Judicial Review of the Determinations of the New Data Protection Review Court Under the Administrative Procedure Act

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On July 16, 2022, the Court of Justice of the European Union issued its decision in *Data Protection Commission v. Facebook Ireland, Schrems,* in which it invalidated the European Commission's adequacy decision for the EU-U.S. Privacy Shield Framework.[1] One ground for invalidation was that, with regard to U.S. Government surveillance, "EU data subjects lack actionable judicial redress and, therefore, do not have a right to an effective remedy in the U.S., as required by Article 47 of the EU Charter."

In response to the Schrems II ruling and after many months of negotiations between the U.S. and the European Commission, on October 7, 2022, President Biden signed the Executive Order On Enhancing Safeguards For United States Signals Intelligence Activities.[2] On the same day, the Department of Justice issued a Final Rule establishing within the Department of Justice a Data Protection Review Court (DPRC).[3] Under the redress mechanism described in the Executive Order and the Final Rule, the Civil Liberties Protection Officer (CLPO) for the Office of the Director of National Intelligence (ODNI) will "investigate, review, and, as necessary, order appropriate remediation" for complaints involving personal information reasonably believed to have been transferred to the United States from a country that meets certain conditions.[4] The complainant may then apply to the DPRC for review of the CLPO's disposition of the complaint, and the DPRC will examine the record created by the CLPO to determine whether the CLPO's decision was "legally correct and supported by substantial evidence"; it will also review the "appropriate remediation" directed by the CLPO.[5] If the DPRC disagrees with the CLPO's decision, it will issue its own determination including its own order for remediation.[6] Under the Order, both the CLPO and the DPRC are protected from dismissal for performance of their functions, and their determinations will be binding on the intelligence agencies concerned.[7]

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[1] Caitlin Fennessy, *The 'Schrems II' Decision: EU-US Data Transfers In Question*, IAPP (Jul. 16, 2020) https://iapp.org/news/a/the-schrems-ii-decision-eu-us-data-transfers-in-question/

[2] Executive Order on Enhancing Safeguards for United States Signals Intelligence Activities (Oct. 7, 2022), https://www.whitehouse.gov/briefing-room/presidential-actions/2022/10/07/executive-order-on-enhancing-safeguards-for-united-states-signals-intelligence-activities/.

[3] 28 C.F.R. Part 201 (2022).

[4] Executive Order *Supra note* 3 at §3(c)(i).

[5] 28 C.F.R. § 201.9 (d)(1)-(2).

[6] *Id.* at § 201.9 (e).

[7] Executive Order *Supra note* 3 at §3(c)(ii),(iv).

This mechanism appears to be intended to satisfy EU standards in its own right, and it may well do so. We will explore how well the mechanism addresses the concerns raised in *Schrems II* in future papers. That said, the creation of this process raises an important question under U.S. law: Is judicial review in a U.S. federal district court available under the Administrative Procedure Act (APA)[8] to rule on the final determinations of the DPRC? Two statements in these documents indicate that the government is well aware of the potential for judicial review. First, the Order's final sentence states: "This order is not intended to, and does not, modify the availability or scope of any judicial review of the decisions rendered through the redress mechanism, which is governed by existing law."[9] Thus, President Biden decided to leave the question of judicial review where it stands under existing law, without expressing an intent either to foreclose or invite it. Second, Section 201.9(h)(3) of the Final Rule provides that the notification to the complainant of the outcome of the redress process "constitutes the final agency action in the matter."[10] As discussed below, "final agency action" is a term of art under the APA, and is typically subject to judicial review.[11]

Final Agency Action Under the APA

Judicial review under the APA is limited to "agency action made reviewable by statute *and* final agency action for which there is no other adequate remedy."[12] Agency action "includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."[13] Courts have acknowledged that the term "agency action" has a broad sweep[14] but hold that it is not so all-encompassing as to authorize them to exercise judicial review over everything done by an administrative agency.[15] For an agency to be considered "final," the action (1) may not be tentative or interlocutory in nature but must present the consummation of the agency's decision making process; and (2) must be an action by which rights or obligations have been determined, or from which legal consequences will flow.[16] Courts must "focus on the practical and legal effects of the agency action" and "interpret finality in a

