcome.⁸³ “To overcome the presumption of reviewability, and intent to preclude judicial review must be ‘fairly discernable from the statutory scheme.’”⁸⁴ The Tenth Circuit noted that the Supreme Court laid out:

... specific factors for courts to consider in analyzing whether, absent explicit language or explicit legislative history, the presumption of reviewability has been overcome: “The congressional intent necessary to overcome the presumption [of reviewability] may [] be inferred from contemporaneous

judicial construction barring review and congressional acquiescence in it ...or from the collective import of legislative and judicial history behind a particular statute ... [or] by inferences of intent drawn from the statutory scheme as a whole.” *Block*, 467 U.S. at 349.⁸⁵

The court of appeals affirmed the district court’s holding that plaintiffs, who claimed no ownership interest in land subject to a mineral patent, were not permitted to challenge that patent, applying § 701(a)(1). The court observed that, despite many revisions to the 1872 Mining Law, Congress had not chosen to provide a right of action to people who lack a property interest in the land subject to a patent.⁸⁶ The court noted that, although “congressional silence alone is not enough to prove acquiescence..., silence as to one area [of a statute] ... coupled with a myriad of revisions within the same statutory scheme begins to look like acquiescence.”⁸⁷

The APA Does Not Apply Where There Are ‘Other Limitations’

In addition to § 701(a)(1), § 702 may preclude review under the APA. Section 702 provides, in part: “Nothing herein affects *other limitations* on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground.”⁸⁸ In addressing § 702 in *Saavedra Bruno v. Albright*, the D.C. Circuit noted that:

The House Report accompanying this amendment described these “other limitations” as including “express and implied preclusion of judicial review.” The Administrative Conference of the United States, which had proposed the specific language enacted as § 702, explained that the courts would still refuse “to decide issues about foreign affairs, military policy and other subjects inappropriate for judicial action.” On the same subject, the Administrative Conference pointed out that “much of the law of unreviewability consists of marking out areas in which legislative action or traditional practice indicate that courts are unqualified or that issues are inappropriate for judicial determination.”⁸⁹

The court then held § 702 precludes review of visa decisions. “In view of the political nature of visa determinations and the lack of any statute expressly authorizing judicial review of consular officers’ actions, courts have applied what has become known as the doctrine of consular nonreviewability.”⁹⁰ This doctrine is one of the “limitations on judicial review” unaffected by § 702’s grant of the right of review to people suffering “legal wrong” from agency action.⁹¹ Alternatively, the court concluded that “from the principles just discussed we may infer that, in the words of APA § 701(a)(1), the immigration laws ‘preclude judicial review’ of the consular visa decisions.”⁹²

The APA Does Not Apply Where ‘Agency Action is Committed to Agency Discretion by Law’

The legislative history of the APA illustrates that “committed to agency discretion by law” in § 701(a)(2) was intended to be a narrow exception. It applies “in those rare instances where ‘statutes are drawn in such broad terms that in a given case there is no law to apply.’”⁹³ For example, an agency decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2)(A). “For good reasons, such a decision has traditionally been ‘committed to agency discretion,’ and we believe Congress

enacting the APA did not intend to alter that tradition.”⁹⁴ The Court observed that:

This construction of the APA avoids conflict with the “abuse of discretion” standard of review in § 706—if no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for “abuse of discretion.”⁹⁵

The Court was careful to note, however, that in doing so:

We emphasize that the decision is only presumptively unreviewable; the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers. Thus, in establishing this presumption in the APA, Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers.⁹⁶

Availability of Injunctive or Declaratory Relief Outside of the APA

The APA provides a general waiver of sovereign immunity for equitable actions filed outside the APA, *i.e.*, suits where the APA’s generic cause of action is inapplicable. Despite the lack of a specific statutory cause of action or the applicability of the APA’s generic cause of action, the Supreme Court has recognized two implicit causes of action, where (1) the president or a federal agency acts unconstitutionally or (2) government conduct exceeds statutory authority. In such cases, federal subject matter jurisdiction is provided by 28 U.S.C. § 1331’s grant of jurisdiction to federal district courts over all cases “arising under” the Constitution, treaties, or federal statutes.

