

THE SCOPE OF REVIEW OF AGENCIES' REFUSALS TO ENFORCE OR PROMULGATE RULES*

The Reagan administration swept into office in part on promises of deregulation.¹ Refusing to adopt new regulations and to enforce existing regulations are two methods of deregulation it has pursued. The administration apparently favors these approaches over the more controversial method of actually rescinding governmental regulations.²

When a federal agency receives a petition to initiate rulemaking proceedings, it may either deny that petition³ or draft a proposed rule and solicit public comments.⁴ Even after receiving comments,

* This Note was developed by Raymond Murphy.

1. See Green, *Reagan's Team: The Gang That Can't Deregulate Straight*, 96 L.A. DAILY J., Mar. 18, 1983, § 1, at 4, col. 3.

2. *Id.* The article criticized the Reagan administration for failing to attack the basis for regulations. Instead, the Reagan administration has merely refused to propose or approve new regulations, and has slowed enforcement of existing regulations. See also Schellhart & Schorr, *Deregulation Drive Brings Mixed Bag of Results*, 95 L.A. DAILY J., Dec. 28, 1982, § 1, at 4, col. 3 [hereinafter cited as *Deregulation Drive*]. The article acknowledges that Reagan's deregulation approach has reduced the flow of new regulations, but questions whether this has really reduced the burdens government places on the private sector.

3. Administrative Procedure Act, 5 U.S.C. § 555(e) (1982) ("Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding.") [hereinafter cited as APA]. The APA's requirement that agencies provide prompt notice of denials of petitions impliedly authorizes agencies to deny petitions. See, e.g., *Arkansas Power & Light Co. v. ICC*, 725 F.2d 716, 726 (D.C. Cir. 1984) (upholding ICC's refusal to initiate rulemaking); *Professional Drivers Council v. Bureau of Motor Carrier Safety*, 706 F.2d 1216, 1223 (D.C. Cir. 1983) (as amended) (an agency possesses a generous measure of discretion in the initiation of rulemaking proceedings); *WWHT, Inc. v. FCC*, 656 F.2d 807 (D.C. Cir. 1981) (FCC denial of rulemaking petition).

4. 5 U.S.C. § 553(b), (c) (1982). Section 553(b) states, "[g]eneral notice of pro-

the agency may refuse to adopt a rule.⁵ Agencies can also deregulate by refusing to enforce existing regulations.⁶ This Note discusses recent decisions concerning judicial review of agencies' refusals to promulgate rules and agencies' decisions not to enforce pre-existing standards. Part I addresses the reviewability of agencies' refusals to act, and Part II analyzes the appropriate scope of review of such decisions.

Generally, courts are willing to review agencies' refusals to promulgate rules, subject to the requirement of the Administrative Procedure Act (APA) that the refusal must represent a final decision by the agency. Whether an agency's refusal to act is final can be a difficult one to determine, especially if the agency indicates that it may reconsider the issue in the future. Courts have not adopted a simple rule for determining finality; rather, they balance competing factors and decide the issue in a pragmatic fashion.⁷

In contrast to the courts' willingness to review agencies' refusals simply to promulgate rules, many courts are still reluctant to review agencies' decisions to withhold enforcement action. Although some courts and commentators have predicted a transition toward increased availability of judicial review of enforcement-discretion decisions, the Supreme Court recently stated in clear terms that enforcement decisions are generally unreviewable.⁸

Even if a court does agree to review an agency's refusal to act, the review, though couched in terms of the arbitrary and capricious standard, is considerably less demanding than the review afforded adoptions of rules or rescissions of rules.⁹ Yet, despite the circumscribed nature of the review, courts will assure that an agency's reasoning in refusing to act has some basis in the record. If the agency solicits public comments it must at least address the major concerns raised in the comments. Furthermore, the agency cannot abdicate its statutory responsibilities.

posed rule making shall be published in the Federal Register." Section 553(c) further provides, "the agency shall give interested persons an opportunity to participate in the rule making."

5. See, e.g., *Professional Drivers Council*, 706 F.2d at 1223 (upholding Bureau's denial of requested rule after months of public comment); *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1062 (D.C. Cir. 1979) (SEC's denial of rule after notice and comment).

