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PRECLUSION OF JUDICIAL REVIEW OF AGENCY INACTION UNDER THE ADMINISTRATIVE PROCEDURE ACT AND *HECKLER v. CHANEY*: *CENTER FOR AUTO SAFETY v. DOLE*

Judicial review of an administrative agency's action has served as an important safeguard against possible abuses of administrative power.[1] The common law developed a presumption of reviewability of affirmative agency action which was codified into the Administrative Procedure Act ("APA").[2] To this general mandate,

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[1] *See* B. SCHWARTZ, ADMINISTRATIVE LAW § 8.1 (2d ed. 1984). Although a useful working definition of an administrative agency is difficult, *see* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1:2 (2d ed. 1978); G. ROBINSON & E. GELLHORN, THE ADMINISTRATIVE PROCESS 21 (1974), the Administrative Procedure Act of 1946, Pub. L. No. 89-554, 80 Stat. 392 (1946) (codified as amended at 5 U.S.C. §§ 551-706 (1982 & Supp. IV 1986)), defines it as "each authority of the Government of the United States . . . but does not include . . . (A) the Congress; (B) the courts of the United States." *Id.* § 551(1). In our tripartite scheme of government, administrative agencies are a part of the executive branch with legislative and adjudicatory powers, although only to the extent permitted by the statutes creating them. *See* L. JAFFE & N. NATHANSON, ADMINISTRATIVE LAW: CASES AND MATERIALS 1-5 (4th ed. 1976); B. SCHWARTZ, *supra*, § 1.6, at 10-11.

The basic remedy available to a party aggrieved by an agency decision is judicial review. *See* B. SCHWARTZ, *supra*, § 8.1; *see also* Stark v. Wickard, 321 U.S. 288, 308-09 (1944) (Congress has circumscribed the power of agencies through judicial review); Ethyl Corp. v. EPA, 541 F.2d 1, 68 (D.C. Cir.) (Leventhal, J., concurring) (legislative powers broadly delegated to agencies due to availability of judicial review), *cert. denied*, 426 U.S. 941 (1976); Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 655 (1985) (availability of judicial review increases likelihood that regulatory discretion will be reasonably exercised). *See generally* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 320-27 (1965) (judicial review as necessary condition if administrative system is to maintain legitimacy).

[2] 5 U.S.C. §§ 551-706 (1982 & Supp. IV 1986). The intent to grant to the courts the power of review was reflected in the legislative history. *See* Abbott Laboratories v. Gardner, 387 U.S. 136, 140 n.2 (1967) (" '[t]o preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it' ") (quoting H.R. REP. No. 1980, 79th Cong., 2d Sess. 41 (1946)); Sunstein, *supra* note 1, at 653-54 (presumption of reviewability derived from legislative history and need to insure regulatory process will be fairly exercised).

The most important aspect of the APA is the recognition of an individual's right to seek judicial review. *See Abbott Laboratories*, 387 U.S. at 140-41. Section 702 of the APA provides in pertinent part: "A person . . . adversely affected or aggrieved by agency action within the meaning of a relevant statute . . . is entitled to judicial review thereof." 5 U.S.C. § 702 (Supp. IV 1986).

the APA provides exceptions where the substantive "statutes preclude judicial review"[3] and where "agency action is committed to agency discretion by law."[4] As to an agency's decision not to act, however, the Supreme Court expressly enunciated a presumption of unreviewability in *Heckler v. Chaney*.[5] Nonetheless, in *Center*

Under common law, the presumption originally was one of unreviewability of administrative decisions. *See* Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 516-17 (1840); *see also* Martin v. Mott, 25 U.S. (12 Wheat.) 19, 31-32 (1827) (recognizing the executive as "sole and exclusive judge" when statute provided discretionary power). In 1902, however, the Supreme Court held that a fraud order issued by the Postmaster General was judicially reviewable. *See* American School of Magnetic Healing v. McAnnulty, 187 U.S. 94, 110-11 (1902). Thereafter, there has been a presumption of reviewability. *See, e.g., Abbott Laboratories*, 387 U.S. at 140-41 (expressly establishing presumption of reviewability and holding drug manufacturers could seek judicial review of FDA rulings); Board of Governors of the Fed. Reserve Sys. v. Agnew, 329 U.S. 441, 444 (1947) (removal order under the Banking Act of 1933 reviewable). *See also* 5 K. DAVIS, *supra* note 1, § 28:1, at 253-55 (discussion of development of presumption of reviewability).

[3] 5 U.S.C. § 701(a)(1) (1982). The application of section 701(a)(1) requires an initial interpretation of the underlying substantive statute to determine the congressional intent to preclude judicial review in certain instances. *See infra* notes 24-33 and accompanying text; *see generally* 2 C. KOCH, ADMINISTRATIVE LAW AND PRACTICE § 8.1 (1985) (discussion of provisions of APA).

