ADMINISTRATIVE LAW

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Control of Agencies by Default

The Courts and Administrative Law

So far, Chapter 1 introduced you to the concept of the administrative state and raised questions about democratic accountability. In Chapter 2, the argument was made that the president (especially Republican presidents) may possess the will to control agency rule making, but the office simply lacks the raw constitutional power to do so. In Chapter 3, you learned that although Congress possesses the power to control agency rule making, it generally lacks the will to exercise that power. As with presidents, Republican majorities in Congress may be possessed of more of a will to control bureaucracy than Democrats, but they have not had the votes to exercise that control. Congress made some earnest attempts to try to pass broad regulatory reform legislation as guidance legislation between 1995 and 1999 but did not have the votes to get it passed. Congress did adopt congressional review but, except for ergonomics regulation, has not used it. Congress seems content with occasional agency-specific attacks, having delegated the power to control agency activity to the White House, and with verbal assaults on bureaucracy on the House and Senate floors. The basic problem with delegating control to the Office of Management and Budget (OMB) is that it only works when there is a Republican in the White House. If a Democrat is president when Republicans control Congress, the latter could try to impose congressional review, but achieving their goal is unlikely unless the Republicans have veto-proof majorities.

If any branch of government is going to exercise control over the administrative state, perhaps that task will fall to the courts. To the extent that courts attempt to exercise control over agencies, administrative law is the tool they use. If we must look to the judicial branch for control over the administrative state, then democracy is in trouble because the judicial branch of government (especially at the federal level but in some states, too) is an undemocratic institution. Federal judges are appointed for a life term (literally a job for life) by design so they will have the institutional freedom to interpret the Constitution without fear of political or partisan reprisal. If, by default, control of one undemocratic institution (the administrative state) falls to another undemocratic institution (the judicial branch), how democratic can our system be?

Impediments to Judicial Control of Agencies

Not only is the federal judicial branch an undemocratic institution, but for a number of reasons, courts are particularly unsuited to play a watchdog role over agencies:

1. *Judicial temperament.* Judges are first of all lawyers, and they all learned the law by examination of precedent. Judicial decision making is dependent on past decisions. Most judges, whether elected or not, see the courts as a conflict resolution institution rather than a policy-making institution.[1]

2. *Deference to expertise.* Throughout the remainder of this book, you will read case after case in which the courts have deferred to agency expertise. That is because courts, judges, lawyers, and juries are not particularly suited to resolve conflicts concerning the optimum parts per million (PPM) of benzene in the air in the workplace, PPM of ozone or particulate matter in the air, the uses of embryonic research, or the availability of genetically altered foods in the food supply. Questions like these are why the administrative state is a reality. Although it may not necessarily reflect judicial deference to agency expertise, research demonstrates that several of the current Supreme Court justices frequently decide in favor of the agencies. A 1990 study (that would not have included Justices Thomas, Ginsburg, or Breyer) indicates that during the 1986–87 term, the Supreme Court sided with the agencies more than 70 percent of the time.[2] Table 4.1 presents a list of current justices of the Supreme Court who were on the Court during the 1986 term; their votes siding with agencies are expressed as a percentage of all administrative law cases in which they participated.

3. *Passive decision making.* Refer again to the case of *Clinton v. New York* at the end of Chapter 2, the line item veto case in which six Supreme Court justices said the line item veto was unconstitutional. Those six justices probably knew it was unconstitutional when Congress passed the Act, but they had to wait for someone to challenge the Act in court before they could decide on the case. Courts are passive decision makers. That means judges must wait for a proper lawsuit before they can exercise decision-making authority. That is not true of the other two branches of government, the legislative and the executive.

4. *Constraints on judicial power.* Besides having to wait before they can act, judges also encounter institutional constraints on their exercise of judicial power. Courts must be certain that various threshold criteria are met before they can decide a case. The field of administrative law has even more threshold criteria to be met than other areas of the law. The remainder of this chapter is an examination of those constraints.

Table 4.1 Sitting Members of the U.S. Supreme Court and Percentage of Administrative Law Cases in Which They Supported the Agency (1986–87)

O'Connor	76.6%
Rehnquist	72.3%
Scalia	67.4%
Stevens	63.8%
Kennedy	62.5%

NOTE: The other current Supreme Court justices had not been appointed when the study was done.

SOURCE: Richard A. Brisbin, Jr., "The Conservatism of Antonin Scalia," 105 *Political Science Quarterly* 13 (Spring 1990).

Case in Point: *Steel Company, aka Chicago Steel and Pickling Co. v. Citizens for a Better Environment (CBE)* 523 U.S. 88 (1998)

The Emergency Planning and Community Right to Know Act of 1986 (EPCRA) establishes a framework of state, regional, and local agencies designed to inform the public about the presence of hazardous and toxic chemicals. It also provides for an emergency response in the event of a health-threatening release of toxic chemicals. The law accomplishes its goal of informing the public by requiring businesses that use hazardous and toxic chemicals to submit annual reports of such use to the Environmental Protection Agency (EPA), as well as to state and local agencies. Hence, the public will know which hazardous materials are "in the area" in company inventories and be apprised of the nature, quantity, and disposal method of toxic chemicals. The EPCRA reporting requirements went into effect in 1988. EPCRA can be enforced in many ways: The EPA can seek criminal, civil, or administrative penalties for reporting violations; state governments can seek civil penalties or equity relief in the form of injunctions; or this statute, like many others, authorizes a private citizen to sue as a means of enforcement. "Any person may commence a civil action on his own behalf against . . . an owner or operator of a facility for failure, among other things" to submit the proper reports. As a prerequisite for filing a citizen suit, the potential plaintiff must notify the EPA, state and local agencies, and the alleged violator 60 days before commencing the suit. The citizen suit will not be allowed to proceed if either the EPA or state or local governments plan legal action against the alleged violator.

Chicago Steel had hazardous material in its inventory and was disposing of toxic chemicals, making the company subject to EPCRA reporting requirements. Citizens for a Better Environment (CBE) is an environmental watchdog group, or as the Court described it, "an association of individuals interested in environmental protection." Chicago Steel ignored the EPCRA reporting requirements until it got caught by CBE. On receiving the 60-day notice of intent to file a citizens enforcement suit, Chicago Steel filed all the required reports with all the relevant agencies. The EPA decided not to bring any legal or administrative action. The state of Illinois also decided not to sue, so CBE filed its citizen suit when the 60-day waiting period expired. Chicago Steel filed motions to dismiss the suit.

This is a unique and complex case that resulted in a unanimous Supreme Court decision. But the 9 to 0 decision had a majority opinion of only three. Justice Scalia wrote the Court opinion, joined by Justices Rehnquist and Thomas. Justices O'Connor and Breyer joined part of Scalia's opinion and concurred with the rest of it. Justice O'Connor wrote a concurring opinion that was joined in part by Justice Kennedy. Justice Breyer wrote a concurring opinion, and Justice Stevens wrote a concurring opinion that was joined in part by Souter and Ginsburg. Two questions were before the Court: (1) Does EPCRA authorize suit for "purely historical violations" of the reporting requirement? Because Chicago Steel was absolutely current in compliance with reporting requirements when the suit was filed, the alleged (and admitted) violations were purely historical. The answer to this legal question is not obvious from the language in the statute, and reasonable people can disagree. (2) The second legal question involves one of those constraints on the exercise of judicial power mentioned above. The question was whether CBE has standing to bring this suit.

As you will read shortly in this chapter, there are several impediments to the exercise of judicial power. A plaintiff in any suit must offer proof that there is a real (not hypothetical) conflict between the parties, that the suit is timely, that the court has jurisdiction, and that the plaintiff is the proper party to bring the suit. The concept of standing is the later question (is the plaintiff the proper party to file this suit?). The Court has developed several tests for standing depending on the type of legal action. The standing test at issue in this case is a three-pronged test: (1) injury in fact, (2) traceability, and (3) redressability. Injury in fact means whether the plaintiff has suffered a demonstrable injury. Traceability gets at causality. It asks whether the injuries suffered by the plaintiff are fairly traceable to the actions of the defendant. Redressability gets at remedies. Every lawsuit must ask the court for a remedy or remedies to compensate the plaintiff for the injuries caused by the defendant. Redressability addresses the issue of whether the plaintiff's injuries can be redressed (remedied) by a favorable court decision. If a favorable court decision will not be of help, then you should not be in court. The plaintiff bears the burden of proving that all three elements of the standing test have been met.

Do you think the CBE has standing to sue Chicago Steel? Before you say, "I don't see an injury," you should know that legal injuries do not necessarily have to be economic. Indeed, even aesthetic injuries have been litigated. CBE says it reports to its members, the public, and the media about the storage and release of toxic materials. It seeks to reduce hazardous and toxic materials in the environment, and it promotes enforcement of environmental laws. CBE says that when companies like Chicago Steel flagrantly violate toxic reporting requirements and hide the presence of hazardous and toxic materials from the public, CBE is prohibited from doing what it exists to do, and its members cannot be accurately informed. Realizing that for fiscal and political reasons the EPA and state governments might not effectively enforce EPCRA, Congress authorized citizen suits for just such a purpose.

Now do you think CBE has standing to sue Chicago Steel? Do you think the Supreme Court said CBE could sue Chicago Steel? Do you think the Supreme Court would allow a business to flagrantly violate the law and get away with it? The Court decided that CBE did not have standing to sue Chicago Steel. The Court was not certain whether there was an injury in fact: "(this Court has) not had occasion to decide whether being deprived of information that is supposed to be disclosed . . . is a concrete injury in fact." The Court passed on the injury question saying that CBE lacked redressability.

In its suit, CBE asked the court to declare the company to be in violation of EPCRA. The company admits it. There is no controversy over this, and such a declaration will not help CBE. CBE asked for fines of $25,000 a day for two violations during the period the company was in violation ($25,000 a day times two for several years). However, by statute, if the money was awarded by the court, it would go into the U.S. Treasury, not into CBE coffers. CBE asked the Court to authorize CBE inspections of the company's records and its facilities, but because CBE failed to allege that the company would violate EPCRA in the future, this would amount to inspection for past violations that everyone admits took place.

Finally, CBE asked the Court for reimbursements for investigative costs (what it cost CBE to find out about the company's lawlessness). CBE also asked to be reimbursed for reasonable attorney fees. However, according to Justice Scalia,

> A plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the costs of bringing the suit. The litigation must give the plaintiff some other benefit besides reimbursement of costs that are a by-product of the litigation itself . . . CBE finds itself, in other words, impaled upon the horns of a dilemma: for the expenses to be reimbursable under the statute, they must be costs of litigation; but reimbursement of the costs of litigation cannot alone support standing.[3]

Even if the Court granted CBE everything it asked for in its suit, CBE would be no better off than it was before the suit. Hence, there is no redressability. If a favorable decision will not help CBE, then CBE should not be in court.

CBE could not sue, so Chicago Steel did indeed get away with flagrantly breaking the law. The point is that there are institutional constraints on the exercise of judicial power, and standing is only one of them.

General Constraints on the Exercise of Judicial Power

Jurisdiction

Before a court can hear a case, it must have the power to resolve that particular conflict. That power is called jurisdiction, and it is conferred on courts by constitutions (state or federal) or by legislatures (state or federal).

Article III of the federal Constitution, for instance, confers the jurisdiction on federal courts to hear cases or controversies involving conflicts that may arise under either the Constitution or laws of the federal government. It goes on to give Congress the power to set jurisdiction for federal courts for cases they can hear on review (called *appellate jurisdiction*). Jurisdiction can be a complicated concept, and in some cases, the issue before the court is whether the court has jurisdiction to hear the case. Not only do courts need to have jurisdiction over a conflict to resolve it, but agencies can only act within the jurisdiction given them by Congress. In the Tobacco Case *(Food and Drug Administration v. Brown and Williamson Corp,* 529 U.S. 120 [2000]*)* at the end of the last chapter, the question was whether the FDA had the jurisdiction to regulate tobacco products. When the California Dental Association prohibited advertising for discount dental services and advertising about the quality of dental care, the Federal Trade Commission (FTC) filed a complaint in federal court alleging restraint of trade by prohibiting truthful and nondeceptive advertising. One of the legal issues in the case was whether the FTC has the jurisdiction to regulate a nonprofit professional association. As is often the case, the answer to that question is not obvious by the language in the statute, but the Supreme Court decided that the FTC did have the jurisdiction.[4] A more dramatic example of an agency found to be acting beyond its jurisdiction can be found in *Bowen v. American Hospital Association.*[5] Apparently, one way for parents, doctors, and hospitals to deal with severely deformed babies is to simply withhold food and life-sustaining treatment. When the Department of Health and Human Services (HHS) documented the extent of such inaction, it adopted regulations that would forbid the practice in any medical facility that received federal money. The HHS said it got the authority (read jurisdiction) to adopt the regulations from Section 504 of the Rehabilitation Act of 1973. That section reads in pertinent part, "No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance." When HHS got sued by the American Hospital Association, the American Medical Association, and others, the Supreme Court said that HHS lacked the jurisdiction to adopt the regulations. When President Clinton dropped Major Goldsmith from the rolls of the Air Force, the major appealed to the Court of Appeals for the Armed Forces (CAAF). The CAAF issued an injunction against the president, but the Supreme Court said that the CAAF lacked jurisdiction to hear the case.[6] The Illinois Council on Long Term Care, Inc., sued the secretary of health and human services, Donna Shalala, in Federal District Court, alleging that certain Medicare regulations violated the Constitution. However, Congress has established a special internal appeals process for social security and Medicare problems, and the Supreme Court found that the district court was without jurisdiction to hear the case.[7] So, one of the first hurdles in a lawsuit is whether the court has jurisdiction to hear the dispute. In a civil lawsuit, the plaintiff has the burden of establishing that the court has jurisdiction over the subject matter of the lawsuit, that it has jurisdiction over both of the parties to the suit, and in some cases, that the court has jurisdiction over property that may be involved in the suit. In the administrative law context, jurisdictional questions are more common where the question is whether an agency acted within its jurisdiction. Generally, federal courts have jurisdiction when one sues an agency. That is because agencies nearly always act pursuant to a federal law; thus, the issue becomes what is referred to as a federal question, and that gives federal courts jurisdiction.

