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Case Comment

HECKLER v. CHANEY: THE PRESUMPTION OF UNREVIEWABILITY IN ADMINISTRATIVE NONENFORCEMENT CASES

ELIZABETH L. CRITTENDEN*

In 1975, eight members of the Supreme Court agreed that the decision of an agency not to enforce its enabling statute was presumptively reviewable.1 The lone dissenter in Dunlop v. Bachowski was Justice Rehnquist. A decade later, eight members of the Court held that such a decision was presumptively unreviewable.2 Justice Rehnquist wrote the majority opinion in Heckler v. Chaney. This major shift in administrative law has been accepted with little question or criticism from the lower federal courts or commentators, even though the Chaney decision has deprived American citizens of yet another tool for confronting the faceless federal bureaucracy.

I. BACKGROUND

A. Conflicting Traditions of Reviewability

Under the Administrative Procedures Act (APA),3 final agency action is generally presumed to be reviewable by the courts.4 A final decision not to act is an action for review purposes.5 This presumption of reviewability has been repeatedly expressed in the leading cases in administrative law. Long before the passage of the APA, the Court found that, even when a statute did not specifically provide for judicial review, "in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief."6 In Abbott Laboratories v. Gardner,7 the Court stated this proposition in stronger language,

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holding that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." Perhaps the most widely known case in administrative law, *Citizens to Preserve Overton Park, Inc. v. Volpe*, permitted examination of a decision by the Secretary of Transportation where there was "no 'showing of clear and convincing evidence' of a . . . legislative intent to restrict access to judicial review."10

On the other hand, the law recognizes an equally strong presumption that the exercise of prosecutorial discretion is *not* subject to judicial review. Over a century ago, in the *Confiscation Cases*11 the Court ruled that prosecutions "are within the exclusive direction of the district attorney, and . . . are so far under his control that he may" decide not to prosecute the case further.12 This general rule has survived into the modern era. In *United States v. Nixon*,13 the Court noted that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case."14

Although cases often speak of the prosecutor's "absolute discretion," there are limits to that discretion. *Bordenkircher v. Hayes*15 reviewed on due process grounds a prosecutor's decision to reindict a suspect, without mentioning any possible bar to reviewability. The Court recognized the breadth of discretion possessed by prosecutors, but held that "broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise."16 For example, the Court has reviewed a prosecutor's enforcement decision when a promise made in a plea bargain is broken17 or when the prosecutor seeks a higher penalty when an accused exercises his right to a *de novo* appeal.18

The degree to which the concept of the unreviewable discretion (within constitutional limits) of a criminal prosecutor extends to bar judicial review of the enforcement decisions of an administrative agency is unclear. Certainly, such actions are reviewable at least for constitutional defects such as due process violations.19 Does reviewability extend beyond constitutional issues? The answer to

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8 *Id.* at 140.
9 *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) [hereinafter cited as *Overton Park*].
10 *Id.* at 410 (citing *Abbott Laboratories*, 387 U.S. 136 and *Brownell v. We Shung*, 352 U.S. 180 (1956).
11 *In re Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1868).
12 *Id.* at 457.
14 *Id.* at 593.
16 *Id.* at 365.
that question lies in how the lower courts will read and apply the apparently contradictory holdings of Bachowski and Chaney.

B. Bachowski

Walter Bachowski was an unsuccessful candidate for union office in District 20 of the United Steelworkers of America. He felt there were numerous irregularities in the election and, after exhausting his union remedies, Bachowski filed a complaint with the Secretary of Labor. The Secretary conducted an investigation, but informed Bachowski that a “civil action to set aside the challenged election is not warranted.”\(^2\) Bachowski brought suit against the Secretary and the Union, requesting that the district court declare the Secretary’s decision arbitrary and capricious and order him to file suit to set aside the District 20 election.

Whether the Secretary’s decision was properly reviewable was a central issue from the beginning of the controversy. The district court held a hearing and subsequently issued an order dismissing the action for lack of subject matter jurisdiction.\(^2\) During the hearing, however, the district court announced that it “lacked authority” to review the Secretary’s decision and order him to file the suit requested by Bachowski.\(^2\)

The Court of Appeals for the Third Circuit reversed the district court’s ruling.\(^2\) That court found federal question jurisdiction proper,\(^2\) but noted that this conclusion did not resolve the question of reviewability of the Secretary’s decision.\(^2\) The Third Circuit observed that Bachowski seemed entitled to judicial review of the Secretary’s decision under 5 U.S.C. section 702, unless such review was precluded by 5 U.S.C. section 701(a), which states that “[t]his chapter applies, according to the provisions thereof, except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.” The court placed the burden of establishing an exclusion under section 701(a) on the Secretary, citing Abbott Laboratories,\(^2\) and a Second Circuit case, Cappadora v. Celebrezze.\(^2\)

