Administrative Inaction and Judicial Review: The Rebuttable Presumption of Unreviewability

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ADMINISTRATIVE INACTION AND JUDICIAL REVIEW: THE REBUTTABLE PRESUMPTION OF UNREVIEWABILITY

Heckler v. Chaney¹

The Administrative Procedure Act² (APA) has traditionally been considered to contain "generous [judicial] review provisions." Even the prohibitions to the availability of judicial review contained in section 701(a)³ were construed to give rise to a presumption of reviewability.⁴ Contrary to this tradition, in Heckler v. Chaney the United States Supreme Court held that an agency's decision not to use its enforcement powers was presumptively unreviewable.⁵ This Note discusses the presumption of unreviewability and its impact on the availability of judicial review in agency inaction cases.

In Heckler v. Chaney, the respondents petitioned the Food and Drug Administration (FDA) to use its enforcement powers to prevent the use of certain drugs to carry out capital punishment under the lethal injection laws

1. 470 U.S. 821 (1985). The Chaney decision has been cited in over twenty cases since it was handed down. Among these, the following are most helpful: Schering Corp. v. Heckler, 779 F.2d 683, 687 (D.C. Cir. 1985) (court noted that case was "on all fours with Heckler v. Chaney" and held that FDA decision not to pursue its enforcement activities in the "new animal drug" area was unreviewable); Electricities of North Carolina v. Southeastern Power Admin., 774 F.2d 1262, 1267 (4th Cir. 1985) (court held unreviewable Southeastern Power Administration marketing decision concerning distribution of electric power); Cardoza v. Commodity Futures Trading Comm'n, 768 F.2d 1543, 1549 (7th Cir. 1985) (distinguished Chaney as adding to list of agency actions unsuitable for judicial review "the class of agency nonenforcement decisions"); Falkowski v. EEOC, 764 F.2d 907, 910 (D.C. Cir. 1985) (This case was on remand from the Supreme Court for reconsideration in light of Chaney. The court on remand held the Department of Justice's decision not to provide counsel was unreviewable.), reh'g denied, 783 F.2d 252, cert. denied, 105 S. Ct. 3319 (1986); Sierra Club v. Block, 615 F. Supp. 44 (D. Colo. 1985) (excellent discussion of Chaney and its impact on the traditional section 701(a)(2) analysis).
of Texas and Oklahoma. The FDA had refused to use its enforcement powers because the respondents’ petition did not present the serious societal threat which is generally required to warrant the use of the agency’s enforcement powers. The FDA supported its position by citing the agency’s “inherent discretion to decline to pursue certain enforcement matters.”

The respondents filed suit in district court to compel the FDA to carry out its statutory responsibilities. The district court granted a summary judgment in favor of the FDA stating, “[D]ecisions of executive departments and agencies to refrain from instituting investigations and enforcement proceedings are essentially unreviewable by the courts.” On appeal of this ruling, the appellate court reversed the lower court. The appellate court noted that prosecutorial discretion is not a “magical incantation which automatically provides a shield for arbitrariness.” Citing a growing trend favoring judicial review, the appellate court held that the agency’s decision was presumptively reviewable. Because nothing in the case rebutted this presumption, the court vacated the lower court’s ruling and remanded the case to the district court for review.

The FDA appealed this decision to the United States Supreme Court. The question presented to the Chaney Court was whether the FDA’s exercise

7. Id. at 821. It was respondents’ theory that these drugs would not induce a quick and painless death. Id. at 823. Because these drugs had not been tested or approved for the use intended by the states, the respondents requested that the FDA delay the use of these drugs until the Agency approved them as safe and effective for human execution. Id. at 824.

8. Id. at 824-25. The FDA stated: “Generally, enforcement proceedings in this area are initiated only when there is a serious danger to public health or a blatant scheme to defraud. We cannot conclude that those dangers are present under State lethal injection laws, which are duly authorized statutory enactments in furtherance of proper State functions . . . .” Id.

9. Id. at 824.
10. Chaney, 718 F.2d at 1178.
11. Id. (emphasis in original).
12. Id. at 1188 (citing 2 K. Davis, Administrative Law Treatise § 9:6, at 239-40 (2d ed. 1979)). The court stated that in the last twenty years courts have “frequently forced agencies to implement and enforce their regulatory statutes, or at least to explain their failure to do so.” 718 F.2d at 1187. For a list of cases finding review was available, see Chaney, 470 U.S. at 850 n.7.
13. 718 F.2d at 1187.
14. Id. at 1187-88.
15. Id. at 1191. The court sent a strong message with its remand. It stated in the opinion:

Both this court and the District Court must be mindful that endless litigation . . . concerning the sufficiency of the agency’s reasons would be inconsistent with the statute’s goal of expeditiously protecting consumers from the alleged hazards. We must be prepared to compel FDA to take action with respect to the prayer for relief where an acceptable explanation of its inaction is not promptly forthcoming.

Id.
of its discretion fell within section 701(a)(2) of the APA and was therefore unreviewable. The \textit{Chaney} Court, in answering the question affirmatively, attempted for the first time to interpret, in detail, section 701(a)(2) of the APA. Traditionally, section 701(a)(2) has been considered a "very narrow exception" to the availability of judicial review. This exception prohibits review where an "agency action is committed to agency discretion by law." 

In \textit{Chaney} the Court first dealt with the statutory construction problem presented by section 701(a). This section contains two seemingly overlapping prohibitions to judicial review. Judicial review is prohibited by section 701(a)(1) when "statutes preclude judicial review," while section 701(a)(2) prohibits review where "agency action is committed to agency discretion by law." The Court separated the two provisions by stating that section 701(a)(1) prohibits review when the statutes involved expressly preclude review, while section 701(a)(2) prohibits review when the statutes involved are drawn in such broad terms that a court would have no meaningful standards to evaluate the agency's exercise of discretion for abuse.