[8] Administrative Procedure Act, 5 U.S.C. §§ 551–559 (2006).
[9] Executive Order *Supra note* 3 at §5(h).
[10] 28 C.F.R. §201.9(h)(3).
[11] Like all lawsuits, a party must have standing to bring a claim before a court under the APA. Whether a complainant invoking this redress process would have standing will be explored in a later paper.
[12] 5 U.S.C. § 704 (2012) (emphasis added).
[13] 5 U.S.C. § 551(13).
[14] *Independent Equipment Dealers Ass'n v. E.P.A.*, 372 F.3d 420, 427 (D.C. Cir. 2004); *F.T.C. v. Standard Oil Co. of California*, 449 U.S. 232, 238 (1980); *Whitman v. American Trucking Associations*, 531 U.S. 457, 478 (2001).
[15] *Hearst Radio v. F.C.C.*, 167 F.2d 225, 227 (D.C. Cir. 1948).
[16] *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

'pragmatic and flexible manner.'"[17] Unless the agency's regulations expressly provide otherwise, an agency action is "final" for purposes of judicial review even if further appeal within the agency is available.[18]

It is clear from the Final Rule that the DPRC's final determination, culminating in notification to the claimant, is intended to "present the consummation of the agency's decision making process" and thus constitutes "an action by which rights or obligations have been determined, or from which legal consequences will flow."[19] Even without the Final Rule labeling the notification as "final agency action," it is likely that a court ruling on the matter would so find.

Before proceeding further, it may be helpful to focus on the fact that the DPRC is established by executive order rather than by statute. The APA precludes judicial review where "there is no *law* to apply" in evaluating challenged agency action.[20] That said, courts have recognized that administrative action taken pursuant to an *executive order* – as opposed to a statute – may be an "agency action" so long as (1) the executive order has the force and effect of a statute - is *law* - and (2) the order places substantive limits on agency discretion.[21] Executive orders have the force and effect of a statute, and thus are binding on executive branch agencies, "if they are properly issued under the President's constitutional and statutory authorities."[22] Therefore, even though the bulk of case law under the APA refers to an agency's *statutory* authority to act, we will assume, for purposes of this paper, that such cases apply to actions taken under the new executive order.

"Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"

Once there is a finding of final agency action, the APA empowers 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 "arbitrary, capricious, an abuse of discretion, or otherwise not

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[17] *Gill v. U.S. Dep't of Justice*, 913 F.3d 1179, 1184 (9th Cir. 2019) (quoting *Oregon Nat. Desert Ass'n v. U.S. Forest Ser.*, 465 F.3d 977, 982 (9th Cir. 2006).

[18] 5 U.S.C. § 704. A longstanding doctrine in administrative law is that one must exhaust remedies within the agency before seeking judicial review. However, there is no exhaustion requirement for cases brought under the APA. As stated in §704, an agency action is final even if further appeal within the agency is available. An exception to that general principle is if the applicable agency regulations specifically provide that judicial review is not available pending appeals within the agency (the agency action must be inoperative until that appeal is final). See, generally *Darby v. Cisneros*, 509 U.S. 137 (1993).

[19] *Bennett v. Spear*, 520 U.S. at 177-78; *see* 28 C.F.R. Part 201.

[20] *Doe v. Benoit*, No. 19-CV-1253 (DLF), 2020 WL 11885578, at *4 (D.D.C. June 29, 2020) (citing *Citizens to Pres. Overton Park. v. Volpe*, 401 U.S. 402, 410 (1971).

[21] *Nat'l Wildlife Fed'n v. Babbitt*, No. CIV. A. 88-0301, 1993 WL 304008, at *8 (D.D.C. July 30, 1993); *see also Ex parte Mitsuye Endo,* 323 U.S. 283, 298 (1944) ("We approach the construction of Executive Order No. 9066 as we would approach the construction of legislation in this field."); *see generally Dong v. Slattery*, 84 F.3d 82 (1996).