[4] 5 U.S.C. § 701(a)(2) (1982). Section 701(a)(2) precludes judicial review when the substantive statute is drawn without providing a court with a meaningful standard by which to measure the validity of an agency's decision. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971); *infra* notes 34-47 and accompanying text. Professor Davis has emphasized that the law of reviewability has not been changed by the APA because operation of section 701(a) depends on the underlying "statute" or "law." *See* 5 K. DAVIS, *supra* note 1, § 28:1, at 256-57. The inquiry to determine the extent to which a statute precludes review, and the extent to which agency action is committed to agency discretion by law, is the same as it would be under the common law. *See id.*

[5] 470 U.S. 821, 831 (1985). *Chaney* involved prison inmates who requested that the Food and Drug Administration ("FDA") act to prevent the use of various drugs for capital punishment purposes. *Id.* at 823. Claiming lack of jurisdiction, the FDA refused to act, noting that even if it had jurisdiction, it had "inherent discretion" not to initiate enforcement proceedings unless there was either an extreme danger to the public or a scheme to defraud. *Id.* at 824-25. The Court declared that there was a presumption of unreviewability of an agency's refusal to take enforcement steps under APA section 701(a)(2). *See id.* at 831. The Court reasoned that: (1) an agency's decision not to act involves a balancing of various elements within its expertise; (2) an agency's coercive power is not exercised when it refuses to act; thus, an individual's liberty or property rights are not infringed upon; (3) inaction, unlike affirmative action, does not provide a focus for judicial review; and (4) an agency's inaction is similar to a prosecutor's discretion not to indict which has been regarded immune from judicial review. *Id.* at 831-32.

The settled rule of prosecutorial discretion has immunized criminal prosecutors from judicial scrutiny of their decisions not to initiate investigations. *See, e.g.*, United States v. Batchelder, 442 U.S. 114, 124 (1979) (decision whether to prosecute generally lies in prosecutor's discretion); Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375, 380 (2d Cir. 1973) (prosecutor's decision not to investigate not subject to judicial intervention in absence of statutorily defined standards of reviewability). In Dunlop v. Bachowski, 421 U.S.

for Auto Safety v. Dole,[6] the Court of Appeals for the District of Columbia Circuit held that an administrative agency's denial of a petition to reopen an investigation was subject to judicial review, concluding that the agency's internal regulations provided a judicially manageable standard.[7]

In *Center for Auto Safety*, the Center for Auto Safety ("CAS"), pursuant to section 1410a of the National Traffic and Motor Vehicle Safety Act ("Act"),[8] petitioned the National Highway Transportation Safety Administration ("NHTSA") to reopen an enforcement investigation alleging a parking mechanism defect in automatic transmissions built by the Ford Motor Company.[9] In 1976, the NHTSA had conducted such an investigation, which re-

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560 (1975), however, the Supreme Court held that the Secretary of Labor's decision not to bring a civil action to set aside a union election was reviewable, but provided no guidelines other than the conclusion that the relevant statute did not preclude review. *Id.* at 568. The Court summarily disposed of the issue of prosecutorial discretion by noting that the Secretary's contention that his decision was unreviewable was without merit. *See id.* at 567 n.7.

[6] 828 F.2d 799 (D.C. Cir. 1987).

[7] *Id.* at 801.

[8] *See* 15 U.S.C. § 1410a (a)-(c) (1982). The Act provides that "[a]ny interested person may file with the Secretary a petition requesting him . . . to commence a proceeding to determine whether to issue an order pursuant to section 1412(b) of this title." *Id.* § 1410a(a). However, subsection (c) grants the agency broad discretion by empowering "[t]he Secretary . . . [to] conduct such investigation or proceeding as he deems appropriate in order to determine whether or not such petition should be granted." *Id.* § 1410a(c). The only obligation imposed on the Secretary is provided in subsection (d): "Within 120 days after filing of a petition . . . the Secretary shall either grant or deny the petition. . . . If the Secretary denies such petition he shall publish in the Federal Register his reasons for such denial." *Id.* § 1410a(d).

The Act provides two stages of investigation and enunciates the remedies available to a successful petitioner:

> (a)If through testing, inspection, investigation, . . . the Secretary determines that any motor vehicle . . .—
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> . . . .
>
> (2) contains a defect which relates to motor vehicle safety;
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> he shall immediately notify the manufacturer . . . , and shall publish notice of such determination in the Federal Register. . . . The Secretary shall afford such manufacturer an opportunity to present data, views, and arguments to establish that there is no defect . . . ; and shall afford other interested persons an opportunity to present data, views, and arguments respecting the determination of the Secretary.
>
> (b)If, after such presentations by the manufacturer and interested persons, the Secretary determines that such vehicle . . . contains a defect . . . , the Secretary shall order the manufacturer (1) to furnish notification respecting such vehicle . . . to owners, . . . and (2) to remedy such defect . . . .

Id. § 1412. The Secretary has delegated authority to the Administrator of the NHTSA to carry out the provisions of the Act. *See* 49 C.F.R. § 1.50(a) (1987). Therefore, throughout this Comment, the NHTSA is referred to as the agency empowered under the Act.

