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NOTE: JUDICIAL REVIEW OF ADMINISTRATIVE RULEMAKING AND ENFORCEMENT DISCRETION: THE EFFECT OF A PRESUMPTION OF UNREVIEWABILITY. *

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LEXISNEXIS SUMMARY:
... The right of persons aggrieved by agency action to obtain judicial review of administrative decisions is now a well-established principle of administrative law. ... Part IV criticizes *Chaney*'s distinction between action and inaction and analyzes the practical effect of the presumption of unreviewability on judicial review of administrative inaction. ... For example, the *Falkowski* court failed to recognize the distinction between the general presumption of reviewability of agency discretion and the narrow *Chaney* presumption of unreviewability in nonenforcement decisions. ... A principal foundation of the *Chaney* presumption of unreviewability is that agency inaction, such as a refusal to enforce, is usually not suitable for judicial review. ... Conversely, the Supreme Court recognized in *Chaney* that inaction, whether a refusal to institute an enforcement action or not, is reviewable if Congress has limited the agency's discretion. ... The numerous decisions in which action has been held unreviewable, and inaction has been held reviewable, highlight that despite *Chaney*, the determination of whether administrative action or inaction has been committed to the agency's discretion by law often depends upon application of *Overton Park*'s law-to-apply standard. ... Viewed in this light, *Chaney* stands only for the proposition that one kind of administrative inaction -- a discretionary refusal to enforce that is not subject to meaningful statutory standards -- is unreviewable. ...

HIGHLIGHT: The availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid. n1

TEXT:
[*596] The right of persons aggrieved by agency action to obtain judicial review of administrative decisions is now a well-established principle of administrative law. Extensive judicial involvement in administrative action ensures the identification and implementation of the values and goals manifested by Congress in regulatory statutes. n2 The Administrative Procedure Act (APA) n3 contains generous review provisions to realize these goals. n4

Two decades ago, the Supreme Court declared that administrative action is entitled to a presumption of reviewability under the [*597] APA. n5 Courts consistently recognized this presumption until 1985 when the

Supreme Court held, in *Heckler v. Chaney*, n6 that the presumption of reviewability did not apply to an agency's discretionary refusal to initiate enforcement proceedings. n7 This decision has caused other courts to reconsider the reviewability of other kinds of administrative inaction and threatens to limit the availability of judicial review of decisions that courts previously would have found reviewable.

This Note assesses the implication of *Heckler v. Chaney* on agencies' refusals to initiate rulemaking or enforcement proceedings. Part I traces the development of the presumption of reviewability of administrative action under the common law and its codification in the APA. Part II examines the judicial attitude toward review of administrative discretion under the APA and includes a discussion of *Heckler v. Chaney.* Part III analyzes post-*Chaney* decisions, discusses the effect of the presumption of unreviewability, and considers the impact of *Chaney* on decisions not to promulgate rules. Part IV criticizes *Chaney*'s distinction between action and inaction and analyzes the practical effect of the presumption of unreviewability on judicial review of administrative inaction. This Note concludes that the *Chaney* presumption of unreviewability is contrary to the policies underlying the APA, and that both nonenforcement and nonpromulgation decisions should be subject to a presumption of reviewability. However, because *Chaney* is unlikely to be overruled in the near future, it should be read narrowly and applied only in nonenforcement decisions factually similar to *Chaney.*

I. Development of the Presumption of Reviewability

A. The Era of Unreviewability

Throughout the nineteenth century, the Supreme Court was reluctant to review discretionary actions of executive agencies unless a statutory provision expressly provided for review. In the 1827 case of *Martin v. Mott,* n8 a decision that for the next seventy-five years would set the tenor of judicial review of delegated authority, the Supreme Court held that the recipient of a statutory delegation of discretionary power was the sole and exclusive judge of the bounds of that power. n9 The Court stated that the question of an abuse of such power was not a proper question for the judiciary. n10 Observing [*598] that all power is susceptible to abuse, the Court ruled that the remedy for such abuse lay not in judicial review but, rather, in the legislative process. n11

Thirteen years later, in *Decatur v. Paulding,* n12 the Court again exercised restraint by holding that it lacked jurisdiction to review the Secretary of the Navy's refusal, while acting as trustee of the Navy's pension fund, to grant Decatur's pension request. n13 The Court stated: "The interference of the courts with the performance of the ordinary duties of the executive . . . would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them." n14

The question of judicial review of executive actions arose frequently in decisions of the late 1800s. n15 These decisions echoed the reasoning of *Decatur v. Paulding,* relying on both the failure of the relevant statutes to provide for judicial review and the statutes' implications that administrative action was final. n16 In 1895, the Supreme Court rejected judicial review of discretionary administrative action in *Lem Moon Sing v. United States.* n17 The Court stated that the question of whether an alien had acquired domicile in the United States was one that had been "constitutionally committed" to the executive branch by Congress, and the judiciary was therefore barred from reviewing the executive branch's decision. n18 In 1900, in the case of *Keim v. United* [*599] *States,* n19 an agency's power to discharge its employees was challenged. The Supreme Court again denied judicial review, stating that "the courts have no general supervising power over the proceedings and action of the various administrative departments of government." n20

B. The Transition from Unreviewability to Reviewability under the Common Law

The presumption of unreviewability encountered its first major setback in 1902. In the landmark decision of *American School of Magnetic Healing v. McAnnulty,* n21 the Supreme Court established a foundation for the presumption of reviewability of administrative action. *Magnetic Healing* arose when the Postmaster General, after deeming fraudulent the plaintiff's claim that "mental powers" could cure disease, barred the plaintiff's commercial use

of the mails. n22

The Court, cautiously stating that the mere creation of an administrative power did not "necessarily and always oust the courts of jurisdiction to grant relief," held that "acts of all . . . officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief." n23 Moreover, in the absence of judicial power to grant relief, "the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual." n24

The sudden departure from precedent in *Magnetic Healing* and other decisions n25 highlights the Court's recognition of the limits of executive discretion. In these cases, the Court implied that parties to administrative proceedings had procedural protections available to them that the executive, even by asserting that the decision fell within the executive's discretionary ambit, could not circumvent. Most important, the barrier against judicial review of administrative [*600] discretion had been broken. n26 Five years later, the Court further eroded the doctrine of unreviewability of administrative action by holding that a decision not preceded by a hearing in good faith is not final. n27

In 1915, judicial review of administrative decisions received one of its most powerful affirmations. In *Gegiow v. Uhl*, n28 the Commissioner of Immigration had refused to admit a group of aliens into the United States because of the likelihood that the aliens would become "public charges" due to the unavailability of employment opportunities. n29 Justice Oliver Wendell Holmes, writing for the Court, justified judicial review of the Commissioner's ruling on the basis that the Commissioner had misinterpreted the law. Justice Holmes maintained that the statutory phrase "'likely to become a public charge'" referred to an individual's incapacity, not to the availability of employment. n30

Because the statute did not provide for judicial review, and, in fact, provided that the Commissioner's decision was to be final, the *Uhl* decision was a significant milestone in the development of a presumption of reviewability. Furthermore, immigration decisions were an area in which administrative discretion traditionally had been considered appropriate and, in *Uhl*, the Commissioner's interpretation of the law was arguably reasonable. Moreover, the aliens were denied the privilege of entry, a right to which they had no claim. n31 The result in *Uhl* emphasizes the evolution of judicial review of administrative discretion since the late 1800s.

Two years after *Uhl*, the Court, in *Lane v. Hoglund*, n32 disregarded the line of contrary authority that had developed during the late 1800s and ordered the Secretary of the Interior to execute a land grant. The *Lane* Court, in an opinion by Justice Willis Van Devanter, stated that every official act requires an official decision that the statute allows or requires such action. n33 When courts find that statutory guidelines are clear, administrative officials have no discretion and judicial review is required. n34

The developing presumption of reviewability was reinforced during the 1920s and 1930s as the judiciary attempted to contain the power of rapidly growing administrative agencies. Even if relevant statutes provided that agency determinations would be final, [*601] the Court often read "final" to require that the decision be supported by substantial evidence, consistent with the relevant law, and not arbitrary or capricious. n35 In 1932, the Supreme Court outlined the proper scope of judicial review. Courts could review an administrative decision to determine whether the official acted within his statutory authority, whether his decision was supported by available evidence, and whether the decisionmaking procedures used satisfied "elementary standards of fairness and reasonableness." n36

Justice Stanley Reed, writing for the majority in *Stark v. Wickard*, n37 held that judicial review was appropriate to determine whether the Secretary of Agriculture had exceeded his statutory authority and thereby impaired a statutorily created right. n38 The Court believed that the "silence of Congress as to judicial review is . . . not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts." n39 The Court stated that it is the judiciary's responsibility to determine the limits of statutory grants of authority. n40 By fully realizing its [*602] Article III powers, the Supreme Court reversed the bar to judicial review of administrative action, and in the process

created a presumption of reviewability. Under this approach, the agency's discretion is not absolute, and courts may overturn an administrative decision if the agency has abused its discretion.

C. The Codification of the Presumption of Reviewability: The Administrative Procedure Act

The Administrative Procedure Act (APA), n41 as passed in 1946, codified the then-developing common law presumption of judicial review of administrative action. n42 On its face, the APA establishes a presumption in favor of reviewability. The APA states that judicial review is available "except to the extent that -- (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." n43 Reviewability under the APA is therefore dependent on statutory language. The drafters did not clearly delineate the "committed to agency discretion" exception, n44 but the mere fact that an agency has some discretion is clearly not enough to bar judicial review. n45 The APA expressly empowers a reviewing court to set aside administrative action that is "an abuse of discretion." n46

The legislative history of the APA supports this conclusion. In hearings on the APA, Congress was concerned about possible administrative abuse of discretion. Congressman Francis Walter, Chairman of the House Judiciary Committee, discussing the section 701(a) exception for matters committed to agency discretion by law, stated that agencies "do not have authority in any case to [*603] act blindly or arbitrarily." n47 In reports on the bill, both houses of Congress indicated that this exception was not intended to bar judicial review altogether. n48

Thus, Congress did not intend to preclude "abuse of discretion" from judicial review; rather, Congress sought to prevent courts from substituting their judgment for that of the agencies. n49 On matters within agency discretion, courts will not substitute their judgment if agency decisions are neither irrational nor unreasonable. The House Report illuminates the distinction between judicial review of abuse of discretion and the substitution of the court's judgment for agency judgment by stating that "the existence of discretion does not prevent a person from bringing a review action but merely prevents him *pro tanto* from prevailing therein." n50 This statement indicates that the "discretion" exception does not bar review of "abuse of discretion" although the litigant may fail to prove that the action was arbitrary or capricious.

Senator Patrick McCarran, Chairman of the Senate Committee on the Judiciary, characterized judicial review as "indispensable, since its mere existence generally precludes the arbitrary exercise of powers." n51 He then explained that an agency's exercise of discretion must not be arbitrary, but rather, "it must be a discretion [*604] based on sound reasoning." n52 In a speech before the American Bar Association, delivered shortly after the passage of the APA, Senator McCarran further clarified his remarks: "Committed 'by law' means, of course, that claimed discretion must have been intentionally given to the agency by the Congress, rather than assumed by it in the absence of express statement of law to the contrary. 'Abuse of discretion' is expressly made reviewable." n53

The legislative history of the APA, by stressing the availability of judicial review for "abuse of discretion," and by adopting a strong presumption in favor of judicial review, implies that the APA's preclusion of judicial review of administrative discretion should be read narrowly.

II. The Judicial View of Administrative Discretion Under the APA

A. Early Decisions Under the APA

In the 1960s and 1970s, the Supreme Court clarified judicial review of administrative discretion under the APA. The Court emphasized the presumption of reviewability and attempted to define the committed-to-agency-discretion exception to judicial review. In *Abbott Laboratories v. Gardner,* n54 a case involving preenforcement review of Food and Drug Administration (FDA) regulations, the Supreme Court for the first time explicitly established a presumption of reviewability of administrative action. n55 The Court determined that judicial review of agency action is precluded only if "there is persuasive reason to believe that such was the purpose of Congress." n56 The Court further stated that the APA's "'generous review provisions'" must be given a hospitable interpretation. n57 Throughout [*605] the 1960s and 1970s, federal courts accepted this presumption of reviewability as controlling law. n58

The Supreme Court specifically addressed the committed-to-agency-discretion exception to judicial review in *Citizens to Preserve Overton Park, Inc. v. Volpe.* n59 In this case, a citizens' committee protested the Secretary of Transportation's decision to build a federally funded highway through a neighborhood park. n60 The Court held that the Secretary's decision was subject to judicial review, because an action is "committed to agency discretion by law" only if there is "no law to apply." n61 Because under the relevant statute the Secretary was permitted to expend funds only if "no feasible and prudent alternative" existed, n62 there was law to apply. The existence of explicit statutory standards made the Secretary's decision a proper subject for judicial review. n63 The Court emphasized, however, that review was limited to deciding whether [*606] the Secretary abused his discretion. n64 *Overton Park*'s no-law-to-apply inquiry, although it has received criticism, n65 remained the benchmark by which the courts interpreted section 701(a)(2) n66 until the Supreme Court again addressed the issue in *Heckler v. Chaney.*

B. Reviewability of Regulatory Inaction Before Chaney

Although the Supreme Court has never addressed the reviewability of agency decisions not to promulgate rules, the D.C. Circuit has considered this question on several occasions during the 1970s and early 1980s. n67 By applying a presumption of reviewability, the D.C. Circuit has consistently reviewed administrative decisions, although the standard of review has generally remained properly deferential to agency discretion and expertise.

