The Scope of Review of Agencies' Refusals to Enforce or Promulgate Rules

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Notes

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

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

When a federal agency receives a petition to initiate rulemaking proceedings, it may either deny that petition[3] or draft a proposed rule and solicit public comments.[4] Even after receiving comments,

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* This Note was developed by Raymond Murphy.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I. Reviewability

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

A. Is the Agency's Decision Final?

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

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

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

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

13. 5 U.S.C. § 701(a)(2) (1982).

14. *Id.* § 704.

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

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

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

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

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

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

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

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

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

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

21. *Id.* at 847-48.

22. *Id.* at 846.

23. *Id.* at 847-48.

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

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

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

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

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26. *Id.* at 847.

27. *Id.* at 848.

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

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

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

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

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

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

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

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

30. *Id.* at 846-47.

31. *Id.* at 847.

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

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

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

B. *Is Action Committed to Agency Discretion?*

Even if an agency's nonaction is final, nonaction may be beyond the reach of judicial review under the APA if review is precluded by statute[35] or if the action is completely committed to the agency's discretion.[36] Historically, both of these exceptions to judicial review have been interpreted narrowly.[37]

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

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

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35. 5 U.S.C. § 701(a)(1) (1982).

36. *Id.* § 701(a)(2).

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

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

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

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

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

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

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

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

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

Chaney v. Heckler concerned the FDA Commissioner's exercise

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

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

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

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

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

46. *Id.* at 1183-84.

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

48. *Id.* at 525-27.

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

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

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

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

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

50. 718 F.2d at 1176.

51. *Id.* at 1176-77.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

63. *Id.* at 1186.

64. *Id.* at 1185-86.

65. *Id.* at 1188.

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

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

no special considerations existed in *Chaney,* and the court should have declined review.[68]

The majority and dissenting opinions demonstrate that the choice of the presumption for or against reviewability is determinative. The majority's presumption in favor of reviewability removes enforcement discretion cases from that small category of agency actions that are not reviewable, whereas the dissent's presumption against reviewability requires special circumstances to justify review.[69]

A subsequent decision by a different panel of the District of Columbia Circuit reached a conclusion opposite from that of the majority in *Chaney v. Heckler. Investment Company Institute v. FDIC* arose when the FDIC refused to consider the Investment Company Institute's request that it declare unlawful a plan by the Boston Five Cents Saving Bank to sell mutual-fund shares through its subsidiaries.[70] The court decided that the FDIC's refusal to consider petitioners' request was so committed to the discretion of the agency that it was not reviewable.[71]

In direct contrast to the analysis in *Chaney,* the rationale of *Investment Company* would render enforcement decisions generally unreviewable.[72] The court inquired whether there was law to apply and determined that there was, but it based its determination on whether there were any circumstances justifying review.[73] In

policy statement, which arguably could provide a standard against which the FDA's action could be reviewed, *see infra* note 95, did not justify review because it was full of permissive language. *Id.* Such a permissive statement could not provide a concrete standard.

68. *Id.* at 1196.

69. The Supreme Court ultimately overruled Judge Wright's opinion in *Chaney,* 105 S. Ct. 1649 (1985). *See* discussion *infra,* at text accompanying notes 97-113. Even before the Supreme Court agreed to hear *Chaney,* the precedential value of the opinion was questionable. Not only did Judge Scalia write a strong dissent, but the same court subsequently issued a contradictory decision, *see infra* text accompanying notes 69-70, and the other member of the panel joining Judge Wright's opinion in favor of reviewability was not a member of the District of Columbia Circuit but was sitting by designation from the Northern District of California. 718 F.2d at 1176.

70. Investment Co. Inst. v. FDIC, 728 F.2d 518, 520 (D.C. Cir. 1984). Apparently, the Investment Company Institute wanted to prevent the Boston Five Cent Savings Bank from selling mutual funds through its branch offices.

71. *Id.* at 528. The court characterized the FDIC's decision as an example of prosecutorial discretion that was inappropriate for review absent standards to govern the agency's exercise of discretion, *id.* at 527; *see also* Alan Guttmacher Inst. v. McPherson, 597 F. Supp. 1530 (S.D.N.Y. 1984) (court held that question of contract renewal by the Agency for International Development was committed to agency discretion and there was no law to apply). *Cf.* Honros v. United States Civil Serv. Comm'n, 720 F.2d 278 (3d Cir. 1983) (court held refusal by U.S. Marshals Service to request a certificate of eligibles from the Civil Service Commission for the purpose of hiring permanent employees was not committed to agency discretion by law and was thus reviewable under the APA's arbitrary and capricious standard).

72. 728 F.2d at 527.

73. *Id.* at 526.

appraising these circumstances, the court considered the need for review to protect the plaintiff's interests and the impact of review on the agency's effectiveness. Ultimately, the court held that enforcement decisions could be reviewed only under unusual circumstances, such as where the agency's action is the exclusive form of relief,[74] where the agency brings an action that it subsequently decides to terminate,[75] or where the agency pursues a consistent policy of abdicating its statutory responsibility.[76] The court found no unusual circumstances to justify review in *Investment Company.*

Realizing its conflict with *Chaney,* the court added a footnote that characterized the *Chaney* presumption in favor of review as dicta.[77] Otherwise, the court continued, *Chaney* would conflict with *Kixmiller v. SEC,* which established that discretionary enforcement decisions are generally unreviewable.[78]

Despite the holding in *Investment Company,* and *Chaney's* ultimate reversal on appeal, Judge Wright's position that courts had been increasingly willing to review enforcement discretion,[79] was not without support. Two recent district court opinions indicate some willingness by courts to review agencies' exercises of enforcement discretion.

In *Amalgamated Transit Union, AFL-CIO v. Donovan,*[80] the District Court for the District of Columbia reviewed the Secretary of Labor's refusal to withhold federal funds from the Metropolitan Atlanta Rapid Transit Authority, rejecting the Secretary's argument that his decision was so committed to his discretion that it

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74. *Id.* at 527 (citing Dunlop v. Bachowski, 421 U.S. 560, 566 (1975)).

75. *Id.* (citing City of Chicago v. United States, 396 U.S. 162, 163 (1969)).

76. *Id.* (citing Adams v. Richardson, 480 F.2d 1159, 1162-63 (D.C. Cir. 1973) (per curiam) (en banc)). In *Adams,* the District of Columbia Circuit reviewed an allegation that the Secretary of Health, Education and Welfare had failed to enforce Title VI of the Civil Rights Act of 1964 by not attempting to end segregation in public schools receiving federal aid. 480 F.2d at 1160-61. The court distinguished this enforcement abstention from the usual case of nonreviewable prosecutorial discretion. *Id.* at 1162. It accepted review because the appellants had not challenged a refusal to take action in one specific school district, but had alleged instead a complete failure to follow the Congressional mandate. *Id.*

Courts will apply this exception to the doctrine of nonreviewable prosecutorial discretion if an agency totally abdicates its statutory enforcement responsibility. *See* Presinzano v. Hoffman-La Roche, Inc., 726 F.2d 105, 112 (3d Cir. 1984) (decision by Office of Federal Contract Compliance Programs not to investigate an alleged breach of contract by a federal contractor did not amount to a total abdication of statutory responsibilities). The FDA in *Chaney* had not engaged in a broad program that contradicted its statutory responsibility to assure that drugs were properly labeled and used. Rather, its decision not to investigate or regulate the use of lethal injections by states as a means of capital punishment was only an isolated decision. It is unlikely that its refusal amounts to an abdication of its responsibilities as courts have applied that phrase. *Cf.* International Ladies' Garment Workers' Union v. Donovan, 722 F.2d 795, 828 (D.C. Cir. 1983) (decision by Secretary of Labor to rescind restrictions on homework in the garment knitting industry, which would subject some 63,000 workers to the risk of oppressive wages, was an abdication of his statutory responsibilities because of his failure to engage in reasoned decision making).