\(^{20}\) Letter from the Secretary of Labor to Walter Bachowski (November 7, 1973).
\(^{22}\) Dunlop v. Bachowski, 421 U.S. at 563; see Bachowski v. Brennan, 502 F.2d 79, 83 (3d Cir. 1974).
\(^{23}\) Bachowski v. Brennan, 502 F.2d 79.
\(^{24}\) Specifically, jurisdiction was found on the basis of 28 U.S.C. § 1337 (1982), which provides in part that “[t]he district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce.”
\(^{26}\) Abbott Laboratories, 387 U.S. at 140-41.
\(^{27}\) Cappadora v. Celebrezze, 356 F.2d 1 (2d Cir. 1966). The Second Circuit held that “[a]bsent any evidence to the contrary, Congress may rather be presumed to have intended that the courts should fulfill their traditional role of defining and maintaining the proper bounds of administrative discretion and safeguarding the rights of the individual.” Id. at 6 (citations omitted).
The Third Circuit disagreed with the Secretary's contention that the Labor-Management Reporting and Disclosure Act of 1959 (L-MRDA) committed the decision to bring suit to set aside a union election to the Secretary's absolute discretion. The court applied the Overton Park "clear and convincing evidence" standard to the Secretary's absolute discretion argument. The court found that limited judicial review would not interfere with the Secretary's functioning under the statute. While recognizing that "the Secretary has considerable discretion in the exercise of his enforcement powers," the court examined the language of the L-MRDA and court decisions interpreting it and concluded that "Congress did not intend to make the Secretary's decision not to bring suit unreviewable."

The court went on to reject as "not applicable to the facts of this case" the Secretary's argument that his decision was an unreviewable exercise of prosecutorial discretion. The court opined that the application of the doctrine of prosecutorial discretion "should be limited to those civil cases which, like criminal prosecutions, involve the vindication of societal or governmental interest, rather than the protection of individual rights." The Secretary's decision to sue involves individual rights as well as societal interests and, thus, would not be exempt from judicial review. The court also noted that, unlike a prosecutor, the Secretary is constrained by statute as to which factors he is to consider in deciding whether to file suit to set aside a union election. The existence of this statutory framework meant to the Third Circuit that nothing in the Secretary's decision was "beyond the judicial capacity to supervise."

Having found that judicial review was available, the Third Circuit went on to discuss the proper scope of that review. The court found that review should ensure that the Secretary's action is not arbitrary, capricious, or an abuse of discretion and that, on remand, Bachowski was "entitled to a sufficiently specific statement of the factors upon which the Secretary relied ... so that the plaintiff may have information concerning the allegations contained in his complaint."

Because of the remedy prescribed by the Third Circuit, the Supreme Court reversed. It did, however, agree with that court's analysis insofar as the question

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29 Bachowski v. Brennan, 502 F.2d at 86.
30 Id. at 85.
31 Id. at 87.
32 Id. This distinction was characterized as "novel" in The Supreme Court, 1974 Term, 89 Harv. L. Rev. 47, 200 (1975).
33 Id. at 88 (quoting K. C. Davis Administrative Law Treatise at 984 (Supp. 1970)). This reasoning is similar to that in the "no law to apply" test, which is first discussed infra in the text accompanying notes 54 and 55.
34 Bachowski v. Brennan, 502 F.2d at 90.
of reviewability was concerned. Writing for an eight person majority, Justice Brennan found "that the Secretary's decision not to sue is not excepted from judicial review by 5 U.S.C. section 701(a)." The opinion briefly noted the provision of the L-MRDA which makes suit by the Secretary the exclusive post-election remedy, but found that this provision was not a prohibition of judicial review. This finding was necessary to overcome the section 701(a)(1) exception—statutes precluding judicial review.

The majority of the Court's analysis on the reviewability issue concerned the section 701(a)(2) exception—committed to agency discretion by law. Under this subsection, the agency "bears the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review." The Court surveyed the relevant administrative law cases, and noted that judicial review is not to be cut off unless there is clear and convincing evidence of legislative intent to do so. In reaching its conclusion that review was available, the Court examined the statutory scheme, the legislative history, relevant L-MRDA cases, and the implementation of the law, as submitted by the Secretary. The Court found that "there is not even the slightest intimation that Congress gave thought to the matter of the preclusion of judicial review." In the absence of clear and convincing evidence of a specific congressional intent to preclude review, the Court rejected the Secretary's argument that his action was unreviewable. In a footnote, the Court also dismissed as meritless the Secretary's argument that his decision not to sue was an unreviewable exercise of prosecutorial discretion. The Court adopted the Third Circuit's distinction between civil cases which involve the vindication of societal or governmental interest and those which involve the protection of individual rights.