In *Natural Resources Defense Council, Inc. v. SEC,* n68 the D.C. Circuit for the first time considered whether the SEC's decision not to promulgate rules was committed to the agency's discretion. The SEC had conducted a rulemaking proceeding in response to a petition requesting rules that would require corporations to disclose their environmental and equal employment policies. n69 However, the SEC declined to propose the requested rule, and ultimately did not adopt a disclosure rule at all. n70

Using *Overton Park*'s no-law-to-apply standard, the court stated that the determination of whether there is law to apply turns on pragmatic considerations. n71 The court believed the strongest argument against reviewability was that decisions that may turn on factors such as budgetary considerations are not well-suited to judicial resolution. n72 In this case, the court held that the issue was reviewable because of the strong presumption of reviewability and [*607] the existence of the agency's rulemaking proceeding, which produced a record that provided a focus for judicial review. n73

Later, in *WWHT, Inc. v. FCC,* n74 the same court extended reviewability to the denial of a rulemaking petition, in which the record was limited to the petition and the agency's denial. *WWHT* arose when the Federal Communications Commission (FCC) denied a petition for rulemaking that requested that local cable operators be required to carry the scrambled signals of subscription television stations (STV). n75 STV broadcasters sought review of this decision, arguing that the FCC's conclusions were supported neither by the record nor by the FCC's rules. n76

The court of appeals held that in the absence of "'clear and convincing legislative intent to negate review,'" an agency's denial of a rulemaking petition is reviewable. n77 The court permitted judicial review despite its conclusion that the decision whether to institute rulemaking proceedings is essentially legislative in nature and largely committed to the agency's discretion. n78 Beginning with a presumption that the agency's denial was reviewable, the court cited *Overton Park* for the proposition that an action is exempt from judicial review only if the statute is written so broadly as to provide no law to apply. n79

The court concluded, however, that the appropriate standard of judicial review would be "very narrow." n80 The court adopted a sliding scale based on consumption of agency resources and the existence of a record for review: "[T]he greater the agency's investment of resources in considering the issues . . . and the more complete the record compiled during the course of the agency's [*608] consideration, 'the more likely it is that the ultimate decision not to take action will be a proper subject of judicial review.'" n81 When no rulemaking proceedings are initiated, the scope of review is extremely deferential and must be limited to a determination that the agency adequately explained its decision and that some basis exists in the record to support that decision. n82 The court added that rulemaking could only be imposed in

three situations: (1) if a significant factual predicate of a prior decision on the subject has been removed; (2) if the agency mistakenly concluded that it lacked jurisdiction to promulgate rules; or (3) if a statute imposed rulemaking requirements. n83

In a subsequent decision, the D.C. Circuit added a caveat. The judicial deference given to denials of rulemaking petitions "is appropriate only where the rejected proposal is addressed to matters within the agency's broad policy discretion." n84 Judicial review must be "exacting" when the petitioner has challenged the agency's compliance with procedural or substantive requirements. n85

C. The Limited Presumption of Unreviewability: Heckler v. Chaney

Heckler v. Chaney n86 abruptly ended the era in which a presumption of reviewability applied to all areas of administrative discretion. In *Chaney*, the Supreme Court held that a presumption of unreviewability applies to an agency's decision not to initiate an enforcement action. n87

Chaney arose when state prisoners who had been sentenced to death by injection of lethal drugs requested the FDA to enjoin the use of these drugs as a violation of the Federal Food, Drug and Cosmetic Act. n88 The FDA rejected this request, claiming that it lacked jurisdiction over the use of drugs for human execution and asserting that, even if jurisdiction did exist, the FDA had "inherent [*609] discretion" to decline to undertake enforcement. n89 The district court granted summary judgment to the FDA, n90 but the court of appeals reversed, holding the agency's action reviewable and the refusal to enforce arbitrary and capricious. n91

The court of appeals relied on section 701(a)'s "strong presumption of reviewability" and held that the exceptions to section 701(a) should be construed narrowly. n92 The court held that *Overton Park*'s no-law-to-apply threshold for judicial review applied to all administrative action, including the discretionary refusal to institute enforcement actions. n93 The court reasoned that a determination of whether there is law to apply turns on pragmatic considerations of whether the issues are appropriate for judicial review. n94 If there is law to apply, the agency action is not committed to agency discretion and is subject to judicial review under the APA. n95 The court held that there was law to apply because it found evidence indicating that the FDA considered itself obligated to institute enforcement actions. n96

The court then considered whether the FDA's decision not to enforce was arbitrary or capricious and concluded that the FDA's refusal was irrational in light of the purposes of the Act. n97 This refusal, the court believed, amounted to an abdication of statutory responsibility by the FDA. n98

A dissenting opinion by Judge [now Supreme Court Justice] Antonin Scalia foreshadowed the Supreme Court's reversal of the majority's conclusion. Judge Scalia cited a 1974 decision, *Kixmiller v. SEC*, n99 for the proposition that agencies' enforcement decisions are "generally unreviewable." n100 He likened administrative [*610] enforcement discretion to prosecutorial discretion, and therefore believed that the decision should be subject to a presumption of unreviewability. n101 Judge Scalia concluded that the FDA rationally refused to become involved in an issue that had little to do with assuring safe and effective drugs. n102

The Supreme Court granted certiorari and then reversed the court of appeals. In an opinion by Justice [now Chief Justice] William Rehnquist, the Court held that agency decisions not to pursue enforcement actions are entitled to a presumption of unreviewability. n103 Justice Rehnquist indicated that *Overton Park*'s no-law-to-apply principle was a narrow exception to the general presumption of reviewability of agency action. n104 He distinguished *Overton Park*, however, on the ground that *Overton Park* did not involve a refusal to take enforcement action. n105

The Court concluded that agency decisions to refuse enforcement action, which are generally made in the absence of clear guidelines, fall within the narrow *Overton Park* exception and are therefore presumptively unreviewable. n106 The Court asserted three factors to justify this presumption. First, the Court stressed that agencies are more competent than courts to make enforcement determinations because of the agencies' greater awareness of the complexities they must consider and the constraints under which they operate. n107 Second, a failure to act, unlike positive action, does

not involve the exercise of a government's coercive power and does not provide a focus for judicial review. n108 Third, a nonenforcement decision is analogous to the exercise of [*611] prosecutorial discretion, which is traditionally unreviewable. n109 The Court created one exception to this presumption of unreviewability: The presumption is rebutted if Congress has set substantive standards or priorities to guide the agency's exercise of its enforcement power -- only if the statute provides guidelines in the form of meaningful standards is there law for a reviewing court to apply. n110

The Court emphasized the limited scope of its decision by explicitly stating that it was not considering a challenge to an agency's refusal to initiate rulemaking proceedings. n111 The Court also did not consider constitutional claims or a consistent refusal to enforce a statute. n112

Justice Thurgood Marshall concurred in the result but objected to the creation of a "presumption of unreviewability." n113 Justice Marshall claimed that this presumption was a marked departure from Supreme Court precedent and prior interpretations of the APA. n114 He also questioned the analogy likening agency enforcement [*612] discretion to prosecutorial discretion. Supported by recent case law, Justice Marshall stressed that prosecutorial decisions focus on past conduct, whereas administrative enforcement decisions often seek to prevent future injuries to entire classes of individuals, such as injuries that might result from misbranded drugs or unsafe industrial plants. n115 Because enforcement decisions affect entire classes of individuals, Justice Marshall concluded that the interest involved in administrative enforcement decisions are more focused and are often more pressing than the interests involved in prosecutorial decisions. n116

Moreover, Justice Marshall believed that the majority's distinction between agency action and inaction was fallacious because agency inaction could have just as devastating an effect on individuals as coercive action. n117 Justice Marshall would have ruled that the FDA's refusal to bring an enforcement action was reviewable, although not an abuse of agency discretion. n118 Finally, Justice Marshall concluded that the many possible exceptions to the presumption of unreviewability of nonenforcement decisions could, in practice, force courts to reach decisions on the merits. n119 To ensure that none of the exceptions applied, courts would have to examine the reasons for the agency's action or inaction -- in effect a de facto examination of the merits, albeit with due deference. n120

III. The Aftermath of Heckler v. Chaney

Since the Supreme Court decided *Chaney*, appellate courts have addressed the reviewability of administrative decisions numerous times, with inconsistent results. The decisions reveal the difficulty of applying *Chaney* in various factual settings. The courts have grappled both with the applicability of the presumption of unreviewability in cases factually dissimilar to *Chaney* and [*613] with the difficulty of determining the circumstances in which an agency's decision must be reviewed on the merits to determine whether the presumption applies. These decisions cast doubt on the usefulness of the presumption of unreviewability, even in nonenforcement cases, in determining whether a decision has been committed to the agency's discretion.

A. Extending the Presumption of Unreviewability Beyond Nonenforcement Decisions

Many courts have limited *Chaney* to its facts by continuing to apply a presumption of reviewability to actions not involving refusals to enforce. n121 In contrast, some courts have expressed a willingness to extend *Chaney*'s holding. n122 The trend toward limiting *Chaney* to its facts is illustrated by *Robbins v. Reagan*, n123 which arose when the Department of Health and Human Services reneged on a promise to convert a privately operated shelter for the homeless into a model shelter, choosing instead to close it. n124

The Community for Creative Non-Violence (CCNV) alleged that the Department of Health and Human Services had abused its discretion by basing its decision to close the shelter on animus [*614] toward the CCNV, the operator of the shelter, such hostility being clearly irrelevant under the Community Services Block Grant Act. n125 The government argued that the decision to close the shelter was unreviewable because there was no federal law to apply.

n126 The court held that *Chaney's* presumption of unreviewability did not apply because the decision to close the shelter was not analogous to a nonenforcement decision. n127 The court read *Chaney* as reaffirming the presumption of reviewability in contexts other than nonenforcement and agreed to review the decision to close the shelter because it found law to apply in the governing statute. n128

The D.C. Circuit employed similar reasoning in *Amalgamated Transit Union v. Donovan,* n129 when it interpreted *Chaney* as reaffirming the strong presumption in favor of judicial review in cases not involving nonenforcement decisions. n130 The underlying statute required the Secretary of Labor to certify that local transit authorities receiving federal funding had made "fair and equitable" labor arrangements under the Urban Mass Transportation Act of 1964. n131 The transit union challenged the Secretary's certification of labor arrangements that had not been bargained for collectively. n132

The court concluded that the statute did not confer discretionary authority upon the Secretary because the statute's certification requirements were mandatory. n133 The court noted that the case concerned the agency's "interpretation of the authority delegated to it," which was reviewable. n134 By divining standards in the [*615] governing statute that controlled the Secretary's actions, n135 the court used *Chaney* to support the proposition that the Secretary did *not* have unreviewable discretion. n136

In *California Human Development Corp. v. Brock,* n137 the petitioners argued that the Department of Labor's method for allocating funds violated the Job Training Partnership Act (JTPA) n138 and agency regulations. The D.C. Circuit again stated that *Chaney's* presumption of unreviewability did not apply because the decision was not a refusal to take enforcement action. n139 The Department's regulations and the statutory guidelines provided law to apply, and the court measured the agency's action against those standards. n140

Judge Scalia, who concurred in the result but not the majority's reasoning, stated that the agency's discretion in allocating JTPA funds was indistinguishable from a decision not to prosecute because, like nonenforcement decisions, allocation decisions often involve "a complicated balancing of a number of factors which are peculiarly within the [agency's] expertise." n141 Therefore, Judge Scalia concluded that *Chaney's* presumption of unreviewability should have been applied to the decision allocating JTPA funds. n142

Judge Scalia also disagreed with the majority's conclusion that the general statutory guidelines provided an adequate basis for review of the agency's action. n143 He also did not believe that the agency regulations limited the Secretary's discretion enough to make that discretion reviewable. n144

Judge Scalia's analysis would extend the presumption of unreviewability beyond nonenforcement decisions of the kind involved in *Chaney.* The majority, in *California Human Development Corp.,* drew a distinction between affirmative acts taken pursuant to a statute and an agency's refusal to take enforcement [*616] action under a statute. n145 Judge Scalia, in his *Chaney* analysis, however, glossed over this distinction, and instead reasoned that the agency possesses presumptively unreviewable discretion in affirmative actions such as grant allocations merely because, like a nonenforcement decision, the allocation may require "'a complicated balancing of . . . factors which are peculiarly within [the agency's] expertise.'" n146 These factors, however, are not the same kinds of resource-allocation factors at issue in *Chaney. Chaney* focused on an agency's allocation of its own resources in choosing when to institute enforcement action. n147 *California Human Development Corp.,* however, concerned the allocation of grant funds -- a statutory benefit -- not an agency resource. n148

The only similarity between an allocation decision and a nonenforcement decision is that the statute granted the Secretary discretion to allocate grant funds based on factors within the agency's expertise. However, Judge Scalia's conclusion that a presumption of unreviewability applies because allocation decisions are traditionally committed to the agency's discretion does not necessarily follow from an express grant of discretion in a statute. Nor does Judge Scalia explain why these decisions are traditionally discretionary. Unlike nonenforcement decisions, allocation decisions can be analogized to neither inaction nor to prosecutorial discretion. The fact that the factors to be considered are uniquely

within the agency's expertise may have caused Congress to grant discretion to the Secretary, but due to the existence of factors other than resource allocation and the lack of any relation to prosecutorial discretion, the decision should not be presumptively unreviewable.

While Judge Scalia sought to expand *Chaney*'s scope, another panel of the D.C. Circuit applied the decision in a haphazard manner. In *Falkowski v. EEOC,* n149 the D.C. Circuit held that the Department of Justice's decision not to provide counsel for a government employee, although not analogous to the exercise of prosecutorial discretion, was nevertheless discretionary and therefore presumptively unreviewable. n150

The court did not apply the *Overton Park* law-to-apply standard, yet found the decision unreviewable because two of the factors identified in *Chaney* -- the agency's superiority as a decisionmaker and the lack of specific congressional limits on the agency's discretion -- were present. n151 The court repeatedly likened the Department of Justice's discretion in this case to the [*617] FDA's refusal, in *Chaney,* to enforce. n152 These similarities led the *Falkowski* court to conclude that the Department of Justice's decision "was within the agency's *unreviewable* discretion." n153

Although on subsequent rehearing the court claimed it had not found the agency's action presumptively unreviewable, n154 the confused language of *Falkowski* apparently added to the *Chaney* presumption of unreviewability by expanding the presumption beyond the narrow confines of a decision not to enforce. Moreover, by focusing entirely on the factors identified in *Chaney* without referring to the general presumption of reviewability, the court's analysis is confusing because it ignored the primary question -- whether there is law to apply. n155

These cases indicate that judges cannot agree on even the threshold question of when the presumption of unreviewability applies. For example, the *Falkowski* court failed to recognize the distinction between the general presumption of reviewability of agency discretion and the narrow *Chaney* presumption of unreviewability in nonenforcement decisions. The confusion surrounding the applicability of the presumption of unreviewability may allow the presumption of unreviewability to be applied to a wide range of agency action outside the nonenforcement sphere.