Unconstitutional Actions of the United States, Including the President, Can Be Enjoined Outside of the APA

Although the Court in *Franklin v. Massachusetts* held that presidential actions are not reviewable under the APA, it was careful to note that “the president’s actions may still be reviewed for constitutionality” outside of the APA.⁹⁷ Indeed, citing *Marbury v. Madison*, the D.C. Circuit concluded that “the judicial branch’s power to enjoin unconstitutional acts by the government is inherent in the Constitution itself.”⁹⁸ In *Bell v. Hood*, the Supreme Court held that the “jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution” is found in 28 U.S.C. § 1331 (district courts have jurisdiction over all cases “arising under” federal law).⁹⁹ In *Simmat v. U.S. Bureau of Prisons*, the Tenth Circuit stated that where the government violates constitutional rights, “equity ... provides the basis for relief—the cause of action, so to speak—in appropriate cases within the court’s jurisdiction.”¹⁰⁰ Even though the APA does not apply to presidential actions, therefore, the unconstitutional actions of a president may be enjoined.

The Ninth Circuit recently addressed this issue in *Washington v. Trump*. There, the court denied the government’s motion for a stay pending its appeal of an order of the U.S. District Court for the Western District of Washington that restrained the execution of the president’s initial executive order on immigration.¹⁰¹ The Ninth Circuit noted that the government did “not merely argue that courts owe substantial deference to the immigration and national security policy determinations of the political branches—an uncontroversial principle well-grounded in our jurisprudence.”¹⁰² Instead, the

government argued that the district court lacked authority to enjoin enforcement of the executive order “because the president has ‘unreviewable authority to suspend the admission of any class of aliens.’”¹⁰³ In the government’s view, because the executive order was motivated by national security concerns, it was “unreviewable, even if those actions potentially contravene constitutional rights and protections.”¹⁰⁴ The government asserted that it violates separation of powers for the judiciary to entertain a constitutional challenge to executive actions such as this.¹⁰⁵

The court of appeals rejected this argument, stating that “neither the Supreme Court nor our court has ever held that courts lack authority to review executive action in those arenas for compliance with the Constitution.”¹⁰⁶ Specifically, the court noted that courts “can and do review constitutional challenges to the substance and implementation of immigration policy” even where “the challenged immigration action implicates national security concerns.”¹⁰⁷

The *Ultra Vires* Actions of a Federal Agency, Even at the Behest of a President, May Be Enjoined

Even where an agency’s enabling statute provides that judicial review of final agency decision is precluded or a federal agency acts at the direction of the president, a plaintiff may maintain a non-statutory review action when the agency acts outside its statutory authority. In *Aid Association for Lutherans*,¹⁰⁸ the D.C. Circuit rejected the Postal Service’s argument that a suit claiming it acted beyond its statutory authority was barred because 39 U.S.C. § 410(a) exempts the Postal Service from judicial review under the APA. The court stated that it was irrelevant “whether traditional APA review is foreclosed, because ‘judicial review is favored when an agency is charged with acting beyond its authority.’”¹⁰⁹

Even where a federal agency acts *ultra vires* at the direction of the president, the federal courts have jurisdiction to enjoin such conduct. In *Chamber of Commerce of U.S. v. Reich*, the D.C. Circuit stated:

That the “executive’s” action here is essentially that of the president does not insulate the entire executive branch from judicial review.... Even if the secretary were acting at the behest of the president, this “does not leave the courts without power to review the legality [of the action], for courts have power to compel subordinate executive officials to disobey illegal presidential commands.”¹¹⁰

The court of appeals cautioned, however, that “non-statutory” review is available only in rare circumstances: “There is certainly no question that non-statutory review ‘is intended to be of extremely limited scope,’ and hence represents a more difficult course for ... [plaintiff] than would review under the APA (assuming final agency action) for acts ‘in excess of statutory ... authority.’”¹¹¹

Conclusion

The fact that the “administrative state” is being reconsidered by all three branches of government foreshadows an active period for suits challenging the actions and conduct of the federal government. Advocates for deregulation will be energized to initiate litigation aimed at pushing the anti-regulation agenda. Advocates for the status quo are likely to push equally hard in the opposite direction, including challenging the repeal or weakening of regulations mandated by acts of Congress. Both government and private attorneys involved in

these cases will need to be well versed in the law governing equitable actions against the United States or federal agencies. ☉



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Endnotes

¹*City of Arlington, Tex. v. F.C.C.*, ___ U.S. ___, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting, joined by Kennedy, J., and Alito, J.).