This construction of section 701(a)(2) is not new. It reflects the "no law to apply" test which was contained in the legislative history of the APA.

\begin{itemize}
  \item 16. \textit{Chaney}, 470 U.S. at 827-28. Section 701(a)(2) reads: "This chapter applies, according to the provisions thereof, except to the extent that—agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2) (1982). Three questions were actually appealed: whether the FDA had jurisdiction; if it did have jurisdiction, whether review was available; and given review, whether there was an abuse of discretion. The Court addressed only question two. \textit{Chaney}, 470 U.S. at 827-28.
  \item 17. \textit{Id.} at 828.
  \item 20. 470 U.S. at 828.
  \item 21. \textit{Id.} In addition to drawing a distinction between these two provisions of the APA, the court discussed the conflict between sections 701(a)(2) and 706(2)(a). This conflict is due to the fact that section 701(a)(2) prohibits review when an action is committed to an agency's discretion, while section 706(2)(a) is a standard of review which courts apply to determine if there is an abuse of discretion. The Court held that section 701(a)(2) applies when there are no meaningful standards to evaluate the agency's actions. In this class of cases, a court could not be qualified to apply the section 706(2)(a) standard. 470 U.S. at 830. Section 706(2)(a) reads: "The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(a) (1982).
  \item 23. \textit{Id.} § 701(a)(2).
  \item 24. \textit{Chaney}, 470 U.S. at 830.
  \item 25. \textit{Id.}
  \item 26. Prior to \textit{Chaney}, there was some confusion with respect to whether section
\end{itemize}
In addition, several courts have used this test in the past to determine whether an agency’s action is reviewable.\textsuperscript{28} The Supreme Court, however, rejected the court of appeal’s statement that the narrow construction of section 701(a)(2) requires “a presumption of reviewability even to an agency’s decision not to undertake certain enforcement actions.”\textsuperscript{29} The Court, relying on a “tradition” of prosecutorial discretion, held that such decisions are presumptively unreviewable.\textsuperscript{30}

The foundation for the Court’s presumption of unreviewability is the recognition that an agency’s decision not to use its enforcement powers involves a “complicated balance of a number of factors which are peculiarly within its expertise.”\textsuperscript{31} This complicated balance includes an agency’s development of an overall policy of enforcement and the allocation of limited resources among various enforcement opportunities to best effectuate that policy.\textsuperscript{32} The Court held that without statutory guidance, these matters are unreviewable because they fall within the expertise of the agency. Therefore, a court would have no meaningful standards to use in applying an abuse of discretion scope of review.\textsuperscript{33}

In addition, the Court characterized nonenforcement decisions as prosecutorial in nature. The Court stated that nonenforcement decisions are similar to decisions within the special province of the executive branch.\textsuperscript{34} At least by analogy, the Court suggested that the policy behind article II, section 701(a)(2) prevented review when there was “no law to apply” or only when there was clear and convincing evidence of Congressional intent to foreclose review. See K. Davis, Administrative Law Treatise § 28.16, at 260 (Supp. 1982).


\textsuperscript{28} See, e.g., Southern Ry. Co. v. Seaboard Allied Milling Corp., 442 U.S. 444, 445-56 (1979) (The Court, in using the “no law to apply” test, held that the permissive language of the statutes involved expressed Congressional intent that the ICC refusal to investigate was not reviewable.).

\textsuperscript{29} Chaney, 470 U.S. at 831. This Note will focus on the impact of Chaney in the nonenforcement area. However, there is a possibility that Chaney will have impact outside the nonenforcement area. While the Court draws on an analogy to criminal prosecutorial discretion to support its presumption, there were indications that all informal agency decisions not to act may come within the Court’s presumption of unreviewability. The Court, in its construction of section 701(a)(2), isolated the “no law to apply” test from the legislative history which had been the foundation of the presumption of reviewability. Id. at 834-35. By doing so, the Court may hold in the future that the presumption of unreviewability is contained in section 701 (a)(2). Therefore, this presumption may apply outside the enforcement area. The Court may have been alluding to this when it stated, “[t]hus, in establishing this presumption in the APA, Congress did not set agencies free.” Id. at 833.

\textsuperscript{30} Id. at 831.

\textsuperscript{31} Id.

\textsuperscript{32} Id.

\textsuperscript{33} Id. at 830-31.

\textsuperscript{34} Id. at 832.
three, of the United States Constitution was applicable.\textsuperscript{35} The agency, absent guidelines provided by Congress, was charged with the responsibility to "take [c]are that the [l]aws be faithfully executed."

Finally, the Court indicated that an agency's inaction does not provide a focus for judicial review.\textsuperscript{37} When an agency does not use its powers, it is difficult to evaluate, absent guidelines, whether an agency exceeded its statutory authority.\textsuperscript{38} The Court also indicated that inaction does not create an exigent need for judicial review because it is unlikely that an agency’s inaction would have a coercive impact on an individual’s liberty or property rights.\textsuperscript{39}

In making a determination of whether a particular case is reviewable, the Court stressed that the presumption of unreviewability could be rebutted when the statutes involved provide a "guideline for the agency to follow in exercising its enforcement powers," thereby, providing courts with law to apply.\textsuperscript{40} The Court cited \textit{Dunlop v. Bachowski}\textsuperscript{41} as a case involving a statute which would provide law to apply.\textsuperscript{42} The Court, in discussing \textit{Dunlop}, stated that under 29 U.S.C. section 482(b) the Labor Secretary's decision not to bring a civil action is reviewable because the statute contains mandatory language which requires the Secretary to use the Department’s enforcement powers upon a finding of probable cause that a violation of the law occurred during a union election.\textsuperscript{43}

\textsuperscript{35.} \textit{Id.} The Court stated: "Finally we recognize that an agency's refusal to institute proceedings share to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch . . . ." \textit{Id.}

\textsuperscript{36.} \textit{Id.} (quoting U.S. CONST. art. II, § 3).

\textsuperscript{37.} \textit{Id.}

\textsuperscript{38.} \textit{Id.} at 832-33.

\textsuperscript{39.} \textit{Id.} at 832.

\textsuperscript{40.} \textit{Id.} at 833.

\textsuperscript{41.} 421 U.S. 560 (1975). In \textit{Dunlop}, the plaintiff alleged that there had been irregularities and violations of law in a union election he lost by 900 votes. The plaintiff requested and received an investigation from the Secretary of Labor. However, the investigation did not result in prosecution. \textit{Id.} at 562-63. The plaintiff sought review of the Secretary's decision not to recommend prosecution on the grounds that the investigation had substantiated the fact that there had been violations during the election. Therefore, the Secretary's inaction was an abuse of discretion. \textit{Id.} at 563-64.

\textsuperscript{42.} \textit{Chaney}, 470 U.S. at 833. The Court's discussion of \textit{Dunlop} is significant because it illustrates the "no law to apply" approach. However, \textit{Dunlop} did not follow this analysis. The Court felt compelled to revisit \textit{Dunlop} because it had been relied on by the FDA petitioners as a rejection of the prosecutorial discretion analogy. \textit{Id.} In \textit{Dunlop}, the Court took a broad approach weighing congressional intent, the unavailability of other remedies, and the need for judicial review. \textit{See Dunlop}, 421 U.S. 560; cf. Southern Ry. Co. v. Seaboard Allied Mining Corp., 442 U.S. 444, 456-57 (1979) (pre-\textit{Chaney} application of the "no law to apply" test).