B. Exceptions to the Presumption of Unreviewability: Review on the Merits?

The presumption of unreviewability of administrative officials' discretionary refusals to initiate enforcement action is hardly the monolith that it appears to be from a cursory glance at *Heckler v.* [*618] *Chaney*. The Court, by deciding only a narrow question in an easy case, a relatively unusual type of nonenforcement case, left open the possibility that the presumption of unreviewability would not apply to many other types of nonenforcement decisions.

The Court expressly refused to decide whether the presumption of unreviewability applies to discretionary refusals to enforce that violate constitutional rights, n156 consistent refusals to enforce a statute that permit a court to conclude that the agency violated its statutory responsibilities, n157 refusals to enforce under statutes that require mandatory enforcement, n158 and refusals to enforce based on the agency's belief that it lacks jurisdiction. n159 Justice Marshall, in his concurring opinion in *Chaney,* asserted that the large number of exceptions to the presumption of unreviewability will require courts to conduct a careful and searching review of the petitioner's claim to determine whether the presumption against review applies to that particular issue. This review becomes the equivalent of review on the merits because an action that falls under any of the exceptions is an abuse of discretion subject to judicial review. n160

Post-*Chaney* judicial decisions suggest that Justice Marshall's prediction was correct. n161 Two circuit court decisions illustrate the need to examine the merits in spite of a court's determination that these kinds of decisions are generally made unreviewable because of the lack of statutory standards. In *Achacoso-Sanchez v. INS,* n162 [*619] the Seventh Circuit concluded that because no substantive standards governed the INS's refusal to grant discretionary relief to an alien, there was no law to apply. n163 Under the *Chaney* presumption, therefore, the court could not review the agency decision on the merits. Yet, the court asserted that it could still review the decision to determine whether the

INS had abused its discretion, by taking action for forbidden or erroneous reasons or in violation of constitutional or procedural requirements. n164

In *Electricities of North Carolina, Inc. v. Southeastern Power Administration,* n165 the Fourth Circuit held that the Southeastern Power Administration's allocation of electrical power was an unreviewable exercise of the agency's discretion. n166 In reaching this conclusion, the court searched the statute carefully to discern if any guidelines existed that circumscribed the agency's exercise of its discretion. n167 The court was unable to find any law to apply that would allow for judicial review. n168 But because the petitioners alleged that the agency's decision was motivated by improper political influence, the court was nevertheless obliged to review the allocation decision on the merits. n169

Thus, if the petitioner alleges that an exception to unreviewability applies, even exercises of discretion that are normally shielded from review will be reviewed to determine whether the agency abused its discretion by considering clearly irrelevant factors, by abridging the petitioner's constitutional rights, or by consistently refusing to enforce a statute, thereby abdicating the agency's statutory responsibility. n170 Regardless of what the relevant statute provides, there is always law to apply to these [*620] issues. n171

Justice Marshall pointed out that "traditional principles of rationality and fair process do offer 'meaningful standards' and 'law to apply' to an agency's decision not to act, and no presumption of unreviewability should be allowed to trump these principles." n172 Moreover, unlike true prosecutorial decisions, discretionary administrative decisions generally produce a record that can serve as a basis for review. n173 The APA provides an additional source of law to apply to nonpromulgation decisions not present in nonenforcement decisions by specifically granting interested persons the right to petition an agency for the issuance of a rule. n174

Decisions involving the scope of prosecutorial discretion buttress this conclusion. Even true prosecutorial discretion can be set aside for abuse of discretion if the prosecutor exercises his discretion for impermissible reasons. n175 In these circumstances, the application [*621] of a presumption of unreviewability adds little but confusion because certain elements of the decision will be reviewable regardless of whether statutory standards exist.

C. Judicial Review of Nonpromulgation Decisions After Chaney

The Supreme Court in *Chaney* expressly refused to decide whether the presumption of unreviewability applies to nonpromulgation decisions. n176 No court has yet applied *Chaney* to hold a refusal to initiate rulemaking proceedings presumptively unreviewable, n177 although, on two recent occasions, the D.C. Circuit has considered the uncertainty of the reviewability of nonpromulgation decisions following in *Chaney*'s wake. n178

[*622] In both of these cases, the D.C. Circuit felt a need to address *Chaney* because a careful review of the seminal refusal-to-promulgate decision, *WWHT, Inc. v. FCC,* n179 reveals that many of the same factors that led the Supreme Court to declare enforcement inaction presumptively unreviewable are present in nonpromulgation contexts as well. n180 In *WWHT,* the D.C. Circuit recognized that an agency's exercise of discretion in deciding whether to promulgate a rule is "essentially legislative" and "largely committed to agency discretion." n181

Like nonenforcement decisions, nonpromulgation decisions are often based on factors not easily susceptible to judicial review, such as budgetary constraints, lack of sufficient expertise, and the balance of competing policies. n182 Yet, in *WWHT,* the D.C. Circuit held that nonpromulgation decisions are subject to judicial review. n183 Because nonpromulgation decisions are largely within an agency's expertise and discretion, however, the court concluded that the scope of judicial review should be narrow and deferential, limited to a determination of whether the agency has adequately explained its decision and whether there is some basis in the record to support the agency's refusal to promulgate the rule. n184

Unless rule promulgation is mandated by statute, the agency's determination whether or not to promulgate a rule is, like the nonenforcement decision in *Chaney*, generally committed to agency discretion because the agency is not exercising its coercive power and the decision involves agency resource allocation. n185 *Chaney* does not change this

result. n186

Nevertheless, under *WWHT*, a court may review a nonpromulgation decision to ensure that the agency used proper procedures and adequately explained its decision. n187 Such inquiries are similar to those undertaken when a court examines whether the exceptions to *Chaney's* presumption of unreviewability apply. The court must ensure that the agency's action was not an abuse of discretion or otherwise contrary to statutory, procedural, or constitutional requirements. *WWHT* indicates that a court can force an agency to institute rulemaking proceedings if a significant factual [*623] predicate of a prior nonpromulgation decision has been removed, if the agency erroneously concluded that it lacked jurisdiction to promulgate the rule in question, or if the statute required rule promulgation. n188 In all of these instances, there is law to apply. n189

Chaney rejected the pragmatic test used in *WWHT* for determining what has been committed to agency discretion and created a presumption of unreviewability. n190 Because the *WWHT* decision relies on factors that are similar to those used by the *Chaney* court to justify the presumption of unreviewability, n191 *Chaney* threatens to overrule *WWHT* sub silentio. n192 If the rationale of *Chaney* is applied to nonpromulgation decisions, those aspects of the agency's decision that the D.C. Circuit held reviewable in *WWHT* would be reduced to mere potential exceptions to an overall presumption of unreviewability. Although in theory this change in emphasis should not result in any change in the scope of review of nonpromulgation decisions, in practice the risk of misinterpretation of *Chaney*'s mandate is great. By rephrasing the analytical benchmark as a rebuttable presumption of unreviewability, courts could easily apply the presumption too broadly and preclude review of concededly reviewable issues by using a stricter interpretation of possible sources of statutory standards. n193

IV. The Fallacy of the Chaney *View of Administrative Discretion*

A principal foundation of the *Chaney* presumption of unreviewability is that agency inaction, such as a refusal to enforce, is usually not suitable for judicial review. The Court's distinction between action and inaction for purposes of judicial review does [*624] not seem to be well-founded either under the APA or in precedent. The proper test to determine whether judicial review is appropriate is whether there is sufficient law to guide courts. *Chaney* indicated that meaningful standards are necessary to enable a court to review administrative discretion. This modification to the *Overton Park* test goes a long way in limiting judicial review of administrative discretion. Creating a presumption of unreviewability based on a distinction between action and inaction serves only to cloud a court's analysis of whether judicial review is appropriate.

A. The Action/Inaction Dichotomy

The *Chaney* majority justified its presumption of unreviewability of nonenforcement decisions by asserting that only action provides a focus for judicial review; Justice Rehnquist, writing for the *Chaney* majority, asserted that inaction does not involve an exercise of the agency's coercive power over an individual's liberty or property rights. n194 Since *Chaney*, other courts have relied on the distinction between action and inaction. n195 That distinction, however, is without meaning in the context of judicial review. It has no bearing on the ultimate question of whether judicially manageable standards exist to provide meaningful judicial review. A decision not to act is more likely to be committed to agency discretion because of the lack of judicially manageable standards for review, but this is not necessarily the case. For example, in *Dunlop v. Bachowski*, n196 agency action was mandatory under the statute; therefore, the agency's refusal to act would be an abuse of discretion. n197 Thus, a presumption of unreviewability for all types of agency inaction is inappropriate.

The distinction also ignores the APA's presumption of reviewability, which is equally applicable to agency action and inaction alike. By defining agency "action" to include a "failure to act," n198 the APA makes agency inaction as reviewable as agency action unless one of the exceptions to section 701(a) applies. n199 Under section 701(a), all agency action, including inaction, is equally entitled to a presumption of reviewability. n200 Therefore, creating a [*625] presumption of unreviewability based on agency inaction lacks statutory support.

Even before the passage of the APA, the Supreme Court rejected distinctions between action and inaction. Justice Felix Frankfurter stated that "any distinction, as such, between 'negative' and 'affirmative' orders, as a touchstone of jurisdiction to review [agency action], serves no useful purpose." n201 Justice Frankfurter stated that "negative" is "an obfuscating adjective in that it implie[s] a search for a distinction -- non-action as against action -- which does not involve the real considerations on which [the issue] rest[s]," that is, judicial review of agency discretion. n202 Although Justice Frankfurter conceded that a judicial order directing the adoption of a practice may raise serious considerations that do not exist when a court merely allows a practice to continue, he concluded that "this bears on the disposition of a case and should not control jurisdiction." n203

The nonpromulgation decisions of the 1970s and early 1980s implicitly recognized the fallacy of the distinction between action and inaction by refusing to bar judicial review of decisions not to promulgate rules. n204 Rather, they focused properly on the *Overton Park* test.

Justice Marshall, in his concurring opinion in *Chaney*, also rejected the distinction between action and inaction. He stated: "[O]ne of the very purposes fueling the birth of administrative agencies was the reality that governmental refusal to act could have just as devastating an effect upon life, liberty, and the pursuit of happiness as coercive governmental action." n205 Although one could make a credible argument that the exercise of prosecutorial discretion resulting in inaction is not an exercise of coercive power affecting liberty or property interests, n206 the argument does not transfer well to the administrative arena.

Most administrative decisions go beyond the mere institution of [*626] an enforcement action against a single individual based upon past conduct. Rather, they may set standards of future conduct for the benefit of large classes of persons. n207 Justice Marshall's argument that administrative inaction, because it deals with future conduct, could have as significant an effect as action, is even more true of rulemaking than enforcement. n208 Rulemaking is intended to affect persons other than merely the petitioners for the rule. n209 Congress often enacts statutes for the particular benefit of a specific class of persons with the expectation that the designated agency will promulgate appropriate rules to achieve the legislative goals. n210 Because a class of persons may benefit from agency action, a decision not to take action, otherwise justified by statute, to enforce health or safety standards or to issue regulations implementing safety standards is likely to affect the interests of a significant number of intended statutory beneficiaries. n211

Decisions not to take action fail to provide a focus for judicial review if, for example, the decision is based on limited agency resources or changing circumstances that are likely to render the rule unnecessary before final rule promulgation. Because these factors are peculiarly within the competence of the agency, they are not readily susceptible to judicial review. n212 Although decisions properly based on these discretionary factors must be upheld by a reviewing court, the existence of such discretion should not render nonpromulgation decisions presumptively unreviewable. Such agency decisions require the same degree of judicial review given to agencies' affirmative actions, for example, to determine whether the agency abused its discretion by failing to consider relevant [*627] factors or by failing to explain its decision adequately. n213

The refusal to promulgate congressionally mandated rules is roughly analogous to a consistent refusal to enforce a statute, which Justice Rehnquist implied might be reviewable, even under a *Chaney* analysis, as an abuse of discretion. n214 Thus, Justice Rehnquist's action/inaction dichotomy becomes less tenable as one moves further from true prosecutorial discretion. The Court's rationale seems inadequate to justify a presumption of unreviewability that conflicts with the APA and forty years of prior judicial precedent.

Post-*Chaney* decisions reveal that the action/inaction dichotomy provides few useful guidelines for determining reviewability. First, courts have not characterized all refusals to enforce as inaction. n215 For example, in *Schering Corp. v. Heckler*, n216 the D.C. Circuit, [*628] repeatedly citing the language of *Chaney*, held that the FDA's settlement agreement with a drug manufacturer -- an agreement not to enforce for a specified period of time -- was an unreviewable exercise of enforcement discretion. n217 The court did not determine whether the settlement agreement was action or inaction; rather, it viewed the FDA as exercising its unreviewable enforcement discretion. n218

In *Coalition to Preserve the Integrity of American Trademarks v. United States,* n219 the D.C. Circuit held that Customs Service regulations that allowed the importation of certain trademarked goods without authorization of the trademark owners violated the Tariff Act. n220 The Customs Service argued that its policy of not taking action to ban the importation of certain categories of grey-market goods was a prerogative of the agency's enforcement discretion. n221 The court rejected this argument, reasoning that the Customs Service had never characterized the regulations as an exercise in enforcement discretion; rather, the court concluded that the Customs Service had rigorously "regarded the regulations as its interpretation of what the law requires rather than as a decision not to prosecute to the letter of the law." n222

In these cases, the courts, in ruling on similar agency decisions not to take action under a statute, reached conflicting results as to whether the refusal to take action constituted unreviewable enforcement discretion. Thus, in one case the presumption of unreviewability was applied and the court did not examine the agency's decision, while in the other case the presumption of reviewability was held to be controlling and the agency's decision [*629] was held to be inconsistent with the governing statute. n223

Moreover, even when an agency's decision constitutes action rather than inaction, it will still be held unreviewable if the decision is not subject to statutory or regulatory guidelines. Conversely, the Supreme Court recognized in *Chaney* that inaction, whether a refusal to institute an enforcement action or not, is reviewable if Congress has limited the agency's discretion. n224

The numerous decisions in which action has been held unreviewable, n225 and inaction has been held reviewable, n226 highlight that despite *Chaney*, the determination of whether administrative action or inaction has been committed to the agency's discretion by law often depends upon application of *Overton Park*'s law-to-apply standard. Because courts must still carefully review statutes, regulations, and legislative histories in search of standards that limit discretion, the presumption of unreviewability is of limited usefulness. Viewed in this light, *Chaney* stands only for the proposition that one kind of administrative inaction -- a discretionary refusal to enforce that is not subject to meaningful statutory standards -- is unreviewable. The insertion of a presumption of unreviewability is unnecessary and only further confuses the determination of whether judicial review is appropriate. n227 If *Chaney* [*630] heralds any useful change in the availability of judicial review, it is only in the level of guidance a statute must provide before a court can find law to apply.