[22] Alex Joel, *Protect Privacy. That's an Order,* Lawfare (Apr. 6, 2021) https://www.lawfareblog.com/protect-privacy-thats-order

in accordance with law."[23] This standard is commonly applied to "informal" agency actions and indeed applies to all reviewable administrative actions as a catchall because it contains no explicit limitation on its applicability.[24]

At the risk of oversimplifying this complex area of law, one can think of agency actions as falling into several categories, one of which is "rulemaking" and another "adjudication." As described in a report by the Congressional Research Service:

> [T]he products of rulemaking proceedings . . . typically are generally applicable, forward looking actions (commonly known as "regulations") bearing the force of law, whereas legally binding, backward looking actions determining the rights or obligations of specific parties based on facts specific to those parties are adjudicative decisions.[25]

Adjudications, in turn, can be deemed "formal" or "informal."[26] A formal process resembles a full-blown trial.[27] An informal process can include elements of an adversarial trial, but provide the agency with greater flexibility in establishing procedures.[28] An informal process may nonetheless include many trial-type attributes. For this paper, we will assume that the DPRC process will be considered an "informal adjudication."[29]

With the foregoing background on the APA, we can now turn to what this means for the newly-established DPRC. In broad terms, if the DPRC makes a determination that qualifies as "final agency action," a federal court's review could include determining whether (a) the DPRC[30] erroneously

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[23] 5 U.S.C. § 706. The grounds listed in Section 706 are: contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; without observance of procedure required by law; unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. The APA case law on these standards is complex. For purposes of this paper, we will focus on the arbitrary and capricious standard. See generally James F. Smith, *Comparing Federal Judicial Review of Administrative Court Decisions in the U.S. and Canada*, 73 Temp. L. Rev. 503, 536 (2000). (Courts have interpreted §706(2) of the APA as establishing three standards of judicial review: de novo, substantial evidence, and arbitrary and capricious. The APA has provided little textual instruction on "how to define, distinguish, and apply" these standards and as such, these questions have been answered by the judiciary who devised a scheme where some provisions of §706(2) apply to all reviewable administrative actions, whereas others are only applicable to the administrative actions specified in the provision.)

[24] 5 U.S.C. §553; Ben Harrington and Daniel J. Sheffner, *Informal Administrative Adjudication: An Overview*, Congressional Research Service (Oct. 1, 2021) https://crsreports.congress.gov/product/pdf/R/R46930.

[25] *Harrington and Sheffner*, *supra* note 25.

[26] *Id.*

[27] *Id*.

[28] *Id*.

[29] *Id.* Note that the standard for formal proceedings is the "substantial evidence" standard, which is more demanding than the arbitrary and capricious standard. Thus, the standard will depend on the formality of the proceedings established for DPRC adjudications.

[30] Note that the DPRC's action could consist of endorsing the CLPO's determination.

interpreted applicable law, (b) the DPRC made (or endorsed) findings of fact that were incorrect , or (c) the DPRC did not properly interpret or apply required procedures.

Question of Law

Courts are empowered to set aside agency action that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" or otherwise "not in accordance with law."[31] When a court reviews an agency's legal interpretation, what standard should it apply? Should it defer to the agency's legal opinion in any way, and if so, by how much?

No deference at all is due to an agency's legal opinion or interpretation when the agency is interpreting laws that it has no special role in administering or implementing.[32] In such situations, the court's legal review is "de novo"; it is as if the court were asked to rule on the legal issue directly.[33] For example, if the DPRC were to interpret the Foreign Intelligence Surveillance Act (FISA), a court could review that interpretation without the need to defer in any way to the DPRC's opinion; if it disagreed with the interpretation, it could simply overturn it.