The remainder of the majority opinion discussed the narrow scope of judicial review of discretionary action by an administrative agency. This "exceedingly narrow scope of review" was the point of Chief Justice Burger's concurrence. The statutory scheme of the L-MRDA, he said, required a much narrower scope of review than normally available under APA section 706(2)(A).

Justice Rehnquist's dissenting opinion criticized the majority for deciding "an issue about which the parties no longer disagree," that is, the type of explanation

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36 Chief Justice Burger joined in the majority opinion but also filed a separate concurrence. Justice Rehnquist concurred in the result in part and dissented in part.
37 Dunlop v. Bachowski, 421 U.S. at 566.
38 Id. at 567.
39 Id. The use of the word "preclusion" here would figure prominently in Judge Scalia's dissent in the Third Circuit Chaney decision.
40 Id. at n.7.
41 Id. at 590.
42 5 U.S.C. § 706(2)(A). This subsection provides that a reviewing court must set aside any agency action it finds to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." Id.
The only real issue in the case, according to Rehnquist, was whether the Secretary could be forced by the courts to bring the suit desired by Bachowski. Justice Rehnquist agreed with the majority that nothing in the L-MRDA specifically prohibited judicial review, thus bypassing the exemption of section 701(a)(1), but he felt that the Secretary’s decision not to sue was exactly the type of administrative action committed entirely to the agency’s discretion. Justice Rehnquist examined the same data analyzed by the majority, but gave more emphasis to the L-MRDA case law which stressed the Secretary’s exclusive role in post-election challenges. He rejected the distinction between vindication of societal interest and protection of individual rights, and asserted that “a more basic response is that such considerations provide no basis for contravention of legislative intent,” which he found in Congress’ grant of exclusive post-election litigation power to the Secretary. While Justice Rehnquist stood alone in his dissent in Bachowski, within ten years his views would be adopted by the majority of the Court.

II. CHANEY

A. Background

Eight death row prisoners petitioned the Secretary of Health and Human Services to enforce numerous sections of the Food, Drug, and Cosmetic Act against states which had adopted statutes permitting lethal injection as a means of human execution. Essentially, they alleged that the statutes provided for an unapproved use of drugs which had been distributed in interstate commerce, thus violating the Act’s prohibition against “misbranding.”

The Commissioner of the Food and Drug Administration (FDA) refused to investigate the prisoners’ complaints or take any of the enforcement actions they sought. He contended that the “FDA’s jurisdiction did not extend to the regulation of state-sanctioned use of lethal injections.” The Commissioner detailed in a letter his reasons for denying the prisoners’ petition.

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41 Dunlop v. Bachowski, 421 U.S. at 591, 593. The Secretary did not appeal the Third Circuit’s holding that he must provide Bachowski with a statement of reasons. Indeed such a statement was filed by the Secretary and is appended to the majority’s opinion. Rehnquist does not, however, approve of the Third Circuit’s reasoning in requiring such a statement. Instead, he bases the Secretary’s obligation on the APA’s requirement that notice of an administrative denial “be accompanied by a brief statement of the grounds” for such action. 5 U.S.C. § 555(e).
42 Dunlop v. Bachowski, 421 U.S. at 595.
43 Id. at 597.
45 Id. at § 352(f). Misbranding occurs when a label does not provide adequate directions for use or warnings against unapproved uses.
47 Letter from FDA Commissioner to prisoners (July 7, 1981). He noted that the FDA would not move against duly authorized state laws. He further stated that he would not choose to enforce the statute in this situation in light of the lack of uniformity in case law and because the FDA did not initiate enforcement actions against unapproved uses unless there was a serious danger to public health.