Standing

You are already somewhat familiar with the issue of standing because of the Case-in-Point. Standing is the concept that limits who can sue. Generally, one cannot sue the government or a government actor unless the plaintiff is the one who suffered an injury as a result of that government action. How the courts define or interpret the concept of standing is important. The narrower the interpretation, the smaller the class of people who can use the courts for redress of an administrative decision or action.

In administrative law, court interpretations about who is a proper party to challenge an administrative action were at first very narrow and constrictive. The U.S. Supreme Court broadened the concept of standing in the late 1960s and into the 1970s, but as evidenced by the CBE Case and the Lujan Case, which you will read shortly, the Rehnquist Court seems to be in the process of narrowing the concept of standing again.

Prior to broadening the concept of standing, the courts applied a test referred to as the *legal interest test.* This meant that an administrative action could not be challenged unless the challenger could show a legally protected interest had been adversely affected. The simple fact that the challenger suffered economic loss because of an administrative action was not enough by itself. That economic loss had to be covered by an existing legal right, such as contract law (breach of contract), property law, probate law, tort law, and so on.

The case that rejected the legal interest test and broadened the class of people who could challenge administrative action was *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 159 (1970). In this case, Mr. Camp, the comptroller of the currency, promulgated the following rule: "Incidental to its banking services, a national bank may make available its data processing equipment or perform data processing services on such equipment for other banks and bank customers." The plaintiff in this case is a trade association of data processing companies that provide data processing services to businesses. Assume for the moment that the businesses and corporations making up the Association of Data Processing Service Organizations control 75 to 90 percent of the market that supplies data processing to businesses. If the national banks are allowed to enter that market, they will cut into the profits of the businesses belonging to the trade association. That reduction of profit is the very definition of economic injury, especially in light of the fact that Section 4 of the Bank Service Corporation Act says, "No bank service corporation may . . . engage in any activity other than the performance of banking services for banks."

Despite the fact that the Administrative Procedure Act grants standing to challenge an administrative action to a person "aggrieved by agency action within the meaning of a relevant statute" (see Section 702 of the Administrative Procedure Act in Appendix A), the district court dismissed the suit, saying the Association of Data Processing Service Organizations lacked standing to challenge the comptroller's action. The district court said (and the circuit court of appeals affirmed) that "a Plaintiff may challenge an alleged illegal competition when as complainant it pursues—1) a legal interest by reason of public . . . charter or contract . . . 2) a legal interest by reason of statutory protection."[8] Because in this case there was no breach of contract or a statute that conferred a special privilege on the data processors, the lower federal courts, following precedent, dismissed the suit. The Supreme Court reversed, creating a two-pronged test for standing to challenge administrative action.

Subsequent to the *Camp* decision, to establish standing, a plaintiff or petitioner needed only to show the following:

1. injury in fact;
2. that the action complained of is arguably under the zone of interest meant to be protected by a particular statute.

The first prong, injury in fact, means that people challenging an administrative action needed only to show that the action or decision caused them some definable injury, economic or otherwise (aesthetic, conservational, or maybe even recreational), and it need not be tied to a legal right or interest.

The second prong of the test is tied to the Administrative Procedure Act, which confers standing on people aggrieved by agency action "*within the meaning of a relevant statute* [italics added]." That is, people challenging agency action must argue (a) that they have suffered some demonstrable injury from agency action, and (b) that the agency action falls under a statute that arguably protects the plaintiff from such action. To apply the first part of the test in this case, the injury in fact is lost profits and, indeed, a lost contract.

The petitioners not only allege that competition by national banks in the business of providing data processing services might entail some future loss of profits for the petitioners, they also allege that respondent American National Bank and Trust was performing or preparing to perform such services for two customers for whom petitioner, Data Systems, Inc., had previously agreed or negotiated to perform such services.[9]

Regarding the second part of the test, the agency action arguably falls under the zone of interest meant to protect the person challenging the agency action, because in this case, the plaintiffs contend the Bank Services Corporation Act strictly limits banks to banking. Hence, arguably, the Act should protect them from the comptroller's policy.

Question

1. What result do you get when you apply the two-pronged test to what you know about the CBE case?

Lujan v. Defenders of Wildlife
504 U.S. 555(1992)

Defenders of Wildlife (DOW) is suing Secretary of the Interior Lujan for a declaratory judgment against a rule promulgated by the Department of Interior (DOI) in 1986. The suit also asks the court to require the Secretary to promulgate a new rule. The Endangered Species Act of 1973 delegates primary enforcement to the DOI. The law requires the Secretary to identify endangered species and their habitat. Further the law requires that all other federal agencies consult with the Secretary prior to taking any action that might adversely impact an endangered species or its habitat. In 1979 DOI promulgated a rule extending the consultation requirement to actions contemplated by federal agencies to be taken overseas. In 1986 the Reagan administration promulgated the rule challenged here that restricts the consultation provision to domestic situations (i.e., not to overseas actions). The crux of the Plaintiff's (DOW) argument is that the Agency for International Development (AID) loaned funds to Egypt and Sri Lanka for water projects that will negatively impact on the habitats of elephants, leopards, and crocodiles (all endangered species) and that AID did so without consulting with the Secretary of Interior. Such consultation would have been required prior to the 1986 change in the requirement.

The opinion was written by Justice Scalia and joined by Justices White and Thomas and Chief Justice Rehnquist. Concurring opinions were by Justice Kennedy, joined by Justices Souter and Stevens; Justice Blackmun joined by Justice O'Connor dissented.

This case involves a challenge to a rule promulgated by the Secretary of the Interior interpreting § 7 of the Endangered Species Act of 1973 (ESA), 87 Stat. 884, in such fashion as to render it applicable only to actions within the United States or on the high seas. The preliminary issue, and the only one we reach, is whether respondents here, plaintiffs below, have standing to seek judicial review of the rule.

I

The ESA, as amended, seeks to protect species of animals against threats to their continuing existence caused by man. The ESA instructs the

Secretary of the Interior to promulgate by regulation a list of those species which are either endangered or threatened under enumerated criteria, and to define the critical habitat of these species.

In 1978, the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), on behalf of the Secretary of the Interior and the Secretary of Commerce respectively, promulgated a joint regulation stating that the obligations imposed by § 7(a)(2) extend to actions taken in foreign nations. The next year, however, the Interior Department began to reexamine its position. A revised joint regulation, reinterpreting 7(a)(2) to require consultation only for actions taken in the United States or on the high seas, was proposed in 1983, 48 Fed.Reg., and promulgated in 1986, 50 CFR 402.01 (1991).

Shortly thereafter, respondents, organizations dedicated to wildlife conservation and other environmental causes, filed this action against the Secretary of the Interior, seeking a declaratory judgment that the new regulation is in error as to the geographic scope of § 7(a)(2) and an injunction requiring the Secretary to promulgate a new regulation restoring the initial interpretation. The District Court granted the Secretary's motion to dismiss for lack of standing. *Defenders of Wildlife v. Hodel,* 658 F.Supp. 43 (Minn.1987). The Court of Appeals for the Eighth Circuit reversed by a divided vote. *Defenders of Wildlife v. Hodel,* 851 F.2d 1035 (1988). On remand, the Secretary moved for summary judgment on the standing issue, and respondents moved for summary judgment on the merits. The District Court denied the Secretary's motion, on the ground that the Eighth Circuit had already determined the standing question in this case; it granted respondents' merits motion and ordered the Secretary to publish a revised regulation. *Defenders of Wildlife v. Hodel,* 707 F.Supp. 1082 (Minn.1989). The Eighth Circuit affirmed. 911 F.2d 117 (1990). We granted certiorari. . . .

[3][4] Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Simon v. Eastern Ky. Welfare Rights Organization,* 426 U.S. 26, 41-42 (1976). Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

[5][6][7] The party invoking federal jurisdiction bears the burden of establishing these elements. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation. . . .

[8] When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury and that a judgment preventing or requiring the action will redress it. When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well. The existence of one or more of the essential elements of standing "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," also *Simon,* supra, 426 U.S., at 41-42, and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or

will be made in such manner as to produce causation and permit redressability of injury.

A

[9][10] Respondents' claim to injury is that the lack of consultation with respect to certain funded activities abroad "increas[es] the rate of extinction of endangered and threatened species." Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing. "But the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." To survive the Secretary's summary judgment motion, respondents had to submit affidavits or other evidence showing, through specific facts, not only that listed species were in fact being threatened by funded activities abroad, but also that one or more of respondents' members would thereby be "directly" affected apart from their "'special interest' in th[e] subject." See generally *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 343,(1977).

[11][12] With respect to this aspect of the case, the Court of Appeals focused on the affidavits of two Defenders' members—Joyce Kelly and Amy Skilbred. Ms. Kelly stated that she traveled to Egypt in 1986 and "observed the traditional habitat of the endangered Nile crocodile there and intend[s] to do so again, and hope[s] to observe the crocodile directly," and that she "will suffer harm in fact as the result of [the] American . . . role . . . in overseeing the rehabilitation of the Aswan High Dam on the Nile . . . and [in] develop [ing] . . . Egypt's . . . Master Water Plan." Ms. Skilbred averred that she traveled to Sri Lanka in 1981 and "observed th[e] habitat" of "endangered species such as the Asian elephant and the leopard" at what is now the site of the Mahaweli project funded by the Agency for International Development (AID), although she "was unable to see any of the endangered species"; "this development project," she continued, "will seriously reduce endangered, threatened, and endemic species habitat including areas that I visited . . . [which] may severely shorten the future of these species"; that threat, she concluded, harmed her because she "intend[s] to return to Sri Lanka in the future and hope[s] to be more fortunate in spotting at least the endangered elephant and leopard." When Ms. Skilbred was asked at a subsequent deposition if and when she had any plans to return to Sri Lanka, she reiterated that "I intend to go back to Sri Lanka," but confessed that she had no current plans: "I don't know [when]. There is a civil war going on right now. I don't know. Not next year, I will say. In the future."

We shall assume for the sake of argument that these affidavits contain facts showing that certain agency-funded projects threaten listed species—though that is questionable. They plainly contain no facts, however, showing how damage to the species will produce "imminent" injury to Mses. Kelly and Skilbred. That the women "had visited" the areas of the projects before the projects commenced proves nothing. As we have said in a related context, "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *Lyons,* 461 U.S., at 102, 103. And the affiants' profession of an "inten[t]" to return to the places they had visited before—where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species—is simply not enough. Such "some day" intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the "actual or imminent" injury that our cases require.

Besides relying upon the Kelly and Skilbred affidavits, respondents propose a series of novel standing theories. The first, inelegantly styled "ecosystem nexus," proposes that any person who uses any part of a "contiguous ecosystem" adversely affected by a funded activity has standing even if the activity is located a great distance away. This approach, as the Court of Appeals correctly observed, is inconsistent with our opinion in *National Wildlife Federation,* which held that a plaintiff claiming injury from environmental damage must use the area affected by the challenged activity and not an area roughly "in the vicinity" of it.

[14] Respondents' other theories are called, alas, the "animal nexus" approach, whereby

anyone who has an interest in studying or seeing the endangered animals anywhere on the globe has standing; and the "vocational nexus" approach, under which anyone with a professional interest in such animals can sue. Under these theories, anyone who goes to see Asian elephants in the Bronx Zoo, and anyone who is a keeper of Asian elephants in the Bronx Zoo, has standing to sue because the Director of the Agency for International Development (AID) did not consult with the Secretary regarding the AID-funded project in Sri Lanka. This is beyond all reason.

B

Besides failing to show injury, respondents failed to demonstrate redressability. Instead of attacking the separate decisions to fund particular projects allegedly causing them harm, respondents chose to challenge a more generalized level of Government action (rules regarding consultation), the invalidation of which would affect all overseas projects. This programmatic approach has obvious practical advantages, but also obvious difficulties insofar as proof of causation or redressability is concerned. As we have said in another context, "suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations . . . [are], even when premised on allegations of several instances of violations of law, . . . rarely if ever appropriate for federal-court adjudication." *Allen*, 468 U.S., at 759-760.