6. See 2 K. DAVIS, *ADMINISTRATIVE LAW TREATISE*, § 9:1, at 216 (2d ed. 1979).

7. See *infra*, Part I A, for detailed discussion of finality.

8. *Heckler v. Chaney*, 105 S. Ct. 1649 (1985), *rev'g* 718 F.2d 1174 (D.C. Cir. 1983). See *infra*, Part I B, for detailed discussion of reviewability of agencies' exercises of enforcement discretion.

9. See Note, *Judicial Review of Rescission of Rules: A "Passive Restraint" on Deregulation*, 53 GEO. WASH. L. REV. 252, 271-72 (1985).

Under the arbitrary and capricious standard of review those courts that agree to review these decisions will only rarely compel an agency to reconsider its refusal to take action. The majority of agencies' refusals to regulate will not be overruled.

I. Reviewability

It is useful to characterize a court's review of an agency's nonaction as lying on a continuum. At one extreme the scope of review is zero. There, the court decides that the issue is not reviewable.¹⁰ At the other extreme, a court may review an agency's decision de novo and substitute its own judgment for that of the agency's.¹¹ Thus, before a court decides how closely to scrutinize an agency's decision, it must first determine whether it has the authority to review the decision at all.¹² The APA prohibits courts from reviewing administrative decisions that are committed to the agency's discretion or administrative decisions that do not constitute final action.¹³ Both of these prohibitions potentially apply to agencies' decisions to refuse to take action.

A. Is the Agency's Decision Final?

Under the Administrative Procedure Act, all final agency action for which no other remedy is available is subject to judicial review.¹⁴ Absent a statutory mandate to the contrary, courts will not intervene in an uncompleted administrative proceeding.¹⁵ Courts will refuse review if no final adverse action has been taken, in order to allow full development of the factual record and further agency action that may render a challenge moot or result in piecemeal challenge and review.¹⁶ The finality requirement avoids the prospect of successive appeals,¹⁷ prevents courts from entangling themselves in abstract disagreements over administrative policies, and protects agencies from judicial interference until their decisions are formalized.¹⁸

10. For example, under the APA courts may not review an administrative action committed to the agency's discretion by law. 5 U.S.C. § 701(a)(2) (1982).

11. For example, the APA grants courts the authority to decide all relevant questions of law. 5 U.S.C. § 706 (1982). Courts have interpreted this grant of authority as allowing independent, or de novo, review of questions of law. *See infra* note 108 and accompanying text.

12. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971) (whether petitioners are entitled to any review is a threshold question).

13. 5 U.S.C. § 701(a)(2) (1982).

14. *Id.* § 704.

15. *E.g.*, *Bakersfield City School Dist. v. Boyer*, 610 F.2d 621, 626 (9th Cir. 1979).

16. *Association of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1156-57 (D.C. Cir.), *cert. denied*, 447 U.S. 921 (1979).

17. *Freeman United Coal Mining Co. v. Director, Office of Workers' Compensation Programs*, 721 F.2d 629, 631 (7th Cir. 1983).

18. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1966). *See also* *South Carolina Elec. Co. v. ICC*, 734 F.2d 1541, 1544-45 (D.C. Cir. 1984) (purpose of ripeness doctrine in context of reviewing agency action is to prevent courts from entangling themselves in abstract agency discussions and to protect agencies from judicial interference). *Accord* *Alascom, Inc. v. FCC*, 727 F.2d 1212, 1216-17 (D.C. Cir. 1984); *Air New Zealand, Ltd. v. CAB*, 726 F.2d 832, 835 (D.C. Cir. 1984).

An agency's decision not to promulgate a rule is not necessarily a final action because the agency may at some time in the future promulgate that rule. Thus, courts must determine whether a particular denial of rulemaking constitutes final action. The Supreme Court has advocated a pragmatic, rather than a mechanical, approach in determining questions of finality.¹⁹ Recent decisions by lower courts have apparently followed the Supreme Court's lead.