So-called "*Auer* deference" applies when a regulation it has promulgated is ambiguous.[34] Under this standard, courts must yield to an agency's interpretation of an ambiguous regulation that the agency has promulgated unless it is "plainly erroneous or inconsistent with the regulation."[35] In 2019 in *Kisor v. Wilkie*, the Supreme Court upheld *Auer* deference but narrowed its scope.[36] As such, courts should only give *Auer* deference to an agency where:

(1) The court establishes that the regulation in question is actually ambiguous after considering the text, structure, history, and purpose of the regulation;
(2) The agency interpretation is an authoritative or official position of the agency;
(3) The interpretation is based on the expertise of that agency; and
(4) The interpretation reflects fair and considered judgment[37]

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[31] U.S.C. § 706(2)(A),(C).
[32] David Zaring, *Reasonable Agencies*, 96 VA L. Rev. 135, 148 (2010) ("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.") (Citing to *Crowell v. Benson*, 285 U.S. 22, 46 (1931)) ("[W]here facts necessary to adjudication of a constitutional right were subject to de novo review")).
[33] *Id*.
[34] *Auer v. Robbins et al.*, 519 U.S. 452 (1997).
[35] *Auer*, 519 U.S. at 461 (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).
[36] *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019).
[37] David L. Portilla and Will C. Giles, *Kisor v. Wilkie: A New Limit on Agency Deference and Its Implications for Banking Organizations*, American Bar Association (Jan. 14, 2020) https://www.americanbar.org/groups/business_law/publications/blt/2020/01/kisor-v-wilkie/?login; *Kisor*, 139 S.Ct. at 2416-18; *see Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (Declining to apply *Auer*

Auer deference is confusingly similar to what is known as *Chevron* deference.[38] Where a claim concerns an agency's interpretation of statutes for which it has authority to make rules, courts traditionally apply *Chevron* deference. *Chevron* is a two step test where the court will defer to an agency's interpretation so long as (1) the statute in question is ambiguous and (2) the agency's interpretation is reasonable.[39] Conversely, if the court finds the statute to be clear and unambiguous, the court directly applies its own legal interpretation to determine whether the agency action comports with the statute (i.e., there is no deference).[40] Subsequent Supreme Court cases have narrowed the scope of *Chevron*. For instance, in *U.S. v. Mead Corporation*, the Supreme Court added a "step 0" to the two-step analysis.[41] After *Mead*, a court must first determine whether "Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[42] If the answer is yes, only then can courts continue with the two-step *Chevron* test. If the answer is no, then no deference is owed to the agency.

How does this apply if the DPRC interprets the newly issued executive order? The Order and the Final Rule expressly contemplate the DPRC having a direct role in interpreting and applying its provisions to the claims brought before it.[43] Under the Order, the redress mechanism is focused on determining whether a "covered violation" has occurred, which is defined in part as a violation of "this order or any applicable agency policies and procedures issued or updated pursuant to this order."[44] In addition, the Final Rule provides in Section 210(a) that "The Executive Order … and its terms *shall be interpreted by the DPRC* exclusively in light of United States law and the United States legal tradition, and not any other source of law" (emphasis added).[45] This suggests that the Order would meet the test in *Mead*, and

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deference where an agency interpretation would have imposed a retroactive liability on parties for conduct that the agency had never addressed before. Citing that the lack of fair warning outweighed the reasons to apply *Auer*).

[38] *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 468 U.S. 837 (1984).

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

[40] *Id* at 843.

[41] *United States v. Mead Corp.*, 533 U.S. 218 (2001) (Holding that tariff classification rulings by the U.S. Customs Service were not entitled to judicial deference under *Chevron* since such rulings do not have the "force of law" and instead applying *Skidmore* deference); Additionally recent cases indicate that the future of *Chevron* deference is unclear. *See* Cass R. Sunstein, *Chevron Step Zero*, 92 VA L. Rev. 187 (2006); UNLV William S. Boyd School of Law Legal Studies Research Paper, "Loud and Soft Anti-Chevron Decisions," September 9, 2017 ("[i]f one counts *King v. Burwell*, all nine justices have at least once signed an explicit opinion holding that *Chevron* should not apply in a situation here the administrative law textbooks would previously have said that it must apply."); *see* Richard J. Pierce, Jr. *Is Chevron Deference Still Alive?*, Regulatory Review, Jul. 14, 2022, https://www.theregreview.org/2022/07/14/pierce-chevron-deference/.

