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Judicial Review of Petitions

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JUDICIAL REVIEW OF PETITIONS

*Cynthia Farina**

Senate bill 343, at least, is careful to say that upon denial of a petition, the denial should be deemed "agency action" for purposes of judicial review. Only at one point in the legislation does the statute speak explicitly to the standard, and that's with respect to the petition for putting an existing major rule on the schedule for analysis. The bill says that the agency's action shall be overturned by the court only on the determination that the action was arbitrary and capricious or an abuse of discretion, which is what we assumed the standard would have been for petition denial.

Would S. 343 or any of these petitioning formulas make more intense the "arbitrary and capricious" review that the D.C. Circuit, for example, now exercises on denials of petitions to engage in rulemaking?

As many of you know, in this particular context the D.C. Circuit does not apply the *Heckler v. Cheney* presumption against reviewability. It uses "arbitrary and capricious" review, but it is very minimal review. Would that continue to be the case? Because if it is, then judicial review won't have a lot of bite here. Is the level of scrutiny intended to be raised? We don't see anything in S. 343 that expressly says so.

One thing that S. 343 would do is to expand the nature of the agency's obligation to explain itself on denial. The current standard in section 553(e) is that the notice of denial has to be accompanied by a brief statement of the grounds for denial. Perhaps the current, relatively minimal judicial review is in part because there's not very much information that the agency is required to give. On the other hand, under S. 343, the agency would be required to give a response to each significant factual and legal claim that forms the basis of the petition—which might itself heighten the "arbitrary and capricious" review that the court gives.

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