In *Center for Auto Safety v. National Highway Traffic Safety Administration*,²⁰ the District of Columbia Circuit decided whether an agency's withdrawal of its advance notice for proposed rulemaking constituted final action.²¹

The National Highway Traffic Safety Administration (NHTSA) had sought public comment on a proposed rulemaking to upgrade the fuel efficiency standards that the Motor Vehicle Information and Cost Saving Act had imposed on auto manufacturers.²² The statute authorized NHTSA to amend the 27.5 mile per gallon standard set for passenger cars made in the year 1985 and beyond, but it required the agency to allow the industry at least twenty months lead-in time before the standard for any particular year became effective.²³ Later, the agency withdrew its notice for proposed rulemaking and denied the Center for Auto Safety's (CAS) request for reconsideration.²⁴

On appeal, the court for the District of Columbia Circuit first observed that an agency's decision to terminate rulemaking proceedings usually constitutes a final agency action because the decision to terminate often reflects an agency's choice of the status quo over other alternatives.²⁵ The court then acknowledged that pragmatic considerations may sometimes create exceptions to this rule. The pragmatic consideration in this instance was the timing

19. *Abbott Laboratories v. Gardner*, 387 U.S. at 149 (decisions concerning judicial review of administrative actions have interpreted the "finality" element in a pragmatic way). The Court purposely left the definition of pragmatic factors open to ensure flexibility in each case. However, it decided that the formal rulemaking in *Abbott Laboratories*—the announcement of the regulation in the Federal Register and the consideration given the public comments—created a final rule. In the Court's view, there was "no hint" that the regulation was informal. *Id.* at 151.

20. 710 F.2d 842 (D.C. Cir. 1983).

21. *Id.* at 847-48.

22. *Id.* at 846.

23. *Id.* at 847-48.

24. *Id.* at 844-45. NHTSA withdrew its proposal for rulemaking, arguing that more stringent standards were unnecessary because the market had already created a strong demand for fuel efficient cars and manufacturers were meeting that demand voluntarily.

25. *Id.* at 846-47. The court also recognized that the definition of "rule" under the APA was sufficiently broad to encompass the agency's withdrawal of its notice of proposed rulemaking. *Id.* at 846.

of the decision: because of the statutorily mandated twenty-month lead-in time, the agency was precluded from amending the standards for 1985. The court therefore held that the decision to terminate the rulemaking, insofar as the proposed changes were to apply to cars manufactured in 1985, was a final action.²⁶ Because the agency had sufficient time to adopt new regulations for post-1985 model years while still complying with the twenty-month lead-in requirement, however, the court held that the decision to terminate the rulemaking for cars to be manufactured after 1985 was not final and thus not reviewable.²⁷

In *Center for Auto Safety*, the court refused to adopt a simple rule that all decisions to terminate rulemakings are final agency actions. Rather, it focused on the pragmatic considerations involved, reaching a logically appealing conclusion.²⁸ The *Center for*

26. *Id.* at 847.

27. *Id.* at 848.

28. *Id.* at 847. Although its decision is logical, the court apparently failed to consider the practical implications that its decision would have on petitioners. According to the decision, petitioners wishing to challenge agency refusals to promulgate regulations that would take effect in future years will have to wait to initiate suit until it is too late for an agency to change its mind for each year's regulation. *Id.* at 848. Petitioners will suffer the burden of challenging the decision to terminate the rulemaking on a yearly basis rather than once each time the agency makes a decision, which seems contrary to the goal of an efficient system of review. Two decisions involving administrative adjudication (rather than denial of rulemaking) present a more reasonable approach to determining finality. In *Freeman United Coal Mining Co. v. Director, Office of Workers Compensation Programs*, 721 F.2d 629 (7th Cir. 1983), the court framed the finality issue in terms of whether the proceedings were complete, and if they were not, whether they were likely to generate new appealable issues. If the proceedings were unlikely to generate new issues the court would consider the order final. *Id.* at 631. The court concluded that, because the Administrative Law Judge had not yet computed the damages, there was still an appealable issue and the decision was not yet final. *Id.*

In *United States v. Louisiana-Pacific Corp.*, 569 F. Supp. 1141 (D. Or. 1983), the court concluded that the agency's decision-making process was not yet complete. The court observed that, although the Federal Trade Commission had denied Louisiana-Pacific's application to sell its Rocklin plant to Roseburg Lumber Company, the decision had been without prejudice and was effective only until the appointment of a trustee to oversee the divestiture of the plant from Louisiana-Pacific. *Id.* at 1144. The court reasoned that no final adverse decision had been made and that the agency was still gathering the facts upon which to base its decision. *Id.* at 1145. Recognizing that one of the purposes of the finality requirement was to ensure that an adverse decision had been made and that a complete record had been developed, the court refused to intervene until the agency had completed the decision-making process. *Id.* at 1144-45.