[15] The most obvious problem in the present case is redressability. Since the agencies funding the projects were not parties to the case, the District Court could accord relief only against the Secretary: He could be ordered to revise his regulation to require consultation for foreign projects. But this would not remedy respondents' alleged injury unless the funding agencies were bound by the Secretary's regulation, which is very much an open question.

The short of the matter is that redress of the only injury in fact respondents complain of requires action (termination of funding until consultation) by the individual funding agencies; and any relief the District Court could have provided in this suit against the Secretary was not likely to produce that action.

[17] A further impediment to redressability is the fact that the agencies generally supply only a fraction of the funding for a foreign project. AID, for example, has provided less than 10% of the funding for the Mahaweli project. Respondents have produced nothing to indicate that the projects they have named will either be suspended, or do less harm to listed species, if that fraction is eliminated. . . .

[19] We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.

* * *

We hold that respondents lack standing to bring this action and that the Court of Appeals erred in denying the summary judgment motion filed by the United States. The opinion of the Court of Appeals is hereby reversed, and the cause is remanded for proceedings consistent with this opinion.

It is so ordered.

Justice Blackmun, with whom Justice O'Connor joins, dissenting.

I part company with the Court in this case in two respects. First, I believe that respondents have raised genuine issues of fact—sufficient to survive summary judgment—both as to injury and as to redressability. Second, I question the Court's breadth of language in rejecting standing for "procedural" injuries. I fear the Court seeks to impose fresh limitations on the constitutional authority of Congress to allow citizen suits in the federal courts for injuries deemed "procedural" in nature. I dissent.

I

Article III of the Constitution confines the federal courts to adjudication of actual "Cases" and "Controversies." To ensure the presence of a "case" or "controversy," this Court has held that Article III requires, as an irreducible minimum, that a plaintiff allege (1) an injury that is (2) "fairly traceable to the defendant's allegedly unlawful conduct" and that is (3) "likely to be redressed by the requested relief." *Allen v. Wright,* 468 U.S. 737, 751 (1984).

A

To survive petitioner's motion for summary judgment on standing, respondents need not prove that they are actually or imminently harmed. They need show only a "genuine issue" of material fact as to standing. Fed.Rule Civ.Proc. 56(c). This is not a heavy burden. A "genuine issue" exists so long as "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). This Court's "function is not [it]self to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." . . .

I think a reasonable finder of fact could conclude from the information in the affidavits and deposition testimony that either Kelly or Skilbred will soon return to the project sites, thereby satisfying the "actual or imminent" injury standard. . . .

I fear the Court's demand for detailed descriptions of future conduct will do little to weed out those who are genuinely harmed from those who are not. More likely, it will resurrect a code-pleading formalism in federal court summary judgment practice, as federal courts, newly doubting their jurisdiction, will demand more and more particularized showings of future harm. Just to survive summary judgment, for example, a property owner claiming a decline in the value of his property from governmental action might have to specify the exact date he intends to sell his property and show that there is a market for the property, lest it be surmised he might not sell again. A nurse turned down for a job on grounds of her race had better be prepared to show on what date she was prepared to start work, that she had arranged day care for her child, and that she would not have accepted work at another hospital instead. And a Federal Tort Claims Act plaintiff alleging loss of consortium should make sure to furnish this Court with a "description of concrete plans" for her nightly schedule of attempted activities. . . .

I find myself unable to agree with the plurality's analysis of redressability, based as it is on its invitation of executive lawlessness, ignorance of principles of collateral estoppel, unfounded assumptions about causation, and erroneous conclusions about what the record does not say. In my view, respondents have satisfactorily shown a genuine issue of fact as to whether their injury would likely be redressed by a decision in their favor. . . .

In conclusion, I cannot join the Court on what amounts to a slash-and-burn expedition through the law of environmental standing. In my view, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison,* 1 Cranch 137, 163, 2 L.Ed. 60 (1803).

I dissent.

Questions

1. The Court does not resolve the legal dispute in *Lujan* the same way it resolved standing in *Camp.* Does the Court offer an explanation of why it did not apply the precedent from *Camp?*
2. Can you find any mention of the "zone of interest" mentioned in the *Lujan* case?
3. What result do you think you would get in *Lujan* if the zone of interest test were applied?

Compare the results in *Lujan* and *Chicago Steel* with *Bennett v. Spear,* 520 U.S. 154 (1997). In *Bennett,* the U.S. Fish and Wildlife Service issued a biological opinion that claimed that long-term operation of the Klamath project would jeopardize the existence of two species of fish on the endangered species list. The Klamath project is a federal Bureau of Reclamation project in California and Oregon consisting of lakes, rivers, dams, and irrigation canals. The biological opinion said that maintaining minimum water levels in two of the lakes would solve the problem. When the Bureau of Reclamation notified the Fish and Wildlife Service and the public that it would operate the Klamath project in accordance with the biological opinion, two ranchers and two irrigation districts sued. Plaintiffs alleged that the mandated lake levels would adversely affect their use of water from the project and that the lake levels set by the Fish and Wildlife Service are not necessary to protect the fish. They attack the procedure used to support the biological opinion as well as its substance. Plaintiffs are suing the secretary of interior and certain Fish and Wildlife Service officials, and they are suing under a citizen-suit provision in the Endangered Species Act, just like the one CBE tried to use. The district court dismissed the suit saying that only plaintiffs with an interest in protecting endangered species fall under the zone of interest protected by the Act. The court of appeals affirmed, but the Supreme Court reversed and found standing. The Court said that the zone of interest protected by the Endangered Species Act is not limited to environmentalists and, furthermore, the plaintiffs demonstrated an injury in fact, traceability, and redressability.

Two variables are at work in these standing cases. The first variable is a constitutional separation of power variable that the courts have imposed to restrict the use of the judicial branch as a vehicle for those who would change public policy simply because they disagree with the policy. The courts refer to this standing aspect as *prudential standing.* The second variable relates to the parties involved in the dispute that the Court has been asked to resolve. One cannot sue on behalf of another person, and the plaintiff must be the injured party.

In a typical case, an agency has taken some action that adversely affects a business, corporation, industry, interest group, or individual. In Chapter 1, for example when the director of the EPA set new air quality standards that reduced the allowable PPM of certain pollutants, not only were individual businesses affected but so were industries and states. The same can be said for Secretary Dole's decision to restrict the effectiveness of the hazard communication standard. Workers who would not receive the warnings were adversely affected. Ditto for the secretary of labor's decision to reduce the PPM of benzene in the air from 10 to 1, which adversely affected petroleum producers' profits.

In situations like these, standing is not difficult because there is an obvious injury in fact and the injured party can show that a particular statute (or constitutional or common law provision) arguably protects them from the actions the agency has taken (i.e., the zone of interest test). The zone of interest test is meant to ensure that ordinary citizens like you and I do not attempt to use the judicial branch to change those public policies with which we disagree (we should use the legislative branch). However, those who are specifically injured by government action (the automobile industry, construction workers, and petroleum producers) do have standing to challenge the policy in court.

Less frequently, however, government action has affected an intervening or third party and that party's action theoretically adversely affects an injured party. The injured party then sues the government agency that started the chain reaction. Such was the case in *Lujan* (and also in *L.A. v. Lyons,* which appears at the end of this chapter).

The Defenders of Wildlife in the *Lujan* case are concerned with the actions of Egypt and Sri Lanka and only more remotely with AID and DOI. Basically, plaintiffs in such situations must argue that the government action (or inaction) caused another party to take some action (or inaction) that adversely affects the plaintiffs. In these third-party standing cases, the Court has created a three-pronged test:

1. Is there injury in fact?
2. Is the injury to the plaintiff fairly traceable to the defendant (i.e. the agency)?
3. If the Court were to grant the plaintiff the remedy requested, would that redress the plaintiffs' injury?

You are already familiar with the first prong, injury in fact. The second prong is referred to as *traceability,* a concept that relates to causality. That is, did the actions of the agency cause the harm to the plaintiffs? In *Lujan,* the Defenders of Wildlife cannot show that the threat to crocodiles, elephants, and leopards is caused by the failure of the DOI to review overseas projects for Endangered Species Act implications. Their injury was not fairly traceable to the DOI.

The third prong of the test, referred to as *redressability,* asks whether the courts can solve the plaintiff's problem. Although the Defenders of Wildlife had traceability problems in their suit against DOI, the Court concentrated on the redressability problem. To understand redressability, you have to know what remedy the plaintiffs have requested. The Defenders of Wildlife were asking the Court to reverse a DOI rule restricting the department's consultation under the Endangered Species Act to domestic projects. Even if the Court were to order Interior to consult on overseas projects related to endangered species, that would not necessarily prevent Egypt and Sri Lanka from proceeding with the projects that threaten crocodiles and elephants and leopards. Hence, according to the Court, Defenders of Wildlife cannot show redressability and lack standing to sue the DOI. Similarly, CBE could not show an injury or redressability in the *Chicago Steel* case. Given what you know about standing, do you think the following plaintiffs have standing to sue?

The mother of an illegitimate child sued a Texas prosecutor and the child's father. Texas had a law that made it a misdemeanor for "any person" to desert, neglect, or fail to provide support and maintenance to his or her child. The law imposed a two-year sentence on anyone convicted. The Texas courts, however, interpreted the law so that it only applied to the parents of children born while the parents were married (Texas imposed no legal duty on parents to support their illegitimate children). The mother in this case sued to require the prosecutor, who had otherwise refused following the Texas courts' interpretation, to prosecute the father for nonsupport. She also asked the federal court to impose reasonable child support on the father. Does she have standing? This 1973 case was an early case articulating the concept of redressability. What does the mother want? She wants child support. What will the mother get if the Court forces the prosecutor and Texas to prosecute the father? She will get the father thrown in jail for two years, but she will not get what she really wants—child support. She is asking the federal courts to force Texas to apply the law equally to the parents of illegitimate and legitimate children. She lacks standing because of redressability.[10]

The Internal Revenue Service (IRS) at one point in time had a rule that required a hospital seeking status as a charitable organization to provide service to those who cannot pay, "to the extent of its financial ability to do so." Status as a charitable organization is desirable because donations and gifts are tax deductible, and that, of course, encourages donations and gifts. When the IRS changed the rule so that hospitals could have charitable status without having to service the poor, the Eastern Kentucky Welfare Rights Organization sued. The plaintiff organization represents poor people and was able to prove that some members were denied hospital care because of their inability to pay. The hospitals that denied service received charitable status from the IRS. Plaintiffs challenged the revised IRS rule on charitable status, alleging that the new rule caused harm. Do you think the welfare rights organization has standing to sue the IRS? What injury has been suffered? The injury is denied medical care. Who caused that injury? The hospital caused it. This is a traceability case. Can you say that, absent the turnabout by the IRS, the individuals who were denied medical service would have received it? The Supreme Court said that the welfare rights organization lacks standing because it cannot show that the injury is fairly traceable to the actions of the IRS.[11] This case was decided in 1976, three years after the Texas case regarding child support.

In 1984, the IRS got sued again in *Allan v. Wright.*[12] This time Black parents who live in the South sued the IRS because it granted tax-exempt status to private schools that discriminate on the basis of race. Laws forbid such discrimination, and even the IRS at the time had a rule that required tax-exempt organizations not to discriminate on the basis of race. The parents, the Wrights, sued to force the IRS to abide by its rule of nondiscrimination. Although the IRS had a rule forbidding discrimination by tax-exempt organizations, it also had a policy that tax-exempt schools merely had to produce a policy statement of nondiscrimination as proof; whether or not the policy statement ever got implemented was not a matter of concern for the IRS. The Wrights attacked this policy in court. The Wrights never attempted to enroll their children in any of these private academies because the private schools were not accepting the applications of Black children. The Wrights sued alleging that their children's constitutionally protected right to attend racially integrated schools was thwarted by the IRS's implementation policy, which encourages white flight from the public schools to private academies. Do you think the Wrights had standing? Do you think this case is similar to the welfare rights case and to *Lujan?* The problem the Wrights faced is that, like poor people in need of medical care and the Defenders of Wildlife, their injury was caused by the private academies (or hospitals or Sri Lanka and Egypt) and not necessarily by agency action. Indeed, the Supreme Court was even at a loss to find that the Wrights had suffered any injury at all.

The *Lujan* case followed on the heels of *Allen v. Wright et al.* At least through *Lujan* in 1990, the Court applied the three-pronged test only in cases where a third party allegedly caused injury, but the plaintiffs were suing an agency. As you can tell from the *Chicago Steel* case, the Court now uses the three-pronged test in all situations, even where one private individual sues another private entity and the suit is specifically authorized by Congress (CBE sues Chicago Steel).

The case of the *Federal Election Commission v. Akins* at the end of this chapter is a good one because the Court applies both standing tests, the zone of interest test and the three-pronged test. The *Akins* case involves a group of voters who are opposed to the political activities of the American Israel Public Affairs Committee (AIPAC). The voters asked the Federal Election Commission (FEC) to find that AIPAC was a "political Committee" under the Federal Election Campaign Act of 1971. Such a finding would mean AIPAC had to disclose its membership list, contributions, and expenditures. The FEC found that AIPAC was not a political committee under the Act, and the voters challenged that decision in court. To find out whether the voters have standing, you will have to read the case.