77. 728 F.2d at 527 n.7.

78. Kixmiller v. SEC, 492 F.2d 641, 645 (D.C. Cir. 1974).

79. 718 F.2d at 1187-88.

80. 582 F. Supp. 522 (D.D.C. 1984).

was unreviewable.[81] Like the *Chaney* court, the district court asserted that there is a strong presumption that agencies' actions are subject to judicial review.[82] The district court also committed the same oversight that Judge Wright did in *Chaney*— it failed to offer any justification for applying a strong presumption of reviewability to denials of enforcement action.[83]

A decision by a California district court offers somewhat stronger support for a presumption of reviewability. In *Dellums v. Smith*[84] the court agreed to review the refusal of the United States Attorney General to initiate an investigation of whether certain federal officers had violated the Neutrality Act, a federal statute.[85] Despite the language of the Ethics in Government Act[86] which requires the Attorney General to undertake an investigation anytime he receives reasonably specific information suggesting that a designated federal official has violated federal criminal law,[87] the Attorney General refused to initiate an investigation.[88] The court rejected the argument that the refusal to investigate was in the Attorney General's exclusive discretion. The court reasoned that, because Congress had supplied specific standards in the statute governing the initiation of investigations, judicial review was possible.[89] The court determined that in effect, Congress had removed the agency's discretion by adopting concrete standards against which a reviewing court could weigh the decision not to act.[90]

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81. *Id.* at 528.

82. *Id.*

83. Like the *Chaney* opinion, *Amalgamated Transit* supported its presumption of reviewability by citing Natural Resources Defense Council, Inc. v. SEC, 606 F.2d 1031 (D.C. Cir. 1979). *See* 582 F. Supp. at 528. The court failed to acknowledge, however, that this decision did not consider the application of the committed-to-agency-discretion exception to agencies' enforcement decisions. *See* discussion *supra* note 55.

84. 573 F. Supp. 1489 (N.D. Cal. 1983). Interestingly, the author of the opinion was the same Judge Weigel who had sat by designation on the *Chaney* court and who had cast the deciding vote in favor of review in *Chaney*.

85. The petitioners requested an investigation into whether certain government officials had violated the Neutrality Act through actions in Nicaragua. The Neutrality Act makes it a crime to organize a paramilitary expedition against a country with which the United States is not at war. 18 U.S.C. § 960 (1982).

86. Ethics in Government Act, 28 U.S.C. § 591(a) (1982).

87. *Id.* § 591(b).

88. 573 F. Supp. at 1491.

89. *Id.* at 1498.

90. A subsequent decision by the District of Columbia Circuit reached a contrary conclusion as to the Attorney General's discretion under the Ethics in Government Act. In Banzhaf v. Smith, 737 F.2d 1167 (D.C. Cir. 1984), the court refused to review the Attorney General's refusal to investigate alleged wrongdoings in the 1980 presidential campaign pursuant to his authority under the Ethics in Government Act. *Id.* at 1169. The court, however, refused review not because the action was committed to the attorney general's discretion but because the language and legislative history indicated Congress's intent to preclude review. *Id.* The *Dellums* court, on the other hand, interpreted the Ethics in Government Act as giving the Attorney General less discre-

Although *Amalgamated Transit Union* and *Dellums* suggest a policy favoring judicial review of enforcement discretion, other recent decisions presaged the Supreme Court's reversal of *Chaney* by expressing considerable reluctance to review an agency's refusal to take enforcement action. The District Court for the District of Columbia in *International Union, United Auto Workers v. Donovan*[91] declined to review a refusal by the Secretary of Labor to take enforcement action. The petitioners alleged that pursuant to the Labor Management Reporting and Disclosure Act, the Secretary should have required certain individuals to disclose their involvement in union activity. The Secretary ruled that there was not substantial evidence to warrant further action.[92]

Judge Harold Greene, in a thoughtful opinion, held that the Secretary's ruling was unreviewable as a matter committed to the Secretary's exclusive discretion.[93] Judge Greene acknowledged the existence of a strong presumption favoring reviewability, but three factors persuaded him to decline to review the Secretary's enforcement decision. First, the applicable provisions of the statute contained only permissive language. They did not compel the Secretary to act under any circumstances. Second, the legislative history and scheme of the statute indicated the Secretary's discretion was meant to be broad. Third, the court found no other special circumstances to justify review.[94]

Judge Greene carefully distinguished the facts of *International Union* from those of *Chaney*. In his view, the agency in *Chaney* was constrained by its own policy statement issued in interpretation of its statutory duties, which supplied a standard against which the agency's refusal to act could be weighed.[95] Judge Greene found no similar standard to apply in *International Union*.

Judge Greene's approach to the issue of reviewability of the agency's refusal to take enforcement action closely resembled the approach subsequently taken by the District of Columbia Circuit in *Investment Company*. Judge Greene declined review of the agency's decision largely because he found no unusual circum-

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tion in enforcing the Act and denying him the power to refuse to conduct at least a preliminary investigation. 573 F. Supp. at 1193.

91. 577 F. Supp. 398 (D.D.C. 1983).

92. *Id.* at 401.

93. *Id.* at 403.

94. Judge Greene also observed that other portions of the statute did contain mandatory language. Had Congress intended to limit the Secretary's discretion in this instance, he reasoned, it would have included mandatory language in the applicable portion of the statute. *Id.* at 403-04.

95. This interpretation of *Chaney* is questionable. First, the dissent in *Chaney* believed the policy statement was sufficiently permissive to allow the Secretary to retain his exclusive discretionary powers. Chaney v. Heckler, 718 F.2d 1174, 1196 (D.C. Cir. 1983) (Scalia, J., dissenting), *rev'd*, 105 S. Ct. 1649 (1985). Second, it is doubtful that an agency's policy statement can provide the necessary law on which a court may base a violation. *See* United States v. Snell, 592 F.2d 1083, 1087-88 (9th Cir.) (affording internal agency policy statements binding effect is not wise because it discourages departments from promulgating laudable policies for fear that such policies will be turned against them), *cert. denied*, 442 U.S. 944 (1979).

stances to justify taking review. He reasoned that the Secretary's refusal of enforcement action represented one of those rare instances where review was not appropriate because there was no law to apply.[96]

Even if a trend toward review of enforcement decisions had been developing, the Supreme Court's recent resolution of the *Chaney* case should put such an idea to rest. In that opinion the Court rejected Judge Wright's "strong presumption" of reviewability of an agency's exercise of enforcement discretion.[97] The Court instead adopted a presumption of unreviewability of decisions to withhold enforcement action. In effect, the Court adopted the approach of the *Investment Company* decision and of Judge Scalia's dissenting opinion below in *Chaney.*

Prior to *Chaney* the Supreme Court had not had occasion to interpret the "committed to agency discretion" exception in great detail.[98] Thus, in *Chaney* the Court had an opportunity to confront that exception directly. The Court clarified four important aspects of the exception.

