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*Administrative Agreements: Should They Be in the Shadows of the Administrative Procedures Act?*

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Abstract by Brooksley Crisman

The goal of the Administrative Procedure Act (APA) is to prevent government agencies from making substantive rules in secret, requiring such procedures as the notice and comment process. There are a number of exemptions built into the APA that allow agencies to make non-substantive law agreements so that they may operate efficiently. The author argues that in fact many substantive rules are being clothed as agreements that fall under an exception to the formal procedures in an effort by the agency to bypass procedural safeguards while creating substantive rules that impose new law, rights, or duties.

The author cites the Railroad Rehabilitation and Improvement Financing program as an example of a “secret” agency agreement that imposed new rules. The article discusses the terms of the agreement as well as the circumstances that led to its discovery. Next, the article compares the agreement with other transportation agreements in order to highlight that the agreement’s violations under the APA. In addition, the article proposes changes to the APA that would prevent similar miscategorizations in the future. Finally, the article hypothesizes as to why so few potential plaintiffs challenge administrative agreements similar to the secret agreement.