Although, strictly speaking, neither *Freeman United* nor *Louisiana-Pacific* involved refusals by agencies to act, these cases do suggest a method for determining whether an agency's refusal to act is a final decision. The agencies, in both cases, had not yet completed their decision-making processes, and the potential for generating new appealable issues was great.

In contrast, in *Center for Auto Safety*, NHTSA, because of congressionally imposed time constraints, was forced to conclude its investigation concerning fuel efficiency standards for 1985 model cars and had by default reached a final decision. 710 F.2d at 847. A new issue could arise only if the agency were to conduct an entirely new rulemaking in the future. The mere possibility that an agency may reconsider an issue, however, should not be dispositive of whether the agency's previous consideration was a final action. See *County of Rockland v. NRC*, 709 F.2d 766, 775 (2d Cir.) (NRC's refusal to take enforcement action to shut down nuclear power plant was final despite agency's promise to reconsider issue), *cert. denied*, 104 S. Ct. 485 (1983). Thus, there was no danger that the rulemaking proceeding NHTSA had already conducted would create a threat of multiple appeals. But the court's decision, refusing to review the

Auto Safety decision suggests several factors that courts should consider in determining whether an agency's refusal to act is final. Generally, agencies' decisions to terminate rulemaking proceedings made subsequent to notice and comment are final.²⁹ If the decision not to act represents an agency's choice of the status quo over possible change, it is final and subject to judicial review absent some pragmatic indications that the decision is not final.³⁰ One important pragmatic consideration, which was dispositive in this case, may be the timing of the decision. If the statute sets a date by which an agency's action may become effective and that date has not yet passed, the decision not to act may not be final.³¹ If the agency still has time to reconsider its decision, courts may see review as senseless. If the agency's refusal to act generates important legal questions that a court should consider, however,³² and the likelihood of new appealable issues in the future arising from the agency's refusal to act is low,³³ then courts may be willing to take review.³⁴

agency decision as it related to the years following 1985, does create a high likelihood of multiple appeals where none previously existed.

If the court had agreed to review the decision, it could have reached a final determination on whether the agency's refusal to adopt the rule was appropriate. Then, if the agency eventually did reconsider the issue and adopted a different course of action, the court could have reviewed that outcome based on any new circumstances that might have arisen. Under this approach to finality, petitioners would be allowed only a single appeal for each administrative decision, an outcome that is presumably preferable to multiple appeals. See *Freeman United Coal Mining v. Director, Office of Workers' Compensation Programs*, 721 F.2d 629, 631-32 (7th Cir. 1983) (the finality requirement avoids the prospect of successive appeals); *United States v. Louisiana-Pacific Corp.*, 569 F. Supp. 1141, 1144 (D. Or. 1983) (finality applies where further agency action could result in piecemeal challenges).

29. *Center for Auto Safety*, 710 F.2d at 846.

30. *Id.* at 846-47.

31. *Id.* at 847.

32. See *County of Rockland v. NRC*, 709 F.2d 766 (2d Cir.), *cert. denied*, 104 S. Ct. 485 (1983). In *County of Rockland*, the Second Circuit decided to review the NRC's refusal to take enforcement action to shut down a nuclear power plant because of the important legal issues generated by the agency's refusal to act. The court contended that the potential harm to the surrounding population that might have resulted from a nuclear accident justified prompt review of the agency's decision to allow the plant to operate. *Id.* at 775.

33. See *supra* note 28, discussing effect of appealable issues on whether agency's decision is final.

34. In a recent case, *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984), the court held that where a court of appeals has jurisdiction over a final agency action it also has jurisdiction to hear suits seeking relief, if those suits would have an effect on the court's future power of review. Petitioner had filed a petition for enforcement of accounting with the FCC in 1979. Rather than acting on the petition, the FCC sought comments and took no further action for five years. Thus, the court held, lack of finality does not preclude jurisdiction over claims of unreasonable agency delay or failure to act. See also *Hawaiian Elec. Co. v. EPA*, 723 F.2d 1440, (9th Cir. 1984) (EPA's refusal to consider a petition to modify air quality permit constitutes final agency action for purposes of judicial review, because the refusal is the the agency's final position on the matter).