The prisoners went to federal court seeking to compel enforcement by the Commissioner. The district court granted summary judgment to the FDA, holding that discretionary agency nonenforcement decisions were "essentially unreviewable by the courts."\(^{50}\)

B. The Circuit Court's Opinion

The Court of Appeals for the District of Columbia Circuit vacated the district court's decision, stating that the lower court "misunderstood and misapplied its review authority."\(^{51}\) The Circuit Court\(^{52}\) noted that APA section 701(a) creates a strong presumption of reviewability and that the exceptions under that section should be construed narrowly.\(^{53}\)

As in \textit{Bachowski}, interpretation of subsection 701(a)(2)—the "committed to agency discretion exception"—was the central statutory provision in dispute. Judge Wright noted a traditional reluctance among some courts in reviewing the exercise of enforcement discretion. But, he interpreted the Supreme Court cases as requiring a narrow construction of the section 701(a)(2) exception, applying it "only in those rare instances where the governing statute is 'drawn in such broad terms that in a given case there is no law to apply.'"\(^{54}\) Judge Wright held that this general rule should be fully applied to cases requiring review of agency enforcement discretion, and cited \textit{Bachowski} to support his holding.\(^{55}\) He analogized \textit{Bachowski} to the instant case and explained that the issue of reviewability had to be determined by the \textit{Overton Park} test of whether there is "law to apply." Such a determination, according to the majority opinion, "turns on such pragmatic considerations as whether judicial supervision is necessary to safeguard plaintiffs' interests, whether judicial review will unnecessarily impede the agency in effectively carrying out its congressionally assigned role, and whether the issues are appropriate for judicial review."\(^{56}\) These "pragmatic considerations" were previously articulated by the same court in \textit{Natural Resources Defense Council, Inc. v. Securities and Exchange Commission.}\(^{57}\) The determination requires weighing "the considerations favoring nonreviewability" against "the strong presump-


\(^{51}\) Chaney v. Heckler, 718 F.2d at 1183.

\(^{52}\) Judge J. Skelly Wright wrote the majority opinion and was joined by Senior District Judge Weigel of the Northern District of California, who was sitting by designation.

\(^{53}\) Chaney v. Heckler, 718 F.2d at 1183. The court cited a number of cases to support this construction.

\(^{54}\) \textit{Id.} at 1184 (quoting \textit{Overton Park}, 401 U.S. at 410).


\(^{56}\) Chaney v. Heckler, 718 F.2d at 1185.

tion of judicial review."

Judge Wright then cited "an earlier policy statement" of the FDA as providing, along with statutory language and case law, the necessary law to make judicial review possible. Additionally, Judge Wright observed, the circuit court had never allowed a claim of prosecutorial discretion to shield agency actions from judicial review for arbitrariness.

Having determined that review was appropriate, the remainder of the majority's opinion was dedicated to discussing the appropriate scope of review and how that standard applied in the case under consideration. In this discussion, the court rejected the Commissioner's legal arguments and factual contentions, concluding that he had "acted arbitrarily, capriciously, and without authority of law."

Then Circuit Judge Scalia dissented, condemning the majority opinion as "rewriting the law with regard to enforcement discretion" and intruding upon powers belonging to other government entities. Judge Scalia found the majority's opinion unsupportable because it did not leave the decision on enforcement priorities entirely up to the executive branch, which he found called for by article II, section 3 of the Constitution. He cited an earlier District of Columbia Circuit decision, Kixmiller v. Securities and Exchange Commission, for the proposition that "[a]n agency's decision to refrain from an investigation or an enforcement action is generally unreviewable."

The dissent primarily attacked the majority's holding that a strong presumption of reviewability applies in cases involving enforcement discretion and asserted that the excerpts cited by the majority were misleading. The Supreme Court's application of the strong presumption of reviewability in Bachowski was, according to Judge Scalia "[i]n the context of its preclusion discussion" of the statutory language. The dissent implied that such a presumption is only appro-

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58 Chaney v. Heckler, 718 F.2d at 1185-86.
59 Id. at 1186. The policy statement relied on by the circuit court originally accompanied a proposed rule, which was never adopted. The court was not deterred, however, by this fact, since the FDA agreed that the statement accurately reflected the agency's policy and interpretation of its enabling statute. Id. at n.28.
60 Id. at 1187 (quoting Medical Comm. for Human Rights v. Securities and Exch. Comm'n, 432 F.2d 659, 673 (D.C. Cir. 1970), vacated as moot, 404 U.S. 403 (1972)).
61 Judge Wright determined that "a court must conduct a 'searching and careful' review of the 'whole record' to determine if the agency has been 'arbitrary or capricious.' " Chaney v. Heckler, 718 F.2d at 1190.
62 Id. This portion of the circuit court's analysis is the most easily criticized, since it seems to subject the Commissioner's reasoning to a higher than stated standard of review.
63 Id. at 1192 (Scalia, J., dissenting).
65 Chaney v. Heckler, 718 F.2d at 1193 (emphasis in original). Because the Supreme Court used the word "preclusion" in discussing congressional intent, Judge Scalia apparently attributes that portion of the Supreme Court's opinion in Bachowski to § 701(a)(1), not § 701(a)(2). On careful reading of Bachowski, Judge Scalia's line drawing does not seem justified. Dunlop v. Bachowski, 421 U.S. at 566-67; see Conclusion, infra.
appropriate in dealing with the section 701(a)(1) exemption, not with that of section 701(a)(2). Judge Scalia read *Bachowski* as addressing the section 701(a)(2) exemption only in a brief footnote adopting the Third Circuit's reasoning.\(^6\) He then stated that a review of the Third Circuit's decision in *Bachowski* implies that most enforcement decisions are not reviewable, in contrast to any strong presumption of reviewability.