²Clyde Wayne Crews, *Nobody Knows How Many Federal Agencies Exist*, COMPETITIVE ENTER. INST. (Aug. 26, 2015), <https://cei.org/blog/nobody-knows-how-many-federal-agencies-exist>.

³See *Code of Federal Regulations: Actual Page Breakdown 1975-2016*, GEORGE WASHINGTON UNIV., available at [https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/TotalPagesCodeFederalReg%20\(1\).xlsx](https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/TotalPagesCodeFederalReg%20(1).xlsx) (last visited Sept. 30, 2017); and Code of Federal Regulations (CFR), U.S. GOV'T BOOKSTORE, <https://bookstore.gpo.gov/CFR> (last visited Sept. 30, 2017).

⁴*City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. at 1878 (Roberts, C.J., dissenting, joined by Kennedy, J., and Alito, J.); *Michigan v. E.P.A.*, ___ U.S. ___, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (stating that *Chevron* raises serious separation-of-powers concerns); *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1213-14 (2015) (Thomas, J., concurring in the judgment) (questioning the constitutionality of *Seminole Rock* deference to agency's interpretation of its regulations on separation-of-powers grounds).

⁵*Alden v. Maine*, 527 U.S. 706, 807 (1999) (Souter, J., dissenting).

⁶5 U.S.C. §§ 701, *et seq.* (the Administrative Procedure Act).

⁷*Chevron U.S.A. Inc. v. Natural Res. Def. Council Inc.*, 467 U.S. 837, 842-843 (1984).

⁸*City of Arlington*, 133 S. Ct. at 1879 (Roberts, C.J., dissenting).

⁹*Auer v. Robbins*, 519 U.S. 452, 461 (1997).

¹⁰545 U.S. 967, 984-85 (2005).

¹¹THE FEDERALIST No. 47 (James Madison).

¹²*Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, C.J., concurring).

¹³See *City of Arlington*, 133 S.Ct. at 1878 (Roberts, C.J., dissenting, joined by Kennedy, J., and Alito, J.).

¹⁴*United States v. Mead Corp.*, 533 U.S. 218, 239, 241 (2001) (Scalia, J., dissenting) (stating that “[w]hen, *Chevron* said, Congress leaves an ambiguity in a statute that is to be administered by an executive agency, it is presumed that Congress meant to give the agency discretion, within the limits of reasonable interpretation, as to how the ambiguity is to be resolved” and “[b]y committing enforcement of the statute to an agency rather than the courts, Congress committed its initial and primary interpretation to that branch as well”).

¹⁵*Id.* at 240 (Scalia, J., dissenting) (quoting *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1996)).

¹⁶*Motor Vehicle Mfrs. Ass'n of U.S. Inc. v. State Farm Mut. Auto.*

Ins. Co., 463 U.S. 29, 44 (1983) (stating that “the arbitrary-and-capricious test applied to rescissions of prior agency regulations”).

¹⁷*Public Citizen Inc., et al. v. Trump, et al.*, No. 1:17-cv-00253, at 1 (D.D.C. Feb. 8, 2017).

¹⁸Docket No. 19.

¹⁹Docket Nos. 14 & 16, respectively.

²⁰*Congressional Review Act Tracker 2017*, GEO. WASH. UNIV. REGULATORY STUDIES CTR. (May 10, 2017), <https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/CRA%20Tracker%2005-10-2017.pdf>.

²¹H.R. 427, 114th Cong. (2015-2016), available at <https://www.congress.gov/bill/114th-congress/house-bill/427>.

²²H.R. 5, 115th Cong. (2017-2018), available at <https://www.congress.gov/bill/115th-congress/house-bill/5>.