B. The Continuing Search for Law to Apply

Although the Supreme Court in *Chaney* did not abandon the *Overton Park* law-to-apply threshold of reviewability, n228 the new presumption of unreviewability may have initiated a change in how explicit statutory or regulatory standards must be before judicial review will be allowed. *Chaney* itself offered little guidance except to indicate that the federal Food, Drug and Cosmetic Act provides no standards while the Labor-Management Reporting and Disclosure Act, at issue in *Dunlop v. Bachowski*, does provide some standards to guide judicial review at least in part because the Act was phrased in mandatory language. n229

A presumption of reviewability encourages courts to read statutory language and legislative history liberally, and to refuse to review decisions only if the statute gives absolutely no guidance. n230 Pre-*Chaney* courts often divined standards from a statute's preamble, statement of purpose, or legislative history. n231 Since *Chaney*, [*631] judges have tended to use a stricter approach. The Eleventh Circuit, in *Florida Department of Business Regulation v. United States Department of the Interior,* n232 held that the Secretary of the Interior's decision to purchase land in trust for the benefit of the Seminole Indian tribe was unreviewable even though the agency had promulgated regulations that listed a number of factors for the Secretary to consider in making the decision. n233 The court concluded that the regulations and the statute failed to provide adequate standards against which the challenged action could be measured. n234

Most recently, in *Doe v. Casey,* n235 the D.C. Circuit held that the CIA Director's decision to terminate an employee because the employee was a homosexual was reviewable, although the applicable statute gave the Director

broad discretion to terminate employees if "'advisable in the interests of the United States.'" n236 Because the court found law to apply, the court applied a presumption of reviewability. The Court concluded that the statute provided standards because a termination would be impermissible if it did not advance the interests of the United States. n237 The scope of review was limited, however, to ensuring that the decision was neither based on constitutionally impermissible factors nor completely unrelated to the interests of the United States. n238 The court admitted that the decision whether to terminate employees was largely within the discretion of the Director. n239

The court would have reached the same result by applying a presumption of unreviewability, because the court's limited review fell within an exception to *Chaney*'s presumption of unreviewability. n240 Thus, in this case, it ultimately made no difference whether the court reviewed agency action or inaction. These [*632] decisions illustrate that courts are not consistent in deciding what kind of statutory or regulatory guidelines will render an agency's action reviewable, regardless of whether there is a presumption of reviewability or of unreviewability. n241

The D.C. Circuit's decision in *Robbins v. Reagan* n242 implies that the choice of which presumption to apply may affect the standard of review. Because the court determined that a presumption of reviewability applied to the decision to close a shelter for the homeless, it stated that the decision could not be held unreviewable unless the statutory scheme and other relevant sources gave "absolutely no guidance" on how to exercise the discretion. n243 The court stated, however, that if the presumption of unreviewability had applied it would have required "a heightened level of discernible standards controlling discretion to rebut the presumption." n244

Judge Scalia, in his concurrence in *California Human Development Corp. v. Brock,* n245 also indicated his belief that changing the presumption of reviewability to one of unreviewability affects the interpretation of sources of law to apply. n246 The majority presumed the action reviewable and found standards in the relevant regulation. n247 Judge Scalia would have adopted the opposite presumption, and therefore would not have interpreted the regulation to require reasonableness, although he stated that he would have read a reasonableness requirement into the regulation had he concluded that the action was presumptively reviewable. n248

To allow *Chaney* to produce a result that depends on whether the decision under consideration constitutes action or inaction distorts congressional intent. Reviewability would be governed by different standards depending on the kind of action involved. Judicial review of inaction would be more difficult to obtain than judicial review of action even if the statutory language is identical. If a presumption of unreviewability is applied to rulemaking as well, judicial review might be available only when a rule is actually adopted. Because asking for too much specificity to make congressional grants of discretion reviewable may, in many cases, subvert legislative intent to make agency decisions reviewable, reviewing [*633] courts should continue to look for law to apply in the traditional sources, including statements of statutory goals or relevant factors, n249 as intended by the drafters of the APA. n250

Conclusion

Resource-allocation decisions are generally committed to administrative discretion and are therefore entitled to a high degree of judicial deference. Yet, the Supreme Court's creation of a presumption of unreviewability, based on spurious distinctions between action and inaction and a questionable analogy to prosecutorial discretion, threatens to limit the availability of judicial review of agency action in an area far broader than nonenforcement decisions. The confusion that *Chaney* has engendered in the lower courts is a direct result of the inherent unworkability of the presumption of unreviewability. Courts are confronted with a situation in which they must conduct what amounts to review on the merits to determine whether the presumption of unreviewability applies. Moreover, some courts are reading *Chaney* as support for a general presumption of unreviewability of other types of agency action. n251

The Supreme Court's holding in *Chaney* reached beyond the question presented. The Court did not have to go to the extreme of laying down an ambiguous presumption of unreviewability for a specific category of agency inaction. The proper standard for all types of administrative action and inaction, both nonenforcement and nonpromulgation decisions, is the presumption of reviewability as embodied in the APA, combined with a high degree of judicial

deference to agency expertise and resource-allocation decisions. Courts must be allowed to review administrative inaction to ensure that the inaction does not amount to a dereliction of agencies' statutory responsibilities or an abuse of discretion. But with Judge Scalia's move to the Supreme Court, it does not seem likely that the presumption of unreviewability will disappear anytime soon. The best that can be hoped for in the short term is that *Chaney* will be restricted to its particular facts and not extended to other types of agency inaction or action. n252

[*634] Administrative nonpromulgation of rules is particularly susceptible to an extension of *Chaney* because agency enforcement and rulemaking discretion can logically be treated in the same manner for the purposes of judicial review. If *Chaney*'s mandate is as broad as some courts have believed, nonpromulgation decisions could likewise succumb to a presumption of unreviewability. Because nonpromulgation decisions may seriously affect the interests of statutory beneficiaries beyond the immediate parties, *Chaney* should be read narrowly and nonpromulgation decisions should be subject to a presumption of reviewability, in spite of the presumption of unreviewability in the area of enforcement discretion. Decisions based on allocation of scarce resources must be upheld, but the courts must remain available to consider allegations of agency misdeeds and must generously interpret statutory guidelines to limit discretion. By doing so, courts will effectuate the goals of the APA and protect the interests of those affected by arbitrary administrative action.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewReviewabilityFactual DeterminationsAdministrative LawJudicial ReviewReviewabilityPreclusionEnvironmental LawLitigation & Administrative ProceedingsJudicial Review

FOOTNOTES:

n1. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 320 (1965).

n2. *See* Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 683 (1985).

n3. 5 U.S.C. §§ 551-706 (1982).

n4. *See id.* §§ 701-706. Administrative action is unreviewable only if Congress has precluded review by statute or if the action has been committed to agency discretion by law. *Id.* § 701(a). This Note addresses only the second exception to judicial review, when action is committed to agency discretion by law. The Supreme Court has also limited the availability of judicial review of administrative action when controlling statutes arguably preclude review. *See* Block v. Community Nutrition Inst., 467 U.S. 340, 351 (1984) (precluding judicial review if congressional intent to preclude review is "'fairly discernible in the statutory scheme'" (quoting Data Processing Serv. v. Camp, 397 U.S. 150, 157 (1970)).

n5. *See* Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967).

n6. 470 U.S. 821 (1985).

n7. *See id.* at 837-38.

n8. 25 U.S. (12 Wheat.) 19 (1827).

n9. *See id.* at 31-32.

n10. *See id.* at 32; *see also* Philadelphia & T. R.R. v. Stimpson, 39 U.S. (14 Pet.) 448, 458 (1840) (stating that when Congress has properly delegated decisionmaking discretion to a public officer, no other tribunal may reexamine the officer's decision).

n11. 25 U.S. (12 Wheat.) at 32.

n12. 39 U.S. (14 Pet.) 497 (1840).

n13. *Id.* at 522-23.

n14. *Id.* at 516.

n15. Many of the challenges to executive action arose as suits against the General Land Office, the agency responsible for identifying and conveying title to public lands. *See, e.g.*, Noble v. Union River Logging R.R., 147 U.S. 165, 171 (1893); United States v. Schurz, 102 U.S. 378, 379 (1880); Johnson v. Townsley, 80 U.S. (13 Wall.) 72, 76-77 (1871); Gaines v. Thompson, 74 U.S. (7 Wall.) 347, 347 (1868). Many other challenges involved immigration issues. *See, e.g.*, Lem Moon Sing v. United States, 158 U.S. 538, 539-40 (1895); Fong Yue Ting v. United States, 149 U.S. 698, 702 (1893); Nishimura Ekiu v. United States, 142 U.S. 651, 652 (1892).

n16. *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 731 (1893); Nishimura Ekiu v. United States, 142 U.S. 651, 663-64 (1892); *see also* Davis, *Nonreviewable Administrative Action*, 96 U. PA. L. REV. 749, 763 (1948) (discussing the history of the nonreviewability of administrative action in the absence of statutory approval of judicial review). In *Hadden v. Merritt*, 115 U.S. 25 (1885), the Supreme Court stated: "To permit judicial inquiry . . . is to open a matter for repeated decision." *Id.* at 28. The Court believed both that the law gave exclusive discretion to the administrative officers charged with the duty and that judicial involvement would only provide "a constant source of confusion and uncertainty." *Id.*

n17. 158 U.S. 538, 549 (1895).

n18. *See id.* at 550. The Court, relying on *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827), reasoned that Congress's power to expel or exclude aliens could be exercised solely through delegation to executive officers; the judiciary could be involved only if Congress decided that judicial involvement was necessary and explicitly provided for it. *Id.* at 545. In this case, the appropriation act of August 18, 1894 provided that "the decision of the appropriate immigration or customs officials . . . shall be final, unless reversed on appeal to the Secretary of the Treasury." Act of August 18, 1894, ch. 301, 28 Stat. 372, 390; *see id.* at 540. The Court interpreted this provision to mean that "the authority of the courts to review the decision of the executive officers was taken away." *Id.* at 549. Because the appropriations act was constitutional, the immigration officer was duly appointed and his decision was within the authority conferred upon him by the act, and no appeal was taken to the Secretary of the Treasury, the Court concluded that the decision of the immigration officer was final and

conclusive with no recourse to judicial review. *Id.* at 544.

n19. 177 U.S. 290 (1900).

n20. *Id.* at 292.

n21. 187 U.S. 94 (1902).

n22. *Id.* at 98.

n23. *Id.* at 108.

n24. *Id.* at 110.

n25. *See, e.g.*, The Japanese Immigrant Case, 189 U.S. 86, 100-01 (1903) (holding that the Due Process Clause entitled an immigrant to a deportation hearing and that the fairness of that hearing was subject to judicial review).

n26. The Court's growing recognition of the right to judicial review may have been prompted by Congress's increased delegation of broad authority to independent agencies in the wake of the industrial revolution. *See* L. JAFFE, *supra* note 1, at 5-9.

n27. *See* Chin Yow v. United States, 208 U.S. 8, 12 (1908).

n28. 239 U.S. 3 (1915).

n29. *Id.* at 8-9.

n30. *Id.* at 10 (quoting Act of February 20, 1907, ch. 1134, § 2, 34 Stat. 898.). In conclusion, Justice Holmes stated that "[t]he courts are not forbidden by the statute to consider whether the reasons, when they are given, agree with the requirements of the act. The statute by enumerating the conditions upon which the allowance to land may be denied, prohibits the denial in other cases." *Id.* at 9.

n31. *See id.* at 8.

n32. 244 U.S. 174 (1917).

n33. *See id.* at 182 (quoting Roberts v. United States, 176 U.S. 221, 231 (1900)).

n34. *See id.* (quoting *Roberts*, 176 U.S. at 231.).

n35. *See, e.g.,* Kessler v. Strecker, 307 U.S. 22, 34 (1939). The Court stated:

If the hearing was fair, if there was evidence to support the finding of the Secretary, and if no error of law was committed, the ruling of the Department must stand and cannot be corrected in judicial proceedings. If . . . one of the elements mentioned is lacking, the proceeding is void and must be set aside.

Id. (footnotes omitted); *see also* United States v. Williams, 278 U.S. 255, 257-58 (1929) (stating that an administrative decision "is final, at least unless it be wholly without evidential support or wholly dependent upon a question of law or clearly arbitrary or capricious"); Davis, *Unreviewable Administrative Action,* 15 F.R.D. 411, 433-39 (1954) (suggesting that the meaning of "final" has become flexible depending on the circumstances in which it is applied and that "'final' often means almost anything except final"). The drafters of the APA incorporated these requirements into the APA's judicial review provisions without substantive change. *See* 5 U.S.C. § 706 (1982).

n36. Lloyd Sabaudo Societa v. Elting, 287 U.S. 329, 335-36 (1932). The Court in *Elting* stated: "The Act of Congress confers on the Secretary great power, but it is not wholly uncontrolled. It is a power which must be exercised fairly." *Id.* at 339; *see* St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring) (stating that "[t]he supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied").

n37. 321 U.S. 288 (1944).

n38. *See id.* at 306, 311.

n39. *Id.* at 309.

n40. *Id.* at 310. In response to Justice Frankfurter, who asserted in dissent that the availability of judicial review is most often a matter of congressional discretion, *id.* at 312, Justice Reed stated:

The responsibility of determining the limits of statutory grants of authority . . . is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction. . . . [U]nder Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power.