First, the Court stated that, although the "committed to agency discretion" exception to judicial review, contained in section 701(a)(2) of the APA, may be similar to the "precluded by statute" exception to judicial review, contained in section 701(a)(1), the two exceptions are unique. Both exceptions may require judicial review of applicable statutes to determine if Congress intended review. Under the "committed to agency discretion" exception, however, Congress need not explicitly preclude the review in the statute. "[R]eview is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion."[99]

Second, the Court declared that refusals by agencies to initiate enforcement action will be presumed to be unreviewable.[100] This

96. United Auto Workers v. Donovan, 577 F. Supp. 398, 403-05. An earlier decision of the Second Circuit further demonstrates that courts have not been guided by a strong presumption of reviewability in enforcement-discretion cases. In New York Racing Ass'n v. NLRB, 708 F.2d 46 (2d Cir. 1983), *cert. denied,* 104 S. Ct. 276 (1984), the court declined jurisdiction to review a refusal by the NLRB to regulate the horse racing industry in New York. The court found clear language in the statute indicating that the NLRB could in its discretion refuse jurisdiction over labor disputes in the racing industry if, "in the opinion of the board," the labor dispute was not sufficiently substantial to warrant the exercise of its regulatory powers. *Id.* at 52. Although the Second Circuit did admit that judicial review is usually not withheld, *id.* at 51, it did not mention a strong presumption in favor of reviewability of agencies' refusals to exercise enforcement powers. Instead, it followed the language of the statute carefully.

97. Heckler v. Chaney, 105 S. Ct. 1649 (1985), *rev'g* 718 F.2d 1174 (D.C. Cir. 1983).

98. *See* 5 U.S.C. § 701(a)(2) (1982).

99. *Chaney,* 105 S. Ct. at 1655.

100. *Id.* at 1656. The Court considered the exercise of enforcement discretion to be

presumption may be rebutted if the substantive statute provides guidelines specifying when the agency may not withhold action. In other words, Congress is free to limit an agency's enforcement discretion in the authorizing statute.[101] The Court then determined that the Food, Drug and Cosmetic Act at issue in *Chaney* is completely permissive and does not compel action under any circumstances. Thus, the presumption of unreviewability is not defeated because the statute contains no guidelines against which a court could measure FDA's refusal to act.[102]

Third, the Court clarified the *Overton Park* test for determining when there is "law to apply" to an agency's refusal to take enforcement action. Inquiring whether there is law to apply is the same as asking whether there are any guidelines within the statute against which the agency's refusal may be judged. Generally, agencies' decisions to withhold enforcement action fall within that narrow class of cases, noted in *Overton Park*, where judicial review is not available because there is no law to apply.[103] Hence, a presumption of unreviewability exists in such cases.

The Court found this reasoning consistent with its opinion in *Dunlop v. Bachowski* where the Court had recognized a "strong presumption" of reviewability of the Secretary of Labor's refusal to file suit to set aside a union election.[104] As Judge Scalia had noted in his dissent to *Chaney* below, the Court's reference in *Bachowski* to a "strong presumption" of reviewability had been in the context of the "precluded by statute" exception to judicial review, which was not at issue in *Chaney*.[105] According to the Court, this "strong presumption" of reviewability of refusals to take enforcement action did not apply to the "committed to agency discretion" exception.[106] Instead, a presumption of unreviewability applied to refusals of enforcement action that fell under the "committed to agency discretion" exception.

In *Bachowski* itself the presumption of unreviewability was overcome because the lower court had found that the applicable statute, the Labor-Management Reporting and Disclosure Act, required the Secretary to act if certain, clearly defined factors were present.[107] Thus, there was law to apply. In *Chaney*, the Court

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unsuitable for judicial review for three reasons. First, the decision not to enforce often involves a balancing of factors that are within the agency's expertise, for example, determination of the likelihood of success of an enforcement action or the best way to deploy limited resources. Second, when an agency refuses enforcement, it does not exercise coercive powers over an individual's liberty or property, and this does not provide the type of focused action that is suitable for review. Third, the agency's refusal to take enforcement action shares the same characteristics as the decision of a prosecutor in the executive branch. Such decisions have traditionally been considered unreviewable. *Id.*

101. *Id.* at 1656-57.
102. *Id.*
103. *Id.* at 1657-58.
104. *Id.*; *see* Dunlop v. Bachowski, 421 U.S. 560 (1975).
105. Chaney v. Heckler, 718 F.2d 1174, 1193 (D.C. Cir. 1983) (Scalia, J., dissenting).
106. *Chaney*, 105 S. Ct. at 1657.
107. Bachowski v. Brennan, 502 F.2d at 87-88.

asserted that this inquiry of whether there is law to apply does not turn on pragmatic considerations of whether the interests at stake are sufficiently important to justify review, as the lower court's opinion in *Chaney* had concluded. The question of whether there is law to apply turns instead on whether Congress has placed limits on the agency's discretion in the statute.[108] The Court found no limits on the Commissioner's discretion to refuse enforcement action under the Food, Drug and Cosmetic Act.

Fourth, the Court considered whether limits on an agency's discretion could originate from some source other than a statute and thus overcome the presumption of unreviewability. The Court clearly favored limitations placed on an agency's discretion by Congress.[109] The Court explicitly refused to decide, however, whether a policy statement issued by an agency could provide sufficient law to apply to the exercise of enforcement discretion to enable a court to take review.[110] The specific policy statement at issue in *Chaney* obligated the FDA to conduct an investigation under certain conditions. The Court declined to apply this statement to limit the agency's discretion and justify judicial review. The Court reasoned that the policy statement was vague, in conflict with prior FDA regulations, and attached to a rule that was never adopted. Thus it could not serve as a basis for limiting the agency's discretion and thereby support judicial review.[111]

The Court's opinion leaves open the possibility that a policy statement that is formally adopted by an agency, that is sharply focused on the agency's exercise of enforcement discretion, and that is not in conflict with the agency's prior regulations, may provide a court with standards against which an agency's refusal of enforcement action could be measured.

The Supreme Court's opinion in *Chaney* fell squarely on the side of unreviewability of administrative enforcement discretion. Nevertheless, the Court indicated the circumstances under which judicial review may still be available. Obviously, an agency may not ignore limitations that Congress has placed on its enforcement discretion.[112] Furthermore, where an agency bases its failure to take enforcement action on its perceived lack of jurisdiction, or where the agency pursues a policy of nonenforcement that is so extreme as to be an abdication of its statutory responsibilities, courts may be able to take review.[113]

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108. *Chaney*, 105 S. Ct. at 1657-58.
109. *Id.*
110. *Id.* at 1658.
111. *Id.*
112. *Id.* at 1660. (Brennan, J., concurring).
113. *Id.* at 1656 n.4.

Agencies can insulate themselves from judicial review in declining to take enforcement action simply by avoiding explanations that the Court indicated might trigger review. To that extent, the Court's opinion merely instructs agencies on how to avoid review of their decisions to withhold enforcement action. What remains uncertain is how far lower courts will bend to find limits on the agencies' enforcement discretion in the statutes, so that they may review agencies' decisions declining enforcement action. Given the Supreme Court's clear articulation of a presumption of unreviewability, absent outrageous conduct by an agency, lower courts will probably refuse to review agencies' decisions to withhold enforcement discretion.