[9] *Center for Auto Safety*, 828 F.2d at 802.

sulted in a settlement agreement that required Ford to notify owners of the possible defect.[10] The CAS brought an action seeking to enjoin the settlement and to compel a recall, but it was unsuccessful.[11] Although the CAS subsequently claimed to have additional evidence, the NHTSA, after reviewing the new evidence along with other available information, denied the petition to reopen the investigation.[12] Consequently, the CAS brought the instant action challenging the NHTSA's denial as "arbitrary and capricious."[13] The district court upheld the agency's denial, holding that the NHTSA's decision not to investigate was not open to judicial review due to the presumption of unreviewability,[14] and that even if it had been reviewable, the scope of review would have been limited to the reasons stated by the agency for its decision.[15] On appeal, a divided panel of the Court of Appeals for the District of Columbia Circuit reversed the district court on both grounds.[16]

Chief Judge Wald, writing for the court, reasoned that the Act did not preclude judicial review of the agency's decision not to investigate[17] and that while the NHTSA's decision was discretionary, its own regulations provided the court with the "law to apply,"

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[10] *See* Center for Auto Safety v. Lewis, 685 F.2d 656, 657 (D.C. Cir. 1982). In *Lewis*, the NHTSA granted the petition and conducted an investigation which lasted over two and one-half years and involved twenty-three million vehicles. *Id.* at 659. The investigation produced over 382 cubic feet of documents including accident reports, blue prints, and engineering evaluations of other types of transmissions. *Id.* at 660. After the investigation, the NHTSA made an "initial determination" that a safety defect existed under 15 U.S.C. § 1412. *Id.* The NHTSA, in deciding to settle with Ford instead of making a final determination, gave the following reasons: (1) a final determination of defect was not likely and, in any event, "major new investigative efforts" would have been necessary; (2) even if the defect were finally determined, enforcement would have been difficult because Ford would have challenged any such order, postponing any potential recovery; and (3) NHTSA resources were being drained by the investigation. *Id.* at 663. However, the NHTSA specifically reserved the right to take further actions if warranted by additional facts. *Id.* at 661 n.5.

[11] *See id.* at 657. The *Lewis* court unanimously upheld the settlement agreement, holding that the NHTSA had not acted arbitrarily. *Id.*

[12] *Center for Auto Safety*, 828 F.2d at 802.

[13] *See id.* The remedy for an "arbitrary and capricious" agency action is provided by the APA: "The reviewing court shall—. . . hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." 5 U.S.C. § 706(2)(A) (1982). The APA also grants the reviewing court a broad scope of review by stating that the "court shall review the whole record or those parts of it cited by a party." *Id.* § 706.

[14] *Center for Auto Safety*, 828 F.2d at 801.

[15] *Id.*

[16] *Id.*

[17] *See id.* at 804; *infra* notes 24-32 and accompanying text.

thereby rebutting the presumption against judicial review.[18] The court also held that the scope of review should go beyond the agency's official statement of reasons and extend to the compiled record upon which the agency based its decision.[19]

In a strong dissent, Judge Bork argued there was "clear and convincing" evidence that the Act precluded judicial review of NHTSA inaction,[20] and that the agency's internal regulations could not create a right to judicial review contrary to congressional intent.[21] Alternatively, Judge Bork argued, the *Chaney* presumption of unreviewability should control to preclude review.[22] On the issue of the scope of review, Judge Bork argued that the reviewing court was restricted to the agency's statement of reasons.[23]

It is suggested that the court in *Center for Auto Safety* had to overcome three hurdles to conclude that judicial review was available: two exceptions of APA section 701(a) and the *Chaney* presumption of unreviewability. It is submitted that the court's decision was erroneous because a balanced construction of the Act demonstrates congressional intent to preclude judicial review in the case of a NHTSA decision not to open a defect investigation. Furthermore, the regulations on which the court relied do not provide judicially manageable standards because they are merely pro-

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[18] *Center for Auto Safety*, 828 F.2d at 803; *infra* notes 34-47 and accompanying text.

[19] *Center for Auto Safety*, 828 F.2d at 801. Generally, the scope of permissible judicial review over administrative decisions ranges from absolute deference to *de novo* review. *See* W. GELLHORN, C. BYSE, P. STRAUSS, T. RAKOFF & R. SCHOTLAND, ADMINISTRATIVE LAW: CASES AND COMMENTS 349 (8th ed. 1987).

In *Center for Auto Safety*, the court distinguished Dunlop v. Bachowski, 421 U.S. 560 (1975), and followed Florida Power & Light Co. v. Lorion, 470 U.S. 729 (1985). *See* 828 F.2d at 809-15. In *Dunlop*, the Supreme Court limited judicial review to the Secretary of Labor's official statement of reasons for not bringing a civil action to set aside a union election. 421 U.S. at 572-74. The Court refused to extend its investigation to the administrative record in order to shield the elective process from lengthy and disruptive litigation. *Id.* at 573. However, in the absence of special considerations such as the need for swift resolution, the *Center for Auto Safety* court deemed the administrative record open to review by recognizing a nexus between the potential safety hazard of faulty design in nuclear reactors, which *Lorion* addressed, and the alleged transmission defects in the instant case. 828 F.2d at 814-15.