²³*See Aminoil, U.S.A. Inc. v. Cal. State Water Res. Cont. Bd.*, 674 F.2d 1227, 1233 (9th Cir. 1982) (concluding that state courts do not have jurisdiction over a suit under the APA (quoting H.R. Rep. No. 94-1656, 94th Cong., 2d Sess. 11 (1976) (reprinted in (1976) U.S.C. Code Cong. & Admin. News, 6121, 6131 (providing that “[t]he consent to suit [under the APA] is also limited to claims in the courts of the United States; hence, the United States remains immune from suit in state courts”)).

²⁴*Watts v. SEC*, 482 F.3d 501, 505 (D.C. Cir. 2007) (quoting *Int’l Bhd. of Teamsters v. Pena*, 17 F.3d 1478, 1481 (D.C. Cir. 1994)).

²⁵*See Trudeau v. FTC*, 456 F.3d 178, 185 (D.C. Cir. 2006).

²⁶5 U.S.C. § 702 (emphasis added).

²⁷*Clark v. Library of Congress*, 750 F.2d 89, 102 (D.C. Cir. 1984) (internal citations omitted).

²⁸*See Bangura v. Hansen*, 434 F.3d 487, 500 (6th Cir. 2006) (discussing prudential and Article III standing in the context of an APA suit); *Grocery Mfgs. Ass’n v. EPA*, 693 F.3d 169, 181 (D.C. Cir. 2012) (recognizing a plaintiff’s obligation to establish both prudential and Article III standing in an APA suit).

²⁹*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 650-61 (1992).

³⁰*Nat’l Credit Union Admin. v. First Nat’l Bank & Trust Co.*, 522 U.S. 479, 492 (1998).

³¹*Clarke v. Securities Indus. Ass’n*, 479 U.S. 388, 399-400 (1987).

³²*Bangura v. Hansen*, 434 F.3d at 500.

³³*Md. Dep’t of Human Res. v. Dep’t of Health & Hum. Servs.*, 763 F.2d 1441, 1445 n.1 (D.C. Cir. 1985) (emphasis added); *see also Trudeau v. FTC*, 456 F.3d at 188.

³⁴*Vieux Carre Prop. Owners, Residents & Assocs. Inc. v. Brown*, 875 F.2d 453, 456 (5th Cir. 1989).

³⁵5 U.S.C. § 704 (emphasis added).

³⁶*See Bennett v. Spear*, 520 U.S. 154, 178 (1997).

³⁷*Jicarilla Apache Nation v. U.S. Dep’t of Interior*, 648 F. Supp. 2d 140, 145 (D.D.C. 2009) (quoting *Port of Boston Marine Terminal Ass’n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

³⁸*Bowen v. Massachusetts*, 487 U.S. 879, 904 (1988).

³⁹*El Rio Santa Cruz Neighborhood Health Ctr. v. U.S. Dep’t of Health & Hum. Servs.*, 396 F.3d 1265, 1270, 1272 (D.C. Cir. 2005) (quoting *Envtl. Defense Fund v. Reilly*, 909 F.2d 1497, 1501 (D.C. Cir. 1990)) (omission and alteration in original).

⁴⁰*Garcia v. Vilsack*, 563 F.3d 519, 523 (D.C. Cir. 2009) (emphasis added) (quoting *El Rio Santa Cruz Neighborhood Health Ctr. v. U.S. Dep’t of Health & Hum. Servs.*, 396 F.3d 1265, 1270 (D.C. Cir. 2005) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967)).

⁴¹*Bowen*, 487 U.S. at 901.

⁴²*El Rio Santa Cruz Neighborhood Health Ctr. Inc. v. U.S. Dep’t of Health & Hum. Servs.*, 396 F.3d 1255, 1272 (D.C. Cir. 2005) Section 706(2)(E)-(F), addressing procedural requirements in promulgating a regulation with the force and effect of law, such as notice and comment, and the “substantial evidence” standard for reviewing formal administrative actions are outside the scope of this article.

⁴⁴*NVE Inc. v. Dep’t of Health & Hum. Servs.*, 436 F.3d 182, 194 (3d Cir. 2006) (stating that “[b]ecause we conclude that the de novo standard does not apply in suits brought under the APA, we ... hold that the District Court’s review must be limited to the administrative record before the FDA”).