Although this is an oversimplification, restricting access to the courts is generally based on a conservative, judicial self-restraint notion, and allowing broader access to the courts is a liberal or judicial activism notion. Currently, a majority of the Supreme Court justices could be called conservative. They were appointed by Presidents Nixon, Reagan, and Bush (Rehnquist, O'Connor, Scalia, Kennedy, and Thomas), and they have used the added concepts of traceability and redressability to restrict plaintiffs' ability to gain standing to challenge government action. Do not be lulled into the belief that concepts like traceability and redressability are neutral and objective criteria. Most of the Supreme Court decisions related to standing inspired spirited dissents. It appears to be true that environmentalist and civil rights plaintiffs have a difficult time meeting the three-pronged test requirements before the current Supreme Court.

Compare the results in *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville* (1993)[13] with *Allen v. Wright.* The City of Jacksonville had a minority business set-aside program (10 percent of all city contracts had to be let to minority businesses). The plaintiff is an association that represents contractors in Jacksonville who never bothered to bid on the contracts in question. They did not bid because they believed the contracts would be awarded to minority businesses. The Wrights never tried to enroll their children in the private academies. They did not attempt to enroll because private academies in the South are the modern vehicle for avoiding the requirements of *Brown v. Board of Education* and are not interested in the applications of Black children. While the Court was at a loss to find an injury, traceability, or redressability in *Allen,* it had no difficulty finding all three for the contractors. Indeed, Chief Justice Rehnquist has defined the jurisprudence of strict constructionism as voting against the defendant in criminal cases and against the plaintiff in civil rights cases,[14] regardless of the issues or the facts.

Timing Constraints

Two concepts are related to the timing of a lawsuit: ripeness and mootness. *Ripeness* means the plaintiff tried to file the suit too soon (before it was ripe for a judicial determination). *Mootness* occurs when the conflict that spurred the lawsuit no longer exists between the parties.

Ripeness

Ripeness in administrative law is not a frequent issue. Ripeness problems are somewhat checked in administrative law by two other concepts you will be introduced to shortly, namely exhaustion and primary jurisdiction. Exhaustion requires a potential plaintiff against an agency to try to resolve the dispute within the agency. Primary jurisdiction means that if a potential plaintiff has a choice between suing the agency in court or pursuing an appeal process within the agency, the plaintiff must go through the agency first. Hence, a person in conflict with an agency rarely turns to the courts before the conflict is ripe. You will occasionally come across the term *finality* in the cases you will read. That means you cannot challenge an agency action until the action is final. Finality is associated with ripeness because it means that the ultimate person within the agency must have decided on the issue before it can be ripe for judicial review. For example, prior to the 1990 census, the director of the Bureau of the Census decided to take the census with the help of sampling techniques. Ultimately, however, the secretary of commerce, who is the boss of the Census Bureau director, decided against using sampling to take the census. Finality was the secretary's decision, and the census bureau could not be sued over its decision to sample until the secretary acted.

Ripeness problems often occur when a plaintiff's injuries are in the future and speculative. For example, in 1940, Congress passed the Hatch Act, which forbids federal executive branch employees from campaigning in federal elections. At the time, the union representing federal workers sued the Civil Service Commission, seeking to have the Hatch Act declared unconstitutional as a violation of their freedoms of association and expression. In the complaint, the federal employees contended that they would like to engage in campaign activity but were afraid of arrest and loss of employment. The case was dismissed by the Supreme Court on the basis of ripeness. No one had been arrested, no one had been fired, and no one had engaged in illegal activity; the Civil Service Commission had taken no action against the plaintiffs. According to the Court, the injury was hypothetical, and the case was dismissed for want of a ripe controversy.[15]

In a similar case, the Immigration and Naturalization Service (INS) promulgated a rule that said the agency would treat resident aliens returning to the United States from outside the country as aliens attempting to enter the first time. This rule would potentially have had the most adverse impact on fishermen who travel to Alaska every year during the summer on commercial fishing boats. Their union sued the INS challenging the rule. The fishermen argued that some of them might not be allowed to reenter the country if the rule were allowed to stand. The suit was dismissed on ripeness grounds. The injury (potential inability of some resident aliens to return to the United States) was too speculative and hypothetical.[16] The most recent administrative law ripeness case involves the National Park Service and those who contract with it for concessions in our national parks.[17] The Contract Dispute Act (CDA) requires those who have contract disputes with the federal government to go through a certain procedure. The Act requires one or two attempts to settle within the agency and then allows for an appeal to the federal courts. In 1998, Congress passed the National Parks Omnibus Management Act. The Act establishes a management program for concessions in the national parks and delegates the power to promulgate rules for implementation to DOI. The DOI subdelegated the rule-making power to the National Park Service, which began to promulgate rules. In one of the rules it adopted, a concession contract was interpreted in such a way that the contracts would not fall under the Contract Dispute Act. A trade association that represented a concessioner in the national parks sued the National Park Service. As there was no contract in dispute yet under the new rules, the Supreme Court dismissed the suit for lack of ripeness.

The concept of speculative injury means that people need not wait for actual injury to occur before they can sue an agency. If agency action will cause imminent injury, the case is considered to be ripe. The Court said that the potential injury in the two cases above was "too remote" for judicial determination. For the classic administrative law ripeness case, see *Abbott Laboratories v. Gardner* 387, U.S. 136 (1967).

Mootness

Mootness is the opposite of ripeness. If a conflict has already been resolved by the time it gets to an appellate court, it may be moot, and the suit may be dismissed. The classic example of a mootness case (although it was not an administrative law case) is *DeFunis v. Odegaard*.[18] This was one of the early reverse discrimination cases. DeFunis was denied admission to law school while certain minority applicants who had lower admission statistics than his were admitted. He sued under the equal protection clause of the Fourteenth

Amendment, and a local judge issued an order forcing the law school to admit DeFunis until the courts could resolve the legal issue. By the time the case got to the Supreme Court, DeFunis had graduated from the law school and was a practicing attorney. There was no longer a legal conflict between DeFunis and the law school, so the case was dismissed as moot.

Constraints on the Exercise of Judicial Power That Are Unique to Administrative Law

Reviewability

As indicated earlier, the Constitution gives Congress the power to set the jurisdiction of federal courts in terms of the questions it can hear acting as a reviewing court, that is, as a court reviewing the decision of a lower court (or administrative agency) rather than acting as a trial court. Indeed, the ability to manipulate federal courts' appellate jurisdiction is a powerful tool in the check and balance system that Congress uses to check the courts. During the Civil War, for example, Congress withdrew federal court jurisdiction to review habeas corpus petitions from prisoners convicted by military tribunals (*Ex Parte McCardle,* 74 U.S. [7 Wall.] 506 [1869]). More recently, Congress limited federal court review of habeas corpus petitions from state prisoners on death row; see the Antiterrorism and Effective Death Penalty Act of 1996.[19]

In the context of administrative law, the decisions of administrative agencies were once covered by a common law presumption of unreviewability. That is, it was considered "mischief" for the courts to interfere with the performance of executive functions.[20] Only if Congress specifically authorized judicial review of an agency's action would the courts grant review. In Chapter 7 of the Administrative Procedure Act (see Appendix A), Congress specifically authorized judicial review of nearly all federal agencies' decisions: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof."[21]

Today, then, nearly all federal agency decisions are reviewable, but it is important to remember that this is the case only because Congress has said so. Indeed, that same section of the Administrative Procedure Act exempts from judicial review two situations: (a) those in which Congress has precluded judicial review by statute and (b) those in which agency action is committed to agency discretion by law.

The first of these exceptions is referred to as *statutory preclusion of judicial review.* The most often cited and litigated example of this preclusion involved the Veterans Administration (VA). In passing the Veterans Benefits Act of 1957, Congress said, "The decisions of the administrator on any question of law or fact . . . providing benefits for veterans and their dependents or survivors shall be final . . . and no . . . court of the United States shall have the power or jurisdiction to review any such decision."[22]

Despite the clarity of the language in the Veterans Benefits Act, the courts have found instances in which preclusion of review does not apply, and the courts have reviewed VA actions. Where a decision allegedly violated the free-exercise clause of the Constitution, the Court said statutory preclusion of judicial review did not apply (*Johnson v. Robinson,* 415 U.S. 361 [1974]). In that case, Robinson, a conscientious objector who served his time in alternate service as required by the draft laws, argued that the VA's decision to deny him benefits violated his free exercise of religion. While Congress can preclude judicial review of normal VA benefit denials, it cannot preclude judicial review of benefit denials that are alleged to violate the Constitution. Only the courts can judge constitutional claims. In a more recent case, the Court decided that the statutory preclusion of review did not apply where a decision of the VA ran counter to another congressional act that applied to all federal agencies.

Traynor v. Turnage
485 U.S. 535 (1988)

Traynor and other petitioners in this case are honorably discharged veterans who have not exhausted their education assistance benefits from the VA within ten years following their discharge. In passing the "GI Bill," Congress mandated that benefits must be used within ten years of discharge. Veterans may obtain an extension beyond the ten-year limit, however, if they were prevented from using the benefits "by a physical or mental disorder which was not the result of (their) own willful misconduct" (38 U.S.C. Sec 1662 [a] [1]).

Traynor, a recovering alcoholic, did not use his benefits within the ten-year limit due to his earlier alcoholism. Turnage, the administrator of the VA, enforced the agency's interpretation that "primary" alcoholism (alcoholism unrelated to an underlying psychiatric disorder) is "willful mis-conduct" and denied Traynor's application for a waiver from the ten-year limit.

Traynor argued that the VA's decision is prohibited by the Rehabilitation Act of 1973, which forbids federal agencies from discriminating against handicapped persons solely on the basis of the handicap (and alcoholism is considered to be a handicap).

The VA argued that the administrator's decisions "on questions of law or fact . . . providing benefits . . . shall be final . . . and no court of the U.S. shall have the power to review any such decision."

The district court held that judicial review was not foreclosed and invalidated the VA's interpretation relating to primary alcoholism as violating the Rehabilitation Act. The circuit court of appeals agreed on the question of reviewability but found the VA's interpretation relating to primary alcoholism to be rational and reasonable and not in conflict with the Rehabilitation Act.

Justice White wrote the opinion, joined by Justices Rehnquist, O'Connor, and Stevens and joined in part by Justices Brennan, Marshall, and Blackmun. Justices Scalia and Kennedy took no part in the decision.

We must first consider whether 211(a)'s bar against judicial review of "the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans" extends to petitioner's claim that the Veterans' Administration regulation defining primary alcoholism as "willful misconduct" discriminates against handicapped persons in violation of the Rehabilitation Act. We have repeatedly acknowledged "the strong presumption that Congress intends judicial review of administrative action." *Bowen v. Michigan Academy of Family Physicians,* 476 U.S. 667, 670 (1986); see also *Dunlop v. Bachowski,* 421 U.S. 560, 567 (1975); *Barlow v. Collins,* 397 U.S. 159, 166–167 (1970). The presumption in favor of judicial review may be overcome "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent." *Abbott Laboratories v. Gardner,* 387 U.S. 136, 141 (1967) (citations omitted). We look to such evidence as "'specific language or specific legislative history that is a reliable indicator of congressional intent,' or a specific congressional intent to preclude judicial review that is 'fairly discernible in the detail of the legislative scheme.'" *Bowen v. Michigan Academy of Family Physicians,* supra, at 673.

In *Johnson v. Robison,* supra, we held that the federal courts could entertain constitutional challenges to veterans' benefits legislation. We determined that "neither the text nor the scant legislative history of 211(a)" provided the requisite "clear and convincing" evidence of congressional intent to foreclose judicial review of challenges to the constitutionality of a law administered by the Veterans' Administration. 415 U.S., at 373–374. In that case, we reasoned that "the prohibitions [of 211(a)] would appear to be aimed at review only of those decisions of law or fact that arise in the administration by the Veterans' Administration of a statute providing benefits for veterans." 415 U.S., at 367. The questions of law presented in that case, however, arose under the Constitution rather than under the veterans' benefits statute and concerned whether there was a valid law on the subject for the Veterans' Administration to execute. We went on to conclude that the principal purposes of 211(a)—"(1) to insure that veterans' benefits claims will not burden the courts and the Veterans' Administration with expensive and time-consuming litigation, and (2) to insure that the technical and complex determinations and applications of Veterans' Administration policy connected with veterans' benefits decisions will be adequately and uniformly made," Id., at 370—would not be frustrated if federal courts were permitted to exercise jurisdiction over constitutional challenges to the very statute that was sought to be enforced. We noted that such challenges "cannot be expected to burden the courts by their volume, nor do they involve technical consideration of Veterans' Administration policy." Id., at 373.