Id. at 310 (citation omitted).

n41. Federal Administrative Procedure Act of 1946, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C. (1982)).

n42. *See* 5 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28:1, at 255 (2d ed. 1984); L. JAFFE, *supra* note 1, at 372. The Attorney General at the time the APA was passed, Tom C. Clark, also believed that the APA merely declares existing law. *See* S. REP. NO. 752, 79th Cong., 1st Sess. 38 (1945) (Appendix B), *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 248, 79th Cong., 2d Sess. 406-07 (1946) [hereinafter APA HISTORY]; *see also* United States v. Wiley's Cove Ranch, 295 F.2d 436, 441 (8th Cir. 1961) (stating that the "Administrative Procedure Act did not change the common

law . . . but rather codified it").

n43. 5 U.S.C. § 701(a) (1982). The APA defines agency action as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." *Id.* § 551(13). Professor Jaffe believed the codification of the presumption of reviewability to be one of the APA's primary achievements. L. JAFFE, *supra* note 1, at 372.

n44. The legislative history does not refer to nonenforcement or nonpromulgation decisions in its discussion of the "committed to agency discretion" exception to judicial review. *See* APA HISTORY, *supra* note 42, at 35-36, 212, 275, 368-69. Despite the lack of specific authority, however, Attorney General Tom C. Clark concluded shortly before the APA's passage that denials of rulemaking petitions were unreviewable. *See* S. REP. NO. 752, 79th Cong., 1st Sess. 44 (1945), *reprinted in* APA HISTORY, *supra* note 42, at 230. He reaffirmed this view after the APA was passed. *See* UNITED STATES DEPARTMENT OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 39, 95 (1947) [hereinafter ATTORNEY GENERAL'S MANUAL].

n45. *See* H.R. REP. NO. 1980, 79th Cong., 1st Sess. (1945), *reprinted in* APA HISTORY, *supra* note 42, at 368-69 (stating that agencies may not act without basis in fact or evidence and are bound by the Constitution and all other applicable laws).

n46. 5 U.S.C. § 706(2)(A) (1982).

n47. H.R. REP. NO. 1980, 79th Cong., 1st Sess. (1945), *reprinted in* APA HISTORY, *supra* note 42, at 368-69. Chairman Walters recalled both Pitt's warning that "unlimited power corrupts the possessor" and the Declaration of Independence's rejection of "arbitrary government," and warned that unreviewable power can be equated to unlimited power. *Id., reprinted in* APA HISTORY, *supra* note 42, at 351. Both the Senate and House reports contain language suggesting that grants of absolute discretion are problems to be remedied by Congress because the courts are incompetent to make decisions without standards. *Id., reprinted in* APA HISTORY, *supra* note 42, at 212, 275.

n48. The Senate report stated that "where statutory standards, definitions or other grants of power . . . confine an agency within limits as required by the constitution, then the determination of the facts does not lie in agency discretion." S. REP. NO. 248, 79th Cong., 2d Sess. 26 (1946), *reprinted in* APA HISTORY, *supra* note 42, at 212. The House report went even further in emphasizing the APA's presumption of judicial review by stating: "It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified." H.R. REP. NO. 1980, 79th Cong., 2d Sess. 41 (1946), *reprinted in* APA HISTORY, *supra* note 42, at 275.

n49. *See* H.R. REP. NO. 1980, 79th Cong., 2d Sess. 41 (1946), *reprinted in* APA HISTORY, *supra* note 42, at 275; *see also* United States v. ICC, 337 U.S. 426, 449 (1949) (illustrating the developing presumption of reviewability by rejecting the argument that, in order to review, the authority must be specifically conferred by Congress). Discretion allows an agency to make reasonable choices within a given area, but it is for the courts to decide the scope of that area of discretion. *See* Berger, *Administrative Arbitrariness and Judicial Review,* 65 COLUM. L. REV. 55, 63 (1965); L. JAFFE, *supra* note 26, at 374.

n50. H.R. REP. NO. 1980, 79th Cong., 2d Sess. 41 (1946), *reprinted in* APA HISTORY, *supra* note 42, at 275.

n51. 92 CONG. REC. 2159 (1946), *reprinted in* APA HISTORY, *supra* note 42, at 326.

n52. 92 CONG. REC. 2154 (1946), *reprinted in* APA HISTORY, *supra* note 42, at 310-11. Professor Kenneth Davis views this statement as approving courts' substitution of their discretion for administrative discretion. *See* 5 K. DAVIS, *supra* note 42, § 28:5, at 273. It would seem, however, that Professor Davis fails to distinguish between section 701(a) "discretion" and section 706 "abuse of discretion." *See* Berger, *supra* note 49, at 60-61. Professor Berger argues that an abuse of discretion is unlawful and therefore cannot fall within the category of action committed to agency discretion by law. *Id.; see also* L. JAFFE, *supra* note 1, at 363 (explaining that "an exercise of discretion is reviewable for legal error, procedural defect, or 'abuse'").

n53. McCarran, *Improving "Administrative Justice": Hearings and Evidence; Scope of Judicial Review*, 32 A.B.A. J. 827, 831 (1946) (quoting 5 U.S.C. §§ 701(a)(2), 706(2)(A)).

n54. 387 U.S. 136 (1967).

n55. *See id.* at 140-41.

n56. *Id.* at 140. In *Abbott Laboratories*, various drug manufacturers sought preenforcement review of FDA regulations requiring printed matter relating to prescription drugs to state the drug's generic name any time its trade name is printed. *Id.* at 138-39. The FDA argued that the statute precluded preenforcement judicial review. *Id.* at 141. Beginning with the presumption of reviewability expressed in section 701 as a whole, the *Abbott* Court found considerable support for the proposition that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is a persuasive reason to believe that such was the purpose of Congress." *Id.* at 140. Judicial review can only be precluded where there has been a showing of "clear and convincing" legislative intent to do so. *Id.* at 141; Rusk v. Cort, 369 U.S. 367, 379-80 (1962); *see also* L. JAFFE, *supra* note 1, at 336-59 (discussing the presumption of reviewability and statutory exclusions thereto).

n57. 387 U.S. at 140-41 (quoting Shaughnessy v. Pedeiro, 349 U.S. 48, 51 (1955)).

n58. *See, e.g.*, Dunlop v. Bachowski, 421 U.S. 560, 567 (1975); *Abbott Laboratories*, 387 U.S. at 140-41; San Juan Legal Serv. v. Legal Serv. Corp., 655 F.2d 434, 438 (1st Cir. 1981); Natural Resources Defense Council v. SEC, 606 F.2d 1031, 1043 (D.C. Cir. 1979); South Windsor Convalescent Home, Inc. v. Mathews, 541 F.2d 910, 913-14 (2d Cir. 1976); Ortega v. Weinberger, 516 F.2d 1005, 1009 (5th Cir. 1975); Sabin v. Butz, 515 F.2d 1061, 1065 (10th Cir. 1975); Pollard v. Romney, 512 F.2d 295, 298 (3d Cir. 1975); Consolidated Tomoka Land Co. v. Butz, 498 F.2d 1208, 1209 (5th Cir. 1974); Littell v. Morton, 445 F.2d 1207, 1211 (4th Cir. 1971); Aquavella v. Richardson, 437 F.2d 397, 400 (2d Cir. 1971); Medical Comm. for Human Rights v. SEC, 432 F.2d 659, 673 (D.C. Cir. 1970); North City Area-Wide Council, Inc. v. Romney, 428 F.2d 754, 757 (3d Cir. 1970); Citizens Comm. for Hudson Valley v. Volpe, 425 F.2d 97, 101-02 (2d Cir. 1970); Curran v. Laird, 420 F.2d 122, 128-29 (D.C. Cir. 1969); Jones v. Freeman, 400 F.2d 383, 390 (8th Cir. 1968); Mulry v. Driver, 366 F.2d 544, 549 (9th Cir. 1966); Deering Milliken, Inc. v. Johnston, 295 F.2d 856, 861 n.8 (4th Cir. 1961); Cross Co. v. NLRB, 286 F.2d 799, 802-03 (6th Cir. 1961).

n59. 401 U.S. 402 (1971).

n60. *Id.* at 406.

n61. *Id.* at 410. "Law to apply" comprehends the existence of judicially managable standards by which a court can judge an agency's decision for arbitrariness. Heckler v. Chaney, 470 U.S. 821, 830 (1985). The Court borrowed the pharse "no law to apply" directly from the legislative history of the APA. *See* S. REP. NO. 752, 79th Cong., 1st Sess. 26 (1945), *reprinted in* APA HISTORY, *supra* note 42, at 212 (stating that "[i]f, for example, statutes are drawn in such broad terms that in a given case there is no law to apply, courts of course have no statutory question to review"). For example, there is likely to be no law to apply to an agency decision that is essentially political or military in nature. *See* Hondros v. United States Civil Serv. Comm'n, 720 F.2d 278, 293 (3d Cir. 1983). Professor Davis argues that the Supreme Court misinterpreted the legislative history. He believes that administrative action may be an abuse of discretion even if there is no statutory law to apply. *See* 5 K. DAVIS, *supra* note 42, § 28:8. He also argues that the *Overton Park* no-law-to-apply standard is dicta and, therefore, should not be controlling. *Id.* The Supreme Court, however, recently reaffirmed the no-law-to-apply standard. *See Heckler*, 470 U.S. at 830-31.

n62. In *Overton Park*, the applicable statutes were 23 U.S.C. § 138 (1970) and 49 U.S.C. § 1653(f) (1970) (repealed in 1983), which both prohibit the approval of highway projects that use publicly-owned parks, recreation areas, or wildlife refuges unless "no feasible and prudent alternative" exists.

n63. *See* 401 U.S. at 411-13.

n64. *See id.* at 416; *see also* Note, *Convergence of the Substantial Evidence and Arbitrary and Capricious Standards of Review During Informal Rulemaking*, 54 GEO. WASH. L. REV. 541, 545-46 (1986) (discussing the narrow scope of judicial review in *Overton Park*).

n65. *See* 5 K. DAVIS, *supra* note 42, § 28:8, at 291-92 (arguing that *Overton Park* is inconsistent with the APA because sections 701 and 706 do not depend on the existence of law to apply).

n66. *See, e.g.*, WWHT, Inc. v. FCC, 656 F.2d 807, 815 (D.C. Cir. 1981); Natural Resources Defense Council v. SEC, 606 F.2d 1031, 1043-44 (D.C. Cir. 1979).

n67. *See infra* notes 68-85 and accompanying text.

n68. 606 F.2d 1031 (D.C. Cir. 1979).

n69. *See id.* at 1036-37.

n70. *Id.* at 1037, 1039.

n71. *Id.* at 1043. The court suggested the following pragmatic considerations for deciding when judicial review is appropriate: (1) the necessity for judicial supervision as a means of protecting the plaintiff's interests;

(2) the effect of judicial review on the agency's effectiveness; and (3) the amenability of the issue to judicial review. *Id.* at 1044.

n72. *Id.* at 1046. The court cited two other factors: the need for judicial supervision to safeguard the plaintiffs' interests and the impact of judicial review on the agency's effectiveness. *Id.* at 1044. The court believed that the agency's inaction insufficiently affected the plaintiffs' interests to warrant special protections for them. *See id.* at 1045. On the other hand, the court expressed concern that judicial review of agency inaction would cause agencies to expend their limited funds in areas they had already determined were not worth further expenditures. *Id.* at 1045.

n73. *See id.* at 1047. The court stated:

[I]n a context like the present one, in which the agency has in fact held extensive rulemaking proceedings narrowly focused on the particular rules at issue, and has explained in detail its reasons for not adopting those rules, we believe that the questions posed will be amenable to at least a minimal level of judicial scrutiny.

Id. The court relied in part on two prior D.C. Circuit decisions in which the court had addressed the merits without deciding the reviewability of administrative decisions not to promulgate rules. *See id.;* National Black Media Coalition v. FCC, 589 F.2d 578, 581 (D.C. Cir. 1978); Action for Children's Television v. FCC, 564 F.2d 458, 479 (D.C. Cir. 1977). In *National Black Media,* the court at least recognized the discretionary nature of the decision not to promulgate rules. 589 F.2d at 581.

n74. 656 F.2d 807 (D.C. Cir. 1981).

n75. *See id.* at 811. Following the denial of this petition, the FCC issued an interpretative rule making it clear that cable operators were not required to carry STV signals under existing rules. *See id.* at 812.

n76. *Id.* at 813.

n77. *Id.* at 809 (quoting Natural Resources Defense Council, Inc. v. SEC, 606 F.2d 1031, 1043 (D.C. Cir. 1979)).

n78. *See id.* at 814-15.

n79. *See id.* at 815.

n80. *Id.* at 809.

n81. *Id.* at 816-17 (quoting Natural Resources Defense Council, Inc., 606 F.2d at 1047 n.19).

n82. *Id.* at 817. The record available for judicial review itself dictates that judicial review must be extremely limited. Normally, the record will consist solely of the petition for rulemaking, any comments thereon, and the agency's explanation of its denial of the petition. *See id.* at 817-18.

n83. *See id.* at 818-19 & n.21. These situations closely parallel Justice Brennan's list of abuses of enforcement discretion that might be reviewable. *See Chaney*, 470 U.S. at 839 (Brennan, J., concurring) (indicating that nonenforcement decisions might be reviewable if: "(1) an agency flatly claims that it has no statutory jurisdiction . . .; (2) an agency engages in a pattern of nonenforcement of clear statutory language; (3) an agency has refused to enforce a regulation lawfully promulgated and still in effect; or (4) a nonenforcement decision violates constitutional rights" (citations omitted)).

n84. ITT World Communications, Inc. v. FCC, 699 F.2d 1219, 1246 (D.C. Cir. 1983), *rev'd on other grounds*, 466 U.S. 463 (1984).

n85. *Id.* The court ultimately reversed the denial of the rulemaking petition, in part because the agency had failed to comply with the APA, the Sunshine Act, and the Communications Act. *Id.* at 1249-50.

n86. 470 U.S. 821 (1985).

n87. *See id.* at 837-38.

n88. *Id.* at 823-24.

n89. *Id.* at 824.

n90. Chaney v. Schweiker, No. 81-2265 (D.D.C. Aug. 30, 1982).

n91. *See* Chaney v. Heckler, 718 F.2d 1174, 1177 (D.C. Cir. 1983), *rev'd*, 470 U.S. 821 (1985).

n92. *See* 718 F.2d at 1183.

n93. *See id.* at 1184.

n94. *Id.* at 1185. The D.C. Circuit developed the "pragmatic considerations" test in an earlier nonpromulgation decision in order to cope with the nebulous law-to-apply issue. *See* Natural Resources Defense Council, Inc. v. SEC, 606 F.2d 1031, 1043-44 (D.C. Cir. 1970). The D.C. Circuit had consistently used this test until it was rejected in *Chaney*, 470 U.S. at 834.

n95. *See* 718 F.2d at 1186-87.