[42] *U.S. v. Mead*, 533 U.S. at 221.

[43] 28 C.F.R. § 201.10(a); Executive Order on Enhancing Safeguards for United States Signals Intelligence Activities §3(d).

[44] Executive Order *supra* note 3 at §3(a), §4(d)(iii)(D).

[45] 28 C.F.R. § 201.10(a).

therefore, that some form of *Chevron* deference would apply, at least with respect to interpretations of *ambiguous* portions of the Order; the reviewing court would therefore defer to DPRC interpretations that are "reasonable."[46]

Finally, so-called *Skidmore* deference, resurrected by *US v. Mead*, is a low level of deference due to less formal agency interpretations of statutes such as opinion letters, operating manuals, and enforcement guidelines.[47] These kinds of agency interpretations are generally issued as guidance documents which are not required to be developed through the rulemaking process.[48] *Skidmore* deference does not compel a court to defer to an agency's interpretation. *Skidmore* recognized that agency views "constitute a body of experience and informed judgment to which courts . . . may properly resort for guidance."[49] However, the weight given to agency decisions depends on "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 it power to persuade, if lacking power to control."[50]

Question of Fact

How do reviewing courts deal with an agency's factual findings?[51] Agency determinations of fact concern the agency's conclusions about the world rather than about the agency's legal authority to act.[52] Where a court is reviewing an agency determination of fact made through either informal rulemaking or

[46] As previously discussed, we think it is fair to assume that APA judicial review standards apply to executive orders with the force of law, in generally the same way as they do to statutes. That said, there are differences that might affect the analysis regarding how to apply the case law on deference. In *Udall v. Tallman*, 380 U.S. 1 (1965), the Supreme Court addressed judicial review of agency interpretations of executive orders that they were charged with implementing. While the *Tallman* court did not directly address the applicability of APA requirements, it held that courts should defer to agency interpretations of the executive orders they are responsible for implementing if the interpretations are "reasonable."Id. at 18. However, *Tallman* itself is dated and subsequent cases apply *Tallman* unevenly, if at all. *See generally* Matthew Chou, *Agency Interpretation of Executive Orders*, 71 Admin. L. Rev. 555 (Sept. 25, 2019) (Discussing circuit split on applying *Tallman* in reviewing agency's interpretations of executive orders); County of Santa Clara v. Trump, 897 F.3d 1225, 1238 ("In contrast to the many established principles for interpreting legislation, there appear to be few such principles to apply in interpreting executive orders.").

[47] *Christensen v. Harris County,* 529 U.S. 576, 587 (2000). (Developing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); *see also U.S. v. Mead*, 533 U.S. at 234 (Clarifying which agency actions *Skidmore* applies to).

[48] Kate R. Bowers, *Agency Use of Guidance Documents*, Congressional Research Service (Apr. 19, 2021) https://www.everycrsreport.com/files/2021-04-19_LSB10591_9477746a9161f3ee6f2d127a70eb84cdcec6e4df.pdf

[49] Aaron-Andrew P. Bruhl, *Hierarchically Variable Deference to Agency Interpretations*, 89 Notre Dame L. Rev. 727, 735 (quoting *Skidmore*, 323 U.S. at 140).

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

[51] Note that where a claim concerns classified information, there may be other barriers to judicial review concerning questions of fact. Would there be procedures put in place to enable a reviewing court to examine classified information? What happens if the government asserts the state secrets privilege to block the release of information that, if disclosed, would cause harm to national security? *See United States v. Reynolds*, 345 U.S. 1 (1953). These issues are beyond the scope of this paper.