⁴⁵*Camp v. Pitts*, 411 U.S. 138, 140-141 (1973) (concluding that “[w]e agree with the Comptroller that the trial procedures thus outlined by the Court of Appeals for the remand in this case are unwarranted under present law”).

⁴⁶*Oregon Nat. Desert Ass’n v. U.S. Forest Serv.*, No. 04-3096, 2007 WL 1072112, at *3 (D. Oregon April 3, 2007) (quoting *Maine v. Norton*, 257 F. Supp. 2d 357, 363 (D. Me. 2003)). The rules relating to motions for summary judgment are inconsistent with the APA’s standard of review because summary judgment procedures are designed to determine whether there is a genuine issue for trial, while in an APA review there will never be a trial. *Klamath Siskiyou Wildlands Ctr. v. Gerritsma*, 962 F. Supp. 2d 1230, 1233 (D. Oregon 2013); *see also Fulbright v. McHugh*, 67 F. Supp. 3d 81 (D.D.C. 2014) (stating that “[i]n a motion for summary judgment under the APA, ‘the standard set forth in Rule 56(a) does not apply because of the court’s limited role in reviewing the administrative record.’”) (quoting *Coe v. McHugh*, 968 F. Supp. 2d 237, 239 (D.D.C. 2014) (citations omitted)).

⁴⁷*Oceana Inc. v. Locke*, 674 F. Supp. 2d 39, 44 (D.D.C. 2009) (quoting *Jifry v. FAA*, 370 F.3d 1174, 1180 (D.C. Cir. 2004)).

⁴⁸*Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁴⁹*Id.* (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

⁵⁰*EEX Corp. v. U.S. Dep’t of Interior*, 111 F. Supp. 2d 24, 30 (D.D.C. 2000) (internal quotation mark omitted).

⁵¹*Chevron*, 467 U.S. at 842-843. The same deferential approach applies to an agency’s interpretation of an ambiguous regulation. *Auer v. Robbins*, 519 U.S. at 457 (applying *Chevron* deference to a Department of Labor regulation) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

⁵²*Chevron*, 467 U.S. at 843 n.9.

⁵³*Id.* at 843.

⁵⁴*Cont’l Air Lines Inc. v. DOT*, 843 F.2d 1444, 1449 (D.C. Cir. 1988).

⁵⁵*Northpoint Tech., Ltd. v. FCC*, 412 F.3d 145, 151 (D.C. Cir. 2005).

⁵⁶*See Chevron*, 467 U.S. at 842-43.

⁵⁷*Council for Urological Interests v. Burwell*, 790 F.3d 212, 222 (D.C. Cir. 2015).

⁵⁸*Nat’l Ass’n of Reg. Util. Comm’rs v. ICC*, 41 F.3d 721, 727 (D.C. Cir. 1994).

⁵⁹*King v. Burwell*, ___ U.S. ___, 135 S.Ct. 2480, 2488 (2015) (quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. ___, ___, 134 S.Ct. 2427, 2444 (2014)).

⁶⁰*Id.*

⁶¹*Id.* at 2489.