II. Scope of Review

A. The Arbitrary and Capricious Standard

Once a court determines that an agency's refusal to issue a rule is reviewable, the court must decide how searching a review it will conduct. The APA allows courts to set aside administrative actions that they find to be arbitrary and capricious.[114] In practice, the arbitrary and capricious standard of review is difficult to apply. The level of scrutiny encompassed by the standard varies with the context of each case along a continuum from according great deference to an agency's decision to conducting an independent review of the decision.[115]

Petitioners may challenge an agency's refusal to promulgate rules on several grounds. They may challenge the legal conclusions reached by an agency,[116] the procedures employed by the agency, or the substantive rationality of the agency's final decision.[117] Each type of challenge invites a different level of scrutiny.[118] This section of the Note first considers the appropriate level of scrutiny that courts should apply to agencies' denials of action based on questions of law. It then discusses the appropriate level of review for procedural and substantive questions.

B. Questions of Law

Under section 555(e) of the APA, an agency must include with any denial of a petition for rulemaking a brief statement of the

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114. 5 U.S.C. § 706(2)(A) (1982).

115. *See* Natural Resources Defense Council, Inc. v. SEC, 606 F.2d 1031, 1049 (D.C. Cir. 1979). The court stated that its review of the agency's procedure would be exacting, *id.* at 1048, whereas its review of the substantive rationality of the agency's decision would be far more circumscribed. *Id.* at 1049. *See also* Note, *supra* note 9, at 254-55 (discussing how scope of review varies with regulatory context of case).

116. The APA authorizes a reviewing court to decide all relevant questions of law. 5 U.S.C. § 706. *See, e.g.*, Chaney v. Heckler, 718 F.2d 1174, 1179 (D.C. Cir. 1983), *rev'd*, 105 S. Ct. 1649 (1985) (review of legal question of agency's jurisdiction).

117. *See, e.g.*, Natural Resources Defense Council, Inc. v. SEC, 606 F.2d 1031, 1048-49 (D.C. Cir. 1979) (review of both agency's procedure and the substantive rationality of agency's decision).

118. *Id.* at 1048-49 (a court closely scrutinizes the procedural aspects of a case and adopts more deferential review of the substantive aspects of a case).

grounds for the denial.[119] If the agency bases its denial on legal grounds, such as lack of statutory authority over an issue, the court will conduct an independent or de novo review of the agency's reasoning to see if it is consistent with the statute.[120] For example, courts will independently decide whether an action is reviewable at all; such a decision is a strictly legal determination.[121] Pure questions of law receive the least deferential review, and the court, in conducting an independent review, substitutes its judgment for that of the agency.

In *Chaney v. Heckler,* the court of appeals conducted a searching review of the FDA Commissioner's authority under the Food, Drug, and Cosmetic Act to determine if the Commission had jurisdiction to control states' use of prescription drugs to execute prisoners.[122] The court found that, contrary to the FDA's interpretation, states' use of drugs to execute prisoners was not exempt from FDA regulation. Noting that the FDA previously had regulated the use of drugs by state-licensed physicians in prison clinical investigations and by state-licensed veterinarians to execute animals, the court held that the agency could not now refuse to regulate merely because the injections were performed by state-licensed physicians.[123]

Courts will not always afford such little deference to an agency's interpretation of a statute. In *Bargmann v. Helms,*[124] the court indicated that it would be more inclined to respect an agency's statutory interpretation if the statute in question was the one that the agency was charged with enforcing.[125] Despite the court's expression of deference, however, it ultimately overruled the Federal Aviation Administration's (FAA) interpretation of the agency's own jurisdiction.[126]

In *Bargmann,* the FAA had denied a petition requesting it to adopt a rule that would require commercial flights to carry addi-

119. 5 U.S.C. § 555(e) (1982) ("the notice [of denial] shall be accompanied by a brief statement of the grounds for denial").

120. Bargmann v. Helms, 715 F.2d 638, 641 (D.C. Cir. 1983) (it is well within court's power to make independent inquiry into an agency's allegations that the agency lacked the power to act); Exxon Corp. v. FTC, 665 F.2d 1274, 1277 n.1 (D.C. Cir. 1981) (court can make independent inquiry into scope of authority of agency); Natural Resources Defense Council, Inc. v. SEC, 606 F.2d 1031, 1050 n.24 (D.C. Cir. 1979) (pure questions of law are generally reviewed de novo).

121. *See, e.g.,* Dunlop v. Bachowski, 421 U.S. 560, 567 (1975) (court conducting inquiry into whether review was appropriate).

122. Chaney v. Heckler, 718 F.2d 1174, 1179 (D.C. Cir. 1983), *rev'd,* 105 S. Ct. 1649 (1985). The court indicated that it would look beyond the language of the enabling statute and consider the statute's goals. *Id.*

123. *Id.* at 1180.

124. 715 F.2d 638 (D.C. Cir. 1983).

125. *Id.* at 641.

126. *Id.* at 641-42.

tional medical equipment. The FAA argued that the requested rule would have required airlines to carry enough medical equipment to handle all emergencies, whereas its statutory authority was limited to requiring medical supplies to treat only those injuries that were likely to result from flight.[127]

The court began its review of the FAA's decision by asserting that courts should be reluctant to review agencies' denials that are based on internal policy considerations such as budgetary constraints.[128] Furthermore, if the agency's decision not to promulgate a rule is a legislative choice and a reflection of the agency's broad rulemaking discretion, the reviewing court should do no more than assure itself that the agency acted in a manner calculated to negate the dangers of irrationality.[129] However, if the agency's decision reflects its belief that it lacks the statutory authority to act, the court may make its own independent inquiry to determine the validity of the agency's conclusion.[130]

Chaney and *Bargmann* illustrate courts' willingness to conduct independent review of legal issues. In *Chaney,* the agency did not solicit public comment;[131] in *Bargmann,* the agency received extensive comment.[132] Yet, in both cases the court reviewed de novo the agencies' legal conclusions that they lacked authority to act.[133]

C. Scope of Review of Procedural and Substantive Issues

Generally, courts will subject agencies' rulemaking procedures to close scrutiny, limited only by the Supreme Court's admonition in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*[134] that a court may not impose more procedures than are required by the APA and the agencies' enabling statutes.[135] In contrast, courts tend to be more deferential to agencies when reviewing their substantive decisions.[136] However, the distinction between substance and procedure is often difficult to determine and the two are often intertwined in appeals of agen-

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127. *Id.* at 639-40.

128. *Id.* at 640.

129. *Id.* at 641 (quoting Action For Children's Television v. FCC, 564 F.2d 458, 472 n.24 (D.C. Cir. 1977)).

130. 715 F.2d at 641.

131. Petitioners did, however present some evidence along with their petitions to the FDA, including a study showing that the lethal injections could cause severe pain. The Commissioner did not solicit further public comment before denying the petition. Chaney v. Heckler, 718 F.2d at 1177-78.

132. *Bargmann,* 715 F.2d at 639.

133. *See id.* at 641 (a court will make an independent review of agency's allegations that it lacked statutory authority to act); Chaney v. Heckler, 718 F.2d at 1180-82 (court independently examined both the language and the legislative history of the statute in order to discern the Commissioner's authority).