Judge Scalia next stated that the other cases cited by the majority "also do not support its position."\(^6\) *Abbott Laboratories* involved agency rule-making, not enforcement actions, and *Overton Park*, he contended, did not involve enforcement discretion, and only addressed section 701(a)(2) in dicta. He cited two District of Columbia Circuit *en banc* cases, pointing out that they did not invoke a presumption of reviewability.\(^6\) Indeed, Judge Scalia maintained that all of the cases cited by the majority "display special circumstances overcoming the usual presumption of nonreviewability."\(^6\)

Judge Scalia admitted that there was no doubt that the *totality* of section 701(a) created a strong presumption of reviewability, but asserted that this presumption was "precisely the contrary" in regard to enforcement decisions.\(^7\) He said that even those who seek such review acknowledge that it would be a change from the existing law.\(^7\) The majority's reliance on Professor Davis was, he maintained, misplaced, since the transition in case law Professor Davis observed has been in the area of the discretion of criminal prosecutors, which had previously been considered absolute.\(^2\) Judge Scalia did not contend that an agency's discretion is absolute, but rather, that it is generally unreviewable. In the instant case, he insisted, there are no special circumstances justifying departure from that general rule.

Judge Scalia next attacked the majority's reliance on the FDA policy statement, contending it did not meet the APA criteria of an "agency rule" since

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\(^6\) *Id.* The footnote so referenced (421 U.S. at 567 n.7) actually addressed only the traditional reluctance to review the exercise of prosecutorial discretion. In the decision below, the Third Circuit dealt separately with the Secretary's general claim of a congressional intent to "preclude judicial review and to commit to the Secretary's absolute discretion the decision whether to bring suit." *Bachowski v. Brennan*, 502 F.2d at 84.

\(^7\) *Chaney v. Heckler*, 718 F.2d at 1193.

\(^8\) *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973); *Curran v. Laird*, 420 F.2d 122 (D.C. Cir. 1969).

\(^9\) *Chaney v. Heckler*, 718 F.2d at 1194. The "special circumstances" cited by Judge Scalia often seem little more than a finding by the court that the agency's action was wrong.

\(^10\) *Id.* at 1195.


\(^7\) 5 U.S.C. § 551(4).
the proposed rule it accompanied was never adopted.\textsuperscript{74} Further, the dissent argued that the policy statement was not violated by the Commissioner’s refusal, since it was up to him to determine if an unapproved use was widespread or had become a danger to the public health.

Finally, Judge Scalia responded to the majority’s contention that his point of view had an anachronistic ring to it by declaring that what the majority heard was “the stifled cry of smothered stare decisis, or perhaps the far-off shattering of well established barriers separating the proper business of the executive and judicial branches.”\textsuperscript{75}

C. The Supreme Court’s Majority Opinion

The Supreme Court reversed the circuit court, and Justice Rehnquist’s majority opinion made many of the same points as Judge Scalia’s dissent below. Bypassing the issue of FDA jurisdiction, Justice Rehnquist said “this case turns on the important question of the extent to which determinations by the FDA \textit{not to exercise} its enforcement authority . . . may be judicially reviewed.”\textsuperscript{76} He agreed with the circuit court that the interpretation of section 701(a)(2) was central to the issue of the availability of review, and observed that the Supreme Court had not analyzed this “committed to agency discretion by law” exception in any great detail in past opinions.

The bare language of section 701(a), according to Justice Rehnquist, does not make clear the difference between the first and second exception to the general rule of reviewability. The first obviously requires construction of the statute involved to determine if Congress specifically intended to preclude review of agency action. The meaning of the second exception is not so obvious. If something is committed to agency discretion \textit{by law}, doesn’t that require the same analysis of statutory language as under section 701(a)(1)? The \textit{Chaney} majority answered this question in the negative, finding the application of the two exceptions clearly separate. The Court found that the second exception applies when Congress has not explicitly precluded judicial review but when “the statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion.”\textsuperscript{77} Justice Rehnquist thus also adopted the \textit{Overton Park} “no law to apply” test for possible section 701(a)(2) exceptions.