The text and legislative history of 211(a) likewise provide no clear and convincing evidence of any congressional intent to preclude a suit claiming that 504 of the Rehabilitation Act, a statute applicable to all federal agencies, has invalidated an otherwise valid regulation issued by the Veterans' Administration and purporting to have the force of law. Section 211(a) insulates from review decisions of law and fact "under any law administered by the Veterans' Administration," that is, decisions made in interpreting or applying a particular provision of that statute to a particular set of facts. Id., at 367. But the cases now before us involve the issue whether the law sought to be administered is valid in light of a subsequent statute whose enforcement is not the exclusive domain of the Veterans' Administration. There is no claim that the regulation at issue is inconsistent with the statute under which it was issued; and there is no challenge to the Veterans' Administration's construction of any statute dealing with veterans' benefits, except to the extent that its construction may be affected by the Rehabilitation Act. Nor is there any reason to believe that the Veterans' Administration has any special expertise in assessing the validity of its regulations construing veterans' benefits statutes under a later-passed statute of general application.

Permitting these cases to go forward will not undermine the purposes of 211(a) any more than did the result in *Johnson*. It cannot be assumed that the availability of the federal courts to decide whether there is some fundamental inconsistency between the Veterans' Administration's construction of veterans' benefits statutes, as reflected in the regulation at issue here, and the admonitions of the Rehabilitation Act will enmesh the courts in "the technical and complex determinations and applications of Veterans' Administration policy connected with veterans' benefits decisions" or "burden the courts and the Veterans' Administration with expensive and time-consuming litigation." Id., at 370. Of course, if experience proves otherwise, the Veterans' Administration is fully capable of seeking appropriate relief from Congress. Accordingly, we conclude that the question whether a Veterans' Administration regulation violates the Rehabilitation Act is not foreclosed from judicial review by 211(a). We therefore turn to the merits of petitioners' Rehabilitation Act claim.

III

It is thus clear that the 1977 legislation cluded an extension of time to a veteran o had not pursued his education because primary alcoholism. If Congress had intended tead that primary alcoholism not be deemed illful mis-conduct" for purposes of 1662(a)(1), it had been deemed for purposes of other erans' benefits statutes, Congress most cernly would have said so.

Petitioners, however, perceive an inconsisncy between 504 and the conclusive presumpn that alcoholism not motivated by mental ness is necessarily "willful." They contend that 4 mandates an individualized determination "willfulness" with respect to each veteran who aims to have been disabled by alcoholism. would arguably be inconsistent with 504 for ongress to distinguish between categories of sabled veterans according to generalized eterminations that lack any substantial basis. If imary alcoholism is not always "willful," as at term has been defined by Congress and the eterans' Administration, some veterans denied enefits may well be excluded solely on the asis of their disability. We are unable to conlude that Congress failed to act in accordance vith 504 in this instance, however, given what he District of Columbia Circuit accurately charcterized as "a substantial body of medical literture that even contests the proposition that lcoholism is a disease, much less that it is a disase for which the victim bears no responsibilty." 792 F.2d, at 200–201. Indeed, even among many who consider alcoholism a "disease" to which its victims are genetically predisposed, the consumption of alcohol is not regarded as wholly involuntary. See Fingarette, The Perils of Powell: In Search of a Factual Foundation for the "Disease Concept of Alcoholism," 83 *Harv. L. Rev.* 793, 802–808 (1970). As we see it, 504 does not demand inquiry into whether factors other than mental illness rendered an individual veteran's drinking so entirely beyond his control as to negate any degree of "willfulness" where Congress and the Veterans' Administration have reasonably determined for purposes of the veterans' benefits statutes that no such factors exist.

In sum, we hold that a construction of 1662(a)(1) that reflects the original congressional intent that primary alcoholics not be excused from the 10-year delimiting period for utilizing "G. I. Bill" benefits is not inconsistent with the prohibition on discrimination against the handicapped contained in 504 of the Rehabilitation Act. Accordingly, since we "are not at liberty to pick and choose among congressional enactments . . . when two statutes are capable of coexistence," *Morton v. Mancari,* 417 U.S., at 551, we must conclude that the earlier, more specific provisions of 1662(a)(1) were neither expressly nor implicitly repealed by the later, more general provisions of 504.

This litigation does not require the Court to decide whether alcoholism is a disease whose course its victims cannot control. It is not our role to resolve this medical issue on which the authorities remain sharply divided. Our task is to decide whether Congress intended, in enacting 504 of the Rehabilitation Act, to reject the position taken on the issue by the Veterans' Administration and by Congress itself only one year earlier. In our view it is by no means clear that 504 and the characterization of primary alcoholism as a willfully incurred disability are in irreconcilable conflict.

If petitioners and their proponents continue to believe that this position is erroneous, their arguments are better presented to Congress than to the courts . . .

Questions

1. The court does review the VA decision; can you explain why?
2. Are there similarities between the reason for reviewing this VA decision and the decision in *Robinson?*

In 1988, as Congress moved the VA from an independent agency to a Cabinet-level agency, it also modified the preclusion of review so that now most (but still not all) of the rulings of the VA are reviewable.

In the fall of 1996, Congress revised the Immigration and Naturalization Act in an attempt to restrict immigration into the United States. In doing so, the conservative Republican majorities believed that the INS would be a better watchdog over immigration policy than the "liberal" courts. Congress made INS immigration decisions unreviewable by the courts in the area of the granting of political asylum. Fortunately for Francisco Lucas Rodriguez-Roman, his case was reviewed by the federal court before the new immigration law went into effect. Mr. Rodriguez so hated the Castro regime that he gave up a career as a teacher to join the merchant marine with the hope that some day he could jump ship in America. This he did, but the INS judge denied him political asylum and ordered him deported to face "harsh if not fatal punishment." The INS judge compared Mr. Rodriguez's desertion to that of Pvt. Eddie Slovik during WW II (Slovik was the only American soldier executed for desertion in WW II). The court reviewing the INS deportation of Mr. Rodriguez reversed the holding that harsh punishment does provide grounds for asylum. At least one member of the court pointed out that had the Rodriguez case hit the courts a few months later after the new immigration bill, Mr. Rodriguez would be on his way back to Cuba because the INS decision would be unreviewable. According to the judge, that surely was not a result intended by the bill's sponsor, Rep. Lamar Smith (R-Texas), who was adamant about denying court review of INS asylum decisions.[23]

If you will turn to the Administrative Procedure Act in Appendix A at the back of your book, you will notice that Sections 564–570 deal with a procedure called *negotiated rule-making* (Neg-Reg), which will be discussed in Chapter 7. For now, however, if you read the first two lines under section 570, which is titled *Judicial Review,* you will see that Congress has exercised statutory preclusion of judicial review for negotiated rules. If you return to the first case in this book in Chapter 2, *Weiner v. U.S.,* you will see that the decisions of the War Claims Commission were precluded from judicial review.

The second exception to general reviewability of agency actions is "agency action committed to agency discretion by law," and this is likely to be confusing. Prior to the Administrative Procedure Act of 1946, most administrative decisions were considered to be unreviewable. For the most part, Congress intended to change that with the passage of the Act. It declared that, with two exceptions, all actions and decisions of federal agencies are subject to judicial review in federal court. First, Congress meant to exempt from judicial review the decisions of agencies for which Congress specifically excluded review in the enabling legislation, such as the VA, War Claims Commission, or negotiated rules. Second, Congress (apparently) intended to exempt another category of agency decisions, but the best description they could come up with was "where agency action is committed to agency discretion by law."

You may be thinking to yourself, "Well, that doesn't mean much to me, but surely a judge, trained in the law, will understand what Congress meant." You would be wrong. There are not many cases in which courts have had to interpret this clause, but where courts have had to deal with it, the judges have been forced to "guess at its meaning and differ as to its application." Justice Souter's opinion in the case below discusses some of the past decisions in this area.

Lincoln v. Vigil
508 U.S. 182 (1993)

Justice Souter delivered the unanimous opinion of the Court.

For several years in the late 1970s and early 1980s, the Indian Health Service provided diagnostic and treatment services, referred to collectively as the Indian Children's Program, to handicapped Indian children in the Southwest. In 1985, the Service decided to reallocate the Program's resources to a nationwide effort to assist such children. We hold that the Service's decision to discontinue the Program was "committed to agency discretion by law" and therefore not subject to judicial review under the Administrative Procedure Act, 5 U.S.C. § 701(a)(2) and that the Service's exercise of that discretion was not subject to the notice-and-comment rulemaking requirements imposed by § 553.

I

The Indian Health Service, an agency within the Public Health Service of the Department of Health and Human Services, provides health care for some 1.5 million American Indian and Alaska Native people . . . The Service receives yearly lump-sum appropriations from Congress and expends the funds under authority of the Snyder Act, 25 U.S.C. § 13, and the Indian Health Care Improvement Act, 25 U.S.C. § 1601. So far as it concerns us here, the Snyder Act authorizes the Service to "expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians," for the "relief of distress and conservation of health." The Improvement Act authorizes expenditures for Indian mental-health care, and specifically for "therapeutic and residential treatment centers" . . .

This case concerns a collection of related services, commonly known as the Indian Children's Program, that the Service provided from 1978 to 1985. In the words of the Court of Appeals, a "clou[d of] bureaucratic haze" obscures the history of the Program, . . . which seems to have grown out of a plan "to establish therapeutic and residential treatment centers for disturbed Indian children." These centers were to be established under a "major cooperative care agreement" between the Service and the Bureau of Indian Affairs and would have provided such children "with intensive care in a residential setting."

Congress never expressly appropriated funds for these centers. In 1978, however, the Service allocated approximately $292,000 from its fiscal year 1978 appropriation to its office in Albuquerque, New Mexico, for the planning and development of a pilot project for handicapped Indian children, which became known as the Indian Children's Program. The pilot project apparently convinced the Service that a building was needed, and, in 1979, the Service requested $3.5 million from Congress to construct a diagnostic and treatment center for handicapped Indian children. . . . The appropriation for fiscal year 1980 did not expressly provide the requested funds, however, and legislative reports indicated only that Congress had increased the Service's funding by $300,000 for nationwide expansion and development of the Program in coordination with the Bureau.

Plans for a national program to be managed jointly by the Service and the Bureau were never fulfilled, however, and the Program continued simply as an offering of the Service's Albuquerque office, from which the Program's staff of 11 to 16 employees would make monthly visits to Indian communities in New Mexico and Southern Colorado and on the Navajo and Hopi Reservations. The Program's staff provided "diagnostic, evaluation, treatment planning and followup services" for Indian children with emotional, educational, physical, or mental handicaps. "For parents, community groups, school personnel and health care personnel," the staff provided training in child development, prevention of handicapping conditions, and care of the handicapped child." Congress never authorized or appropriated monies expressly for the Program, and the Service continued to pay for its regional activities out of annual lump-sum appropriations from 1980 to 1985, during which period the Service repeatedly apprised Congress of the Program's continuing operation.

Nevertheless, the Service had not abandoned the proposal for a nationwide treatment program, and in June 1985 it notified those who referred patients to the Program that it was "re-evaluating [the Program's] purpose . . . as a national mental health program for Indian children and adolescents." In August 1985, the Service determined that Program staff hitherto assigned to provide direct clinical services should be reassigned as consultants to other nationwide Service programs, and discontinued the direct clinical services to Indian children in the Southwest. The Service announced its decision in a memorandum, dated August 21, 1985, addressed to Service offices and Program referral sources . . .

The Service invited public "input" during this "difficult transition," and explained that the reallocation of resources had been "motivated by our goal of increased mental health services for all Indian [c]hildren." Ibid. [FN2]

Respondents, handicapped Indian children eligible to receive services through the Program, subsequently brought this action for declaratory and injunctive relief against petitioners, the Director of the Service and others (collectively, the Service) in the United States District Court for the District of New Mexico. Respondents alleged, inter alia, that the Service's decision to discontinue direct clinical services violated the federal trust responsibility to Indians, the Snyder Act, the Improvement Act, the Administrative Procedure Act, various agency regulations, and the Fifth Amendment's Due Process Clause.

II

First is the question whether it was error for the Court of Appeals to hold the substance of the Service's decision to terminate the Program reviewable under the APA. The Act provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof," and we have read the Act as embodying a "basic presumption of judicial review." *Abbott Laboratories v. Gardner,* 387 U.S. 136. This is "just" a presumption, however, *Block v. Community Nutrition Institute,* 467 U.S. 340 (1984), and under § 701(a)(2) agency action is not subject to judicial review "to the extent that" such action "is committed to agency discretion by law." As we explained in *Heckler v. Chaney,* 470 U.S. 821 (1985), § 701(a)(2) makes it clear that "review is not to be had" in those rare circumstances where the relevant statute "is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." "In such a case, the statute ('law') can be taken to have 'committed' the decisionmaking to the agency's judgment absolutely." *Heckler,* supra, at 830.