[20] *See Center for Auto Safety*, 828 F.2d at 816-18 (Bork, J., dissenting).

[21] *See id.* at 819 (Bork, J., dissenting).

[22] *See id.* at 819-20 (Bork, J., dissenting).

[23] *See id.* at 820-26 (Bork, J., dissenting). Judge Bork argued that the instant case was more compelling than *Dunlop* because the Act provided the NHTSA with even more discretion than that given to the Secretary of Labor in *Dunlop*, thereby requiring the reviewing court to restrict the scope of review to the reasons stated by the NHTSA. *See id.* at 820, 821-25 (Bork, J., dissenting).

cedural guidelines for the agency. Finally, this Comment will suggest that by examining congressional intent, the *Chaney* presumption should be overcome in its own right, not merely as a part of the "law to apply" test.

STATUTORY PRECLUSION UNDER SECTION 701(a)(1)

Although the APA's general presumption is one of reviewability, section 701(a)(1) provides an exception when the statutes under which the agency operates preclude judicial review.[24] Where there is no express provision foreclosing judicial review, section 701(a)(1) will nonetheless apply if congressional intent of preclusion can be shown by "clear and convincing" evidence[25] or is "fairly discernible."[26] Application of these standards requires the courts to examine not only the express language of the statute but also its structure, objectives, legislative history, and the nature of the agency action involved.[27]

The majority in *Center for Auto Safety* impliedly conceded that the language of the Act grants very broad, if not absolute, discretion to the Secretary without subjecting him to any legal standard.[28] Furthermore, the Act's structure explicitly provides ju-

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[24] *See supra* note 3.

[25] *See* Dunlop v. Bachowski, 421 U.S. 560, 567 (1975) ("[o]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review") (quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967)); *see also* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971) (applying *Abbott Laboratories* test and finding no "showing of 'clear and convincing evidence' ").

A similar standard of "persuasive reason" has been derived from *Abbott Laboratories* and is often cited. *See, e.g.*, Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670 (1986) ("judicial review . . . by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress") (quoting *Abbott Laboratories*, 387 U.S. at 140); Morris v. Gressette, 432 U.S. 491, 501 (1977) (same).

[26] *See* Block v. Community Nutrition Inst., 467 U.S. 340, 351 (1984) (presumption of reviewability overcome when congressional intent of preclusion is "fairly discernible in the statutory scheme") (quoting Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 157 (1970)). The "fairly discernible" standard is less stringent than the "clear and convincing" standard and the Court used it to explain that the "clear and convincing" standard was never meant in the strict evidentiary sense. *See id.* at 350-51.

[27] *See id.* at 345; *see also* Southern Ry. Co. v. Seaboard Allied Milling Corp., 442 U.S. 444, 454-63 (1979) (language, structure, and legislative history of Interstate Commerce Act implied preclusion of judicial review of ICC's decision not to investigate shipping rate increase). *See generally* Note, *Statutory Preclusion of Judicial Review Under the Administrative Procedure Act*, 1976 DUKE L.J. 431, 442-49 (discussion of elements to be examined in ascertaining congressional intent to preclude judicial review under section 701(a)(1)).

[28] *See Center for Auto Safety*, 828 F.2d at 806-08. The Secretary "may" conduct an investigation as "he" deems appropriate. *See* 15 U.S.C. § 1410a(c) (1982).

dicial review[29] and appropriate remedies[30] at various stages of review but not at the stage of petition denial. The Act's basic objective of safety is not controverted; however, it is submitted that Congress intended this objective to be effectuated through agency discretion and expertise. Congressional intent to preclude review is also illustrated by the removal of an express provision for judicial review over petition denials in what became the 1974 amendment.[31] Lastly, it is significant that the administrative decision involved inaction, not an exercise of affirmative power.[32]

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[29] *See* 15 U.S.C. § 1394 (1982) (establishing jurisdiction and judicial review over validity of orders establishing safety standards); *id.* § 1399(a) (granting the district courts jurisdiction over enforcement actions by the Secretary against motor vehicle manufacturers).

[30] *See id.* § 1399(a) (injunctive relief to restrain sale of defective automobiles); *id.* § 1400(b) (civil action by a dealer to recover damages plus costs incurred due to sale of nonconforming vehicle); *see also id.* § 1398 (imposition of civil penalties upon violation of section 1397).

[31] *See Center for Auto Safety*, 828 F.2d at 817-18 (Bork, J., dissenting). The original bill had the following provision under the section on "Agency Responsibility":

> (a)(e)(1) If the Secretary denies the petition . . . , the petitioner may commence a civil action in a United States district court to compel the Secretary to commence or complete the proceeding (or both) . . . .
>
> (2) If the petitioner can demonstrate to the satisfaction of the court, by preponderance of the evidence in a de novo proceeding before such court, that the motor vehicle . . . contains a . . . defect which relates to motor vehicle safety . . . and that the failure of the Secretary to commence or complete the proceeding as requested in the petition unreasonably exposes the petitioner or other consumers to a risk of injury . . . , the court shall order the Secretary to commence or complete the proceeding . . . .