134. 435 U.S. 519 (1978). For a detailed discussion of *Vermont Yankee,* see Note, *The Substantial Impact Test: Victim of the Fallout From* Vermont Yankee? 53 GEO. WASH. L. REV. 118 (1985).

135. 435 U.S. at 548.

136. *See* Natural Resources Defense Council, Inc. v. SEC, 606 F.2d 1031, 1049 (D.C. Cir. 1979) (review of substantive rationality of agency's refusal to act is far more circumscribed than review of procedures).

cies' refusals to act.[137]

Courts are usually reluctant to interfere in agencies' decisions not to promulgate rules and apply a narrow scope of review, deferring to the agency's decision. In *WWHT Inc. v. FCC*,[138] the Court for the District of Columbia Circuit elaborated on the appropriate scope of review of denials of rulemaking. The court declared that an agency's determination that it is not in the public interest to promulgate a rule must be upheld if it does not violate a law and if the agency supplies an articulated justification that makes a rational connection between the facts found and the choice made.[139] The court articulated three factors that tended to narrow the scope of review of denials of rulemaking. First, if the agency's decision falls within its broad rulemaking discretion, review should be narrow. Generally, decisions not to promulgate rules are within an agency's discretion. The extent of that discretion will determine how narrow the review becomes.[140]

Second, the scope of review is limited by the extent of the record. When an agency refuses to promulgate rules, the record may not be suitable for judicial review because it may be little more than the agency's statement of the grounds for denial.[141] A third factor limiting review is the extent of the agency's expertise on the subject matter of the rule. If the proposed rule pertains to a matter of policy within the agency's expertise, the review should be limited to ensuring that the agency adequately explained the facts and policy concerns it relied upon, and that those concerns have some rational basis in fact.[142]

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137. *Natural Resources Defense Council, Inc. v. SEC*, helps to illustrate the difference between procedural and substantive challenges. The petitioners argued that the Securities and Exchange Commission (SEC) should have considered a variety of alternative methods of corporate disclosure of environmental and equal opportunity information. The court characterized this challenge as procedural, and it conducted an "exacting" review to determine what procedures the National Environmental Policy Act (NEPA) required the SEC to apply. *Id.* at 1048. As it does with legal questions, the APA requires courts to conduct their own review of procedural questions. 5 U.S.C. § 706(2)(D) (1982) (a reviewing court may "set aside agency action, findings, and conclusions found to be [promulgated] without observance of procedure required by law"). The court ruled that NEPA did not require consideration of the requested alternatives. *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d at 1054.

The petitioners also challenged the SEC's conclusion in its statement of grounds for denial that the cost to registrants of requiring disclosure would be prohibitively high. *Id.* at 1058. The court characterized this as a substantive challenge of the rationality of the SEC's conclusions based on the available information. *Id.* at 1058-59. Here, in contrast to its review of the procedural issues, the court deferred to the SEC's expertise, recognizing that, in the absence of hard, factual data, this type of legislative determination was best left to the agency. *Id.* at 1059-60.

138. 656 F.2d 807 (D.C. Cir. 1981).

139. *Id.* at 817.

140. *Id.* at 817-18.

141. *Id.*

142. *Id.*

Thus, it seems clear that the standard of review for an agency's refusal to act is a narrow one.[143] Recently in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*,[144] the Supreme Court characterized the appropriate standard of review of an agency's refusal to act as narrower than the review conducted of an agency's rescission of rules.[145] The

143. The scope of review may become so narrow that the agency's decision becomes unreviewable, such as review of prosecutorial discretion. *See supra* note 39.

144. 103 S. Ct. 2856 (1983).

145. For a detailed theoretical discussion of the scope of review of agencies' decisions to rescind, see Note, *supra* note 9 at notes 128-71 and accompanying text (contending that although the Supreme Court in *State Farm* purported to apply the same standard of review to rescission as to promulgation of rules, because of the deregulatory context presented by rescission, the Court actually engaged in heightened review).

Recent decisions concerning the scope of review of rescission have attempted to follow *State Farm's* lead. In Natural Resources Defense Council, Inc. v. EPA, 725 F.2d 761 (D.C. Cir. 1984), the District of Columbia Circuit considered a challenge to the Environmental Protection Agency's (EPA) rescission of regulations governing emissions from vessels when they are docked at marine terminals and when they are going "to-and-from" such terminals. The court upheld the EPA's rescission of the to-and-from regulation but reversed the rescission of the marine-terminal regulation because the agency completely failed to consider whether at least some of the emissions of a vessel at a terminal could be attributed to the terminal and therefore regulated under the Clean Air Act. *Id.* at 771-75. This echoes the standard applied in *State Farm*, under which the agency was directed to consider all relevant alternatives and explain why rescission was the superior choice. *See State Farm*, 103 S. Ct. at 2867-74. The court cited *State Farm* for the proposition that the regulations rescinded were entitled, as a settled course of behavior, to a presumption that they best carried out the policies of the Clean Air Act. *National Resources Defense Council, Inc. v. EPA*, 725 F.2d at 767.

Rescisson of tire-tread wear grading requirements by the National Highway Transportation and Safety Administration (NHTSA) was invalidated in Public Citizen v. Steed, 733 F.2d 93 (D.C. Cir. 1984). The District of Columbia Circuit found the NHTSA's decision to be arbitrary and capricious under the standard of review laid down in *State Farm*. NHTSA had failed to explain why it was necessary to suspend the treadwear standards instead of continuing them while developing improvements, or why available alternatives would not correct program deficiencies. *Id.* at 103.

Center for Science in the Pub. Interest v. Regan, 727 F.2d 1161 (D.C. Cir. 1984), arose out of the Treasury Department's 1981 rescission of its ingredient labeling rule for alcoholic beverages. The district court ordered Treasury to reinstate the rule, but before Treasury's appeal could be heard, Treasury issued a new regulation rescinding the rule. 727 F.2d at 1163-64. In light of the new rescission, the District of Columbia Circuit held that the appeal of the original rescission was moot. The court relied on *State Farm* for the proposition that an agency has authority to reconsider past rulemaking by appropriate procedures. Accordingly, it was not improper for Treasury to engage in new rulemaking to supercede its defective rulemaking. Final determination of the rights of the parties concerning ingredient labeling would have to wait until the new administrative record was before the court. *Id.* at 1164-66.

In National Wildlife Fed'n v. Watt, 571 F. Supp. 1145 (D.D.C. 1983), the court held that rescission of a regulation on grounds that it is unconstitutional must nevertheless be accompanied by notice and comment procedures as required by the APA. *Id.* at 1157-58. The Secretary of the Interior had rescinded the regulation on the grounds that the regulation and its enabling statute, which contained a legislative veto provision, had been invalidated by the Supreme Court's decision in INS v. Chadha, 103 S. Ct. 2764 (1983), which held the legislative veto unconstitutional. Plaintiffs responded to the Secretary's constitutional argument and also challenged the rescission as violating the APA's notice and comment procedures. 571 F. Supp. at 1153-58.