- ⁶²*U.S. Telecom Ass'n v. F.C.C.*, ___ F.3d ___, 2017 WL 1541517 (D.C. Cir. May 1, 2017) (en banc).
- ⁶³*Id.* at *30.
- ⁶⁴*Id.*
- ⁶⁵*Id.* at *30-31 (emphasis in original).
- ⁶⁶*Darden v. Peters*, 488 F.3d 277, 283-84 (4th Cir. 2007).
- ⁶⁷*J.J. Cassone Bakery Inc. v. NLRB*, 554 F.3d 1041 (D.C. Cir. 2009) (quoting *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1173-74 (D.C. Cir. 1980)).
- ⁶⁸*Darden v. Peters*, 488 F.3d 277, 283-84 (4th Cir. 2007).
- ⁶⁹*Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 818 (9th Cir. 2016) (quoting *Williams v. Babbitt*, 115 F.3d 657, 662 (9th Cir. 1997)).
- ⁷⁰*Northwest Envtl. Advocates v. EPA*, 537 F.3d 1006, 1014 (9th Cir. 2008).
- ⁷¹*Id.* at 1011, 1021.
- ⁷²*Dep't of Army v. Blue Fox Inc.*, 525 U.S. 255, 261-64 (1999).
- ⁷³5 U.S.C. § 703.
- ⁷⁴*Bowen*, 487 U.S. at 894, 889-90 (emphasis in original).
- ⁷⁵5 U.S.C. § 701(b)(1).
- ⁷⁶*Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992) (emphasis added). The Court noted, however, that the president's actions are reviewed for constitutionality. *Id.* at 801. This issue is explored herein.
- ⁷⁷*Sarsour v. Trump*, No. 1:17cv00120, 2017 WL 1113305, at *2 (E.D. Va. Mar. 24, 2017).
- ⁷⁸*Id.* at *2.
- ⁷⁹*Id.* at *9 (quoting *Dalton v. Specter*, 511 U.S. 462, 469 (1994)).
- ⁸⁰*High Country Citizens Alli. v. Clarke*, 454 F.3d 1177, 1181 (10th Cir. 2006).
- ⁸¹5 U.S.C. §§ 702, 704. Even where statutory provisions expressly preclude APA review, as discussed in Part II, judicial review is provided where an agency acts *ultra vires*.
- ⁸²*See, e.g., Saavedra Bruno v. Albright*, 197 F.3d 1153, 1158 (D.C. Cir. 1999).
- ⁸³*High Country Citizens Alli.*, 454 F.3d at 1177, 1181 (citing *Block v. Cmty. Nutrition Inst.*, 467 F.2d 340, 349 (1984)).
- ⁸⁴*Id.* at 1182 (citing *Ass'n of Data Processing Serv. Orgs. Inc. v. Camp*, 397 U.S. 150, 157 (1970)).
- ⁸⁵*Id.* at 1182.
- ⁸⁶*Id.* at 1190-91.
- ⁸⁷*Id.* at 1190.
- ⁸⁸5 U.S.C. § 702 (emphasis added).
- ⁸⁹*Saavedra Bruno*, 197 F.3d at 1158 (citations omitted).
- ⁹⁰*Id.* at 1160.
- ⁹¹*Id.*
- ⁹²*Id.*
- ⁹³*Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971) (quoting S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)).
- ⁹⁴*Heckler v. Chaney*, 470 U.S. 821, 832-33 (1985).
- ⁹⁵*Id.* at 831.
- ⁹⁶*Id.* at 832-33.
- ⁹⁷*Franklin*, 505 U.S. 788 at 801 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935)).
- ⁹⁸*Hubbard v. EPA* 809 F.2d 1, 11 n.15 (D.C. Cir. 1986) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).
- ⁹⁹327 U.S. 678, 684 (1946).
- ¹⁰⁰413 F.3d 1225, 1232 (10th Cir. 2005).
- ¹⁰¹*Washington v. Trump*, 847 F.3d 1151, 1161 (9th Cir. 2017) (citing *Cardenas v. United States*, 826 F.3d 1164, 1169 (9th Cir. 2016) (stating that a president's power to expel or exclude aliens is "a fundamental sovereign attribute" that is "largely immune from judicial control") (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)).
- ¹⁰²*Id.* at 1161.
- ¹⁰³*Id.*
- ¹⁰⁴*Id.*
- ¹⁰⁵*Id.*
- ¹⁰⁶*Id.*
- ¹⁰⁷*Id.* at 1161, 1162.
- ¹⁰⁸*Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166 (D.C. Cir. 2003).
- ¹⁰⁹*Id.* at 1172.
- ¹¹⁰*Chamber of Com. of U.S. v. Reich*, 71 F.3d 1322, 1328 (D.C. Cir. 1996) (quoting *Soucie v. David*, 448 F.2d 1067, 1072 n. 2 (D.C. Cir. 1971)).
- ¹¹¹*Trudeau*, 456 F.3d at 190 (quoting *Griffith v. FLRA*, 842 F.2d 487, 493 (D.C. Cir. 1988) and 5 U.S.C. § 706(2)(C)).