B. Is Action Committed to Agency Discretion?

Even if an agency's nonaction is final, nonaction may be beyond the reach of judicial review under the APA if review is precluded by statute³⁵ or if the action is completely committed to the agency's discretion.³⁶ Historically, both of these exceptions to judicial review have been interpreted narrowly.³⁷

This section addresses the reviewability of agencies' exercises of discretion in the context of a narrow category of administrative refusals to act: an agency's refusal to take action to enforce standards that have already been adopted either by statute or through rulemaking.³⁸

The most common example of an agency's enforcement or prosecutorial discretion is that of a state prosecutor, who may choose to prosecute one person while releasing another. These decisions are virtually nonreviewable as committed exclusively to the prosecutor's discretion.³⁹ Another example of enforcement discretion is the authority of a licensing agency to decide to institute revocation proceedings against one violator while ignoring the violations of another.⁴⁰ Traditionally, courts have been un-

35. 5 U.S.C. § 701(a)(1) (1982).

36. *Id.* § 701(a)(2).

37. See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967). The Supreme Court in *Abbott* held that courts must allow judicial review unless the legislative intent to preclude review was shown by "clear and convincing evidence." *Id.* This standard was, until recently, construed to require fairly explicit language prohibiting review in either the statute or its legislative history. *E.g., id.*; see generally L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 339-63 (1965) (discussing the presumption of reviewability and the judicial interpretation of allegedly statutory exclusion).

In 1984, however, the Court reinterpreted "clear and convincing" to mean "fairly discernable in the statutory scheme." *Block v. Community Nutrition Inst.*, 104 S. Ct. 2450, 2457 (1984) (quoting *Data Processing v. Camp*, 397 U.S. 150, 157 (1970)). "Fairly discernable" includes inferences from the "collective impact" of a statute's legislative and judicial history. *Id.* at 2456. Thus, the Court no longer requires explicit language and interprets more broadly the statutory preclusion exception to judicial review.

The Court has also stated that action committed to an agency's discretion is unreviewable only in those rare instances where the statute is drawn so narrowly that there is no law to apply. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971).

The Supreme Court has, however, made inroads into the *Overton Park* doctrine. In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), the Court held that the APA "established the maximum procedural requirements" the Court could impose upon agencies engaged in rulemaking, except in the rarest circumstances. *Id.* at 525. Thus, *Vermont Yankee* effectively places beyond review most agency decisions to provide or deny procedures not required by the APA.

38. Because the APA's definition of "rule" includes an agency's statement that implements law or policy, the enforcement of existing standards by an agency qualifies as a rule, and conversely, the refusal by an agency to enforce is also a rule. See 5 U.S.C. § 551(4); see also *Center For Auto Safety v. National Highway Traffic Safety Admin.* 710 F.2d 842, 846 (D.C. Cir. 1983) (NHTSA's withdrawal of its notice of proposed rule constituted a rule).

39. 2 K. DAVIS, *supra* note 6, § 9:1, at 217 (2d ed. 1979); see also *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 380 (2d Cir. 1973) (in the absence of statutorily defined standards of reviewability or statutory policies of prosecution, the problems inherent in supervisory prosecutorial decisions do not lend themselves to resolution by the judiciary).

40. For further examples, see 2 K. DAVIS, *supra* note 6, § 9:1, at 217.

willing to review the exercise of this enforcement discretion.⁴¹ At least one influential commentator believes that the trend since 1970 has shifted toward an increased willingness by courts to review discretionary enforcement decisions, at least where those decisions are made by agencies or officers that do not hold the title of prosecutor.⁴² However, in *Heckler v. Chaney*, the Supreme Court apparently put a halt to that trend, ruling that agencies' decisions to withhold enforcement are generally not reviewable.⁴³