H.R. 5529, 93d Cong., 1st Sess. § 7 (1973). This provision was deleted by the House Committee on Interstate and Foreign Commerce and Representative Eckhardt, one of the original sponsors, objected and stated that he would offer an amendment to avail the civil actions, *see* 120 CONG. REC. 27,807-08 (1974), but he never did so. *See Center for Auto Safety*, 828 F.2d at 818 (Bork, J., dissenting).

The *Center for Auto Safety* court distinguished between the normal APA scope of review and the bill's *de novo* review which would permit independent judicial determination, and concluded that Congress intended merely to delete the *de novo* review, not to completely eliminate the availability of review. *See* 828 F.2d at 804-05. It is submitted, however, that Congress could have expressed that intent by simply deleting the phrase containing "de novo proceeding." *See* 828 F.2d at 818 (Bork, J., dissenting) (citing letter from House Committee Chairman who approved such deletion).

The strongest evidence in the legislative history supporting the court's interpretation is a Conference Report statement that the conferees decided to leave to the courts the question of availability of pre-enforcement review. *See id.* at 806-07; H.R. CONF. REP. No. 1452, 93d Cong., 2d Sess. 32, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6084, 6095. However, this passage concerns review of suits by manufacturers objecting to enforcement of defect remedies and does not apply to the relevant section, entitled "Agency Responsibility," which governs citizen petitions under section 1410a. *See id.* at 6106.

[32] *See supra* note 5. It is suggested that the four reasons noted by the Court in *Chaney* to support the presumption of unreviewability under section 701(a)(2) may well be consid-

It is submitted that these five elements should be examined as a whole to determine whether it is "fairly discernible in the statutory scheme" that Congress intended to foreclose review. The *Center for Auto Safety* court failed to consider all of these elements and, from those it did examine, concluded that each particular element did not by itself provide "clear and convincing" evidence without being weighed cumulatively.[33]

AGENCY DISCRETION PRECLUSION UNDER SECTION 701(a)(2)

The precise meaning of section 701(a)(2) has been a troublesome issue for the courts.[34] The Supreme Court in *Citizens to Preserve Overton Park, Inc. v. Volpe*[35] applied this exception to statutes " 'drawn in such broad terms that in a given case there is no law to apply.' "[36] The *Center for Auto Safety* court acknowledged

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ered in the balancing process under section 701(a)(1).

[33] *See Center for Auto Safety*, 828 F.2d at 804-09.

[34] *Compare* 5 U.S.C. § 701(a)(2) (1982) (some actions within agency discretion are not reviewable) *with* 5 U.S.C. § 706(2)(A) (1982) ("reviewing" courts determine existence of "abuse of discretion"). It is suggested that there is some contradiction between the two sections because a court cannot determine whether there has been an abuse of discretion without reviewing the decision. An example of this tension is illustrated by WWHT, Inc. v. FCC, 656 F.2d 807 (D.C. Cir. 1981), which presented a question as to whether the FCC's denial of a petition for rulemaking was reviewable. *Id.* at 809. The court stated:

> Except where there is evidence of a 'clear and convincing legislative intent to negate review,' . . . agency denials of petitions for rulemaking may be made the subject of judicial review. We have no doubt that, except in the rarest of cases, the decision to institute rulemaking is one that is largely committed to agency discretion; however, this begs the question with respect to judicial review.

Id. at 815; *see also* Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 874 (D.C. Cir. 1970) ("while review is not granted for action 'by law committed to agency discretion,' . . . review is expressly provided for when there is an abuse of that discretion").

[35] 401 U.S. 402 (1971).

[36] *Id.* at 410 (quoting S. REP. No. 752, 79th Cong., 1st Sess. 26 (1945)). Since *Citizens to Preserve Overton Park*, section 701(a)(2) has been known as the "no law to apply" exception. *See, e.g.*, Southern Ry. Co. v. Seaboard Allied Milling Corp., 442 U.S. 444, 445 (1979) (citing *Citizens to Preserve Overton Park* approvingly). Professor Davis has criticized the "no law to apply" standard as dictum which contradicts the true congressional intent. *See* 5 K. DAVIS, *supra* note 1, § 28:8, at 290-93. However, the idea has been widely accepted by the courts and the search has become whether the "law to apply" was present or not in a given case. *See, e.g.*, Arizona Power Auth. v. Morton, 549 F.2d 1231, 1239 (9th Cir.) ("no law to apply" to Secretary of Interior's decision of marketing criteria), *cert. denied*, 434 U.S. 835 (1977); Sierra Club v. Block, 615 F. Supp. 44, 46-48 (D. Colo. 1985) (searching for "law to apply" in Wilderness Act).