The district court granted a preliminary injunction and subsequently granted summary judgment to plaintiffs. National Wildlife Fed'n v. Clark, 577 F. Supp. 825 (D.D.C. 1984). The court avoided deciding the constitutional question and based its decision on the Secretary's violation of the APA. The court stated that an agency's efforts to amend or rescind regulations must strictly adhere to a process of reasoning

Court then directed the agency to supply a reasoned explanation for its rescission of a rule, providing a rational connection between the facts found and the choice made. The court also required the agency to consider all alternatives within the ambit of the adopted rule and explain why its decision to rescind was superior to other alternatives.[146] The Court's holding implies that an agency would not be required to produce such a detailed explanation or undertake such a thorough consideration of alternatives in the case of a refusal to act.[147]

Although *State Farm* establishes a very narrow standard of review for administrative refusals to take action, other judicial decisions are less explicit in defining what is required of agencies that refuse to adopt rulemaking proposals. In *Arkansas Power & Light Co. v. ICC*,[148] the District of Columbia Circuit reiterated the position that under the APA the scope of review of an agency's decision to deny a rulemaking petition is *very narrow*.[149] The Interstate Commerce Commission (ICC) had refused to initiate a rulemaking proceeding to establish standards for the type of evidence that would be relevant to railroad rate inquiries under the Long-Cannon Amendment.[150] The court limited its review to ensuring that the agency had adequately explained the facts and policy conclusions upon which it had relied.[151]

Similarly, in *Bargmann v. Helms*,[152] the Court for the District of Columbia Circuit observed that, if an agency's decision not to promulgate represents its broad rulemaking discretion, a reviewing court should do no more than assure itself that the agency acted rationally and in a nonarbitrary fashion.[153] The court, however, reversed and remanded the agency's denial of rulemaking, in-

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on the record with informed comments from those affected. Accordingly the Secretary could not decide for himself an original constitutional question and protect his decision from judicial review. *Id.* at 829.

146. 103 S. Ct. at 2867-74.

147. *Cf.* International Ladies' Garment Workers' Union v. Donovan, 722 F.2d 795 (D.C. Cir. 1983). The District of Columbia Circuit followed the Supreme Court's ruling in *State Farm* that agencies' rescissions of rules are not analogous to agencies' refusals to take action. It applied the "normal" standard of review to the agency's rescission rather than the narrower standard applied to refusals. *Id.* at 814. For a detailed discussion of the scope of review applied in this decision, *see* Note, *supra* note 9, at notes 172-83 and accompanying text.

148. 725 F.2d 716, 723 (D.C. Cir. 1984).

149. *Id.* at 723.

150. The Long-Cannon Amendment of 1980, Pub. L. No. 96-448, § 202, 94 Stat. 1895, 1900 (codified at 49 U.S.C. § 10707a(e)2B (1982), supplemented the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, (codified at 49 U.S.C. §§ 10704-10707a (1982)), with a list of factors that the Commission was to consider in determining whether to investigate any proposed rate increase.

151. 725 F.2d at 723.

152. 715 F.2d 638 (D.C. Cir. 1983).

153. *Id.* at 641.

structing the agency to consider whether rulemaking would be justified in light of the information received from the public.[154] Presumably, this would compel the agency, as a matter of procedure, to consider all of the appropriate information it had in its possession, and as a matter of substance, to reach a conclusion that could be rationally justified by that information.

Even though courts will conduct a narrow review of agencies' refusals to act, it appears that they are ultimately reluctant to interfere with refusals to promulgate rules. Two recent decisions illustrate this proposition. In *Professional Drivers Council v. Bureau of Motor Carrier Safety,*[155] the District of Columbia Circuit upheld the agency's refusal to amend certain rules governing the permissible hours of service of professional drivers.[156] The Bureau of Motor Carrier Safety had received extensive public comment before refusing to adopt the proposed amendments. The Board explained that it could find no evidence of a link between the number of hours worked by a driver and the amount of accidents per driver and thus refused to amend the regulations. The Board reasoned that without establishing this link, it could not justify the expense of changing the regulations.[157]

The court began its consideration of the agency's refusal by determining the proper scope of review. The court cited several factors that tended to circumscribe its review: the nature of the decision to refuse to promulgate a rule, the unorganized nature of the record, and the deference that must be afforded an agency in areas within the agency's expertise.[158] These factors are very similar to those cited in *WWHT, Inc. v. FCC.*[159] Based on these factors, the court opted for an extremely narrow scope of review and ultimately accepted the agency's articulated policy justification for refusing to take action.[160]

The opinion of the Seventh Circuit in *Wisconsin Electric Power Co. v. Costle*[161] provides further evidence of courts' reluctance to disturb an agency's refusal to act,[162] especially if the decision is within the agency's expertise. The Wisconsin Electric Power Company (WEPCO) had petitioned the Environmental Protection Agency (EPA) to redesignate portions of Milwaukee as being in compliance with national ambient air quality standards. The EPA refused to institute rulemaking procedures to change the designation, basing its decision on a study by the Wisconsin Department of Natural Resources. That study used an EPA-approved modeling technique, and it predicted that air quality in Milwaukee

154. *Id.* at 643.
155. 706 F.2d 1216 (D.C. Cir. 1983).
156. *Id.* at 1222-23.
157. *Id.* at 1219-20.
158. *Id.* at 1220-21.
159. *See supra* text accompanying notes 128-30.
160. 706 F.2d at 1221.
161. 715 F.2d 323 (7th Cir. 1983).
162. *Id.* at 328 ("only in the rarest and most compelling circumstances" will courts overturn agencies' judgments not to institute rulemaking).

would fall below the required standards.[163]

WEPCO challenged the EPA's procedures, arguing that the agency should have given notice of its intent to rely on the Wisconsin study and that it should have made the study available for public comment.[164] The court ruled that, although *Vermont Yankee* prohibited it from imposing more procedures than required by statute, it could require the agency to at least respond to the petition and set forth its reasons for denial. This minimal amount of procedure was necessary, in the court's view, to enable meaningful judicial review.[165] The court then ruled that the EPA had satisfied that minimum.[166]

WEPCO also challenged the substance of the EPA's decision, arguing that the choice to rely on modeled data rather than available monitored data concerning the actual air quality in Milwaukee was arbitrary and capricious.[167] Not surprisingly, the court deferred to the EPA's choice of scientific data. In the past, EPA had used either modeled or monitored data. The court was not about to enter an area within the agency's expertise and compel the agency to choose a course of action that was inconsistent with its past practices.[168]

The decisions discussed above indicate courts' reluctance to interfere with agencies' refusals to act. Courts apparently require little more from the agencies than a statement of their reasons for denial. If that statement indicates that the agency's choice was based on a policy consideration, such as a determination of whether the expenditure of resources necessary to undertake the rulemaking is justified, courts will only require that this policy concern have some basis in fact. Similarly, if the agency refuses to take action in an area that is within its special expertise, courts will interfere only in the most compelling circumstances.

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163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.* at 329-30.
168. *Id.* at 329-31. Because the EPA was acting consistently with past practice, *Wisconsin Electric* can be distinguished from Chaney v. Heckler, 718 F.2d at 1179, where the Commissioner maintained that he lacked the authority to regulate states' use of drugs, when he had already regulated such use on past occasions. *See supra* notes 110-11 and accompanying text. Had the EPA in *Wisconsin Electric* suddenly opted for a measurement technique that had never been used in the past, the court may have been more suspect of its decision. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Department of Transp., 680 F.2d 206, 221 (D.C. Cir. 1982) ("sudden and profound alterations in an agency's policy constitute 'danger signals' that the will of Congress is being ignored"), *vacated and remanded on other grounds*, 103 S. Ct. 2856 (1983).