n96. *See id.* at 1186. The majority's source of law to apply was highly questionable, however. It relied on an FDA policy statement accompanying a proposed rule that was never adopted as a source of law. *Id.* at 1186 & n.28.

n97. *Id.* at 1188-90.

n98. *Id.* at 1192.

n99. 492 F.2d 641 (D.C. Cir. 1974).

n100. 718 F.2d at 1192 (Scalia, J., dissenting). *Kixmiller*, however, involved a staff-level policy statement not reviewed by the full Commission. 492 F.2d at 643-44. The *Kixmiller* court distinguished a prior decision on the basis that the Commission in the prior case had approved the staff's decision not to take action. *Id.* at 644; *see* Medical Comm. for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972).

n101. *See* 718 F.2d at 1195-96 (Scalia, J., dissenting).

n102. *Id.* at 1200 (Scalia, J., dissenting).

n103. *See* 470 U.S. at 831-32. Justice Rehnquist defined the alternatives as either allowing unlimited judicial review of agency enforcement discretion or creating a broad area of unreviewability. *See id.* at 830-35; Mikva, *The Changing Role of Judicial Review*, 38 ADMIN. L. REV. 115, 138 (1986). In outlining the options in this manner, Justice Rehnquist missed an obvious intermediate option: Administrative enforcement discretion can be both reviewable and at the same time subjected to a high degree of judicial deference. Judge Wright had recognized that in *Chaney* this was not an "either or" question and that "the *scope* of review was an issue logically distinct from whether there should be review at all." *Id.* Judge Wright believed that the adoption of the "hard look" standard would best reconcile the tensions between judicial review and agency expertise. *Id.; see Chaney*, 718 F.2d at 1188.

n104. 470 U.S. at 831.

n105. *See id.*

n106. *See id.* at 831-32, 838. Justice Rehnquist emphasized that, contrary to lower courts' determinations that pragmatic considerations governed whether an administrative action was discretionary, those considerations merely illustrate why nonenforcement decisions have traditionally been unreviewable. *Id.* at 834; *see* 718 F.2d at 1185.

n107. *See* 470 U.S. at 832. The agency is far better equipped than a court to assess the likelihood of success, whether the contemplated enforcement action best suits the agency's policies, and whether the agency's limited resources would more profitably be committed elsewhere. *Id.*

n108. *Id.* For a discussion of the difficulties with this distinction, see *infra* notes 192-226 and accompanying text.

n109. *See* 470 U.S. at 832. The Court likened an agency's refusal to enforce to an executive branch prosecutor's decision not to indict. *Id.* The analogy is tenuous. An agency is created through a delegation of power and is guided by statute; courts must be able to remedy an agency's failure to enforce a statute when the

refusal to enforce it amounts to an abuse of discretion. The prosecutor's decision whether or not to indict is based on protecting governmental or societal interests.

n110. 470 U.S. at 832-33. The Court indicated that "the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Id.* This is essentially a restatement of the *Overton Park* law-to-apply test. *See infra* note 228. The Court expressly distinguished its prior decision in *Dunlop v. Bachowski*, 421 U.S. 560 (1975), which held that the Secretary of Labor's refusal to file a civil action in response to a complaint asking that a union election be set aside was reviewable. *See id., aff'g* Bachowski v. Brennan, 502 F.2d 79, 87-88 (3d Cir. 1974); *see also* 470 U.S. at 833-34. The Court found that the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 401-531 (1982), imposed standards that circumscribed the Secretary's discretion. *See* 421 U.S. at 567 n.7. The statute required the Secretary to file suit if he found "probable cause to believe that a violation . . . has occurred." 29 U.S.C. § 482(b). The *Chaney* Court concluded that this mandatory language rebutted the presumption of unreviewability, whereas the permissive language in the Food, Drug, and Cosmetic Act, 21 U.S.C. § 372 (1982), did not. *See* 470 U.S. at 835.

n111. 470 U.S. at 825 n.2.

n112. *Id.* at 833 n.4, 838. Justice Brennan, concurring in the result, listed a number of exceptions to the Court's holding that nonenforcement decisions are presumptively unreviewable, including: (1) when an agency believes the conduct is outside its jurisdiction, (2) when an agency establishes a pattern of nonenforcement of clear statutory language, (3) when an agency refuses to enforce a valid regulation, (4) when a nonenforcement decision violates constitutional rights, and possibly (5) when the decision is made for illegitimate reasons such as bribery. *Id.* at 839 (Brennan, J., concurring).

n113. *Id.* at 840 (Marshall, J., concurring).

n114. *Id.* at 843. Justice Marshall complained:

Because this "presumption of unreviewability" is fundamentally at odds with rule-of-law principles firmly embedded in our jurisprudence, because it seeks to truncate an emerging line of judicial authority subjecting enforcement discretion to rational and principled constraint, and because, in the end, the presumption may well be indecipherable, one can only hope that it will come to be understood as a relic of a particular factual setting in which the full implications of such a presumption were neither confronted nor understood.

Id. at 840. Justice Marshall accused the majority of ignoring contrary precedent and relying on "completely undefined and unsubstantiated references to 'tradition.'" *Id.* at 844.

n115. *Id.* at 847-48.

n116. *Id.* at 848. Justice Marshall illustrates the distinction between administrative enforcement discretion and prosecutorial discretion by stating that "[a] request that a nuclear power plant be operated safely or that protection be provided against unsafe drugs is quite different from a request that an individual be put in jail." *Id.*

n117. *Id.* at 851 (Marshall, J., concurring). For example, an agency's consistent failure to enforce a statute

or promulgate regulations would deprive intended statutory beneficiaries of protection intended by Congress. *See* Note, *Judicial Review of Administrative Inaction*, 83 COLUM. L. REV. 627, 643 (1983).

n118. *See* 470 U.S. at 841-42. Justice Marshall pointed out that an agency's decision, if based on resource constraints and a determination that other problems were more pressing, would be upheld in any event. *Id.* at 842. But he believed the strong likelihood that an agency's decision would be affirmed was insufficient to justify a general presumption of unreviewability "no matter what factor caused the agency to stay its hand." *Id.* at 843.

n119. *See id.* at 854.

n120. *Id.*

n121. *See, e.g.*, Doe v. Casey, 796 F.2d 1508, 1513-14 (D.C. Cir. 1986) (disregarding *Chaney* as precedent and reiterating the presumption of reviewability of agency action); Robbins v. Reagan, 780 F.2d 37, 44 (D.C. Cir. 1986) (stating that the presumption of unreviewability applies only to nonenforcement decisions; in other cases the presumption of reviewability prevails); Berger v. Heckler, 771 F.2d 1556, 1578 (2d Cir. 1985) (stating that *Chaney* is inapplicable if the agency did not refuse to take action); California Human Dev. Corp. v. Brock, 762 F.2d 1044, 1048 n.28 (D.C. Cir. 1985) (stating that *Chaney* is not applicable if the agency acted under authority of congressionally approved regulations); Horizons Int'l, Inc. v. Baldrige, 624 F. Supp. 1560, 1571 (E.D. Pa. 1986) (stating that the Attorney General's grant of antitrust immunity is not a nonenforcement decision; therefore presumption of unreviewability does not apply). Most courts have followed *Chaney* only in cases involving nonenforcement decisions. *See, e.g.*, Brown v. Housing Auth., 784 F.2d 1533, 1540 (11th Cir. 1986) (stating that a refusal to bring enforcement action for failure to comply with HUD regulations was an unreviewable exercise of enforcement discretion); International Union, United Automobile, Aerospace & Agricultural Implement Workers v. Brock, 783 F.2d 237, 244 (D.C. Cir. 1986) (stating that a nonenforcement decision based on resource allocation is unreviewable); Schering Corp. v. Heckler, 779 F.2d 683, 685 (D.C. Cir. 1985) (stating that a settlement embodying an agreement not to initiate enforcement action for 18 months was unreviewable under *Chaney*).

n122. *See* Florida Dep't of Bus. Regulation v. United States Dep't of the Interior, 768 F.2d 1248, 1255 (11th Cir. 1985) (stating that the Secretary of the Interior's decision to acquire a tract of land in trust for the benefit of an Indian tribe is unreviewable because the Secretary had congressional approval to do so), *cert. denied*, 106 S. Ct. 1186 (1986); Falkowski v. EEOC, 764 F.2d 907, 911 (stating that the Department of Justice's decision not to provide legal counsel to plaintiff is within the Department's unreviewable discretion), *reh'g denied*, 783 F.2d 252 (D.C. Cir. 1985) *cert. denied*, 106 S. Ct. 3319 (1986); *see also* California Human Dev. Corp. v. Brock, 762 F.2d 1044, 1053 (D.C. Cir. 1985) (Scalia, J., concurring) (advocating the extension of the presumption of unreviewability to the allocation of funds under the Job Partnership Training Act).

n123. 780 F.2d 37 (D.C. Cir. 1985).

n124. *See id.* at 39.

n125. 42 U.S.C. §§ 9901-9912 (1982).

n126. *Id.* at 41-42.

n127. *See id.* at 47. This conclusion was based on the court's finding that a number of attributes of a rescission of a commitment distinguish it from a refusal to enforce. These distinctions from a nonenforcement decision are: (1) in a rescission of a commitment, the agency itself had earlier decided to commit the funds involved and thus it is not a substitution of the court's judgment for the agency's; (2) the rescission of a commitment involves some exercise of an agency's coercive power that impacts those affected; (3) in a rescission of a commitment an agency takes an affirmative action that provides a focus for judicial review; and (4) a decision to rescind a commitment bears no resemblance to a prosecutor's decision not to indict. *Id.*

n128. *Id.* at 45, 48 (construing 42 U.S.C. § 9910 (1982)). Because the presumption of unreviewability did not apply, the court concluded that the agency's decision was reviewable "unless the statutory scheme, taken together with other relevant materials, provides absolutely no guidance as to how that discretion is to be exercised." *Id.* at 45. In *Robbins,* the court found that the statute limited the purposes for which funds could be granted. The court concluded: "[I]t can be presumed that [Congress] intends that the . . . agency make its allocation based on factors solely related to the goal of implementing the stated statutory purposes in a reasonable fashion, rather than taking irrelevant or permissible factors into account." *Id.* at 48.

n129. 767 F.2d 939 (D.C. Cir. 1985).

n130. *Id.* at 945.

n131. Urban Mass Transportation Act of 1964, § 13(c), 49 U.S.C. app. § 1609(c) (1982).

n132. 767 F.2d at 943.

n133. *Id.* at 944.

n134. *Id.* at 945 n.7. (citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 n.9 (1984) (stating that an agency's determination of its own authority is reviewable)).

n135. 767 F.2d at 947-51.

n136. *Id.* at 945-46.

n137. 762 F.2d 1044 (D.C. Cir. 1985).

n138. Job Training Partnership Act, § 402, 29 U.S.C. § 1672 (1982).

n139. *See* 767 F.2d at 1048 n.28.

n140. *See id.* The court found the situation analogous to the requirement that an agency is bound by its validly promulgated regulations, even if the agency's decision to promulgate the regulations is discretionary. *Id.*

n141. *Id.* at 1052 (quoting *Chaney*, 470 U.S. at 831).

n142. *Id.*

n143. *See* 762 F.2d at 1052. Judge Scalia pointed out that the statute required the Secretary to specify the rationale for the proposed formula in the public comment notice, but did not require him to state his rationale for the final allotments. *Id.; see* 29 U.S.C. § 1572(d) (1982).

n144. *See* 762 F.2d at 1053. Judge Scalia believed that unreviewable discretion already existed within the agency. Therefore, unless the regulation attempted to confine that preexisting discretion, which in his opinion the regulation failed to do, there was no basis for implying the reasonableness requirement into the regulation.

n145. *See id.* at 1048 n.28.

n146. *Id.* (quoting *Chaney*, 470 U.S. at 831).

n147. *Chaney*, 470 U.S. at 831-32.

n148. *See California Human Development Corp.*, 762 F.2d at 1045-48.

n149. 764 F.2d 907 (D.C. Cir.), *reh'g denied*, 783 F.2d 252 (1985), *cert. denied*, 106 S. Ct. 3319 (1986).

n150. The court stated that "[u]nder the standard set forth in *Heckler v. Chaney*, the decision by DoJ not to act is unreviewable." *Id.* at 910.

n151. *Id.* This approach appears to adopt the "pragmatic considerations" test explicitly rejected by *Chaney*. *See* 470 U.S. at 834; *supra* notes 71-72 and accompanying text.

n152. *See* 764 F.2d at 911.

n153. *Id.* (emphasis added).

n154. In denying a petition for rehearing, the court was forced to clarify that it had not used the *Chaney* presumption of unreviewability; rather, the court indicated that the existence of some of the factors that were identified in *Chaney* as justifying a presumption of unreviewability persuaded the court that the traditional presumption of reviewability was rebutted. *Falkowski*, 783 F.2d at 254. The court emphasized that *Chaney* did not require a shift in the general presumption of reviewability for this case. *Id.*

Other courts have also misapplied the *Chaney* analysis. In Brown v. Housing Authority, 784 F.2d 1533

(11th Cir. 1986), the court held that the Department of Housing and Urban Development's refusal to bring an enforcement action against the housing authority for allegedly failing to comply with regulations governing utility allowances for public-housing tenants was an unreviewable exercise of enforcement discretion, relying on *Chaney*'s analysis of reviewability. *See id.* at 1540. The court cited *Chaney* in support of the proposition that "federal courts are ill-equipped to review the managerial, economic, and technical concerns inherent in establishing utility allowances." *Id. Chaney*, however, did not address that proposition; instead, it referred to an agency's allocation of scarce enforcement resources. Although the court implicitly adopted the presumption of unreviewability, it misunderstood the significance of the *Chaney* factors.

n155. *See* 764 F.2d at 911.

n156. *See Chaney*, 470 U.S. at 838.

n157. *Id.* at 833 n.4.

n158. *See id.* at 835; *see also* Bresgal v. Brock, 637 F. Supp. 280, 283 (D. Or. 1986) (stating that *Chaney*'s presumption of unreviewability of enforcement discretion is inapposite when a statute mandates enforcement).

n159. 470 U.S. at 833.