The Supreme Court's decision resolves a conflict that resulted from two recent decisions from the District of Columbia Circuit on whether an agency's refusal to take enforcement action is judicially reviewable.⁴⁴ In the first of those opinions, *Chaney v. Heckler*,⁴⁵ the majority held that the refusal by the Commissioner of the Food and Drug Administration (FDA) to investigate the use by several states of lethal injections to execute prisoners was reviewable. The court reasoned that the APA created a strong presumption of reviewability even of discretionary enforcement decisions.⁴⁶ In contrast, a different panel of the same circuit, in *Investment Co. Institution v. FDIC*,⁴⁷ declined review of a decision by the Federal Deposit Insurance Corporation (FDIC) refusing to declare unlawful a plan by the Boston Five Cents Savings Bank to sell mutual fund shares through its subsidiaries. In considering whether the FDIC's decision fell within the committed-to-agency-discretion exception, the court stated that review of an agency's enforcement discretion is generally prohibited.⁴⁸

Chaney v. Heckler concerned the FDA Commissioner's exercise

41. See, e.g., *Newman v. United States*, 382 F.2d 479, 482 (D.C. Cir. 1967) (existence of broad discretion in the prosecutor has long been accepted); see also 2 K. DAVIS, *supra* note 6, § 9:14 ("traditional system is, with few exceptions, one of . . . no judicial review of administrative discretion"). For a discussion and ultimately a rejection of possible justification for the traditional judicial reluctance to review enforcement discretion, see Note, *Judicial Review of Administrative Inaction*, 83 COLUM. L. REV. 627, 630-38 (1983) (pragmatic and other constitutional reasons that may once have justified a judicial reluctance to review nonenforcement cases are no longer persuasive in light of developments in the roles of Congress, administrative agencies, and courts).

42. See 2 K. DAVIS, *supra* note 6, § 9:6, at 239-48; see, e.g., *Adams v. Richardson*, 480 F.2d 1159, 1163-64 (D.C. Cir. 1983) (compelling agency to take enforcement action that it had withheld); *Trailways of New England, Inc. v. CAB*, 412 F.2d 926, 931-32 (1st Cir. 1969) (although the Board's discretion is broad, at some point it must be limited). Nevertheless, the availability of judicial review of agencies' refusals to take enforcement action is far from clear. See *WWHT, Inc. v. FCC*, 656 F.2d 807, 816 (D.C. Cir. 1981) (although scope of review is narrow, courts of appeals have jurisdiction to determine whether agency abused its discretion in denying requests for rulemaking).

43. *Heckler v. Chaney*, 105 S. Ct. 1649 (1985).

44. See *Investment Co. Inst. v. FDIC*, 728 F.2d 518 (D.C. Cir. 1984); *Chaney v. Heckler*, 718 F.2d 1174 (D.C. Cir. 1983), *rev'd*, 105 S. Ct. 1649 (1985).

45. 718 F.2d 1174 (D.C. Cir. 1983).

46. *Id.* at 1183-84.

47. 728 F.2d 518 (D.C. Cir. 1984).

48. *Id.* at 525-27.

of discretion under the Food, Drug and Cosmetic Act. The Act requires the FDA to ensure that drugs distributed in interstate commerce are safe and directs that all such drugs be labeled with directions for use and with adequate warnings against improper uses.⁴⁹ The Commissioner of the FDA had previously interpreted these labeling provisions as imposing an obligation on the agency to investigate and take appropriate action against unapproved uses of drugs where the unapproved use had become widespread or had endangered public health.⁵⁰ Eight death row inmates petitioned the FDA to investigate and stop states' use of certain drugs in the execution of prisoners. The petitioners alleged that the lethal injections of the drugs into humans as a method of execution constituted an unapproved use of the drugs. The FDA refused to take any action. The inmates appealed.⁵¹

The district court held that the Commissioner's refusal to act was unreviewable as an exercise of his exclusive enforcement discretion.⁵² The District of Columbia Circuit rejected this argument. In a controversial opinion, the court held that section 701(a) of the APA creates a strong presumption in favor of review of agencies' actions. The court extended this strong presumption of reviewability to an agency's refusal to take enforcement action.⁵³ Such instances of enforcement discretion, the court asserted, will be presumed subject to review unless the enabling statute was drawn so broadly that there is no law for the court to apply.⁵⁴

The majority opinion, authored by Judge Wright, cited five decisions in support of the presumption in favor of reviewability. Upon closer scrutiny, the cited opinions offer only questionable support for the court's proposition that the strong presumption in favor of reviewability applies to an agency's denial of enforcement action.

The court relied most heavily on a Supreme Court opinion, *Dunlop v. Bachowski*.⁵⁵ Of the five opinions cited, *Bachowski* is the only one involving an agency's decision to refrain from exer-

49. Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301-392 (1982).