\textsuperscript{43.} \textit{Chaney}, 470 U.S. at 833. The critical language of 29 U.S.C. § 482(b) is: "The Secretary shall investigate such complaint and, if he finds probable cause to
In Chaney the Court did not find such mandatory language.⁴⁴ In its review of the statutes involved, the Court held that the decision by the FDA not to use its enforcement powers was within the agency’s discretion because the statutes were framed in permissive terms and provide no guidelines or conditions for their use.⁴⁵ Therefore, absent some express indication that Congress intended to limit the agency’s discretion, the decision of the FDA not to use its enforcement powers is unreviewable.⁴⁶

The emphasis the majority places on deference to an agency’s expertise in making nonenforcement decisions is strongly rooted in administrative law.⁴⁷ The Court, in Moog Industries, Inc. v. Federal Trade Commission,⁴⁸ used such deference when it held that absent a patent abuse of discretion, an agency's nonenforcement decisions should not be overturned.⁴⁹ In Moog the petitioner requested the Court to postpone the enforcement of a Federal Trade Commission cease-and-desist order until similar orders could be issued against other firms in the industry.⁵⁰ The Court denied petitioner’s request. In reaching its decision, the Court stated that only the Commission is competent to determine both the extent of the relevant industry and whether the competition within that industry is such that identical treatment of the entire industry is required.⁵¹

believe that a violation of the subchapter has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization.” 29 U.S.C. § 482(b) (1982). The Chaney court, in finding mandatory language in this statute, stated that “[t]he statute quite clearly withdrew discretion from the agency and provided guidelines for the exercise of its enforcement power.” Id. at 834.

⁴⁴. 470 U.S. at 835. The Court in discussing the language of the statutes involved stated that the general enforcement provision of the FDCA, 21 U.S.C. § 372 (1982), merely “authorized” investigations; unlike the statute in Dunlop it did not make mandatory the use of its powers. Id. The remaining provisions failed to provide law to rebut the presumption because the statutes did not set conditions which would outline when the agency’s enforcement powers should be used. In addition, the statutes which did not contain mandatory terms were merely descriptions of the sanctions available, rather than mandates to the agency to impose the sanctions in every case. Id.

⁴⁵. 470 U.S. at 835-36. The Court also rejected three additional arguments: (1) The Court summarily rejected the FDA petitioner’s argument that 21 U.S.C. § 352(f)(2) (1982) (misbranding) and id. § 355 (new drugs) provide law to apply because they were irrelevant. 470 U.S. at 835-36. (2) The Court rejected the use of a policy statement attached to an unpromulgated rule as a source of law to rebut the presumption of unreviewability. Id. at 836. (3) The Court rejected FDA petitioner’s negative inference argument that because the statutes provide that the Secretary does not have to report for prosecution minor violations, then the Secretary must report major violations. Id. at 837.

⁴⁶. Id. at 837-38.
⁴⁷. See infra notes 48-52 and accompanying text.
⁴⁹. Id. at 414.
⁵⁰. Id. at 411-12.
⁵¹. Id. at 413.
In both *Moog* and *Chaney* the Court expressed concern that judicial review might interfere with the agency’s use of its expertise to develop and carry out its statutory mandate in the most efficient and economical way.\(^{52}\) The degree of deference in these cases is justified upon the grounds that the Court, without law to apply, cannot review an agency’s informed judgment.\(^{53}\) However, in neither *Moog* nor *Chaney* did the Court address the question of whether review is available when the allegation that an agency abused its discretion is based upon law outside the agency’s enforcement statutes.

The distinction between reviewing an agency’s informed judgment for an abuse of discretion and reviewing an agency’s decision to determine if it is lawful is central to the position taken by Justice Brennan in his concurring opinion.\(^{54}\) Justice Brennan presumed that Congress could not have intended section 701(a)(2) to allow administrative agencies to ignore “clear jurisdictional, regulatory, statutory, or constitutional commands.”\(^{55}\) While the presumption of unreviewability would limit review in the hundreds of mundane cases agencies decide daily, Justice Brennan would allow review, for example, in the four areas which the majority specifically left open or when it is clear that an agency’s decision was based entirely on “illegitimate reasons.”\(^{56}\)

The questions left unanswered by the majority are whether judicial review will be available when 1) an agency claims that it is without jurisdiction, 2) an agency abdicates its statutory authority, 3) an agency refuses to enforce a lawfully promulgated rule, or 4) an agency’s inaction violates an individ-

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52. Compare *Chaney*, 470 U.S. at 831-32 with *Moog*, 355 U.S. at 413.
53. See supra note 21 and accompanying text.
54. This distinction was drawn in *Ness Inv. Corp. v. USDA, Forest Service*, 512 F.2d 706, 715 (9th Cir. 1975). The court ruled that the decision by the Forest Service not to issue a special permit to construct, operate, and maintain a resort on federal parklands was a decision committed to the agency’s discretion by law. *Id.* However, the court stressed that federal courts do have jurisdiction to determine if an agency has reached its decision in conformity with the law. *Id.* In *Ness*, the court stated that when there is no law to apply, an individual’s allegation that an agency abused its discretion in making an informed judgment is unreviewable. Review is available when an allegation of abuse of discretion involves a “violation by the agency of constitutional, statutory, regulatory or other legal mandates.” *Id.* This approach is consistent with Justice Brennan’s position in that it would allow review in essentially the same areas, for the same reasons. See *Chaney*, 470 U.S. at 838-39 (Brennan, J., concurring).
55. *Chaney*, 470 U.S. at 839 (Brennan, J., concurring).
56. *Id.* Review has been available on these grounds in the past. See *Standard Oil Co. of Cal. v. FTC*, 596 F.2d 1381 (9th Cir.), *rev’d on other grounds*, 499 U.S. 232 (1981). In *SOCAL*, it was alleged that the FTC issued a complaint because of improper and irrelevant pressure from Congress, rather than a finding of “reason to believe” there had been a violation. *Id.* at 1384. The court allowed review but set strict parameters. The court ruled that if, on remand, the district court found that the FTC issued the complaint based *entirely* on improper factors, then the Agency did abuse its discretion. *Id.* at 1386. If the court found that it was based on both proper and improper bases, then section 701(a)(2) would bar review. *Id.*
ual's constitutional rights.\textsuperscript{57} Review of lower court decisions prior to \textit{Chaney} indicates that courts are competent to use other sources of law to evaluate an agency's nonenforcement decisions for an abuse of discretion.\textsuperscript{58} In addition, this prior case law demonstrates serious problems which can arise absent judicial oversight.