Some courts have departed from the rigid "no law to apply" standard, indicating that judicial competence, as urged by Professor Davis, is the appropriate standard. *See, e.g.*, Cities of Carlisle and Neola, Iowa v. Federal Energy Regulatory Comm'n, 704 F.2d 1259, 1262 (D.C. Cir. 1983) (while recognizing "no law to apply" test, court undermined it by stating

that the Act conferred broad discretion on the agency and that it did not provide the "law to apply."[37] However, the court discerned the "law to apply" from the NHTSA regulations.[38] Dissenting, Judge Bork concluded that the statute precluded review and that the agency's regulations were subordinate to the substantive statute.[39]

The court's analysis of this issue rested on the regulatory standard of whether there was a "reasonable possibility" of the existence of a safety-related defect.[40] However, the exact language provided by the regulations states that a petition would be granted if there was a "reasonable possibility that the order requested in the petition will be issued at the conclusion of the appropriate proceeding."[41] It is submitted that these are two different standards;

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that "[t]he absence of standards by which to evaluate agency action militates strongly against judicial review"); Natural Resources Defense Council, Inc. v. SEC, 606 F.2d 1031, 1043 (D.C. Cir. 1979) ("[i]n practice, the determination . . . turns on pragmatic considerations as to whether an agency determination is the proper subject of judicial review").

A balancing approach proposed by one commentator is soundly based and should be considered in determining whether review should be denied for action committed to agency discretion. *See* Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367, 379 (1968). Saferstein identified nine factors to be considered: (1) broad agency discretion; (2) expertise and experience required to understand subject matter of agency action; (3) managerial nature of agency; (4) impropriety of judicial intervention; (5) necessity of informal agency decision making; (6) inability of reviewing court to ensure correct result; (7) need for expeditious operation of congressional programs; (8) quantity of potentially appealable agency actions; and (9) existence of other methods of preventing abuse of discretion. *Id.* at 380-95. *See also* Falzarano v. United States, 607 F.2d 506, 512 (1st Cir. 1979) (testing principles applicable in determining judicial review).

[37] *See Center for Auto Safety*, 828 F.2d at 801.

[38] *See id.* at 801, 803.

[39] *See id.* at 819 (Bork, J., dissenting). Judge Bork argued that since there was a strong congressional intent to preclude review, the agency's own rules could not defeat this intent. *See id.* (Bork, J., dissenting); *see also* Harrison v. Bowen, 815 F.2d 1505, 1517 (D.C. Cir. 1987) ("an agency cannot create through its implementing regulations a right of review withheld by the underlying statute").

[40] *See Center for Auto Safety*, 828 F.2d at 800-02 (construing 49 C.F.R. § 552.8 (1987)).

[41] 49 C.F.R. § 552.8 (1987). Section 552.8 provides, in pertinent part, that "at the conclusion of the technical review, the Administrator . . . determines whether there is a reasonable possibility that the order requested . . . will be issued . . . . If such a reasonable possibility is found, the petition is granted. If it is not found, the petition is denied." *Id.*

The NHTSA promulgated the regulations of section 552 to "establish[] procedures for the submission and disposition of petitions . . . to initiate rulemaking or to make a determination that a motor vehicle . . . contains a defect which relates to motor vehicle safety." *Id.* § 552.1. After a petition is filed, *see id.* § 552.4, an Associate Administrator is to conduct a technical review "to determine whether there is a reasonable possibility that the requested order will be issued at the conclusion of the appropriate proceeding." *Id.* § 552.6. He may hold a public meeting if he decides it "would contribute to the determination whether to commence a proceeding." *Id.* § 552.7.

the former is an objective test of fact-finding whereas the latter is an indication of discretion granted by the Act to the agency.[42]

Whether there was a reasonable possibility of the issuance of the requested order pursuant to section 1412(b) of the Act was answered in the negative by the NHTSA in *Center for Auto Safety, Inc. v. Lewis*.[43] The *Lewis* court upheld such discretion even when the NHTSA made an initial determination that a safety-related defect existed.[44] *Center for Auto Safety* presented a less compelling case than *Lewis* because the CAS was seeking judicial review of the agency's discretion prior to the commencement of the investigation[45] and involved a matter which the agency reserved its exclusive right to pursue further if additional evidence was revealed.[46] It is submitted that the fact that a lengthy investigation was previously conducted and that the agency's prior decision not to further pursue it was approved by the *Lewis* court buttresses the conclusion that the agency's regulations provided only guidelines for the exercise of the agency's discretion.[47]

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[42] *See, e.g.*, 40 Fed. Reg. 21,487 (1975) (codified at 40 C.F.R. § 552 (1987)) (proposed May 10, 1975). The NHTSA published a notice proposing the regulations which stated that "the Administrator . . . would decide whether there is a reasonable possibility of positive action, and grant or deny the petition accordingly." *Id.* After receiving comments from various interested groups, the NHTSA decided to make "no substantial changes from the proposal." 40 Fed. Reg. 42,013 (1975).