The circuit court had also recognized the appropriateness of the \textit{Overton Park} standard, but Justice Rehnquist faulted the circuit court’s insistence that \textit{Overton Park} taught that the agency discretion exception was a very narrow one, requiring

\textsuperscript{74} Judge Scalia disagreed with the majority’s assertion that the FDA admitted the policy statement was an accurate reflection of the agency’s position. \textit{Chaney v. Heckler}, 718 F.2d at 1197.

\textsuperscript{75} \textit{Id.} at 1198.

\textsuperscript{76} \textit{Heckler v. Chaney}, 470 U.S. at 828 (emphasis in original).

\textsuperscript{77} \textit{Id.} at 830.
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[47x616]a presumption of reviewability even in the enforcement area. Justice Rehnquist pointed out that *Overton Park* did not involve the denial of enforcement, but involved authorization for the expenditure of funds under a statute providing guidance for such action.

The Court ruled that a refusal to undertake enforcement is a decision generally committed to an agency's absolute discretion and the presumption is that judicial review is not available.78 A primary reason for this ruling was Justice Rehnquist's recognition that such a decision is generally unsuitable for judicial review because it involves a balancing judgment within the agency's expertise. A decision not to enforce usually does not involve exercise of the government's coercive power, and resembles a prosecutor's decision not to indict, an area traditionally immune from review due to constitutional considerations. The Court stressed that this unreviewability is only presumptive, and sufficient guidelines in the substantive statute may make review possible. The Court implied, but specifically refused to decide, that the presumption against review may also be overcome in other situations not presented in *Chaney*.79

The Court distinguished *Bachowski*, which formed the foundation for the circuit court's decision, finding that there the language of the L-MRDA provided standards adequate for review. While acknowledging that *Bachowski* rejected the agency's prosecutorial discretion analogy, Justice Rehnquist's *Chaney* opinion stated "[o]ur textual references to the 'strong presumption' of reviewability in . . . [Bachowski] were addressed only to the § (a)(1) exception; we were content to rely on the Court of Appeals' opinion to hold that the § (a)(2) exception did not apply."80 The *Bachowski* decision that review was appropriate was not, according to the *Chaney* Court, based on the pragmatic considerations cited by the Third Circuit. Justice Rehnquist pointed out that it was up to Congress to provide law for the courts to apply, and that it is not appropriate for courts to intervene where there is no such standard, even when "the interests at stake are important."81

According to Justice Rehnquist, *Bachowski* is consistent with a general presumption of unreviewability because the relevant L-MRDA language rebutted the presumption by providing guidelines for the exercise of agency enforcement power and, thus, standards upon which to base review. The substantive statute granting enforcement powers under the FDA, according to Justice Rhenquist, "commit[s] complete discretion to the Secretary to decide how and when they should be

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78 Id. at 831.
79 Id. at 833 n.4. Circumstances mentioned by the Court included when the agency's nonenforcement policy amounts to an abdication of its statutory responsibilities. See infra note 84.
80 Id. at 834. The difficulty with Justice Rehnquist's logic on this issue is that the circuit court's opinion in *Bachowski* does not so clearly address itself to these distinctions between subsections 701(a)(1) and (a)(2).
81 Id.
exercised.” The Court found “singularly unhelpful the agency ‘policy statement’ on which the Court of Appeals placed great reliance,” since it was attached to a rule that was never adopted, and since it was subject to various interpretations.

In summary, the Court held that the “general exception to reviewability provided by § 701(a)(2) for action ‘committed to agency discretion’ remains a narrow one, but within that exception are included agency refusals to institute investigative or enforcement proceedings, unless Congress has indicated otherwise.”

D. Justice Marshall’s Opinion

Justice Marshall concurred only in the result reached by the majority opinion, declaring that “[e]asy cases at times produce bad law.” The presumption of unreviewability announced by the majority was, according to Justice Marshall, fundamentally at odds with basic jurisprudential principles. He urged that agency refusals to enforce administrative decisions be reviewed, as are other agency actions, under the abuse of discretion standard of APA section 706(2)(A).

In the case before the Court, Justice Marshall would have held on the merits that the Commissioner’s refusal to grant the prisoners’ petition was within the discretion statutorily granted to him. Justice Marshall felt that an agency’s discretionary decision to put its limited resources to work on other tasks should generally be afforded deference by the courts and would not be violative of section 706(2)(A). The concurring opinion stated that the problem with the majority’s decision was that it “transforms the arguments for deferential review on the merits into the wholly different notion that ‘enforcement’ decisions are presumptively unreviewable altogether.”

