Supplementary Material

Chapter 10: The Reagan Era – Judicial Power and Constitutional Authority

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Heckler v. Chaney, 470 U.S. 821 (1985)

A group of death row inmates in Oklahoma and Texas petitioned the federal Food and Drug Administration (FDA) to block the use of drugs in lethal injections. The prisoners contended that using drugs for off-label purposes by non-medical personnel violated the Federal Food, Drug, and Cosmetics Act (FDCA). The FDA denied the petition, contending that it did not have jurisdiction over such drug uses or the criminal justice system. The inmates filed suit in federal district court seeking a judicial order forcing the FDA to act under its statutory authority, but the court dismissed the suit. On appeal, a divided circuit court reversed the trial court. Margaret Heckler, the secretary of Health and Human Services, appealed to the U.S. Supreme Court. In a unanimous decision, the Court reversed the circuit court, finding that the courts could not review such agency inaction.

The case turned on the meaning of the Administrative Procedure Act (APA), which authorizes and structures judicial review of agency decisions, and the FDCA, which authorizes FDA regulation of drugs. But central components of the Court's analysis were assumptions about the scope of judicial authority and the place of administrative agencies within the political system. For a majority of the justices, inaction by agencies was generally unreviewable. Such decisions reflected both the policy expertise of the agencies and the delegation of authority by Congress and should not be challenged by judges.

Why might inaction by agencies be treated differently than positive actions? Could Congress authorize judicial review of such agency decisions? Why should courts assume that Congress had not already authorized such review? Are agency regulatory decisions comparable to prosecutorial decisions in criminal cases? Why might the conservative majority on the Court favor a more deferential standard in these cases than the more liberal Brennan and Marshall?

JUSTICE REHNQUIST delivered the opinion of the Court.

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. . . . For us, this case turns on the important question of the extent to which determinations by the FDA *not to exercise* its enforcement authority over the use of drugs in interstate commerce may be judicially reviewed. . . .

The APA's comprehensive provisions for judicial review of "agency actions" [state that] any person "adversely affected or aggrieved" by agency action, including a "failure to act," is entitled to "judicial review thereof," as long as the action is a "final agency action for which there is no other adequate remedy in a court." The standards to be applied on review are governed by the provisions of [the APA]. But . . . judicial review "applies, according to the provisions thereof, except to the extent that -- (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." Petitioner urges that the decision of the FDA to refuse enforcement is an action "committed to agency discretion by law" under [the APA].

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. . . . This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed

to an agency's absolute discretion. See . . . *United States v. Nixon* (1974) . . . This recognition of the existence of discretion is attributable in no small part to the unsuitability for judicial review of agency decisions to refuse enforcement.

The reasons for this general unsuitability are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities. Similar concerns animate the principles of administrative law that courts generally will defer to an agency's construction of the statute it is charged with implementing, and to the procedures it adopts for implementing that statute. . . .

In addition to these administrative concerns, we note that when an agency refuses to act it generally does not exercise its coercive power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect. Similarly, when an agency does act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. The action at least can be reviewed to determine whether the agency exceeded its statutory powers. . . . Finally, we recognize that an agency's refusal to institute proceedings shares 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, inasmuch as it is the Executive who is charged by the Constitution to "take Care that the Laws be faithfully executed."

We of course only list the above concerns to facilitate understanding of our conclusion that an agency's decision not to take enforcement action should be presumed immune from judicial review under [the APA]. For good reasons, such a decision has traditionally been "committed to agency discretion," and we believe that the Congress enacting the APA did not intend to alter that tradition. . . .

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. . . . The FDA's decision not to take the enforcement actions requested by respondents is therefore not subject to judicial review under the APA. The general exception to reviewability provided by [the APA] for action "committed to agency discretion" remains a narrow one, see *Citizens to Preserve Overton Park v. Volpe* (1971), but within that exception are included agency refusals to institute investigative or enforcement proceedings, unless Congress has indicated otherwise. In so holding, we essentially leave to Congress, and not to the courts, the decision as to whether an agency's refusal to institute proceedings should be judicially reviewable. No colorable claim is made in this case that the agency's refusal to institute proceedings violated any constitutional rights of respondents, and we do not address the issue that would be raised in such a case. . . .