D. *Circumstances That Justify Judicial Interference*

Despite courts' traditional reluctance to overturn agencies' refusals to promulgate rules,[169] a recent decision of the District of Columbia Circuit has overruled an agency's refusal to take action.[170] This section examines this and other decisions in order to discover under what circumstances the court would reverse an agency's refusal to act.

In *Action on Smoking and Health v. Civil Aeronautics Board,*[171] the court was not satisfied with the agency's minimal discussion of its failure to adopt several proposed rules.[172] The Civil Aeronautics Board (CAB) had adopted a final rule that, in effect, rejected several other proposals to limit smoking on airplanes.[173] The Board argued that it was not necessary to discuss explicitly each proposal that was rejected because "there can be little doubt that the Board was aware of the pros and cons of each alternative."[174] The court disagreed. It held that the APA's guarantee of an opportunity for the public to comment on proposed rules would be meaningless unless the agency responded to the significant issues raised by the public. The court also directed the Board to explain the reasoning behind its statement that the rejected proposals were inconsistent with the Board's desired balance between regulation and competition among airlines.[175]

Although the opinion of the court of appeals in *Chaney v. Heckler* was overturned on the issue of reviewability,[176] it nonetheless demonstrates one court's application of the arbitrary and capricious standard of review. In declining to regulate or even to investigate the use of lethal injections to execute state prisoners, the FDA Commissioner concluded that the lethal injections had created no serious threat to public health.[177] The court found the Commissioner's conclusion to be irrational. The majority believed that the uncontroverted evidence showed that the injections posed a substantial threat of torturous pain to persons being executed.[178] The court also found that the Commissioner's refusal to regulate these state functions was inconsistent with past FDA regulation of states' administration of drugs.[179] Based on these findings, the

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169. *See* WWHT, Inc. v. FCC, 656 F.2d 807, 818 (D.C. Cir. 1981). The court acknowledged that, because of the broad discretion agencies enjoyed to decide not to promulgate rules and the narrow scope of review afforded such decisions, very few courts had forced agencies to institute rulemaking when the agency had initially decided not to do so.

170. Action on Smoking and Health v. CAB, 699 F.2d 1209 (D.C. Cir. 1983).

171. 699 F.2d 1209 (D.C. Cir. 1983).

172. *Id.* at 1217.

173. *Id.*

174. *Id.*, quoting from the Brief for the Civil Aeronautics Board, at 32.

175. *Id.*

176. Chaney v. Heckler, 718 F.2d 1174 (D.C. Cir. 1983), *rev'd,* 105 S. Ct. 1649 (1985).

177. 718 F.2d at 1178.

178. *Id.* at 1190.

179. *Id.* at 1180-81, 1190. The court also noted that the Commissioner himself had previously admitted that the FDA had jurisdiction over all state laws that purported to legitimize the lawful shipment of an unapproved new drug in interstate commerce

court had little difficulty in holding that the Commissioner's refusal to investigate states' use of drugs to execute prisoners was arbitrary and capricious.[180]

Both *Action on Smoking and Health* and *Chaney* adjudicated agencies' refusals to act that were well within the agency's authority. Generally, a court would hesitate to overrule this type of decision. Additionally, the agencies' explanations in each case would appear to have satisfied the traditional requirement that the agency offer a statement of its grounds for denial.[181] Yet, in each case the court parted with tradition, subjected the agency's denial of action to close scrutiny and ultimately overruled its decision.

The court's analysis in *Action on Smoking and Health* can best be explained by reference to the three factors articulated in *WWHT* as influencing the scope of review: the agency's discretion, the extent of the record, and the types of issues involved.[182] Although the Civil Aeronautics Board enjoyed considerable discretion over its decision of whether to institute rulemaking, the other two factors may have persuaded the court to interfere with the agency's discretion. First, the agency had received extensive public comment; the record for review was more developed than usual when agencies refuse to act.[183] Courts may be more willing to review an agency's decision that is based on a focused record.[184] In addition, because the Board had rejected the proposed rules by adopting a new rule instead of simply denying the petition, according to the APA it had to supply a statement of basis and purpose for the new rule.[185] A statement of basis and purpose for a rule is more detailed than a statement of grounds for denial of action. The court noted that the stringency of its review of the basis-and-purpose statement depends on the nature of comments received.[186] The court may have felt more justified in directing the agency to address the major concerns raised in the comments in the statement of basis and purpose than it would have had the agency only been required to issue a statement of grounds for de-

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or that purported to permit the misbranding of a drug. Therefore, the Commissioner's subsequent statement that he could not regulate states' use of drugs to execute death row inmates contradicted this prior admission. *Id.* at 1182.

180. *Id.* at 1189-90.

181. The APA requires only a "brief statement of the grounds for denial." 5 U.S.C. § 555(e) (1982). *See, e.g.*, Transcontinental Bus Sys., Inc. v. CAB, 383 F.2d 466 (5th Cir. 1967), *cert. denied*, 390 U.S. 920 (1968) (CAB's statement of reasons for dismissing complaint seeking suspension of certain tariffs filed by air carriers was sufficient).

182. *See supra* notes 127-30 and accompanying text.

183. *See* Action on Smoking and Health v. CAB, 699 F.2d at 1211-12, 1215-16.

184. *See* National Resources Defense Council, Inc. v. SEC, 606 F.2d 1031, 1046-47 (D.C. Cir. 1979).

185. 5 U.S.C. § 553(c) (1982) ("the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose").

186. *Action on Smoking and Health*, 699 F.2d at 1216.

nial. The court rejected the agency's claim that it was required to supply only minimal explanation because the agency's adoption of the new rule followed "extensive notice and comment."[187]

The court may also have been influenced by the type of issue involved. The medical question of the health effects of passive smoking on airline passengers does not appear to be one that is within the special expertise of the Civil Aeronautics Board.[188] In addition, the Board did not attempt to justify its decision by raising policy issues or by claiming that it lacked the resources to undertake the rule change. On the contrary, the Board expended considerable resources in studying the proposed rules.[189] The court may have felt that, once the agency had expended the resources to study the proposals in depth, the agency was obligated to address the major issues in its final decision. Notably, the types of issues involved in this challenge to the Board's actions were procedural. Petitioners maintained that the CAB failed to address individual proposals for smoking bans or special smoking protections for susceptible persons.[190] As previously discussed, courts are more willing to subject agencies to review when considering strict procedural requirements.[191] Here the court merely required the Board to address each issue in more depth. The court did not actually compel rulemaking by the Board.[192]

As to *Chaney,* its subsequent reversal gives the court of appeals' decision little precedential value. It nonetheless provides insight into what factors might contribute to a court's finding that an agency's decision to withhold action was arbitrary and capricious. A closer look at the opinion uncovers at least two factors that may have persuaded the court to reverse the agency's refusal to investigate or promulgate rules. First, the explanations offered by the agency were blatantly false. The Commissioner's statement that he lacked jurisdiction to regulate states' use of drugs openly contradicted prior regulations issued by the Commissioner.[193] Courts have at times been more willing to overturn an agency's refusal when the agency's decision is based on a plain error of law.[194] Furthermore, the Commissioner's assertion that the public health could not be threatened because states were performing the injections obviously conflicted with the FDA's prior policy. Previously

187. *Id.* at 1217.