The first question left open by the Court was whether an agency can reject a request for agency action on the ground of lack of jurisdiction and avoid judicial review.\textsuperscript{59} Earlier cases have suggested that jurisdictional issues are reviewable because they are questions of law.\textsuperscript{60} In \textit{National Association for the Advancement of Colored People v. Federal Power Commission},\textsuperscript{61} the District of Columbia Circuit reviewed the rejection of a NAACP petition requesting the Federal Power Commission to promulgate rules affecting the employment practices of the industry it regulates. The Commission refused to institute rulemaking proceedings on the grounds that it lacked jurisdiction.\textsuperscript{62} The court remanded the case to the Commission, holding that the Commission does have limited jurisdiction to promulgate rules in this area.\textsuperscript{63} The court noted that it had considered only the question of jurisdiction and not the Commission's considerable discretion to decide not to promulgate rules.\textsuperscript{64}

The court's approach in \textit{NAACP} further illustrates that a grant of jurisdiction to an agency carries with it a responsibility to consider the merits of a petition when the subject matter of the petition is within the agency's jurisdiction. This is consistent with Justice Brennan's position, in that he argued that section 701(a)(2) was not intended by Congress to "set agencies free to disregard legislative direction."\textsuperscript{65} From this perspective, despite the fact that nonenforcement decisions involve issues within the agency's discre-

\textsuperscript{57} \textit{Chaney}, 470 U.S. at 839 (Brennan, J., concurring).

\textsuperscript{58} The \textit{Chaney} majority held that when there was no law to apply, the court would have no guidelines to apply the abuse of discretion scope of review. 470 U.S. at 830. Because these areas involve questions of law, such as construction of statutes and the Constitution, courts have law to apply. If the majority's holding was given a literal construction, these sources of law might be unavailable because they are not explicitly contained within the enforcement statutes of an agency. See \textit{infra} notes 128-29 and accompanying text.

\textsuperscript{59} \textit{Chaney}, 470 U.S. at 833 n.4.

\textsuperscript{60} See \textit{infra} notes 61-73 and accompanying text.


\textsuperscript{62} \textit{Id.} at 433.

\textsuperscript{63} \textit{Id.} at 446.

\textsuperscript{64} \textit{Id} at 447 n.53; see also Garcia v. Neagle, 660 F.2d 983 (4th Cir. 1981) (the court held that although the substantive decision was committed to the absolute discretion of the Commission, review was available to the extent that the Commission's decision violated its statutory mandate).

\textsuperscript{65} \textit{Chaney}, 470 U.S. at 839 (Brennan, J., concurring) (quoting the majority opinion, 470 U.S. at 833).
tion, the determination of the parameters of an agency’s statutory authority is a question of law reviewable by the courts.66

Permitting review of jurisdictional questions will also improve the quality of information available to individuals seeking administrative action.67 In National Organization for Reform of Marijuana Laws v. Ingersoll,68 the District of Columbia Circuit discussed this aspect of judicial review. In NORML, the Bureau of Narcotics and Dangerous Drugs rejected a petition requesting that marijuana be declassified or reclassified to a lower schedule of controlled substances.69 The Bureau rejected the petition, stating it was not authorized to institute the rulemaking proceedings requested.70 The court ruled that a more detailed refusal was required. The court criticized the Bureau’s rejection of the petition by stating, “It was not the kind of interchange and refinement of views that is the life-blood of a sound administrative process.”71 The court pointed out that a decision on the merits would have informed the petitioners of their “alternative position[s] in the light of” the Bureau’s decision.72 Allowing review of jurisdiction in agency nonenforcement cases will increase the availability of information and decrease the likelihood that an agency will arbitrarily deny jurisdiction and avoid the responsibility of providing a reasoned articulation.73

66. See SCM Corp. v. FTC, 565 F.2d 807 (2d Cir. 1977), cert. denied, 449 U.S. 821 (1980) (In discussing this case, the court stated that the agency was required to reconsider its decisions in light of the court’s interpretation of law.); cf. Trans Alaska Pipeline Rate Cases, 436 U.S. 631, 638 n.17 (1978) (discussion of limited review of ICC use of its enforcement powers to determine if the ICC had gone beyond its statutory authority where the decision of whether to use its powers was not reviewable).

67. See infra notes 71-75 and accompanying text.

68. 497 F.2d 654 (D.C. Cir. 1974).

69. Id. at 656.

70. Id. at 659.

71. Id.

72. Id.

73. By allowing review in this area, a court will be able to enforce a basic principle of administrative law—an agency must make the correct decision for the correct reason. See SEC v. Chenery Corp., 318 U.S. 80 (1943). The relationship between the Chenery principle and an agency’s informal decision is discussed in K. Davis, supra note 26, §§ 16.00-.09, at 90. Professor Davis indicates a need to develop a stronger law requiring agencies to give reasons for their informal findings. He cited with approval an approach taken in Matlovich v. Secretary of the Air Force, 591 F.2d 852 (D.C. Cir. 1978). He quoted the following language from Matlovich which explains the importance of this type of information.

The fundamental principle of reasoned explanation ... serves at least three interrelated purposes: enabling the court to give proper review to the administrative determination; helping to keep the administrative agency within proper authority and discretion, as well as helping to avoid and prevent arbitrary, discriminatory, and irrational action by the agency; and informing the aggrieved person of the grounds of the administrative action so that he
The second question left open by the court presents an issue of statutory
abdication.\textsuperscript{74} In reserving this question, the Court stated that in statutory
abdication "situations the statute conferring authority on the agency might
indicate that such decisions were not ‘committed to agency discretion.’"\textsuperscript{75}
The Court may be referring to the fact that in the past courts have resolved
these statutory abdication cases by applying a broad form of the "no law
to apply" test.\textsuperscript{76} The courts have examined the statutes and legislative history
to determine if Congress, in passing the statutes, intended to have the pro-
gram implemented or if Congress simply intended to create a tool the agency
could use at its discretion.\textsuperscript{77}

When Congress passes legislation which creates a program that they
desire to have implemented, then an agency's decision not to implement the
program is not an act of discretion, but a violation of law.\textsuperscript{78} In \textit{Allison v. Block},\textsuperscript{79} the Eighth Circuit held that although the statute conferred discretion
on the Secretary of Agriculture in individual cases, the Secretary must provide
notice to the farmers that a new program is available and must promulgate
procedures to implement the program. In \textit{Allison}, the Secretary of Agriculture
argued that a statute authorizing a foreclosure-deferral program merely
created an additional power to be used at his discretion.\textsuperscript{80} The appellate court
rejected the Secretary's argument that the program was a tool which the
Secretary could "keep in his back pocket."\textsuperscript{81} The court in \textit{Allison} found law
to apply in the legislative history which indicated not only an intent to actively
help the farmers, but also referred to methods used in other programs which
might be utilized to implement the foreclosure-deferral program.\textsuperscript{82}