n160. *See id.* at 854-55 (Marshall, J., concurring); *see also The Supreme Court, 1984 Term*, 99 HARV. L. REV. 1, 269 (1985) (determining whether exceptions apply is essentially a review for abuse of discretion). Professor Cass Sunstein goes even further to argue that *Overton Park*'s law-to-apply test is itself indistinguishable from merit review. He states: "Once one has said that an action is unreviewable because there are no legal constraints on the exercise of discretion with respect to the particular allegation, one might as well say that, with respect to that allegation, there is no legal violation." Sunstein, *supra* note 2, at 659.

n161. Pre-*Chaney* decisions also reveal the difficulty of distinguishing unreviewability from deferential review. In Rockford League of Women Voters v. NRC, 679 F.2d 1218 (7th Cir. 1982), the Nuclear Regulatory Commission denied petitioner's request that it institute a proceeding to revoke a construction permit for a nuclear plant. *Id.* at 1218. The court held that the scope of review of agency inaction was "very limited" and refused to overturn the denial because the agency's resource allocation decisions called for managerial, not legal judgment. *See id.* at 1222. The court concluded that it would step in "only if we were strongly convinced that the Commission was inexcusably defaulting on its fundamental responsibility to protect the public safety from nuclear accidents." *Id.* at 1223. It is difficult to see how the court's analysis would have differed significantly had the case arisen after *Chaney*. The court would have found the nonenforcement decision presumptively unreviewable, but still would have had to review the facts to ensure that the agency was not abandoning its statutory duty. *See also infra* notes 177-89 and accompanying text (comparing *Chaney*'s and *WWHT*'s analyses of reviewability). The only difference is that pre-*Chaney* courts admitted they were reviewing the merits, however deferential that review might have been.

n162. 779 F.2d 1260 (7th Cir. 1985).

n163. *Id.* at 1265.

n164. *Id.*

n165. 774 F.2d 1262 (4th Cir. 1985).

n166. *See id.* at 1266. Because the allocation decision was not a nonenforcement decision, the court applied a presumption of reviewability. The court relied on the *Overton Park* test, after concluding that the Supreme Court had approved the test in *Chaney*. *Id.*

n167. *See id.* at 1266-67.

n168. *Id.*

n169. A decision based on factors that Congress could not have intended to be relevant is an abuse of discretion. *Id.* at 1267-68; *see also* Florida Dept. of Bus. Regulation v. United States Dept. of the Interior, 768 F.2d 1248, 1255-56 (11th Cir. 1985) (concluding that, although a decision to acquire a tract of land for an Indian tribe was unreviewable, the court was forced to undertake the equivalent of review on the merits, by considering the statute, the Secretary's decision, and legislative intent).

n170. *See Electricities of N.C., Inc.*, 774 F.2d at 1267; *see also* Dina v. Attorney Gen., 793 F.2d 473, 476-77 (2d Cir. 1986) (indicating in dicta that the court would have jurisdiction over a claim that the agency had acted fraudulently or used constitutionally impermissible factors); Robbins v. Reagan, 780 F.2d 37, 47 (D.C. Cir. 1985) (holding that a decision alleged to have been predicated on personal animus toward petitioner is reviewable); *Falkowski*, 764 F.2d at 910 (stating that the portion of the claim alleging unconstitutional discrimination was reviewable despite the fact that the decision was committed to agency discretion); Wong Wing Hang v. INS, 360 F.2d 715, 718 (2d Cir. 1966) (stating that exercises of administrative discretion are reviewable for abuse of that discretion).

n171. *See Chaney*, 470 U.S. at 852-53 (Marshall, J., concurring); Sunstein, *supra* note 2, at 676-79.

n172. 470 U.S. at 853 (Marshall, J., concurring).

n173. *See* Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375, 380 (2d Cir. 1973) (stating that providing a cause of action for failure to prosecute a criminal action could damage the accused's reputation because, unlike administrative decisions which are on the public record, prosecutors' files and grand jury proceedings in criminal cases are confidential).

n174. 5 U.S.C. § 553(e) (1982). The APA states: "Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." *Id.* Although this section grants the public no right to force an agency to conduct a rulemaking proceeding, *see* WWHT, Inc. v. FCC, 656 F.2d 807, 813 (D.C. Cir. 1981); S. REP. NO. 752, 79th Cong., 1st Sess. 15 (1945), *reprinted in* APA HISTORY, *supra* note 42, at 185, 201, the APA requires an agency denying a rulemaking request to give notice of the denial accompanied by a statement of the grounds for denial. *See* 5 U.S.C. § 555(e) (1982). Section 555(e) of the APA states:

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 proceedings. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

Id. Thus, judicial review of a denial of a rulemaking petition also should be available to determine whether the agency followed proper procedures in denying the request. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 303 (1979) (administrative discretion is limited by the APA's procedural requirements); ITT World Communications v. FCC, 699 F.2d 1219, 1245-46 (D.C. Cir. 1983) (stating that although review of denial of a rulemaking petition is extremely deferential, if the petitioner challenges the agency's compliance with procedural norms, review must be exacting to ensure that the agency has "scrupulously" followed the law), *rev'd on other grounds*, 466 U.S. 463 (1984). Of course, the remedy must be limited to a remand to force the agency to adequately explain its reasons for denying the petition. *See WWHT, Inc.*, 656 F.2d at 818-19.

n175. The Supreme Court "has made clear that traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law." Marshall v. Jerrico, Inc., 446 U.S. 238, 249 (1980); *see also* Wayte v. United States, 470 U.S. 598, 608 (1985) (stating that selective prosecutions of vocal draft resisters are reviewable for First and Fifth Amendment violations); Thigpen v. Roberts, 468 U.S. 27, 30 (1984) (stating that a vindictive exercise of prosecutorial discretion is impermissible and, therefore, reviewable); Blackledge v. Perry, 417 U.S. 21, 27-28 (1974) (same); Adams v. Richardson, 480 F.2d 1159, 1161-62 (D.C. Cir. 1973) (rejecting concept of absolute prosecutorial discretion); Medical Comm. for Human Rights v. SEC, 432 F.2d 659, 673 (D.C. Cir. 1970) (stating that "the phrase 'prosecutorial discretion' [is not] a magical incantation which automatically provides a shield for arbitrariness"), *vacated as moot*, 404 U.S. 403, 407 (1972).

n176. *Chaney*, 470 U.S. at 825 n.2.

n177. One court did consider whether regulatory action was reviewable. The Secretary of Agriculture recently argued that the method of branding dairy cows to identify them for purposes of the dairy termination program was immune from judicial review because the subject was committed to agency discretion. *See* Humane Soc'y, Inc. v. Lyng, 633 F. Supp. 480, 481, 485 (W.D.N.Y. 1986). The court rejected this argument, finding standards in a myriad of statutes that prohibited cruelty to animals and concluded that the agency's prescribed method was arbitrary and capricious for failing to address the cruelty-to-animals issue. *Id.* at 486-87.

n178. In American Horse Protection Ass'n, Inc. v. Lyng, 812 F.2d 1, 3-7 (D.C. Cir. 1987) (Williams, J.), the court of appeals reviewed the district court's decision granting summary judgment to the Secretary of Agriculture concerning his decision not to revise rules that had been promulgated under the Horse Protection Act, 15 U.S.C. §§ 1821-1831 (1982). The court, in deciding whether a nonpromulgation decision was reviewable, stated that "[t]he reviewability of a refusal to institute a rulemaking has been a source of some uncertainty since the Supreme Court held refusals to take ad hoc enforcement steps presumptively unreviewable in Heckler v. Chaney." *American Horse Protection Ass'n*, 812 F.2d at 3 (citation omitted). In a well-reasoned argument, Judge Williams properly illustrated the differences between nonenforcement and nonpromulgation decisions. He concluded that *Chaney* did "not appear" to apply to nonpromulgation decisions. *Id.* at 4.

In another recent D.C. Circuit case, Farmworker Justice Fund, Inc. v. Brock, 811 F.2d 613 (D.C. Cir. 1987), the court considered whether the Secretary of Labor could be compelled to issue field sanitation standards for drinking water and toilet facilities for agricultural workers. *Id.* at 614-19. The opinion by Chief Judge Wald stated that "there has been some uncertainty about how these principles [of judicial review] apply in cases involving agency *inaction." Id.* at 620. The court then diligently sought to distinguish *Chaney* so as to allow

judicial review. *Id.* at 621-22. Because the court found "judicially manageable standards" to determine whether the agency abused its discretion, the court properly found the agency's refusal to promulgate reviewable. *Id.* at 623. However, as the dissent by Judge Williams appropriately indicated, "*Chaney* is not directly applicable," and although it does share some common elements with the case at hand, *id.* at 635 (Williams, J., dissenting), under the precedent of *WWHT,* it is not necessary to distinguish *Chaney* to hold a refusal to promulgate to be reviewable.

Both of these cases indicate that courts are increasingly blurring the factors that were used in *Chaney* to justify the presumption of unreviewability. The failure to restrict the *Chaney* policy factors strictly to nonenforcement decisions may allow the presumption of unreviewability to apply to almost all agency actions involving an element of agency discretion now governed by the presumption of reviewability. For a thoughtful analysis of this problem, see Note, *The Impact of* Heckler v. Chaney *on Judicial Review of Agency Decisions,* 86 COLUM. L. REV. 1247, 1256-58 (1986).

n179. 656 F.2d 807 (D.C. Cir. 1981).

n180. *See American Horse Protection Ass'n,* 812 F.2d at 4; *Farmworker Justice Fund,* 811 F.2d at 620-22.

n181. *See* 656 F.2d at 814-15.

n182. *See id.* at 817; Natural Resources Defense Council, Inc. v. SEC, 606 F.2d 1031, 1046 (D.C. Cir. 1979). The similarities between enforcement and promulgation are illustrated in Olympus Corp. v. United States, 792 F.2d 315, 320 (2d Cir. 1986), in which the Customs Service promulgated a regulation allowing certain gray market goods to be imported without seizure. This regulation reflected Customs' longstanding nonenforcement policy. *Id.*

n183. *See* 656 F.2d at 819.

n184. *Id.* at 817.

n185. *See id.*

n186. *See Chaney,* 470 U.S. at 838 (1985).

n187. *See* 656 F.2d at 817.

n188. *See* 656 F.2d at 819 & n.21.

n189. *See* Sunstein, *supra* note 2, at 658; Note, *supra* note 117, at 657.

n190. *See* 470 U.S. at 832; see also Note, *supra* note 177, at 1256.

n191. *See supra* notes 107-09 and accompanying text.

n192. One court has stated, however, that *Chaney* "does not *appear* to overrule our prior decisions allowing review of agency refusals to institute rulemakings." American Horse Protection Ass'n, Inc. v. Lyng, 812 F.2d 1, 4 (D.C. Cir. 1987) (emphasis added). This guarded conclusion presents the possibility that the court, on further consideration, may rule that *Chaney* does in fact overrule *WWHT*.

n193. D.C. Circuit Judge Abner Mikva has accused the *Chaney* majority of "paint[ing] with a broad brush," the result being an opinion far broader than necessary to decide the case. Mikva, *The Changing Role of Judicial Review*, 38 ADMIN. L. REV. 115, 135, 139 (1986). Judge Mikva argues that the *Chaney* decision violated the first duty of a reviewing court "to refrain from making the law worse or more confusing." *Id.* at 140. Because a workable doctrine of administrative law has developed, the proper solution, Mikva proposes, is for the courts to "paint with a fine brush" in an incremental and evolutionary manner. The result of doing otherwise, as occurred in *Chaney*, is that the workable doctrine of administrative law "is much more likely to be dramatically mucked up." *Id.; see also infra* notes 242-48 and accompanying text.

n194. 470 U.S. at 832.

n195. *See, e.g.*, Salvador v. Bennett, 800 F.2d 97, 99 (7th Cir. 1986) (stating that "[a]dministrative inaction or stasis is reviewable rarely"); Berger v. Heckler, 771 F.2d 1556, 1578 (D.C. Cir. 1985) (distinguishing between the decision to refrain from taking action and the decision to proceed by means other than rulemaking); California Human Dev. Corp. v. Brock, 762 F.2d 1044, 1048 n.28 (D.C. Cir. 1985) (distinguishing between an agency's "refusal to take enforcement action under a statute" and its decision "to act under the authority of regulation approved by Congress").

n196. 421 U.S. 560 (1975).

n197. *Id.* at 571-72.

n198. 5 U.S.C. § 551(13) (1982).

n199. *Id.* § 701(a).

n200. *See id.;* Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967). Justice Marshall faulted the *Chaney* majority for completely ignoring *Abbott*'s mandate that all agency action is presumed reviewable under the APA. *See Chaney*, 470 U.S. at 843-44 (Marshall, J., concurring).

n201. Rochester Tel. Corp. v. United States, 307 U.S. 125, 143 (1939). This decision abolished the negative-order doctrine, which precluded judicial review of orders denying action because they infringed no private rights. *Id.; see* Piedmont & N. Ry. v. United States, 280 U.S. 469, 475 (1930); *see also* Sunstein, *supra* note 2, at 666-67 (discussing the demise of the negative-order doctrine).

n202. 307 U.S. at 141.

n203. *Id.* at 142.

n204. *See supra* notes 68-85 and accompanying text.

n205. 470 U.S. at 851 (Marshall, J., concurring). Professor Sunstein believes the fact that inaction does not affect traditional private rights is not a sufficient basis to distinguish action from inaction, because Congress created administrative agencies to protect those private interests that are not protected by traditional common law rights. Sunstein, *supra* note 2, at 667-68.

n206. *See* 470 U.S. at 832. In fact, Justice Marshall argued in his *Chaney* concurrence that even prosecutorial discretion is not subject to a presumption of unreviewability. *Id.* at 846-47 (Marshall, J., concurring).

n207. Virtually all rulemaking decisions, as well as many enforcement decisions, involve issues of health, safety, and other matters affecting persons beyond the immediate parties. *See Chaney*, 470 U.S. at 847-48 (Marshall, J., concurring); Sunstein, *supra* note 2, at 681 (stating that an agency's "refusal to engage in rulemaking is likely to affect a broader range of people than is an isolated enforcement decision; such a refusal is therefore more likely to implicate the concerns associated with a pattern of nonenforcement").

n208. *See* 470 U.S. at 847-48 (Marshall, J., concurring); *see supra* text accompanying note 204.

n209. The APA defines "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4) (1982).