Over the years, we have read § 701(a)(2) to preclude judicial review of certain categories of administrative decisions that courts traditionally have regarded as "committed to agency discretion" . . . In *Heckler* itself, we held an agency's decision not to institute enforcement proceedings to be presumptively unreviewable under § 701(a)(2). An agency's "decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise," ibid., and for this and other good reasons, we concluded, "such a decision has traditionally been 'committed to agency discretion.' " Similarly, in *ICC v. Locomotive Engineers,* 482 U.S. 270 (1987), we held that § 701(a)(2) precludes judicial review of another type of administrative decision traditionally left to agency discretion, an agency's refusal to grant reconsideration of an action because of material error. In so holding, we emphasized "the impossibility of devising an adequate standard of review for such agency action." Ibid. Finally, . . . 701(a)(2) precludes judicial review of a decision by the Director of

Central Intelligence to terminate an employee in the interests of national security, an area of executive action "in which courts have long been hesitant to intrude."

The allocation of funds from a lump-sum appropriation is another administrative decision traditionally regarded as committed to agency discretion. After all, the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way. See *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. Donovan,* 746 F.2d 855, 861 (1984) (Scalia, J.) ("A lump-sum appropriation leaves it to the recipient agency (as a matter of law, at least) to distribute the funds among some or all of the permissible objects as it sees fit"). For this reason, a fundamental principle of appropriations law is that where "Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on" the agency.... *American Hospital Assn. v. NLRB,* 111 S.Ct. 1539 (1991) (statements in committee reports do not have the force of law). Put another way, a lump-sum appropriation reflects a congressional recognition that an agency must be allowed "flexibility to shift . . . funds within a particular . . . appropriation account so that" the agency "can make necessary adjustments for 'unforeseen developments'" and "'changing requirements.'"

[2] Like the decision against instituting enforcement proceedings, then, an agency's allocation of funds from a lump-sum appropriation requires "a complicated balancing of a number of factors which are peculiarly within its expertise": whether its "resources are best spent" on one program or another; whether it "is likely to succeed" in fulfilling its statutory mandate; whether a particular program "best fits the agency's overall policies"; and, "indeed, whether the agency has enough resources" to fund a program "at all." *Heckler,* 470 U.S., at 831. As in *Heckler,* so here, the "agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities." Of course, an agency is not free simply to disregard statutory responsibilities: Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes (though not, as we have seen, just in the legislative history).

And, of course, we hardly need to note that an agency's decision to ignore congressional expectations may expose it to grave political consequences. But as long as the agency allocates funds from a lump-sum appropriation to meet permissible statutory objectives, § 701(a)(2) gives the courts no leave to intrude. "[T]o [that] extent," the decision to allocate funds "is committed to agency discretion by law."

[3] The Service's decision to discontinue the Program is accordingly unreviewable under § 701(a)(2). As the Court of Appeals recognized the appropriations Acts for the relevant period do not so much as mention the Program, and both the Snyder Act and the Improvement Act likewise speak about Indian health only in general terms. It is true that the Service repeatedly apprised Congress of the Program's continued operation, but, as we have explained, these representations do not translate through the medium of legislative history into legally binding obligations. The reallocation of agency resources to assist handicapped Indian children nationwide clearly falls within the Service's statutory mandate to provide health care to Indian people, and respondents, indeed, do not seriously contend otherwise. The decision to terminate the Program was committed to the Service's discretion.

IV

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Questions

1. The agency's decision to terminate the program was not reviewable. Can you explain why?
2. Justice Souter lists several kinds of decisions that are not reviewable because they are committed to agency discretion by law. Can you pick them out?

In the *Lincoln* case above, the Court finds that the agency action is unreviewable because it is committed to agency discretion by law. In the case below, the secretary of transportation argues that his decision is unreviewable, but the Court finds that it is reviewable. See if you can find another category of agency decisions that are not reviewable as committed to agency discretion.

Citizens to Preserve Overton Park v. Volpe
401 U.S. 402 (1971)

In 1968, the secretary of transportation announced that he agreed with local Memphis officials that a six-lane federal highway would have to be routed through Overton Park. In 1969, the secretary approved the authorizations of federal highway funds for the highway through the park. Neither the announcement nor the decision was accompanied by a statement of reasons or findings of fact or an explanation.

Citizens to Preserve Overton Park sued the secretary to enjoin the release of federal monies on the basis of section 4 of the Department of Transportation Act of 1966, 49 U.S.C. 1653, and section 138 of the Federal-Aid Highway Act of 1968, 23 U.S.C. 138. They forbid the authorization of federal funds for highways through public parks if a "feasible and prudent" alternate route exists. If the secretary finds that no feasible and prudent alternate route exists, then the secretary may release funds only after "all possible planning to minimize harm" to the park.

Both the district and circuit courts would have dismissed the suit against the secretary of transportation (Volpe) on a technicality. The Supreme Court merely said that the two lower courts were wrong to dismiss the case and sent it back for trial to the district court. In their dissent, Justices Black and Brennan argued that the secretary of transportation had abused his power and the whole affair should be sent back to him for hearings and a new decision (i.e., they would void the secretary's decision rather than overruling the lower courts on technical points of law).

Justice Marshall wrote the opinion, joined by Chief Justice Burger and Justices Harlan, Stewart, White, and Blackmun. Justice Black dissented, joined by Justice Brennan. Justice Douglas did not participate.

A threshold question—whether petitioners are entitled to any judicial review—is easily answered. Section 701 of the Administrative Procedure Act, 5 U.S.C. 701, provides that the action of "each authority of the Government of the United States," which includes the Department of Transportation, is subject to judicial review except where there is a statutory prohibition on review or where "agency action is committed to agency discretion by law." In this case, there is no indication that Congress sought to prohibit judicial review and there is most certainly no "showing of 'clear and convincing evidence' of a . . . legislative intent" to restrict access to judicial review. Similarly, the Secretary's decision here does not fall within the exception for action "committed to agency discretion." This is a very narrow exception. Berger, Administrative Arbitrariness and Judicial Review, 65 *Col. L. Rev.* 55 (1965). The legislative history of the Administrative Procedure Act indicates that it is applicable in those rare instances where "statutes are drawn in such broad terms that in a given case there is no law to apply." Section 4 (f) of the Department of Transportation Act and 138 of the Federal-Aid Highway Act are clear and specific directives. Both the Department of Transportation Act and the Federal-Aid Highway Act provide that the Secretary "shall not approve any program or project" that requires the use of any public park land "unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park. . . ." 23 U.S.C. 138 49 U.S.C. 1653 (f). This language is a plain and explicit bar to the use of federal funds for construction of highways through parks—only the most unusual situations are exempted.

Despite the clarity of the statutory language, respondents argue that the Secretary has wide discretion. They recognize that the requirement that there be no "feasible" alternative route admits of little administrative discretion. For this exemption to apply the Secretary must find that as a matter of sound engineering it would not be feasible to build the highway along any other route. Respondents argue, however, that the requirement that there be no other "prudent" route requires the Secretary to engage in a wide-ranging balancing of competing interests. They contend that the Secretary should weigh the detriment resulting from the destruction of park land against the cost of other routes, safety considerations, and other factors, and determine on the basis of the importance that he attaches to these other factors whether, on balance, alternative feasible routes would be "prudent." But no such wide-ranging endeavor was intended.

It is obvious that in most cases considerations of cost, directness of route, and community disruption will indicate that park land should be used for highway construction whenever possible. Although it may be necessary to transfer funds from one jurisdiction to another, there will always be a smaller outlay required from the public purse when park land is used since the public already owns the land and there will be no need to pay for right-of-way. And since people do not live or work in parks, if a highway is built on park land no one will have to leave his home or give up his business. Such factors are common to substantially all highway construction.

Thus, if Congress intended these factors to be on an equal footing with preservation of park land there would have been no need for the statutes. Congress clearly did not intend that cost and disruption of the community were to be ignored by the Secretary. But the very existence of the statutes indicates that protection of park land was to be given paramount importance. The few green havens that are public parks were not to be lost unless there were truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reached extraordinary magnitudes. If the statutes are to have any meaning, the Secretary cannot approve the destruction of park land unless he finds that alternative routes present unique problems.

Plainly, there is "law to apply" and thus the exemption for action "committed to agency discretion" is inapplicable. But the existence of judicial review is only the start: the standard for review must also be determined.

The student should not be overly concerned that the Court's attempt to clarify the "committed to agency discretion" clause may not have been much help. It is easier to describe certain situations where agency action is committed to agency discretion by law than it is to define the concept. Here is the laundry list:

1. When there is no meaningful standard against which to judge the agency's action
2. When there is no law to apply to the agency's action (from *Overton Park*)
3. When an agency decides not to institute enforcement proceedings
4. When an agency refuses to grant a reconsideration hearing after a final decision
5. When an agency uses funds appropriated from Congress as a lump-sum (from *Lincoln*)
6. When agency decisions involve national security or defense issues

In a recent case, the CIA director fired an employee because the employee was a homosexual. The statutory authority used by the director says, "the Director . . . may, in his discretion, terminate the employment of any officer or employee of the agency *whenever he shall deem such termination necessary or advisable in the interest of the United States* [the emphasis is mine]." The terminated employee sued the director on two fronts: First, he alleged the director abused his discretion under the Act (firing for sexual orientation is not in the interests of the United States) and, second, he alleged a constitutional due process violation in that he was fired without a hearing. The Court said that the director's firing decision under the Act was committed to agency discretion by law and not reviewable. As was the case in the *Robinson* case, the constitutional claim was reviewable.[24] What is important to grasp here is that reviewability of agency action is granted by legislation and that, generally, Congress intended to extend judicial review to most agency actions. There are two exceptions. The first exception is where Congress specifically forbids judicial review for a particular agency or a particular kind of action. The second exception is a nebulous category of actions referred to as "actions committed to agency discretion," a category that is hard to define and little used.

For an interesting case dealing with both standing and action committed to agency discretion by law, see *Dalton v. Specter,* 511 U.S. 642 (1994). In this case, Senator Arlen Specter (R-Pennsylvania) challenged the closure of the Philadelphia Naval Shipyard under the 1990 Defense Base Closure and Realignment Act. The majority of the court found that the senator lacked standing under the Administrative Procedure Act and that President Clinton's acceptance of Closure Commission recommendations was action committed to the President and, hence, was not reviewable. In a concurring opinion, four justices thought that base closure decisions precluded judicial review by statute.

Reviewability of Cost/Benefit Analysis, Risk Analysis, and Science

One of the hottest areas of academic debate in administrative law is whether and to what extent the science and data used by agencies is reviewable in court. Recall from the material in Chapter 2 that Congress passed (as a rider to a budget bill) the Data Quality Act. Because it was a rider, there is no legislative history, no committee hearings, no floor debate, and so on. The Act delegates legislative power to the White House, actually to the OMB, which subdelegates it to the Office of Information and Regulatory Affairs, which issues guidelines for all agencies on the use of data and science. Each agency, then, is to adopt its own specific guidelines and procedures for making its data and science available to the public. The public and regulated parties are to be able to access an agency's data or science and challenge it. Furthermore, by other legislation, nearly all agencies (but the White House is mostly concerned with the environment and health areas) are required to engage in cost/benefit or risk analysis prior to adopting rules. A major issue is whether an agency's cost/benefit analysis, the science on which it relies, or any agency decision not to rectify challenged science is reviewable. The issue is open because agency action is generally not reviewable unless it is final. The concept of finality means that the head of an agency has made a final decision or an agency's proposed rule has become a final rule with the force and effect of law. Typically, an agency's cost/benefit or risk analysis is done prior to proposing the rule (if the benefits do not outweigh the costs, there is no sense proposing the rule).

The question of whether a court can review agency science is debatable because, as indicated above, Congress has not addressed the issue. Neither has the Supreme Court. Indeed, there is little case law on the subject and the circuits appear to be in conflict.

Although the Supreme Court has not addressed that specific issue, it has decided a case that involved the quality of the science placed in evidence at trial. In 1993, the Court decided *Daubert v. Merrell Dow Pharmaceuticals,*[25] in which the parents of minor children who were born with defects sued the manufacturer of the prescription drug Bendectin. The plaintiffs alleged that the mothers took the drug during pregnancy, and it caused the deformities. The drug company moved to dismiss the case, arguing that no epidemiological (human statistical) studies demonstrated a statistically significant association between Bendectin and birth defects. The phrase *statistically significant association* means the probability that two variables vary together is not due to chance (the ingestion of Bendectin, together with the presence of birth defects, either is or is not due to chance). The plaintiffs relied on test-tube and live-animal studies, pharmacological studies of drugs with similar properties, and reanalysis or recalculation of previously published epidemiological studies.

The trial judge sided with the drug company and dismissed the suit. The judge concluded that epidemiological evidence was the most reliable. Therefore, the live-animal, test-tube, and pharmacological evidence was inadmissible. The recalculated epidemiological evidence was inadmissible as well because it was not peer reviewed. The court of appeals agreed, but the Supreme Court reversed. Actually, the issue in the case was a narrow one: What is the proper standard for the admission of expert testimony under federal rules of evidence? The Court said that scientific evidence must be both relevant and reliable. Reliability means that it is based on scientific validity. Validity in scientific parlance means that a measure measures what it is supposed to measure.[26] The Supreme Court reversed the lower courts because they had applied the wrong standard. It was possible that some of the excluded testimony was both relevant and reliable. This is the only Supreme Court case to examine judicial review of science, but its relevance to administrative law may be tenuous. *Daubert* was a tort case, and other than the federal rules of evidence, there was no statutory law to compound things. Two circuit courts have decided administrative law cases that are on point and have reached somewhat different conclusions.