Justice Marshall commented that this presumption was inconsistent with prior interpretations of the APA and criticized the majority for ignoring Abbott Laboratories and its requirement that only “‘clear and convincing evidence’ of a contrary legislative intent should . . . restrict access to judicial review.” The cases cited by the majority, according to Justice Marshall, did not support a broad presumption of unreviewability. Vaca v. Sipes is the only case relied on by the

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82 Id. at 835.
83 Id. at 836. The Court did not decide if “an agency’s rules might under certain circumstances provide courts with adequate guidelines for informed judicial review.” Id.
84 Id. at 838 (citation omitted). Justice Brennan filed a concurrence, which pointed out that the Court did not decide that the following actions are unreviewable: 1) an agency claim of lack of jurisdiction; 2) an agency pattern of nonenforcement of clear statutory language; 3) a refusal to enforce a valid regulation; or 4) a claim of violation of constitutional rights. Id. (Brennan, J., concurring).
85 Id. at 840 (Marshall, J., concurring).
86 Id. at 842-43.
87 Abbott Laboratories, 387 U.S. at 141.
majority which involved administrative action, and it merely teaches that the un-reviewable enforcement discretion discussed in that case results from the particular statutory scheme and the explicit legislative intent to withdraw judicial review. The other cases relied on by the majority were distinguished by Justice Marshall because they involved prosecutors' discretion in enforcing the criminal law. Even among those cases, Justice Marshall contended, only *Nixon* provides any support for the general proposition of unreviewability, and that case held that it was an abuse of discretion to act contrary to validly promulgated regulations.

Justice Marshall maintained that the majority's reliance on principles of prosecutorial discretion was inappropriate because even that special kind of discretion is not entirely unfettered and because "arguments about prosecutorial discretion do not necessarily translate into the context of agency refusals to act." Justice Marshall reasoned that, while criminal prosecutions vindicate only intangible societal interests, requests to an agency to take enforcement actions most often involve concrete injuries or benefits made cognizable or bestowed by Congress through statutes, therefore, an agency decision not to enforce, "[u]nlike traditional exercises of prosecutorial discretion 'may itself result in significant burdens on a . . . statutory beneficiary.'" Justice Marshall also found principles of prosecutorial discretion inappropriate because a major purpose of the APA was to make judicial review of agency action available, and because under the APA, the courts have continued to narrow the class of administrative actions treated as so discretionary as to avoid review.

Justice Marshall found little comfort in the majority's statement that the presumption of unreviewability can be rebutted by guidelines supplied by the substantive statute. This position seemed to Justice Marshall to imply "far too narrow a reliance on positive law . . . as the sole source of limitations on agency discretion not to enforce." Even in the absence of constitutional or statutory guidelines, Justice Marshall would have allowed review in numerous circumstances, such as when there were allegations of conflicts of interest, bribes, retaliation, or when an agency's refusal to enforce departs from its own historical practice. Because the majority at least would allow review in limited circumstances, it seemed to Justice Marshall "that a court must always inquire into the reasons for the agency's action before deciding whether the presumption [of unreviewability] ap-

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90 *See supra* text accompanying notes 15-18.
91 *Heckler v. Chaney*, 470 U.S. at 847.
92 *Id.* at 848 (quoting Marshall v. Jerrico, Inc., 446 U.S. 238, 249 (1980)).
93 *Id.* (citing Shapiro, *Administrative Discretion: The Next Stage*, 92 *Yale L.J.* 1487, 1489 n.11 (1983)). Justice Marshall next argued that the majority's reliance on what it termed the tradition of unreviewability is refuted by a substantial body of case law from lower courts. He pointed out that the lower courts frequently deal with complaints of agency inaction and often respond by requiring explanations or by granting injunctive relief. *Id.* at 850.
94 *Id.* at 852.
plies." Such an inquiry would differ little, according to Justice Marshall, from a review on the merits conducted with due deference to the agency’s discretion.

In conclusion, Justice Marshall argued that a literal application of the majority’s holding would take an important role away from the courts in addressing “one of the pressing problems of the modern administrative state,” and expressed his hope that the lower courts, over time, would read Chaney not as requiring avoidance of judicial review, but as mandating proper deference to agency policy making.