In contrast, in \textit{Rank v. Nimmo} the Ninth Circuit held that Congress
had intended to create a discretionary tool when it passed the statute in-

\begin{footnotes}
\item[74] \textit{Chaney}, 470 U.S. at 833 n.4.
\item[75] \textit{Id.} Based on the facts of the \textit{Chaney} case, the Court stated that it did
not "have a situation where it could justifiably be found that the agency has con-
sciously and expressly adopted a general policy that is so extreme as to amount to
an abdication of its statutory responsibilities." \textit{Id.}
\item[76] \textit{See infra} notes 77-89 and accompanying text.
\item[77] \textit{See, e.g.,} Allison \textit{v. Block}, 723 F.2d 631 (8th Cir. 1983).
\item[78] \textit{See, e.g.,} Adams \textit{v. Richardson}, 480 F.2d 1159 (D.C. Cir. 1973). In
\textit{Adams}, the court used a broad approach in determining Congressional intent that
the Secretary of HEW withhold funds from school districts that did not comply with
a voluntary desegregation program. Failure to deprive funds was found to be a
dereliction of duty. \textit{Id.} at 1163-66.
\item[79] 723 F.2d 631 (8th Cir. 1983).
\item[80] \textit{Id.} at 635.
\item[81] \textit{Id.} at 634.
\item[82] \textit{Id.} at 634-35.
\end{footnotes}
volved.\textsuperscript{83} The court stated that nothing in the legislative history of the assignment-refunding option\textsuperscript{84} indicated that Congress intended to require the Veterans Administration (VA) to implement the program.\textsuperscript{85} The court decided that the absence of both standards and procedures indicated that the decision to implement the program was within the discretion of the Administrator.\textsuperscript{86}

If the presumption of unreviewability is applied to the statutory abdication area, its primary impact may be to require a more persuasive showing of congressional intent to enable review. However, in State of Iowa ex rel. Miller v. Block,\textsuperscript{87} the Eighth Circuit did not apply the presumption of unreviewability. Instead the court distinguished Chaney as applying only when an agency refuses aid to a single individual.\textsuperscript{88} The Iowa case involved the refusal of the Secretary of Agriculture to implement several disaster relief programs. The court followed the approach of Allison v. Block in holding that the Secretary's refusal to implement these programs was reviewable.\textsuperscript{89} Regardless of whether the presumption of unreviewability applies, here again, the issue is one of statutory interpretation which falls within the expertise of the court.

Whether an agency's lawfully promulgated rules provide law to apply which can rebut the presumption of unreviewability is the third question left open by the Court.\textsuperscript{90} The Chaney Court, in its construction of the "no law to apply" test, implied that "law" is synonymous with "statute," but stopped short of saying that a statute is the only source of authority to rebut the presumption of unreviewability.\textsuperscript{91}

\textsuperscript{83} 677 F.2d 692, 700 (9th Cir.), cert. denied, 459 U.S. 907 (1982). The case is useful for discussion here because the court followed the statutory abdication analysis and reached the conclusion that the statutes created a discretionary tool. However, the case may be of limited precedential value because review might have been precluded by 38 U.S.C. § 211 (1982). Therefore, the court should never have reached the issue of statutory abdication. This statute is the general VA preclusion statute which limits the jurisdiction of courts to review decisions of administrators "on any question of law or fact under any law providing benefits for veterans." \textit{Id.} Despite this problem, courts have cited and discussed \textit{Rank} favorably. See, e.g., Mopa Band of Paiute Indian v. United States Dept. of Interior, 747 F.2d 563, 565 (9th Cir. 1984); \textit{Allison}, 723 F.2d at 636.

84. The assignment-refunding option authorized the VA to pay off a loan prior to foreclosure and receive assignment. \textit{Rank}, 677 F.2d at 699.

85. \textit{Id.} at 700.

86. \textit{Id.} In addition to the legislative history, the court noted that the lack of standards made it difficult to conduct an abuse of discretion review. The VA decision involved various policy considerations internal to the management of the VA. \textit{Id.}

87. 771 F.2d 347 (8th Cir. 1985).

88. \textit{Id.} at 350 n.2.

89. \textit{Id.} at 355.

90. \textit{Chaney}, 470 U.S. at 836. In reserving this question, the Court rejected respondents' argument that a policy statement attached to an unpromulgated rule could supply law to rebut the presumption of unreviewability. \textit{Id.}

91. \textit{Id.} at 830-36.
In the past, an agency’s lawfully promulgated rules (regulations) have sometimes been used to declare the agency’s actions illegal.\(^2\) In \textit{Vitarelli v. Seaton},\(^3\) the question presented to the Court was whether a dismissal was ineffective because the Department of Interior failed to comply with its own regulations granting employees procedural rights beyond those granted by statute in termination decisions.\(^4\) The Court held that the Department was bound by its rules,\(^5\) and that the dismissal was illegal because it fell substantially short of the Department’s regulations.\(^6\) Justice Frankfurter, writing a concurring opinion, explained the policy behind the decision: “An executive agency must be rigorously held to the standards by which it professes its action to be judged.”\(^7\)

Similarly, in \textit{United States ex rel. Accardi v. Shaughnessy},\(^8\) the Court addressed the question of whether an agency’s rules could limit its discretion in enforcement decisions. In \textit{Accardi} the Attorney General promulgated a regulation vesting a board with the discretion to determine whether an alien’s application for suspension of deportation should be approved.\(^9\) The Attorney General announced at a press conference that he was going to deport a hundred people whose names appeared on a list.\(^10\) The Court was concerned that the Board’s knowledge the petitioner’s name appeared on the Attorney General’s list prevented the Board from using its independent judgment.\(^11\) The Court, finding that so long as the regulation is in effect, “it has the force of law,”\(^12\) remanded the case with instructions to determine whether the Board had exercised its discretion as the regulation required or had simply deferred to the influence of the Attorney General.\(^13\) \textit{Accardi} stands for the proposition that an agency’s lawfully promulgated rules have the force of law which can limit an agency’s discretion in the enforcement area.\(^14\)

\(^{2}\) See infra notes 93-110 and accompanying text.


\(^{4}\) Id. at 536-46.

\(^{5}\) Id. at 546.

\(^{6}\) Id. at 545.

\(^{7}\) Id. at 546.

\(^{8}\) 347 U.S. 260 (1954).

\(^{9}\) Id. at 265-66.

\(^{10}\) Id. at 264.

\(^{11}\) Id. at 264-65.

\(^{12}\) Id. at 265.

\(^{13}\) Id. at 268.

