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*The Limits of Legislative Control over the “Hard Look”*

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Abstract by Raymond R. Janairo

The author posits that the arbitrary and capricious standard of the Administrative Procedure Act is a likely target of “legislative tinkering.” The piece discusses “certain unintended side effects for constitutional law” such legislative tinkering may generate. Specifically, although hard-look review may not be a constitutional doctrine, the author argues that congressional elimination of that standard from the APA would affect how courts use other means of judicial control over agency discretion which are constitutionally-based, such as the nondelegation doctrine. Moreover, the author argues that the separation of powers doctrine requires that “courts decide for themselves how to assess the minimal rationality of agency action and that congressional elimination of the hard-look would violate this principle.”

The author suggests that eliminating the hard-look gloss would not eliminate the judiciary’s concerns over arbitrary agency action; this congressional action would only preclude one means of policing arbitrariness. Therefore, one unintended constitutional consequence could be a “tighter” nondelegation doctrine. If courts are reluctant to use the nondelegation doctrine, courts that cannot employ hard-look review may then turn to constitutional avoidance by using narrow statutory interpretations. The author also argues that “there must be some limit on [ ] congressional power to govern the operation of judicial power,”—that is, determining standards of review. Allowing Congress to lower the standard of review for arbitrary agency action would force courts to give their stamp of approval to agency actions without any scrutiny. This, according to the author, amounts to a subrationality review. Based on these arguments, the piece concludes with the author’s summation against congressional action to eliminate the judicial hard-look gloss on § 706(2)(A)’s arbitrary and capricious standard.