n210. *See, e.g.*, 29 U.S.C. § 651(b) (1982) (Occupational Safety and Health Act of 1970) (stating that the Secretary of Labor has the authority to set mandatory safety and health standards); 15 U.S.C. § 2051(b) (1982) (Consumer Product Safety Act) (stating that one purpose of the Act is "to develop uniform safety standard"); 16 U.S.C. § 831 (1982) (Tennessee Valley Authority Act) (stating that the purpose of the Authority is to maintain and operate the designated properties).

n211. *See* 470 U.S. at 847-48 (Marshall, J., concurring). The existence of identifiable statutory beneficiaries makes the interests at stake in administrative nonenforcement decisions more focused than in criminal prosecutorial decisions. *Id.* Furthermore, nonimplementation harms the statutory beneficiaries because of their continued exposure to the evils the statute was intended to correct. *See* Note, *supra* note 117, at 630. Judicial review forces agencies to focus on the concerns of those harmed by the agencies' failure to regulate. *Id.* at 643.

n212. *See* WWHT, Inc. v. FCC, 656 F.2d 807, 817, 819 (D.C. Cir. 1981). Furthermore, the denial of a rulemaking petition requires a statement of reasons, which itself provides a focus for judicial review. *See supra* note 169 and accompanying text.

n213. *See* Natural Resources Defense Council, Inc. v. SEC, 606 F.2d 1031, 1046-47 (D.C. Cir. 1979) (stating that judicial review is difficult because the issues are not susceptible to judicial resolution, but deferential review is allowable). A decision not to act based on competing priorities is unreviewable, but an

allegation that inaction was caused by a bribe must be reviewed regardless of the agency's other priorities; no broad rule can immunize inaction from judicial review. *See* Sunstein, *supra* note 2, at 674-75. To determine whether the agency has abused its discretion, courts need not decide, or even be qualified to decide, the question answered through exercise of the agency's discretion. 5 K. DAVIS, *supra* note 42, § 28:7. Although separation of powers considerations might prevent courts from making administrative policy, they do not prevent courts from reviewing agency action for abuse of discretion. *See* Note, *supra* note 117, at 631.

n214. *See Chaney*, 470 U.S. at 833 n.4. Just as active deregulation is subject to judicial review for abuse of discretion, *see* Motor Vehicles Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41 (1983), an agency's refusal to enforce regulations is merely a form of passive deregulation and, therefore, should also be subject to the same standard of judicial review. *See* Mikva, *supra* note 192, at 134-35; Sunstein, *supra* note 2, at 681. The majority in *Chaney* alludes to the possibility that such a refusal to take action may give rise to judicial review, but the refusal must amount to "an abdication of [the agency's] statutory responsibilities." 470 U.S. at 833 n.4. Inherent in the Court's reasoning is the untenable assertion that an agency's failure to enforce a regulation *cannot* be arbitrary or capricious unless it amounts to a complete abdication of the agency's statutory obligations. Regulation and deregulation, whether active or passive, should be treated equally by the law. When an agency rescinds or suspends a regulation, that action need not amount to an abdication of the agency's statutory responsibilities to warrant judicial review; similarly, an agency's refusal to enforce a statute should not be required to meet such a stringent test to obtain judicial review. For another example of an agency's refusal to enforce a statute as being subject to judicial review, see MCI Telecommunications Corp. v. FCC, 765 F.2d 1186, 1190 n.4 (D.C. Cir. 1985) (approving, in dicta, the reviewability of an agency's adoption of a policy of nonenforcement of a statute).

n215. In Heterochemical Corp. v. FDA, 644 F. Supp. 271 (E.D.N.Y. 1986), the district court thoroughly analyzed the FDA's decision not to prosecute after a prolonged investigation. *See id.* at 273-76. The court distinguished *Chaney* on the basis that *Chaney* dealt with the FDA's refusal to commit agency resources (inaction), whereas in this case, the FDA's investigation of possible violations was a commitment of agency resources (action) and the decision not to prosecute was therefore presumptively reviewable. *Id.* This line of reasoning illustrates the tenuous nature of the differences between action and inaction.

n216. 779 F.2d 683 (D.C. Cir. 1985).

n217. *See id.* at 685-87.

n218. *See id.* The court admitted that the settlement agreement went beyond a mere refusal to enforce or the abandonment of an enforcement action. *Id.* at 687. The D.C. Circuit, again relying on the authority of *Chaney*, held in International Union, UAW v. Brock, 783 F.2d 237 (D.C. Cir. 1986), that the Department of Labor's refusal to take enforcement action against an employer's alleged failure to comply with reporting requirements was unreviewable. *See id.* at 244-45. This conclusion followed directly from *Chaney* although the refusal took the form of a revocation of a prior decision to enforce, and although another part of the decision, which set forth the Department's interpretation of the underlying statute, was reviewable. *See id.* at 245; *see also* Thompson v. United States Dep't of Labor, 635 F. Supp. 302, 304 (E.D. Pa. 1986) (stating that a decision to suspend investigatory proceedings was unreviewable even though the statute required the agency to investigate complaints; the decision to institute enforcement action was within the agency's discretion).

n219. 790 F.2d 903 (D.C. Cir. 1986).

n220. *Id.* at 918.

n221. *Id.*

n222. *Id.* In *Shelly v. Brock,* 793 F.2d 1368 (D.C. Cir. 1986), union members sued the Secretary of Labor seeking to compel him to sue their union for alleged violations of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 401-531 (1982), after the Secretary refused to set aside the union election results. *Id.* at 1371. The court stated that although great weight must be accorded the Secretary's discretion, the district court erred when it concluded that "the Secretary has broad prosecutorial discretion, subject to only limited judicial review." *Id.* at 1373. The court of appeals admonished that "[t]he Secretary's discretion is broad, but it cannot be equated with the prosecutorial discretion of a United States Attorney; the Secretary must justify the exercise of his discretion by specific reference to the terms of the authority vested in him by the Act." *Id.* In this case, administrative inaction justified judicial review.

n223. The result sometimes falls in between these two examples. In *Shelly,* administrative inaction -- a refusal to enforce -- resulted in deferential judicial review, rather than having review precluded through the presumption of unreviewability. *See* 793 F.2d at 1373.

n224. 470 U.S. at 832-33.

n225. *See, e.g.,* Florida Dep't of Business Regulation v. United States Dep't of the Interior, 768 F.2d 1248, 1255-57 (11th Cir. 1985) (holding the Secretary of the Interior's decision to acquire land in trust for the Seminole Indian tribe unreviewable because the governing statute provided no judicially manageable standards to circumscribe the Secretary's discretion); Electricities of N.C., Inc. v. Southeastern Power Admin., 774 F.2d 1262, 1266 (4th Cir. 1985) (stating that an agency's allocation of power among its customers was unreviewable because the statute provided no law for a reviewing court to apply); *see also* Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 538 (D.C. Cir. 1986) (stating that a decision to issue a citation to petitioner for a safety violation was an exercise of the agency's unreviewable enforcement discretion despite guidelines indicating that citations would not be issued in those circumstances).

n226. *See, e.g.,* Dunlop v. Bachowski, 421 U.S. 560, 566-67 (1975) (holding the Secretary of Labor's decision not to bring a civil action against a union that allegedly held an invalid election reviewable); Rockford League of Women Voters v. NRC, 679 F.2d 1218, 1223 (7th Cir. 1982) (stating that a decision not to institute a proceeding to revoke a construction permit is reviewable for the purpose of determining whether statutory and regulatory requirements have been met); WWHT, Inc. v. FCC, 656 F.2d 807, 815 (D.C. Cir. 1981) (stating that an agency's denial of a rulemaking petition is reviewable); Heterochemical Corp. v. FDA, 644 F. Supp. 271, 273-76 (E.D.N.Y. 1986) (stating that the FDA's decision not to take certain enforcement steps is reviewable).

n227. Commentators have criticized the argument for a presumption of unreviewability as forming a "logical pyramid . . . constructed where each successive iteration of the principle appears reasonable unto itself but lacks an essential legal foundation in previous decisions," but that the judges nevertheless achieve their goal of a presumption of unreviewability because "the legal flaws are lost in skillful language." Chapple & Kraus, *Rehnquist-Scalia Combined Effect May Far Exceed Current Predictions,* Nat'l L.J., Sept. 15, 1986, at 24, col. 2, 26, col. 1. For example, Justice Rehnquist attempted to gloss over the Supreme Court's statement in *Dunlop v. Bachowski* that "[w]e agree with the Court of Appeals . . . that there is no merit in the Secretary's contention that his decision is an unreviewable exercise of prosecutorial discretion." *See Dunlop,* 421 U.S. at 567 n.7; *Chaney,*

470 U.S. at 834. In his *Chaney* opinion, Justice Rehnquist addressed only one example of what the court of appeals believed precluded the doctrine of prosecutorial discretion from applying in administrative enforcement actions. *See* 470 U.S. at 834. The court of appeals, however, premised its argument against prosecutorial discretion on a much broader base. The court stated its "belie[f] that the doctrine of prosecutorial discretion should be limited to those civil cases which, like criminal prosecutions, involve the vindication of societal or governmental interests, rather than the protection of individual rights." Bachowski v. Brennan, 502 F.2d 79, 87 (3d Cir. 1974), *aff'd sub nom.* Dunlop v. Bachowski, 421 U.S. 560 (1975).

n228. *See Chaney*, 470 U.S. at 829-31. In fact, if anything, *Chaney* has added to *Overton Park*. *Chaney* is cited repeatedly as clarifying the *Overton Park* law-to-apply test with the *Chaney* meaningful standards test. *See, e.g.*, Getty v. Federal Sav. and Loan Ins. Corp., 805 F.2d 1050, 1058 (D.C. Cir. 1986) (stating that whether there is law to apply depends on whether meaningful standards exist); Wallace v. Christensen, 802 F.2d 1539, 1543 n.2 (9th Cir. 1986) (en banc) (stating that the Supreme Court in *Chaney* "clarif[ied] and reaffirm[ed] Overton Park" by creating the meaningful standards test); Hill v. Group Three Hous. Dev. Corp., 799 F.2d 385, 396 (8th Cir. 1986) (using the *Chaney* meaningful standards test to clarify the *Overton Park* law-to-apply test); Humane Soc'y v. Lyng, 633 F. Supp. 480, 485 (W.D.N.Y. 1986) (stating that *Chaney* followed the *Overton Park* law-to-apply test).

n229. *See Chaney*, 470 U.S. at 833-34. In *Bachowski*, the court of appeals held that the statute required the Secretary of Labor to file suit if certain conditions were met. Bachowski v. Brennan, 502 F.2d 79, 87-88 (3d Cir. 1974), *aff'd sub nom.* Dunlop v. Bachowski, 421 U.S. 560 (1975); *see* Shelley v. Brock, 793 F.2d 1368, 1373 (D.C. Cir. 1986) (stating that a decision not to sue under the Labor-Management Reporting and Disclosure Act is reviewable); Doyle v. Brock, 632 F. Supp. 256, 258 (D.D.C. 1986) (same).

n230. When statutory standards are ambiguous, the existence of a presumption of reviewability is crucial. In such cases judicial intervention is especially necessary to ensure that the agency has not acted in an arbitrary or capricious manner. *See* L. JAFFE, *supra* note 1, at 336.

n231. *See, e.g.*, Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 851-53, 862-63 (1984) (divining standards for review from the legislative history of the controlling statutes).

n232. 768 F.2d 1248 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 1186 (1986).

n233. *Id.* at 1255. 25 C.F.R. § 151.10 (1986) lists seven factors that "the Secretary shall consider" in evaluating acquisition requests. These factors include: the existence of statutory authority for the acquisition; the need for additional land; the purpose for which the land will be used; and jurisdictional problems and conflicts of land use. *See id.*

n234. 796 F.2d 1508 (D.C. Cir. 1986).

n235. *Id.* at 1256-57.

n236. *Id.* at 1519 (quoting 50 U.S.C. § 403(c) (1982)).

n237. *Id.* at 1517-19.

n238. *Id.* at 1519-20. The court stated that although it "cannot second-guess the Director's decision that the termination of an employee is advisable in the interests of the United States, we must at least satisfy ourselves that the termination has *some* relationship to the interests of the United States." *Id.* at 1518. Otherwise, the statute would immunize terminations that were "wholly irrational, vindictive or even blatantly unconstitutional." *Id.*

n239. *Id.* at 1520-21.

n240. *See Chaney,* 470 U.S. at 838.

n241. For example, in Lorion v. NRC, 785 F.2d 1038 (D.C. Cir. 1986), the court declined to "plumb the intricacies of this reviewability conundrum," and went directly to the merits of the case because it believed the *Chaney* issue was too difficult to resolve. *Id.* at 1041. The court considered the merits of Lorion's claims to be clear enough to "avoid the potentially far-reaching questions on the scope of *Chaney." Id.*

n242. 780 F.2d 37 (D.C. Cir. 1985).

n243. *See id.* at 45. The court determined that because Congress had limited the purposes for which the grant allocations at issue could be made, only factors related to that goal could be considered; therefore the statutory purpose itself created law to apply. *Id.* at 48; *see supra* note 128.

n244. 780 F.2d at 45-47 (stating that "[s]ince decisions not to take enforcement action are difficult subjects for judicial review, it is reasonable to require some extra degree of substantive guidance to give the court a focus and basis for its review").

n245. 762 F.2d 1044 (D.C. Cir. 1985).

n246. *See id.* at 1052-53 (Scalia, J., concurring).

n247. *See id.* at 1048 n.28; *supra* notes 137-46 and accompanying text.

n248. *See* 762 F.2d at 1053 (Scalia, J., concurring).

n249. *See The Supreme Court, 1984 Term, supra* note 159, at 274-75 (predicting and lamenting the post-*Chaney* tendency to require specific standards in statutes).

n250. The legislative history refers to "statutory standards, definitions, or other grants of power" as sources of law to apply that confine agency discretion. S. REP. at 212, H.R. REP. at 275.

n251. *See supra* note 122.

n252. The D.C. Circuit has on several occasions turned adversity into complicity by reading *Chaney* as the Supreme Court's reaffirmation of the presumption of reviewability in areas outside of enforcement decisions. *See* Robbins v. Reagan, 780 F.2d 37, 45 (D.C. Cir. 1985); Amalgamated Transit Union v. Donovan, 767 F.2d 939, 945 (D.C. Cir. 1985). The D.C. Circuit has also attempted to contain *Chaney* to its facts. *See supra* note 121 and accompanying text.