\(^{14}\) Id. The \textit{Accardi} case was heard a second time by the Court. Shaunessy \textit{v. United States ex rel. Accardi}, 349 U.S. 280 (1954). On remand of the earlier case, the District Court held that the Board had used its independent judgment; therefore, the writ of habeas corpus was dismissed. \textit{Id.} at 282. The appellate court reversed the finding that the Attorney General’s statements had “unconsciously” influenced the Board. \textit{Id.} On appeal to the Supreme Court, the Court reversed the appeals court, stating that it “believe[d] that Accardi ha[d] [received] the hearing required by [its] previous opinion.” \textit{Id.}
The relationship between section 701(a)(2) and an agency's lawfully promulgated rules was directly addressed in *Scanwell Laboratories, Inc. v. Shaffer*.\(^{105}\) In *Shaffer*, the District of Columbia Circuit held that regulations of the Federal Aviation Administration (FAA) regarding procurement had the force of law, thereby limiting the FAA’s discretion in awarding contracts.\(^{106}\) The court held that once the plaintiff had made a prima facie showing that the agency had violated its regulations, the agency could not claim that the issue had been committed to its discretion by law.\(^{107}\) The court, discussing administrative discretion in general, stated, “When the bounds of discretion give way to the stricter boundaries of law, administrative discretion gives way to judicial review.”\(^{108}\)

If an agency’s rules outline situations in which the rules mandate that an agency use its enforcement powers, it seems likely that this will provide law to rebut the presumption of unreviewability. If, as in *Shaffer*, a plaintiff can demonstrate that the agency’s action is contrary to a rule which has the force of law, the court is competent to review because the agency has previously limited its discretion.\(^{109}\) If a court were to take the opposite position, an agency could effectively ignore its own rules, affording no notice to interested parties who might rely on the agency’s rules to their detriment.\(^{110}\)

The final question left open by the Court is whether review is precluded when an agency’s action violates an individual’s constitutional rights.\(^{111}\) In *Johnson v. Robison*,\(^{112}\) the Court addressed the question of whether Congress, by statute, can preclude review of constitutional issues. In *Johnson* Congress precluded judicial review in legislation which provided veterans’ educational benefits.\(^{113}\) A conscientious objector appealed a denial of benefit by the Veteran’s Administration to the Court on constitutional grounds.\(^{114}\)

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106. *Id.* at 874.
107. *Id.*
108. *Id.*
109. If an agency’s rules are mere descriptions of sanctions, rather than attempts by an agency to limit its discretion, then there will be no law to apply. Sunstein, *Reviewing Agency Inaction after Heckler v. Chaney*, 52 U. Chi. L. Rev. 653, 679 (1985). This point is similar to the position taken by *Chaney* with respect to the different impact of statutes. Statutes which condition agency enforcement powers provide law and those which merely describe sanctions do not. See supra notes 44-45 and accompanying text.
110. In addition to the fact that rules have the force of law, they cannot be revoked without some of the same procedures which were used to promulgate them. See, e.g., *Motor Vehicle Mfg. Ass’n v. State Farm Mut. Ins. Co.*, 436 U.S. 29 (1983) (case presented question of whether the Department of Transportation violated the APA by rescinding a passive occupant restraint rule).
111. *Chaney*, 470 U.S. at 838.
113. *Id.* at 366.
114. *Id.* at 365.
The Court held that Congress could not have intended to prevent review of constitutional issues, or the constitutionality of the preclusion statute would be in question.\textsuperscript{115} The question of whether Congress, in remaining silent with respect to judicial review, can limit review of constitutional issues was addressed in \textit{Estep v. United States}.\textsuperscript{116} In \textit{Estep}, local boards were charged with classifying individuals as to their availability for military service. They had refused to grant exemptions to individuals who claimed to be exempt from the service because, as Jehovah's Witnesses, they were ministers of religion.\textsuperscript{117} The statutes had not provided for judicial review of the local boards' decisions.\textsuperscript{118} Consequently, during enforcement proceedings, the district courts refused to review the local boards' decisions.\textsuperscript{119} The Supreme Court ruled that in the enforcement hearings the individuals had a right to raise the issue of jurisdiction.\textsuperscript{120} The Court noted that Congress may limit the availability of judicial review by remaining silent.\textsuperscript{121} The denial of power to the courts depends upon the whole setting of the statutes involved and the scheme of regulations which is adopted.\textsuperscript{122} However, the Court indicated that the power of Congress to prevent review is limited "when the Constitution requires [review]."\textsuperscript{123} The proposition that the Constitution is a source of law which will rebut the presumption of unreviewability appears to be settled.\textsuperscript{124} In \textit{Johnson}, the court held that Congress could not limit the Court's jurisdiction to hear constitutional issues by an unequivocal statute precluding review.\textsuperscript{125} In \textit{Estep}, the court stated that even when Congress is silent, review may be constitutionally required.\textsuperscript{126} It follows that Congress cannot limit judicial review of constitutional issues by drafting enforcement statutes in permissive terms. In this area, the courts are competent to review because they have law to apply.

\begin{itemize}
\item \textsuperscript{115} \textit{Id.} at 367.
\item \textsuperscript{116} 327 U.S. 114 (1945).
\item \textsuperscript{117} \textit{Id.} at 116-17.
\item \textsuperscript{118} \textit{Id.} at 119.
\item \textsuperscript{119} \textit{Id.}
\item \textsuperscript{120} \textit{Id.} at 122. "The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which [the board] gave the registrant." \textit{Id.}
\item \textsuperscript{121} \textit{Id.} at 119.
\item \textsuperscript{122} \textit{Id.} at 120.
\item \textsuperscript{123} \textit{Id.}
\item \textsuperscript{124} See infra notes 112-23 and accompanying text; see also \textit{Marbury v. Madison}, 5 U.S. (1 Cranch) 137, 178-79 (1803) ("If a law be in opposition to the Constitution . . . the court must determine which of these rules governs the case. This is of the very essence of . . . judicial duty."). See generally, Hart, \textit{The Power of Congress to Limit Jurisdiction of Federal Courts: An Exercise in Dialectic}, 66 Harv. L. Rev. 1362, 1387 (1953) ("If the court finds that what is being done is invalid, its duty is simply to declare the jurisdictional limitation invalid.").
\item \textsuperscript{125} \textit{Johnson v. Robinson}, 415 U.S. 361, 368 (1973).
\item \textsuperscript{126} 327 U.S. at 120.
\end{itemize}
The source is the United States Constitution which, in order to maintain our form of government, must prevail over all other law. 127

The answers to the questions left open by the Chaney Court will determine, in part, the impact of the case. If the majority's holding is literally construed, review in the previously discussed areas may be foreclosed because these sources of law are not explicitly included within an agency's enforcement statutes. 128 This outcome is undesirable because it would result in an unacceptable degree of abdication by the Court of the judiciary's oversight responsibility. Justice Brennan's approach, on the other hand, would allow the judiciary to continue in its oversight role while promoting the policy considerations advanced by the majority to support the presumption of unreviewability. 129

One reason the majority cited for holding an agency's nonenforcement decision presumptively unreviewable was that these decisions involve a complicated balance of factors within the expertise of an agency. 130 This justification for the presumption of unreviewability should not prevent review where the issues involve questions of law which are ultimately within the expertise of a court. 131 Past case law indicates that a distinction can be drawn between an unreviewable agency decision involving an agency's expertise and a reviewable agency decision that is within its expertise but outside the law. 132 If the presumption of unreviewability can be rebutted by a threshold showing that an agency's nonenforcement decision is outside some implicit source of law, then this distinction will be a part of the rebuttable presumption of unreviewability. 133 Therefore, the presumption will provide sufficient flexi-