188. The court noted that the Board had the power to regulate the quality and quantity of flights. The Board generally sought to balance minimum quality standards with the need for competition. *Id.* at 1213.

189. The Board had regulated smoking in airplanes since 1973. It had received substantial comment on the issue and many of its regulations had been challanged in court. *See id.* at 1211-12.

190. *Id.* at 1217.

191. *See supra* section II, C.

192. 699 F.2d at 1219.

193. Chaney v. Heckler, 718 F.2d at 1180.

194. For example, when an agency is blind to its statutory power a court may override its refusal to act. *See* State Farm Mut. Auto. Ins. Co. v. Department of Transp., 680 F.2d 206, 221 (D.C. Cir. 1982), *vacated and remanded on other grounds,* 103 S. Ct. 2856 (1983).

the FDA had regulated the use of drugs by state-licensed physicians in prison clinical studies and by state-licensed veterinarians in the executuion of animals because of the threat to public welfare posed by the use of those drugs.[195] The agency could not now justify its refusal to take action by relying on states' control of the use of drugs in the execution of prisoners.

The second and more important factor supporting the court's decision in *Chaney* is the type of interest involved—the execution of human beings. Courts have in the past been willing to subject agencies' decisions that affect serious human interests to a higher level of scrutiny than would otherwise be applied.[196] The petitioners in *Chaney* would appear to qualify for this special treatment. Indeed, the court expressed outrage that an agency would refuse even to investigate the evidence and expert testimony offered by petitioners that allegedly showed that the execution of persons by lethal injection caused excruciating pain. The court accused the FDA of ignoring its statutory responsibilities.[197] It also observed that the agency's desire to avoid such a "morally troubling" issue may have placed the petitioners' eighth amendment rights in jeopardy.[198] As in *Action on Smoking and Health,* the *Chaney* court did not ultimately compel the agency to adopt a rule.[199] It merely instructed the agency to investigate the matter and comply with the requirement that it either take action or supply sufficient, rational reasons for denying action.[200]

Conclusion

There is no doubt that courts are still reluctant to overturn agencies' decisions to refuse rulemaking. Courts will conduct a circumscribed review of such decisions, especially where the decision lies within the agency's area of expertise. As *Action on Smoking and*

195. *Chaney,* 718 F.2d at 1190.

196. *See* Wellford v. Ruckleshaus, 439 F.2d 589, 601 (D.C. Cir. 1971) (the interests in life, health, and liberty have a special claim to judicial protection in comparison to economic interests); Center For Science in the Pub. Interest v. Department of Treasury, 573 F. Supp. 1168, 1173 (D.D.C. 1983) (where the health of the public is at issue close scrutiny of administrative action is particularly appropriate). *Center for Science in the Public Interest* concerned labeling ingredients on alcoholic beverages. In *Wellford,* the Secretary of Agriculture had refused to suspend the registration of DDT. Although the human interest involved in *Chaney* may not be as widespread as in the above cases, the potential direct consequences to a specific group of people are much greater.

197. Chaney v. Heckler, 718 F.2d at 1192.

198. *Id.* The eighth amendment prohibits "cruel and unusual punishments." U.S. CONST. amend. VIII.

199. *See supra* text accompanying note 176.

200. 718 F.2d at 1191. The court did note, however, that because of the potential danger to consumers, it would compel administrative action if the agency did not promptly offer an explanation. *Id.* at 1191.

Health indicates, however, courts will not blindly accept agencies' inaction. Where there is a developed record and where the agency's rationale for refusing to adopt a rule is not one that lies particularly within the agency's area of expertise, a court may require the agency at least to address major issues before refusing to act.

The lower court in *Chaney* was even willing to invade the bastion of prosecutorial discretion and overturn an agency's refusal to take enforcement action. One could speculate that the court was influenced by the serious interest involved in the case, the execution of human beings.[201] Yet the Supreme Court, acting mainly in the name of tradition, refused to disrupt its perceived presumption of unreviewability of enforcement discretion to allow review in *Chaney*.[202] The Court was not moved by the human interest involved because of its fear of importing "profound differences of opinion over the meaning of the Eighth Amendment to the United States Constitution into the domain of administrative law."[203] Although this fear is undoubtedly well-founded, the wisdom of creating a presumption of unreviewability is questionable.

Justice Marshall, in his concurring opinion, observed that the tradition of prosecutorial discretion is more firmly entrenched in criminal law than in civil decisions.[204] Furthermore, even in the criminal area, exceptions to absolute prosecutorial discretion are abundant.[205] Even accepting the notion of prosecutorial discretion in criminal cases, Justice Marshall sees a fundamental difference between a criminal prosecutor's decisions not to take enforcement action and the same decisions by an administrative agency. Criminal prosecutorial decisions attempt to vindicate intangible societal rights arising out of past conduct, whereas enforcement decisions by agencies seek to prevent concrete future injuries, such as the torture allegedly suffered by prisoners who are executed by lethal injection.[206] In Justice Marshall's view, Congress created the right to prevent these future injuries, and courts have a duty to assure that an agency's lack of enforcement does not burden the rights of the statutory beneficiaries.[207]

Justice Marshall's opinion is appealing. The differences between criminal prosecutorial discretion and general enforcement discretion are significant.[208] In addition, commentators have been encouraging the Court to take a new look at the doctrine of

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201. The court of appeals seemed to emphasize the potential torturous pain to persons being executed. *See Chaney*, 718 F.2d 1174, 1191-92.

202. *Chaney*, 105 S. Ct. at 1656-57.

203. *Id.* at 1659.

204. *Id.* at 1664-65 (Marshall, J., concurring).

205. *Id.*

206. *Id.*

207. *Id.* at 1665-66.

208. *See* Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1195, 1285 n.386 (1982); Note, *supra* note 41, at 658-61 (1983).

prosecutorial discretion for many years.[209] Nevertheless, Justice Marshall reaches the same result as the majority. He would review FDA's refusal to take enforcement action, but he would not overrule that decision as arbitrary and capricious because the statute did not require the FDA to act, and because the agency provided a sufficient basis on which it refused to act.[210]

The presumption of unreviewability the Supreme Court articulated in *Chaney* seems to insulate agencies from review of their decisions not to take enforcement action. Both the majority and Justice Marshall's concurring opinion offer guidelines for agencies to follow in order to avoid review of their exercises of enforcement discretion. As long as the statute contains no concrete limitations on the agency's discretion, and the agency justifies its refusal to take enforcement action on some non-legal ground within its expertise, such as a determination of how best to deploy its resources, a court cannot take review. As a result of *Chaney*, courts will probably be extremely reluctant to review exercises of enforcement discretion by agencies. What remains undetermined is the extent to which a court will strain the meaning of an agency's authorizing statute to find some concrete limits on an agency's discretion in order to review an agency's refusal, that the court considers unreasonable, to take enforcement action.

209. *Chaney*, 105 S. Ct. at 1665 n.6; *see, e.g.*, K. DAVIS, DISCRETIONARY JUSTICE 211 (1969); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 375 (1965).

210. *Chaney*, 105 S. Ct. at 1661 (agency explained that it refused to act because other problems were more pressing).