[52] Zaring *supra note* 33 at 147.

an informal adjudication, the arbitrary and capricious standard would apply.[53] That standard requires that "inquiry into the facts is to be searching and careful," [54] and that agencies make decisions:

1. Based on a consideration of the relevant factors;
2. Without "a clear error of judgment";
3. Under the correct legal standard; and
4. With a satisfactory explanation for their action including a rational connection between the facts found and the choice made.[55]

This inquiry is highly situation specific and in general requires that an agency demonstrate that it engaged in reasoned decision making when reaching its determination.[56] Agencies must provide "the essential facts upon which the administrative decision was based"[57] and explain what justifies their determinations with actual evidence beyond a "conclusory statement."[58] Courts may further invalidate an agency action if the agency failed to consider an important factor relevant to the action, such as the policy effects of the decision.[59] That said, as courts have noted, "the ultimate standard of review is . . . narrow. . . [and t]he court is not empowered to substitute its judgment for that of the agency."[60]

While a court should not substitute its own judgment, it may nonetheless review agency decisions for abuse of discretion (drawing from the language of §706(2)(A)). For instance, where an agency has a regulation permitting a reopening for good cause after the lapse of the time for appeal, courts review the refusal to reopen for abuse of discretion.[61] As stated in *Cappadora v. Celebrezze*

> The fact that reopening is a matter of agency discretion to a considerable extent. . .does not lead inevitably to a conclusion that such an exercise of administrative power is wholly immune from judicial examination; § 10(e) of the APA expressly authorizes the courts to set aside any administrative decision constituting an abuse of

[53] Jared P. Cole, An Introduction to Judicial Review of Federal Agency Action, Congressional Research Service (Dec. 7, 2016), https://sgp.fas.org/crs/misc/R44699.pdf..
[54] *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416; *Ass'n of Data Processing Service Organization, Inc.,* 745 F.2d 677, 684 (D.C. Cir. 1984); *Pacific Legal Foundation v. Department of Transportation,* 593 F.2d 1338, 1343 (D.C. Cir. 1979); *American Public Gas Ass'n v. Federal Power Comm'n*, 567 F.2d 1016, 1028–29 (D.D.C. 1977).
[55] *Overton Park*, 401 U.S. at 415-16; *Motor Vehicle Mfrs. Assn. of U.S., Inc. v. State Farm Mut. Automobile Ins. Co.,* 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).
[56] *Dep't of Homeland Sec. v. Regents of the University of Cal.*, 140 S. Ct. 1891, 1904 (2020).
[57] *United States v. Dickerman*, 201 F.3d 915, 926 (7th Cir. 2000) (quoting *Bagdonas v. Dep't of the Treasury*, 422, 426 (7th Cir. 1996)).
[58] *Allied-Signal, Inc. v. Nuclear Regulation Commision*, 988 F.2d 146, 152 (D.C. Cir. 1993).
[59] *Center for Biological Diversity v. U.S. Bureau of Land Management.,* 698 F.3d 1101, 1124 (9th Cir. 2012).
[60] *Overton Park*, 401 U.S. at 416.
[61] *Szostak v. Railroad Retirement Bd.*, 370 F.2d 253, 254 (2d Cir. 1966).

> discretion. The question is whether the Secretary in deciding not to reopen enjoys absolute discretion — whether such a decision is totally committed to the judgment of the agency because of the practical requirements of the task to be performed, absence of available standards against which to measure the administrative action, or even the fact that no useful purpose could be served by judicial review.
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> …
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> Absent any evidence to the contrary, Congress may . . . be presumed to have intended that the courts should fulfill their traditional role of defining and maintaining the proper bounds of administrative discretion and safeguarding the rights of the individual.[62]

Procedural Error

The Order and the Final Rule establish the basic processes for investigating and adjudicating "qualifying complaints." In addition they call for the development and issuance of further policies and procedures, which presumably will establish more detailed processes for the redress mechanism. It is possible that a complainant may feel that their claim was not handled in accordance with those procedures; that is, that there was a procedural error that adversely affected the complaint. If the mechanism nonetheless proceeds to the point of notification to the complainant as "final agency action," then judicial review would likely apply as described above. However, what happens if the complainant believes that a procedural error has prevented their claim from being properly adjudicated by the DPRC and thus the Final Rule's acknowledgement of "final agency action" never takes place?