128. *Chaney*, 470 U.S. at 837-38. It is likely that the number of questions left open by the Court is some indication that review will be available in at least some of these areas. Sunstein, *supra* note 109, at 675.
129. With respect to oversight, Justice Brennan's approach will allow courts to review an agency's assertion that it lacks jurisdiction. *See supra* notes 59-73 and accompanying text. This approach will also allow a court in statutory abdication cases to require agencies to carry out the intent of Congress. *See infra* notes 74-89 and accompanying text. In addition, a court will be able to require agencies to adhere to the positions they take in lawfully promulgated rules. *See supra* notes 90-115 and accompanying text. Finally, a court will be able to review an agency's inaction to determine if that inaction violates an individual's constitutional rights. *See supra* notes 111-27 and accompanying text. For a discussion of judicial review when an agency's nonenforcement decision is based on an entirely illegitimate reason, *see supra* note 56 and accompanying text. With respect to Justice Brennan's approach promoting the policy considerations advanced by the majority, *see infra* notes 130-47 and accompanying text.
131. *See supra* 59-137 and accompanying text.
133. The concept that the availability of judicial review should be conditioned upon a threshold showing that an agency has violated some law is discussed in
bility to assure that a court can continue to have oversight to enforce regulatory, statutory, and constitutional laws, while maintaining a proper degree of deference to an agency’s expertise.\(^{134}\)

The majority suggested that the separation of powers concept embodied in article II, section 3, of the United States Constitution provides an additional reason for creating the presumption of unreviewability.\(^{135}\) When a court is faced with a nonenforcement decision and no law to apply, the court is not competent to apply an abuse of discretion scope of review.\(^{136}\) Absent some source of guidelines to aid a court in evaluating an agency’s nonenforcement decision, the court would be substituting its judgment for that of the agency, violating the separation of powers doctrine.\(^{137}\) While this concern may support the creation of the presumption of unreviewability, it does not support the limitation of the source of law to rebut the presumption to only explicit guidelines within an agency’s enforcement statutes. If this were the only source of law, then it would place administrative agencies above the judiciary, and also above the Constitution.\(^{138}\) Justice Brennan’s approach provides for deference to an agency when there is no law to apply, yet allows the courts to carry out their responsibilities to review the actions of administrative agencies to ensure they are within the laws.

The majority also discussed the fact that agency inaction fails to provide a sufficient focus for judicial review.\(^{139}\) Nonenforcement decisions, by their informal nature, involve an abbreviated administrative record.\(^{140}\) The abbre-

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134. The reviewable issues under Justice Brennan’s approach are questions of law which are within the expertise of a reviewing court. See supra note 129; see also Saferstein, *supra* note 133, at 383 (“Where expertise is an important factor in determining general nonreviewability, a court can nevertheless carve out areas where expertise is not required.”).

135. *Chaney*, 470 U.S. at 832.

136. *See supra* note 21 and accompanying text.

137. Section 701(a)(2) prohibits review when there is no law to apply. This, at least by analogy, is the same rationale behind one aspect of the political question doctrine in that the doctrine prevents judicial review when there are no “judicially discoverable and manageable standards” to apply. See, e.g., Baker v. Carr, 369 U.S. 186 (1962). In administrative law, the need to withhold review because of separation of power concerns has been greatly reduced by “the rise of a number of strategies by which courts might review the exercise of discretion without usurping the executive function. Courts may require explanations for decisions, and in reviewing those explanations, they may be quite deferential.” Sunstein, *supra* note 109, at 671 (footnotes omitted). For cases demonstrating these “strategies,” see infra note 144.

138. *See supra* notes 124-27 and accompanying text; see also Sunstein, note 109, at 670 (“The ‘take care’ clause is a duty, not a license.”).

139. *Chaney*, 470 U.S. at 832.

140. When individuals request an agency to take on a task, section 555(e) requires that “prompt notice shall be given of the denial in whole or in part of a
viated record would, to some extent, magnify the court’s lack of competence to apply the abuse of discretion scope of review.\textsuperscript{141} There are, however, methods at a court’s disposal to contend with this problem.\textsuperscript{142} While review may be impractical if the court is without law to apply, when there is law to apply, a court would have guidelines to evaluate what record exists.\textsuperscript{143} In addition, the court would have a sufficient focus to make a meaningful request for additional information from the agency or to evaluate the testimony of the decision-maker.\textsuperscript{144} Regardless of whether this law comes from explicit or implicit sources, the court should be equally competent to apply an abuse of discretion scope of review.

Finally, the majority’s statement that inaction is less likely to have a coercive impact is a weak justification for any presumption against reviewability.\textsuperscript{145} This is particularly true of a literal construction of the majority’s holding. If the source of law was limited to explicit guidelines within the statutes, then the availability of review would depend upon Congressional selection of statutory language, rather than the facts of the case.\textsuperscript{146} Using Justice Brennan’s approach and rebutting the presumption from implicit sources would at least allow review in factually-compelling cases.

The majority and Justice Brennan may differ with respect to the source of law which will rebut the presumption of unreviewability. However, both agree that the institutional needs of administrative agencies are sufficiently

\textsuperscript{141} The Court did not explain why inaction fails to provide a focus for judicial review. The Court merely stated that agency action does provide a sufficient focus for review. \textit{Chaney}, 470 U.S. at 832. The availability of review is conditioned upon the existence of law to apply, rather than agency action. Therefore, this discussion is centered on the single greatest variable which the existence of law will affect—a court’s competence to review the record.

\textsuperscript{142} \textit{See, e.g.,} Citizens to Preserve Overland Park, Inc. v. Volpe, 401 U.S. 402 (1971) (informal decision to build a highway through a park); Camp, Controller of the Currency v. Pitts, 411 U.S. 139 (1973) (informal decision not to issue a national bank charter).

\textsuperscript{143} \textit{See, e.g.,} Dunlop v. Bachowski, 421 U.S. 560 (1975).

\textsuperscript{144} Traditionally, courts have disliked ad hoc explanations and exposing the decision-maker to questioning. Nevertheless, due to necessity they have abandoned these constraints in cases involving informal decision-making. \textit{See, e.g.,} Citizens to Preserve Overland Park, Inc. v. Volpe, 401 U.S. 402 (1971) (informal decision to build a highway through a park); Camp, Controller of the Currency v. Pitts, 411 U.S. 138 (1973) (informal decision not to issue a national bank charter).

\textsuperscript{145} \textit{Chaney}, 470 U.S. at 832.