In a 2002 case,[27] the EPA issued a report in 1993 entitled *Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders.* The report categorized secondhand smoke (environmental tobacco smoke) as a Group A (known human) carcinogen responsible for 3,000 nonsmoker deaths a year. Nearly all of the American tobacco companies sued. The tobacco plaintiffs alleged a number of problems with the EPA's procedure, studies, and the report. They argued that the EPA exceeded its jurisdiction and violated some statutory restrictions on investigating tobacco products. They accused the EPA of not following the proper procedure, and they said the decision making was not reasoned (as required by the Administrative Procedure Act) because of the faulty science and scientific procedures. The trial judge decided in favor of the tobacco companies and vacated the EPA's report. Although the trial judge was overruled by the circuit court, what he concluded about the EPA's behavior is instructive because it echoes what the business community has been arguing for years about overburdensome bureaucratic rules and the "junk science" on which they are based.

In this case, the court said the EPA publicly committed to a conclusion before research had begun; excluded industry by violating the Act's procedural requirements; adjusted established procedure and scientific norms to validate the agency's public conclusion; and aggressively used the Act's authority to disseminate findings to establish a de facto regulatory scheme intended to restrict plaintiff's products and to influence public opinion. On conducting the secondhand smoke risk assessment, the EPA disregarded information and made findings on selected information; did not disseminate significant epidemiological information; deviated from its own risk assessment guidelines; failed to disclose important findings and reasoning; and left significant questions without answers. The EPA's conduct left substantial holes in the administrative record. While so doing, the EPA produced limited evidence, then claimed the weight of the agency's research evidence demonstrated that secondhand smoke causes cancer.[28]

The circuit court, however, found that the report was not a final agency action and neither it nor the science/procedure that produced it was reviewable under the Administrative Procedure Act. The EPA report was produced pursuant to a mandate from a law called the Radon Research Act, which orders the EPA to establish a research program for radon gas and indoor air quality. It also instructs the EPA to coordinate such research at the federal, state, local, and private level. Furthermore, the EPA is directed to disseminate the research findings. You will notice from the above description of the Radon Research Act that it does not authorize the EPA to take any regulatory action. The EPA is simply to conduct, coordinate, and disseminate research. Citing both *Bennett v. Spear* and *Dalton v. Specter,* the Court found that the agency action (issuing the report) had "no direct and appreciable legal consequences" on either the plaintiffs or anyone else. Hence, it is not a "final agency action" so the report is unreviewable.[29]

The second case is slightly different because the agency action affected other federal and state agencies, which then caused private citizens to react: It did have a legal effect. The case is *Tozzi v. HHS* (2001),[30] and it was mentioned in the discussion of junk science in Chapter 2; it appears at the end of this chapter. In the *Tozzi* case, the Department of Health and Human Services moved a chemical (dioxin) from one category to another, from "reasonably anticipated to cause cancer" to "a known carcinogen" and published it as such in the *Federal Register.* Once it was published in the *Federal Register* as a known carcinogen, the Occupational Safety and Health Administration (OSHA) included it in its hazardous communication standards, which caused businesses that use it to warn employees about it. That is a legal effect, and the Court said the agency action was reviewable. The *Tozzi* case at the end of the chapter is a good one because Jim Tozzi, a former member of the U.S. House of Representatives, is one of the leaders of the antiregulation forces. He is responsible for the attachment of the Data Quality Act as a rider, and he is the name associated with the concept of junk science.[31] The case is interesting because the Court analyzes the quality of peer review and the science the agency used.

Exhaustion

If people believe they have been or are about to be injured by administrative action, they cannot turn to the courts for help until they have gone through all the available channels within the agency. That is, they must *exhaust* all legal remedies within the agency.

Every agency has published procedural rules for clients of the agency to follow in trying to redress an adverse agency decision or other agency action. For example, if people believe they are eligible for veterans benefits, Social Security, or a tax exemption, they can apply to the VA or Social Security Administration or, in the latter case, simply claim the exemption on a tax return. If the claim is denied in any of those situations, the procedure to follow is similar for anyone wishing to challenge that denial. First, appeal the initial denial decision to the supervisor of the clerk who processed the application and determined that it did not qualify for the benefit (or tax exemption). Most often, the supervisor will support the position of the clerk. Next, appeal to the supervisor's supervisor, who will most likely be the director of the local office. If that appeal is unsuccessful, appeal the decision of the local director to the regional office. If the decision from the regional office is still adverse, some agencies require (allow) an appeal to the head of the agency for a final agency decision, which can then (and only then) be challenged in the courts. That is the concept of exhaustion, and under normal circumstances, a federal court will simply not entertain a suit by a plaintiff who has not exhausted all avenues of appeal available within the agency. Virtually all states use the concept of exhaustion, but there are myriad differences between states in terms of exceptions allowed so that a potential plaintiff can "short circuit" exhaustion.

In a recent exhaustion case, a prison inmate claimed that prison guards assaulted him; tightened and twisted handcuffs, which caused injury; withheld medical treatment for the injured wrists; and threw cleaning fluid in his face.[32] He wanted money damages for violation of his constitutional right to be free from cruel and unusual punishment. Congress passed the Prison Litigation Reform Act of 1995, which in pertinent part required prison inmates to exhaust internal prison remedies before suing over prison conditions. The prison in question had an inmate grievance procedure with a hearing and two stages of appeal, but even if an inmate was successful in pursuing a grievance, money damages were not available as a remedy. Booth, the inmate, filed a grievance and had the hearing but skipped the appeals because he could not obtain the money damages even if he won. He sued instead. The Supreme Court said it was proper to dismiss his suit for failure to exhaust available remedies, even if the remedy he sought was not available through the agency procedure.

Primary Jurisdiction

When a question could be handled by either a court of law or an administrative agency, the court should normally decline to exercise jurisdiction until the administrative agency has had the opportunity to deal with the issue first. This is the concept of *primary jurisdiction,* and it generally requires a party in conflict with an agency to go through the agency first rather than turning to the courts.

For example, between 1944 and 1950, the Army contracted with the Bangor and Sea Board Railroad and with the Western Pacific to transport bomb casings filled with napalm. The railroads billed the Army at a first-class rate for carrying "incendiary bombs," but the Army paid at the lower, fifth-class rate for carrying "gasoline in steel drums." The railroads here have two choices. They can sue in a federal court of claims, or they can bring their case to the Interstate Commerce Commission (ICC).

In fact, the railroads chose the court of claims, which decided in their favor. However, on appeal, the Supreme Court said that "the question of tariff construction, as well as the reasonableness of the tariff . . . are within the exclusive primary jurisdiction of the ICC." The Court vacated the decision of the court of claims and mandated that the issue be dealt with first by the ICC.[33] Following is one of the most famous primary jurisdiction cases, in which Allegheny Airlines had the misfortune of bumping consumer activist Ralph Nader from one of its flights.

Nader v. Allegheny Airlines, Incorporated
426 U.S. 290 (1976)

Justice Powell delivered the opinion, joined by a unanimous court (Burger, Brennan, Stewart, White, Marshall, Blackmun, Rehnquist, and Stevens).

I

The facts are not contested. Petitioner agreed to make several appearances in Connecticut on April 28, 1972, in support of the fundraising efforts of the Connecticut Citizen Action Group (CCAG), a nonprofit public interest organization. His two principal appearances were to be at a noon rally in Hartford and a later address at the Storrs campus of the University of Connecticut. On April 25, petitioner reserved a seat on respondent's flight 864 for April 28. The flight was scheduled to leave Washington, D.C., at 10:15 a.m. and to arrive in Hartford at 11:15 a.m. Petitioner's ticket was purchased from a travel agency on the morning of the flight. It indicated, by the standard "OK" notation, that the reservation was confirmed.

Petitioner arrived at the boarding and check-in area approximately five minutes before the scheduled departure time. He was informed that all seats on the flight were occupied and that he, like several other passengers who had arrived shortly before him, could not be accommodated. Explaining that he had to arrive in Hartford in time for the noon rally, petitioner asked respondent's agent to determine whether any standby passengers had been allowed to board by mistake or whether anyone already on board would voluntarily give up his or her seat. Both requests were refused. In accordance with respondent's practice, petitioner was offered alternative transportation by air taxi to Philadelphia, where connections could be made with an Allegheny flight scheduled to arrive in Hartford at 12:15 p.m. Fearing that the Philadelphia connection, which allowed only 10 minutes between planes, was too close, petitioner rejected this offer and elected to fly to Boston, where he was met by a CCAG staff member who drove him to Storrs.

Both parties agree that petitioner's reservation was not honored because respondent had accepted more reservations for flight 864 than it could in fact accommodate. One hour prior to the flight, 107 reservations had been confirmed for the 100 seats actually available. Such overbooking is a common industry practice, designed to ensure that each flight leaves with as few empty seats as possible despite the large number of "no-shows"—reservation-holding passengers who do not appear at flight time. By the use of statistical studies of no-show patterns on specific flights, the airlines attempt to predict the appropriate number of reservations necessary to fill each flight. In this way, they attempt to ensure the most efficient use of aircraft while preserving a flexible booking system that permits passengers to cancel and change reservations without notice or penalty. At times the practice of overbooking results in oversales, which occur when more reservation-holding passengers than can be accommodated actually appear to board the flight. When this occurs, some passengers must be denied boarding ("bumped"). The chance that any particular passenger will be bumped is so negligible that few prospective passengers aware of the possibility would give it a second thought.

In April 1972, the month in which petitioner's reservation was dishonored, 6.7 confirmed passengers per 10,000 enplanements were denied boarding on domestic flights. For all domestic airlines, oversales resulted in bumping an average of 5.4 passengers per 10,000 enplanements in 1972, and 4.6 per 10,000 enplanements in 1973. In domestic operations respondent oversold 6.3 seats per 10,000 enplanements in 1972 and 4.5 seats per 10,000 enplanements in 1973. Thus, based on the 1972 experience of all domestic airlines, there was only slightly more than one chance in 2,000 that any particular passenger would be bumped on a given flight. Nevertheless, the total number of confirmed ticket holders denied seats is quite substantial, numbering over 82,000 passengers in 1972 and about 76,000 in 1973.

The only issue before us concerns the Court of Appeals' disposition on the merits of petitioner's claim of fraudulent misrepresentation. Although the court rejected respondent's argument that the existence of the Board's cease-and-desist power under 411 of the Act eliminates all private remedies for common-law torts arising from unfair or deceptive practices by regulated carriers, it held that a determination by the Board that a practice is not deceptive within the meaning of 411 would, as a matter of law, preclude a common-law tort action seeking damages for injuries caused by that practice. Therefore, the court held that the Board must be allowed to determine in the first instance whether the challenged practice (in this case, the alleged failure to disclose the practice of overbooking) falls within the ambit of 411. The court took judicial notice that a rule-making proceeding concerning possible changes in reservation practices in response to the 1973–1974 fuel crisis was already underway and that a challenge to the carriers' overbooking practices had been raised by an intervenor in that proceeding. The District Court was instructed to stay further action on petitioner's misrepresentation claim pending the outcome of the rule-making proceeding. The Court of Appeals characterized its holding as "but another application of the principles of primary jurisdiction, a doctrine whose purpose is the coordination of the workings of agency and court," 512 F.2d, at 544.

The question before us, then, is whether the Board must be given an opportunity to determine whether respondent's alleged failure to disclose its practice of deliberate overbooking is a deceptive practice under 411 before petitioner's common-law action is allowed to proceed. The decision of the Court of Appeals requires the District Court to stay the action brought by petitioner in order to give the Board an opportunity to resolve the question. If the Board were to find that there had been no violation of 411, respondent would be immunized from common-law liability.

The doctrine of primary jurisdiction is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. The doctrine has been applied, for example, when an action otherwise within the jurisdiction of the court raises a question of the validity of a rate or practice included in a tariff filed with an agency, e.g., *Danna v. Air France*, 463 F.2d 407 (CA2 1972); *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 417–418 (1959), particularly when the issue involves technical questions of fact uniquely within the expertise and experience of an agency—such as matters turning on an assessment of industry conditions, e.g., *United States v. Western Pacific R. Co.*, supra, at 66–67. In this case, however, considerations of uniformity in regulation and of technical expertise do not call for prior reference to the Board.

Petitioner seeks damages for respondent's failure to disclose its overbooking practices. He makes no challenge to any provision in the tariff, and indeed there is no tariff provision or Board regulation applicable to disclosure practices. Petitioner also makes no challenge, comparable to those made in *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, supra, and *Lichten v. Eastern Airlines, Inc.*, 189 F.2d 939 (CA2 1951), to limitations on common-law damages imposed through exculpatory clauses included in a tariff. Referral of the misrepresentation issue to the Board cannot be justified by the interest in informing the court's ultimate decision with "the expert and specialized knowledge," *United States v. Western Pacific R. Co.*, supra, at 64, of the Board. The action brought by petitioner does not turn on a determination of the reasonableness of a challenged practice—a determination that could be facilitated by an informed evaluation of the economics or technology of the regulated industry. The standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts, and the judgment of a technically expert body is not likely to be helpful in the application of these standards to the facts of this case.