The *Center for Auto Safety* court noted that the NHTSA stated that the "reasonable possibility" standard "limits the discretion of the Administration" in two directions: the petition shall not be granted if a "reasonable possibility" is lacking, but must be granted if a "reasonable possibility" exists. *See* 828 F.2d at 801-02 n.4. However, this statement was in response to General Motors' argument that the NHTSA would have to grant virtually all petitions under the "reasonable possibility" standard. *See* 40 Fed. Reg. 42,013 (1975). The NHTSA disagreed and stated that "[t]he use of the modifier 'reasonable' limits the discretion of the Administrator to grant only a petition for an order or rule that has a reasonable chance of being issued, not a petition for any order or rule that may conceivably be issued." *Id.* It is submitted that such a statement was not necessary if the standard which the NHTSA had in mind was an objective and factual test of the "reasonable possibility" of a safety defect.

[43] 685 F.2d 656, 663-64 (D.C. Cir. 1982). The *Lewis* court approved the NHTSA's rationale that the improbability that the requested order would be issued was a legitimate exercise of the agency's discretion not to make a final determination. *See id.*; *see also supra* note 10 (discussing NHTSA investigation undertaken in *Lewis*).

[44] *See Lewis*, 685 F.2d at 662-63.

[45] *See Center for Auto Safety*, 828 F.2d at 802. It is also significant that the CAS was challenging the NHTSA's decision as "arbitrary and capricious" without a more definite showing of special risks. *See* Sunstein, *supra* note 1, at 682-83 (allegation of generalized arbitrariness presents weakest claim for reviewability).

[46] *See Center for Auto Safety*, 828 F.2d at 802 (citing *Lewis*, 685 F.2d at 661 n.5)

[47] The special circumstance of *Center for Auto Safety* that the petitioners had sought judicial review previously militates against review; to hold otherwise would force courts to

Chaney PRESUMPTION OF UNREVIEWABILITY

By concluding that NHTSA's regulations provided the court with a judicially manageable standard, the *Center for Auto Safety* court decided to settle the precise issue that the Supreme Court intentionally left unanswered in *Heckler v. Chaney*.[48] Although there are some decisions to this effect, most of the authority is in the context of affirmative agency action, not an agency's decision not to act.[49]

It is suggested that there are three possible ways the *Chaney* precedent can be viewed to apply in the instant case. The first is that it is a mere example of APA section 701(a)(2), which is the view the *Center for Auto Safety* court seems to have taken. Under

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exercise judicial review every time a petitioner claimed to have additional evidence.

[48] *See* 470 U.S. at 836. The Court rejected the argument that an FDA policy statement attached to an unpromulgated rule could provide the "law to apply" but left "the problem of whether an agency's rules might under certain circumstances provide courts with adequate guidelines for informed judicial review of decisions not to enforce." *Id.*

The *Chaney* court also left unanswered three other situations: (1) where an agency claims lack of jurisdiction, *id.* at 833 n.4; (2) where an agency's policy "is so extreme as to amount to an abdication of its statutory responsibilities," *id.*; and (3) where it is claimed that constitutional rights are violated, *id.* at 838. The *Chaney* holding itself and these unanswered questions drew much criticism from commentators. *See, e.g.*, Mikva, *The Changing Role of Judicial Review*, 38 ADMIN. L. REV. 115, 134-40 (1986) (administrative discretion to refuse enforcement may be limited by unanswered issues); Sunstein, *supra* note 1, at 665-83 (discussing why there should be no distinction between cases of action and inaction); Comment, *Administrative Law: The Creation of a Presumption of Unreviewability in Cases of Administrative Inaction [Heckler v. Chaney, 105 S. Ct. 1649 (1985)]*, 25 WASHBURN L.J. 347, 355-56 (1986) (presumption of unreviewability encourages Reagan administration's policy of deregulation through inaction).

Despite its shortcomings, *Chaney* is the law and has been widely applied. *See, e.g.*, International Union, United Auto. Implement Workers of Am. v. Brock, 783 F.2d 237, 244-45 (D.C. Cir. 1986) (decision not to enforce reporting requirements of the Labor-Management Reporting and Disclosure Act unreviewable); Falkowski v. EEOC, 764 F.2d 907, 910 (D.C. Cir. 1985) (Department of Justice's decision not to provide counsel unreviewable), *cert. denied*, 478 U.S. 1014 (1986); Sierra Club v. Block, 615 F. Supp. 44, 47-48 (D. Colo. 1985) (applying *Chaney* to Department of Agriculture's failure to claim federally reserved water rights).