\textsuperscript{146} Professor Davis advanced the question of whether Congress, when drafting statutes, has judicial review in mind and makes a deliberate choice between permissive and mandatory language. K. Davis, \textit{supra}, note 26, at 251.
important to justify a presumption of unreviewability.147 In contrast, Justice Marshall rejected the creation of the presumption of unreviewability.148 Although he acknowledged that a degree of deference must be given to an agency's expertise, he placed greater emphasis on the rights of the individual and the importance of the judiciary's role in maintaining these rights.149

Justice Marshall, in his opinion concurring in judgment only, challenged the Court's creation of a rebuttable presumption of unreviewability as bad law.150 Justice Marshall characterized agency inaction as a "pressing problem of the modern administrative state, given the enormous powers, for both good and ill, that agency inaction, like agency action, holds over citizens."151 Marshall argued that the Court's break with tradition would bind the hands of the courts to deal with these pressing problems.152 Justice Marshall rejected the notion that the tradition of prosecutorial discretion is sufficiently strong to form a basis for the presumption of unreviewability.153 He suggested that the Court's holding gives too much discretion to an agency and not enough flexibility to the courts to deal with administrative lawlessness.154

Justice Marshall argued that Justice Brennan's position did not mitigate the impact of the Court's holding, but rather magnified the problems it created. Justice Marshall pointed out that if the Court's decision is given its literal meaning, these four areas will be unreviewable when the presumption is not rebutted.155 Alternatively, he argued that, if the Court allows review

147. This position can be demonstrated by the importance the majority places on allowing an agency to allocate its limited resources among various enforcement opportunities. Chaney, 470 U.S. at 831-32. Justice Brennan, in support of the general presumption, stated that "in the normal course of events, Congress intends to allow broad discretion for its administrative agencies to make particular enforcement decisions . . . ." Id. at 838 (Brennan, J., concurring).
149. See infra notes 150-56 and accompanying text.
151. Id. at 840 (Marshall, J., concurring).
152. Id. (Marshall, J., concurring).
153. Justice Marshall's discussion of prosecutorial discretion focuses on the fact that prosecutorial discretion in criminal law or administrative law is not absolute. Id. at 846-48 (Marshall, J., concurring). The case law supports Marshall's position. See, e.g., Blackledge v. Perry, 417 U.S. 21, 28 (1973) ("Due process of law requires . . . vindictiveness must not enter into North Carolina's two tiered appellate process . . . . [T]herefore . . . it was not constitutiona[l] . . . for the state to respond to Perry's invocation of his statutory right to appeal by bringing a more serious charge . . . ."). While prosecutorial discretion has been constitutionally limited when the "prosecutor" has taken action, this limit may be ineffective when the "prosecutor-administrator" does not act. See K. Davis, supra note 26, § 28.00, at 251 (discussion on selective enforcement), cf. St. Martin's Press v. Carey, 605 F.2d 41, 45 (2d Cir. 1979) ("The choice between prosecuting and not prosecuting is entirely within the discretion of a district attorney.").
155. Id. at 854 (Marshall, J., concurring).
in these areas without rebutting the presumption, courts will be deciding cases on their merits, rendering meaningless the presumption of unreviewability.\textsuperscript{156}

Justice Marshall would allow review of an agency’s refusal to take an enforcement action absent “clear and convincing congressional intent to the contrary, giving deference to the agency’s expertise.”\textsuperscript{157} On the facts of this case, Justice Marshall would have allowed review and would have reversed the appellate court on the grounds that there was nothing to suggest that an abuse of discretion occurred.\textsuperscript{158}

The conflict between Justice Marshall’s concern for individual rights and the majority’s concern for deference to an agency’s expertise is at the center of the tension surrounding section 701(a)(2).\textsuperscript{159} Justice Marshall’s approach would render section 701(a)(2) useless and place individual rights above administrative agencies’ need to be shielded from meaningless and expensive review.\textsuperscript{160} The opposite approach, which would allow only explicit sources of law to rebut the presumption of unreviewability in section 701(a)(2) would place the needs of administrative agencies above the rights of individuals.\textsuperscript{161} Justice Brennan’s approach of allowing the presumption of unreviewability to be rebutted by implicit sources of law provides the best balance of individual rights and agency needs.

\begin{itemize}
\item \textsuperscript{156} \textit{Id.} at 854 (Marshall, J., concurring).
\item \textsuperscript{157} \textit{Id.} (Marshall, J., concurring).
\item \textsuperscript{158} \textit{Id.} at 833-54 (Marshall, J., concurring).
\item \textsuperscript{159} This tension was the focus of a series of articles, some of which are Berger, \textit{Administrative Arbitrariness and Judicial Review}, 65 \textit{COLUM. L. REV.} 55 (1965); Berger, \textit{Administrative Arbitrariness—A Reply to Professor Davis}, 114 \textit{U. PA. L. REV.} 814 (1966); Berger, \textit{Administrative Arbitrariness: A Synthesis}, 78 \textit{YALE L. REV.} 965 (1969); Davis, \textit{Administrative Arbitrariness is Not Always Reviewable}, 51 \textit{MINN. L. REV.} 643 (1967); Davis, \textit{Administrative Arbitrariness—A Final Word}, 114 \textit{U. PA. L. REV.} 814 (1966). The articles deal with the question of whether an arbitrary agency action could be unreviewable because of section 701(a)(2).
\item \textsuperscript{160} Justice Marshall’s approach fails to draw a distinction between sections 701(a)(1) and 701(a)(2). His approach would arguably permit review in all cases not involving an express congressional bar to review. Beyond the increased cost to the agency in defending its decisions not to act more frequently, one commentator suggests that unlimited review of administrative agencies’ nonenforcement decisions may cause the formalization of informal decisions in order to facilitate judicial review. This formalization would result in an increase in cost and a decrease in efficiency. See Sunstein, \textit{ supra} note 109, at 673.
\item \textsuperscript{161} This approach would result in an unnecessary reduction of the judiciary’s power of oversight. Justice Brennan’s approach would shield an agency from the burdens of meaningless review, which could result in increased cost and a reduction in the efficiency of administrative agencies. See Saferstein, \textit{ supra} note 133, at 319 (“Mr. Saferstein . . . would have the courts consider more fully the possibilities of partial review, limited to those issues which could be examined without excessive cost to the institutions involved.”).
\end{itemize}
The *Chaney* decision, by addressing section 701(a)(2) in detail, has laid the foundation for a more consistent analysis for dealing with the question of reviewability in agency inaction cases. The impact of *Chaney* will depend upon whether review will be available when the source of law to rebut the presumption of unreviewability comes from outside an agency’s enforcement statutes. By expanding the source of law to include regulations, statutes, and the Constitution, courts will be able to assure that an agency’s exercise of discretion is within the law. In addition, the courts will be able to maintain a proper degree of deference to an agency’s expertise while providing needed review to protect individual rights.

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