III. Reaction from Lower Courts

Little negative reaction has been generated by the Chaney decision, and the federal courts have applied its logic in a number of situations. The Sixth Circuit has refused to review the alleged failure of the Department of Health and Human Services to monitor the compliance of health care facilities with the free and reduced cost provisions of a construction grant program. The Seventh Circuit would not determine if the Environmental Protection Agency had improperly failed to undertake rulemaking regarding coke oven operations, citing Chaney among other reasons for its reluctance. This reluctance is particularly telling of the broadening reach of Chaney in application since that case did not involve the question of required rulemaking. In a case dealing primarily with the matter of standing, the Ninth Circuit opined that the private plaintiffs had no right to a court order compelling the Secretary of the Department of Transportation to assess penalties against railroads for safety violations. The Eleventh Circuit ruled that it could not review the Department of Housing and Urban Development’s alleged failure to enforce its regulations which provide for a utility allowance for public housing tenants. The District of Columbia court has dealt with numerous Chaney-type actions and, in following that case, has expanded the areas of applicability to include refusal to review an FDA settlement with a drug manufacturer and the decision of the Department of Justice not to provide legal counsel to the

94 Id. at 853.
95 Id. at 854.
96 Gillis v. United States Dep’t of Health and Human Services, 759 F.2d 565 (6th Cir. 1985).
97 Bethlehem Steel Corp. v. United States Envtl. Protection Agency, 782 F.2d 645 (7th Cir. 1986). The court also noted that original jurisdiction on the rulemaking question was properly with the district court.
98 Heckler v. Chaney, 470 U.S. at 825 n.2.
99 Railway Labor Executives Ass’n v. Dole, 760 F.2d 1021 (9th Cir. 1985).
plaintiff in a civil rights suit. The district court for the District of Columbia applied Chaney in granting summary judgment in a suit challenging the Department of Transportation's handling of reported failures in the automatic transmissions of certain Ford automobiles.

Other courts have found Chaney not applicable to the cases before them, distinguishing Chaney factually or refusing to expand its reasoning beyond the area of nonenforcement decisions. The Second Circuit ruled that the Secretary of Health and Human Services could be required to promulgate regulations implementing a consent decree. The Fourth Circuit considered the underlying constitutional questions raised when a utility challenged an enforcement decision by the Maryland Public Service Commission. Finding adequate law to apply and a congressional intent to provide judicial scrutiny, the Seventh Circuit examined a decision by the Commodity Futures Trading Commission not to review a commodities exchange disciplinary action. The Eighth Circuit distinguished Chaney's single instance of refusal to enforce from a failure to implement an entire program in finding reviewable the Department of Agriculture's inaction on a special disaster payment program.

The district courts have frequently found reasons to distinguish Chaney and go on to provide judicial review. There was, according to both the District of Columbia and the trial court, ample "law to apply," and review of the government's decision to close a shelter for the homeless was proper. A statute containing the relief sought provided the "law to apply" in a mandamus action in New York. A district court in Pennsylvania distinguished Chaney's concern over the allocation of prosecutorial resources from the availability of judicial enforcement of the Secretary of Commerce's duty to certify export activities as not having

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104 In one case, the District of Columbia Circuit "avoided" the question of whether the Supreme Court's ruling in Chaney applied in a citizens' action to revoke the license for a nuclear reactor and went on to determine that the Nuclear Regulatory Commission had not abused its discretion in refusing the request. Lorion v. United States Nuclear Regulatory Comm'n, 785 F.2d 1038 (D.C. Cir. 1985).

105 Berger v. Heckler, 771 F.2d 1556 (2d Cir. 1985).


107 Cardoza v. Commodity Future Trading Comm'n, 768 F.2d 1542 (7th Cir. 1985).


anticompetitive effects in the domestic market. Because the Oregon district court found that the Secretary of Labor was required to enforce a safety statute, it granted the injunction requested by the affected forestry workers. A Colorado court refused to dismiss on jurisdictional grounds the Sierra Club's declaratory judgment action against the Secretary of Agriculture because there were manageable standards to review his failure to act, but the court granted the Secretary summary judgment on the merits.

IV. CONCLUSION

Contrary to the assertions of then Judge Scalia and Justice Rehnquist, the presumption of nonreviewability established by Chaney is a major departure from the long standing rule of reviewability as articulated in Bachowski. In order to downplay this conflict, their opinions attribute the strong presumption of reviewability in Bachowski to the preclusion exception of section 701(a)(1). This reading of Bachowski is strained at best, since the reference portion of that opinion specifically notes the absence of a statutory prohibition.

Nevertheless, it appears that Chaney is now firmly entrenched as the law of the land and that Justice Marshall's hope that the lower courts would read the decision as merely mandating proper deference to agency policy making will not be realized. Therefore, it will be up to Congress to provide sufficient statutory specificity when mandating action on the part of an administrative agency so as to assure that citizens will have recourse to the courts when faced with agency indifference or nonfeasance.

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113 Bresgal v. Brock, 637 F. Supp. 280 (D. Or. 1986). This case provides perhaps the most narrow reading yet of Chaney.