[49] *See, e.g.*, Vitarelli v. Seaton, 359 U.S. 535, 539-40 (1959) (dismissal of employee ineffective because Department of Interior failed to afford procedural rights granted by its regulations); Service v. Dulles, 354 U.S. 363, 388-89 (1957) (discharge of Foreign Service Officer in noncompliance of Regulations of Department of State invalid); California Human Dev. Corp. v. Brock, 762 F.2d 1044, 1049 (D.C. Cir. 1985) (Labor Department's allocation of funds subject to conformance to its own regulations). *But see* Sunstein, *supra* note 1, at 680 (failure to enforce agency regulations not grounds for judicial intervention). The *Center for Auto Safety* court added that the *Service* principle also applied to nonenforcement decisions. *See* 828 F.2d at 808. It is submitted that the decision to extend the *Service* principle to agency inaction completely disregards the four reasons set out in *Chaney*. *See supra* note 5 (discussing *Chaney* rationale).

this approach, the analysis is the same as the traditional "law to apply" test because once the *Center for Auto Safety* court decided that the agency's regulations provided the "law to apply," the court's inquiry did not have to proceed any further.[50] Here again, however, the court failed to recognize that the proper standard was the "reasonable possibility of issuance of the requested order,"[51] which left intact the statutory discretion evidenced by the NHTSA's prior decision not to institute the final determination in *Lewis*.[52] The second approach, argued by Judge Bork in his dissent, is that although the *Chaney* court explicitly held that the presumption of unreviewability was under section 701(a)(2), the Court distinguished subsections (a)(1) and (a)(2) while commenting on the "no law to apply" statement in *Citizens to Preserve Overton Park, Inc.*, a case which did not involve an agency's decision not to act.[53] Furthermore, the fact that the two subsections have common features under the general presumption of reviewability and that the *Chaney* court spoke in general language, led Judge Bork to argue that the *Chaney* court intended the presumption of unreviewability to be applied generally to both subsections.[54]

An alternative approach, it is submitted, is the most logical and correct interpretation of *Chaney*. It is suggested that agency inaction, which is committed to agency discretion, triggered the *Chaney* presumption of unreviewability, thus distinguishing *Center for Auto Safety* from other affirmative action cases governed by the normal presumption of reviewability and requiring a test other than the traditional "law to apply" test. The *Center for Auto Safety* court recognized that a different test was required but disposed of the issue by concluding that the agency's own regulations sufficiently rebutted *Chaney*.[55] The *Chaney* court provided that the means to overcome the presumption could be derived

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[50] *See Center for Auto Safety*, 828 F.2d at 803.

[51] *See* 49 C.F.R. § 552.8 (1987); *see also* supra note 41.

[52] *See supra* notes 40-42 and accompanying text.

[53] *See Center for Auto Safety*, 828 F.2d at 819-20 (Bork, J., dissenting).

[54] *See id.* (Bork, J., dissenting).

[55] *See id.* at 803. The court considered the first rationale of *Chaney* and concluded that the " 'reasonable possibility' of a safety-related defect" standard ruled out the resources factors. *See id.* This conclusion is contrary to past NHTSA policy and actions as evidenced by *Lewis* and the Secretary's letter to the Chairman of the House Committee on Interstate and Foreign Commerce. *See id.* at 804-09. Additionally, the court did not consider other *Chaney* concerns.

from the substantive statute and any congressional limitation of the agency's exercise of enforcement power, which necessarily involves a determination of congressional intent.[56] Therefore, if the underlying statute grants broad discretion without providing the "law to apply," and the agency decides not to open an enforcement investigation, the court must construe the statute to determine whether the presumption of unreviewability is rebutted.[57] In *Center for Auto Safety*, there was ample statutory evidence that the Act favored preclusion of review; thus, the *Chaney* presumption was not rebutted, but rather, strengthened.[58]

It may seem that the second and the last approach amount to the same result. It is suggested, however, that the crucial distinction is that the latter approach does not apply the *Chaney* presumption to all agency inaction, but only to those decisions which are committed to an agency's discretion within the meaning of section 701(a)(2). Then, and only then, will the *Chaney* presumption operate and then the court must examine the congressional intent to determine whether the presumption is sufficiently overcome.

CONCLUSION

To conclude that the court had authority to review the NHTSA's decision not to investigate, the *Center for Auto Safety* court relied on the NHTSA's own regulations to provide the "law to apply" and on a statutory construction that failed to consider all the necessary elements. In special circumstances of agency inaction committed to agency discretion, the *Chaney* presumption should not be rebutted by mere presence of the "law to apply" in the agency's regulations. Under the circumstances, courts should examine the intent of Congress, embodied in the statute under which

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[56] *See* Heckler v. Chaney, 470 U.S. 821, 832-33 (1985). The Court also stated that "[i]n 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." *Id.* at 838.

[57] *See id.* at 839 (Brennan, J., concurring). Justice Brennan emphasized the need for contrary congressional intent to defeat the presumption of unreviewability by concluding: "Individual, isolated nonenforcement decisions, however, must be made by hundreds of agencies each day. It is entirely permissible to presume that Congress has not intended courts to review such mundane matters, absent . . . some indication of congressional intent to the contrary . . . ." *Id.*

[58] *See supra* notes 28-31 and accompanying text (discussing the Act and analyzing its legislative history).

the agency operates, when determining the reviewability of an administrative agency's decision.

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