50. 718 F.2d at 1176.

51. *Id.* at 1176-77.

52. *Id.* at 1183 (citing *Chaney v. Schweicker*, No. 81-2265, slip op. (D.D.C. Aug. 3, 1982)).

53. *Id.* at 1185-86 (citing *National Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1043-44 (D.C. Cir. 1979)). The court framed its inquiry in terms of whether considerations discouraging reviewability were sufficiently compelling to rebut the strong presumption in favor of review of the Commissioner's enforcement decision.

54. *Id.* at 1184. The court in *Investment Company* explained that there is "no law to apply" if "there are no standards to govern the agency exercise of discretion." *Investment Co. Inst. v. FDIC*, 728 F.2d at 527. The determination of whether there is law to apply turns on pragmatic considerations as to whether an agency's determination is the proper subject of judicial review. See *National Resources Defense Council, Inc. v. SEC*, 606 F.2d at 1043. This in turn depends on the need for judicial supervision to safeguard the plaintiff's interests, the impact of review on the effectiveness of the agency, and the appropriateness of the issues raised for judicial review. *Id.* at 1044.

55. 421 U.S. 560 (1975). *Bachowski*, a union candidate who was defeated in an election, filed a complaint with the Secretary of Labor alleging violations of federal

cising its enforcement powers.⁵⁶ As Judge Scalia's dissent in *Chaney* points out, however, the *Bachowski* opinion ruled on a different exception to judicial review under the APA than the one at issue in *Chaney*.⁵⁷

Both the majority and dissenting opinions of the court of appeals in *Chaney* focused on language in the lower court's opinion in *Bachowski* that stated, "[n]ot every refusal by a Government official to take action to enforce a statute, however, is unreview-

disclosure requirements during the election. Based on investigative findings, the Secretary refused to bring an action to set aside the election. *Id.* at 562-63.

56. Judge Skelly Wright, writing for the majority in *Chaney*, also cited *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), in support of the strong presumption of reviewability. 718 F.2d at 1183; see *Dunlop v. Bachowski*, 421 U.S. at 567 (Brennan, J., for the Court, citing *Abbott*). However, the *Abbott Laboratories* opinion addressed only the statutory-preclusion exception contained in section 701(a)(1) of the APA; it did not even consider the committed-to-agency-discretion exception contained in section 701(a)(2) of the APA. 387 U.S. at 140. The latter was the exception at issue in *Chaney*.

Judge Wright also cited *WWHT, Inc. v. FCC*, 656 F.2d 807 (D.C. Cir. 1981) and *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031 (D.C. Cir. 1979) in support of the presumption. *Chaney v. Heckler*, 718 F.2d at 1183. In both decisions, however, the court reviewed general petitions for rulemaking, not requests for enforcement action. Although both opinions asserted that section 701(a) of the APA creates a strong presumption of reviewability, (see *WWHT, Inc. v. FCC*, 656 F.2d at 815; *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d at 1043), Judge Wright fails to state why this presumption should apply to the special case of refusals of enforcement action, which had traditionally been considered unreviewable.

Judge Wright also cited *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), in support of a strong presumption in favor of reviewability of agencies' refusals to take enforcement action. *Chaney v. Heckler*, 718 F.2d at 1183. The majority's reliance on *Overton Park* is unfounded because that opinion also did not address the review of enforcement discretion.