The judgment of the Court of Appeals is *reversed*.

JUSTICE BRENNAN, concurring.

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JUSTICE MARSHALL, concurring.

Easy cases at times produce bad law, for in the rush to reach a clearly ordained result, courts may offer up principles, doctrines, and statements that calmer reflection, and a fuller understanding of their implications in concrete settings, would eschew. In my view, the "presumption of unreviewability" announced today is a product of that lack of discipline that easy cases make all too easy. The majority,

eager to reverse what it goes out of its way to label as an "implausible result," not only does reverse, as I agree it should, but along the way creates out of whole cloth the notion that agency decisions not to take "enforcement action" are unreviewable unless Congress has rather specifically indicated otherwise. Because this "presumption of unreviewability" is fundamentally at odds with rule-of-law principles firmly embedded in our jurisprudence, because it seeks to truncate an emerging line of judicial authority subjecting enforcement discretion to rational and principled constraint, and because, in the end, the presumption may well be indecipherable, one can only hope that it will come to be understood as a relic of a particular factual setting in which the full implications of such a presumption were neither confronted nor understood.

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[T]he Court transforms the arguments for deferential review on the merits into the wholly different notion that "enforcement" decisions are presumptively unreviewable altogether -- unreviewable whether the resource-allocation rationale is a sham, unreviewable whether enforcement is declined out of vindictive or personal motives, and unreviewable whether the agency has simply ignored the request for enforcement. . . . But surely it is a far cry from asserting that agencies must be given substantial leeway in allocating enforcement resources among valid alternatives to suggesting that agency enforcement decisions are presumptively unreviewable *no matter what factor caused the agency to stay its hand*.

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. . . . The half-sentence cited from *Nixon*, which states that the Executive has "absolute discretion to decide whether to prosecute a case," is the only apparent support the Court actually offers for even the limited notion that prosecutorial discretion in the criminal area is unreviewable. But that half-sentence is of course misleading, for *Nixon* held it an abuse of that discretion to attempt to exercise it contrary to validly promulgated regulations. Thus, *Nixon* actually stands for a very different proposition than the one for which the Court cites it: faced with a specific claim of abuse of prosecutorial discretion, *Nixon* makes clear that courts are not powerless to intervene. And none of the other prosecutorial discretion cases upon which the Court rests involved a claim that discretion had been abused in some specific way.

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. . . . In contrast [to criminal prosecutions], requests for administrative enforcement typically seek to prevent concrete and future injuries that Congress has made cognizable . . . . Entitlements to receive these benefits or to be free of these injuries often run to specific classes of individuals whom Congress has singled out as statutory beneficiaries. The interests at stake in review of administrative enforcement decisions are thus more focused and in many circumstances more pressing than those at stake in criminal prosecutorial decisions. . . .

Perhaps most important, the *sine qua non* of the APA was to alter inherited judicial reluctance to constrain the exercise of discretionary administrative power -- to rationalize and make fairer the exercise of such discretion. Since passage of the APA, the sustained effort of administrative law has been to "continuously [narrow] the category of actions considered to be so discretionary as to be exempted from review." . . . Judicial review is available under the APA in the absence of a clear and convincing demonstration that Congress intended to preclude it precisely so that agencies, whether in rulemaking, adjudicating, acting or failing to act, do not become stagnant backwaters of caprice and lawlessness. . . .

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The problem of agency refusal to act is one of the pressing problems of the modern administrative state, given the enormous powers, for both good and ill, that agency inaction, like agency action, holds over citizens. . . . Over time, I believe the approach announced today will come to be understood, not as mandating that courts cover their eyes and their reasoning power when asked to review an agency's failure to act, but as recognizing that courts must approach the substantive task of reviewing such failures with appropriate deference to an agency's legitimate need to set policy through the allocation of scarce budgetary and enforcement resources. Because the Court's approach, if taken literally, would take the courts out of the role of reviewing agency inaction in far too many cases, I join only the judgment today.