In *Smith v. Berryhill*, the Supreme Court addressed whether courts could review a claim challenging the dismissal of the plaintiff's appeal of an Administrative Law Judge's denial of disability benefits.[63] Under §405(g) of the Social Security Act (SSA), judicial review is permitted for "any final decision of the [agency] made after a hearing."[64] The central tension stemmed from the deadlines that the SSA imposed for each stage of review: a party who seeks review must file his request within 60 days of receiving the ALJ's ruling and where that deadline is not met, the Appeals Council will dismiss the request.[65] The SSA also dictates that dismissals are "binding and not subject to further review."[66] The Court highlighted that although the plaintiff erred in meeting the deadline, it is unlikely that "Congress

[62] *Cappadora v. Celebrezze*, 356 F.2d 1, 5-6 (2d Cir. 1966).
[63] *Smith v. Berryhill,* 139 S. Ct. 1765 (2019).
[64] *Id.*
[65] *Id.* at 1772.
[66] *Id.*

intended for this claimant-protective statute to leave a claimant without recourse to the courts when such a mistake does occur. . .”[67] The Court held that the dismissal of the claimants' appeal for failure to file in a timely matter *does* constitute a final agency action as “such a dismissal calls an end to a proceeding in which a substantial factual record has already been developed and on which considerable resources have already been expended.[68]

Once the Court determined the claim was reviewable, it considered both the appropriate scope and standard of review. To determine the scope, the Court noted that while there was no jurisdictional bar to considering the merits, “fundamental principles of administrative law. . . teach that a federal court generally goes astray if it decides a question that has been delegated to an agency if that agency has not first had a chance to address the question.”[69] As such, “a court should restrict its review to the procedural ground that was the basis for the Appeals Council dismissal and (if necessary) allow the agency to address any residual substantive questions in the first instance.”[70] As for the standard of review, the Court held that the “abuse of discretion” standard as to the overall conclusion, and the “substantial evidence” standard as to any fact were appropriate.[71]

Conclusion

Overall, a few points emerge. A ruling by the DPRC is ”final agency action” under the APA and as such, will be subject to judicial review.[72] The courts would likely review DPRC rulings to determine whether they were “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” In reviewing the DPRC’s interpretations of law, whether the court would accord those interpretations any sort of deference, and to what degree, will depend in large part on the law that the DPRC is interpreting. A court may well defer to some degree if the DPRC is interpreting ambiguous provisions of its own regulations or of the executive order, provided those interpretations are reasonable. No deference would be due if the court finds those provisions to be clear, or that Congress did not intend for the DPRC to have a role in interpreting or applying them (e.g., FISA). With respect to

[67] *Id.* at 1776.
[68] *Id.* at 1777 (Smith’s entitlement to judicial review is confirmed by “the strong presumption that Congress intends judicial review of administrative action.”) (citing *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986)).
[69] *Smith v. Berryhill*, 139 S. Ct. at 1779; *see INS v. Orlando Ventura*, 537 U.S. 12, 16, 18 (2002); *see also Bowen v. City of New York*, 476 U.S. 467, 485 (1986) (“Because of the agency’s expertise in administering its own regulations, the agency ordinarily should be given the opportunity to review applications of those regulations to a particular factual context”).
[70] *Smith v. Berryhill*, 139 S. Ct. at 1779.
[71] *Id.* at footnote 19. Note that a claimant alleging that their complaint was wrongfully rejected might well be able to show the type of actual injury required to establish standing.
[72] As noted earlier, standing would still have to be established.

factual determinations, the DPRC will need to demonstrate that it engaged in reasoned decision making and provide the essential facts used to make the determination. While the court may not substitute its own judgment for that of an agency, it may nonetheless review agency action for abuse of discretion. Where a claim challenges a DPRC decision on procedural grounds, the action is likely reviewable under the abuse of discretion standard.

By establishing the DPRC, the government has triggered the application of a rich and complex body of administrative law relating to judicial reviewability of the new court's adjudications.