57. See 718 F.2d at 1193 (Scalia, J., dissenting). Judge Antonin Scalia observed that the *Bachowski* opinion did not consider the narrow question addressed by Judge Skelly Wright of whether the decision to refuse enforcement action was so committed to the discretion of the agency that a court must decline review. Rather, Judge Scalia argued, *Bachowski* considered whether the language of the Labor Management Reporting and Disclosure Act explicitly precluded review. *Id.* See also *Dunlop v. Bachowski*, 421 U.S. at 566 (Court relied on the Labor Management Reporting and Disclosure Act to discern reviewability). Nonetheless, the *Chaney* majority may have been influenced by a theory developed in the *Bachowski* litigation that proposed an exception to the nonreviewability of enforcement decisions where the decision involves the protection of individual rights. The Third Circuit's opinion, which preceded the Supreme Court's consideration of *Bachowski*, did address the reviewability of enforcement discretion. See *Bachowski v. Brennan*, 502 F.2d 79, 87-88 (3d Cir. 1974), *rev'd on other grounds sub nom.* *Dunlop v. Bachowski*, 421 U.S. 560 (1975) (reversing, because the court of appeals erroneously interpreted the APA as authorizing a trial-type inquiry by reviewing court). That opinion proposed that the doctrine of unreviewable enforcement discretion be limited to those civil cases that, like criminal prosecutions, involve the vindication of societal or governmental interests rather than the protection of individual rights. 502 F.2d at 87. The Third Circuit then found that, because the statute at issue demonstrated a deep concern for the interests of the individual, it would be appropriate to review the agency's exercise of enforcement discretion. *Id.* at 87-88. The Supreme Court later approved this reasoning. See *Bachowski*, 421 U.S. at 567 n.7 (agreeing with the court of appeals, for the reasons stated in the opinion, that the Secretary's decision was reviewable).

able.”⁵⁸ The majority apparently read this as establishing a strong presumption in favor of reviewability.⁵⁹ In his dissent, Judge Scalia read the language as meaning that most enforcement decisions are not reviewable. He interpreted *Bachowski* as implying a general principal of nonreviewability of enforcement decisions.⁶⁰

The four other opinions cited by Judge Wright for the presumption favoring review also fail to offer solid support.⁶¹ Nonetheless, Judge Wright assumed the existence of a strong presumption in favor of reviewability that applied even to enforcement decisions. He then inquired whether this was one of those rare instances where the statute was drawn in such broad terms that review would be impossible because there was “no law to apply,”⁶² and decided that it was not.⁶³ In conducting its inquiry of whether there was law to apply, the court asked if there were any other considerations counseling against review, such as whether review would intrude on the agency’s functions and whether the issues were appropriate for judicial review. It then phrased the issue as whether any of these considerations weighed sufficiently in favor of nonreviewability to rebut the strong presumption in favor of judicial review.⁶⁴ It found that they did not.⁶⁵

In contrast to the majority’s approach, the dissent in *Chaney* began with a presumption of nonreviewability and, not surprisingly, reached a result consistent with this presumption. Citing *Kixmiller v. SEC*,⁶⁶ Judge Scalia’s dissent began with the premise that there is a presumption that courts will not review an agency’s refusal to take enforcement action, and that only special considerations would allow a court to take review.⁶⁷ In Judge Scalia’s view,

58. *Bachowski v. Brennan*, 502 F.2d 79, 87 (3d Cir. 1974). Although the Supreme Court did not cite this specific language with approval, it agreed that the exercise of prosecutorial discretion was reviewable for the reasons cited by the lower court. *Bachowski*, 421 U.S. at 567.

59. *Chaney v. Heckler*, 718 F.2d at 1185 n.26.

60. *See id.* at 1193 (Scalia, J., dissenting). Judge Scalia felt that the Third Circuit in *Bachowski* had carefully distinguished its review of the Secretary of Labor’s enforcement discretion from “the more typical case in which a decision not to enforce is unreviewable.” *Id.*

61. *See supra* note 55 and accompanying text.

62. 718 F.2d at 1184-85 (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971)) (an action is only committed to the exclusive discretion of the agency where the statute is drawn in such broad terms that there is no law to apply).

63. *Id.* at 1186.

64. *Id.* at 1185-86.

65. *Id.* at 1188.

66. 492 F.2d 641, 645 (D.C. Cir. 1974) (agency’s decision not to investigate or take enforcement action is generally unreviewable).

67. 718 F.2d at 1196 (Scalia, J. dissenting). If the agency’s refusal had amounted to a conscious and express adoption of a policy that constituted an abdication of its statutory duty, Judge Scalia would have opted for review. *Id.* at 1194. *See infra* note 75. Also, if the agency had made the very finding that automatically triggered its statutory duty to act, Judge Scalia would have taken review. *Id.* In other words, if the FDA had found that the lethal injections did pose a public health risk and then refused to investigate, the court would have been obligated to review. *Id.* at 1195. Judge Scalia dismissed a further consideration, the presence of mandatory language in the statute, as unimportant because all criminal statutes contain mandatory language and yet prosecutors still enjoy broad discretion. *Id.* at 1196. In addition, the agency’s own