III

We conclude that petitioner's tort action should not be stayed pending reference to the Board and accordingly the decision of the Court of Appeals on this issue is reversed. The Court of Appeals did not address the question whether petitioner had introduced sufficient evidence to sustain his claim. We remand the case for consideration of that question and for further proceedings consistent with this opinion.

Question

1. This case and previous cases make it clear that courts do not always have to defer to agencies in cases like this. Can you list the two situations that need to exist before primary jurisdiction comes into play? Try to answer this question from the case before checking the summary section at the end of the chapter.

For a more recent primary jurisdiction case, see *Marquez v. Screen Actors Guild,* 525 U.S. 33 (1998). Naomi Marquez was an actress who won a part in a television show. The Screen Actors Guild had a union security clause with the production company. Such a clause prohibits the company from hiring actors unless they belong to the union. If they do not belong, the would-be actors are given a specific amount of time to join the union. Ms. Marquez failed to join the union by the time the company was ready to film, so they hired another actress. The plaintiff sued the union in federal district court, claiming that the union committed what is called an *unfair representation,* a claim that would have been appropriately heard in federal district court. The union, however, claimed that what the actress was complaining about was an *unfair labor practice,* and such a claim would fall within the primary jurisdiction of the National Labor Relations Board (NLRB). The Supreme Court agreed that it was an issue of whether the union engaged in an unfair labor practice; hence, the district court did not have jurisdiction to hear the case until the NLRB decided the issue first.

The Scope of Review

An individual who has been adversely affected by a federal agency action or decision and who wants to sue must demonstrate (a) that the court has jurisdiction to hear the case, (b) that the individual has standing to challenge the administrative decision or action, (c) that the case is ripe and not moot, (d) that the agency's action is reviewable, (e) that the individual has exhausted all administrative remedies available within the agency, and (f) that primary jurisdiction problems are not involved. If all of those barriers are overcome, the individual may challenge the agency action in court. The question to which we now turn our attention is this: Once a court has decided to review agency action, how closely should the court examine the agency behavior? This is referred to as the *scope of review.*

Section 706 of the Administrative Procedures Act, entitled *Scope of Review,* authorized courts reviewing agency action to take two kinds of action. First, in Section 706 [1] (B) courts can compel agency action if an agency has illegally refused to act (see *Heckler v. Chaney* below and *Norton v. Southern Utah Wilderness Alliance* at the end of this chapter) or if an agency has unreasonably delayed action (meant to provide a remedy against agency foot-dragging). Second, courts can void or reverse the following kinds of agency action: unconstitutional agency action, Section 706 [2] (B); agency action contrary to federal law or beyond the jurisdiction of an agency, Section 706 [2] (C); agency action in violation of procedure, Section 706 [2] (D); agency action that is arbitrary, capricious, or an abuse of discretion, Section 706 [2] (A) (this is what you will shortly come to know as the "arbitrary or capricious scope of review of agency decisions"); agency decisions not supported by substantial evidence in the record, Section 706 [2] (E) (this is what you will come to refer as the substantial evidence test); and finally, agency action found to be unwarranted by the facts after a trial *de novo* by reviewing court, Section 706 [2] (F).

Court Review of Agency Foot-Dragging and Inaction

The language of Section 706 (1) makes it clear that Congress intended to authorize courts to compel agencies to act in cases of bureaucratic recalcitrance. However, typically, courts show tremendous deference toward agency excuses for inaction. This deference is explained by the Court in the case that follows.

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

Justice Rehnquist wrote the opinion, joined by a unanimous court (Burger, White, Blackmun, Powell, Stewart, and O'Connor). Justices Brennan and Marshall concurred.

I

Respondents have been sentenced to death by lethal injection of drugs under the laws of the States of Oklahoma and Texas. Those States, and several others, have recently adopted this method for carrying out the capital sentence. Respondents first petitioned the FDA, claiming that the drugs used by the States for this purpose, although approved by the FDA for the medical purposes stated on their labels, were not approved for use in human executions. They alleged that the drugs had not been tested for the purpose for which they were to be used, and that, given that the drugs would likely be administered by untrained personnel, it was also likely that the drugs would not induce the quick and painless death intended. They urged that use of these drugs for human execution was the "unapproved use of an approved drug" and constituted a violation of the Act's prohibitions against "misbranding." They also suggested that the FDA's requirements for approval of "new drugs" applied, since these drugs were now being used for a new purpose. Accordingly, respondents claimed that the FDA was required to approve the drugs as "safe and effective" for human execution before they could be distributed in interstate commerce. See 21 U.S.C. 355. They therefore requested the FDA to take various investigatory and enforcement actions to prevent these perceived violations; they requested the FDA to affix warnings to the labels of all the drugs stating that they were unapproved and unsafe for human execution, to send statements to the drug manufacturers and prison administrators stating that the drugs should not be so used, and to adopt procedures for seizing the drugs from state prisons and to recommend the prosecution of all those in the chain of distribution who knowingly distribute or purchase the drugs with intent to use them for human execution. The FDA Commissioner responded, refusing to take the requested actions. The Commissioner first detailed his disagreement with respondents' understanding of the scope of FDA jurisdiction over the unapproved use of approved drugs for human execution, concluding that FDA jurisdiction in the area was generally unclear but in any event should not be exercised to interfere with this particular aspect of state criminal justice systems. He went on to state:

"Were FDA clearly to have jurisdiction in the area, moreover, we believe we would be authorized to decline to exercise it under our inherent discretion to decline to pursue certain enforcement matters. The unapproved use of approved drugs is an area in which the case law is far from uniform. Generally, enforcement proceedings in this area are initiated only when there is a serious danger to the 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. . . ."

II

Respondents then filed the instant suit in the United States District Court for the District of Columbia, claiming the same violations of the FDCA and asking that the FDA be required to take the same enforcement actions requested in the prior petition. Jurisdiction was grounded in the general federal-question jurisdiction statute, 28 U.S.C. 1331, and review of the agency action was sought under the judicial review provisions of the APA, 5 U.S.C. 701–706. The District Court granted summary judgment for petitioner. It began with the proposition that "decisions of executive departments and agencies to refrain from instituting investigative and enforcement proceedings are essentially unreviewable by the courts." The court then cited case law stating that nothing in the FDCA indicated an intent to circumscribe the FDA's enforcement discretion or to make it reviewable. A divided panel of the Court of Appeals for the District of Columbia Circuit reversed. The majority began by discussing the FDA's jurisdiction over the unapproved use of approved drugs for human execution, and concluded that the FDA did have jurisdiction over such a use. The court then addressed the Government's assertion of unreviewable discretion to refuse enforcement action. The APA's comprehensive provisions for judicial review of "agency actions" are contained in 5 U.S.C. 701–706. 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 706. But before any review at all may be had, a party must first clear the hurdle of 701(a). That section provides that the chapter on 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 701(a)(2).

This Court has not had occasion to interpret this second exception in 701(a) in any great detail. To this point our analysis does not differ significantly from that of the Court of Appeals. That court purported to apply the "no law to apply" standard of *Overton Park.* We disagree, however, with that court's insistence that the "narrow construction" of (a)(2) required application of a presumption of reviewability even to an agency's decision not to undertake certain enforcement actions. Here we think the Court of Appeals broke with tradition, case law, and sound reasoning.

Overton Park did not involve an agency's refusal to take requested enforcement action. It involved an affirmative act of approval under a statute that set clear guidelines for determining when such approval should be given. Refusals to take enforcement steps generally involve precisely the opposite situation, and in that situation we think the presumption is that judicial review is not available. 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. Batchelder,* 442 U.S. 114, 123–124 (1979); *United States v. Nixon,* 418 U.S. 683, 693 (1974); *Vaca v. Sipes,* 386 U.S. 171, 182 (1967); *Confiscation Cases,* 7 Wall. 454 (1869). This recognition of the existence of discretion is attributable in no small part to the general 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. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,* 435 U.S. 519, 543 (1978); *Train v. Natural Resources Defense Council, Inc.,* 421 U.S. 60, 87 (1975).

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. See, e.g., *FTC v. Klesner,* 280 U.S. 19 (1929). 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." U.S. Const., Art. II, 3.

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 701(a)(2). 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. In so stating, we emphasize that the decision is only presumptively unreviewable; the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers. Thus, in establishing this presumption in the APA, Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers. Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue. 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 701(a)(2) for action "committed to agency discretion" remains a narrow one, see *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (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. *Johnson v. Robison*, 415 U.S. 361, 366 (1974); *Yick Wo v. Hopkins*, 118 U.S. 356, 372–374 (1886). The fact that the drugs involved in this case are ultimately to be used in imposing the death penalty must not lead this Court or other courts to import profound differences of opinion over the meaning of the Eighth Amendment to the United States Constitution into the domain of administrative law.

The judgment of the Court of Appeals is Reversed.

The Law/Fact Distinction

As indicated in Chapter 1, agencies frequently interpret law. In making decisions or taking action, there is almost always a statute involved and usually an agency interpretation of that statute. The agency generally applies its interpretation of the statute to factual situations and makes a decision or takes some action (or refuses to act). In reviewing each agency action, courts show less deference to an agency's interpretation of the law than they do to an agency's determination of facts. This is because courts are just as well-suited to interpret law as agencies are; hence, any reason such as expertise for court deference to agencies disappears.

The *law/fact distinction* addresses the notion that courts will exercise stringent judicial review of agency action on questions of laws: Does the agency action violate a provision of the Constitution or some other federal law? Is the agency's interpretation of the law consistent with congressional intent? Has the agency attempted to take some action that is beyond its jurisdiction? However, the courts will show considerable deference to an agency's finding of fact: Were the employee's injuries work related? Does the applicant meet the requirements for a license or requested benefits? Did management engage in an unfair labor practice?

Court Review of Agency Action

If a challenged agency action survives court review of the questions of law involved, review will move to scrutiny of the agency decision, rule, or action. Here, court interpretations of Section 706 of the Administrative Procedure Act have established three standards of court review. The three standards of the scope of review are referred to as (a) the arbitrary and capricious standard, (b) the substantial evidence test, and (c) *de novo* review. The legal term *de novo* means "completely new from the start,"[34] so *de novo* review of agency action would require a whole new trial on the issue or action. This type of court review of agency action is rare, but Section 552(B) of the Administrative Procedure Act (in Appendix A) requires *de novo* court review of an agency's decision to withhold information under the Freedom of Information Act. The *Overton Park* case was presented earlier in this chapter. Two legal issues were considered: whether the secretary of transportation's decision was reviewable (the Court said it was) and what standard of review should the Court apply to the Secretary's decision? That part of the *Overton Park* case will be presented shortly.

Substantial evidence review of agency action is, by practice, limited to review of decisions, orders, or agency action that comes about as the result of a quasi-judicial hearing. The "substantial evidence test" means the reviewing court should examine the full record to be satisfied that there is substantial evidence in the record to support the decision of the agency. This test is similar to the kind of review appellate courts should apply when reviewing the decision of a trial court. The two interesting cases presented next are illustrative of court attempts to apply the substantial evidence test.

State Employees' Retirement System v. Industrial Accident Commission 217 P.2D 992 (1950)

The opinion by Justice Sparks.

This is a proceeding upon writ of review of a death benefit award made by the Industrial Accident Commission in favor of the widow and three minor children of Karl Lund, deceased. Petitioner State Employees' Retirement System seeks an annulment of the award, on the grounds that respondent commission had acted without and in excess of its powers and that the evidence was insufficient to justify the findings of fact. The decedent, Karl Lund, was employed as a game warden by the Department of Natural Resources. As such officer his duties were to enforce the provisions of the Fish and Game Code, and in so doing he had no regular or prescribed hours of duty. At times he was required to go on night patrol and to station himself in isolated areas where infractions of the Fish and Game Code might occur. An automobile equipped with a two-way radio was furnished him by his employer. The car was also so equipped that it might be converted into a bed, and it was permissible for him, while on night patrol, to sleep in the car.

On June 13, 1948, the deceased went on duty at 10 o'clock in the morning. According to the entries in his diary he went on patrol to "Napa State Hospital, Soscal, thence to Cuttings Wharf, Brown's Valley to Oakville night patrol Trinity Road." At 2:58 p.m. on the 13th Lund reported by radio to the sheriff's office that he was in service. No further reports were received from him. On the 14th, Lund not having returned or checked in by radio, a search was made for him. At a point 16 or 18 miles from Napa, the car furnished Lund by the state was found. It was parked about 20 feet off a side road, facing into a hill. This side road was a slight distance from the Oakville-Trinity Mountain road. It was in "wild" country and where, according to Lund's superior officer, apprehensions were made of violators hunting deer at night with spotlights. About 12 feet to the rear of the state car there was another automobile parked. Investigation revealed that the interior of the state car had been converted into a bed, and on this bed were found the dead bodies of Karl Lund and of a woman, Chelsea Miami. The bodies were clad respectively only in shorts and panties and were partially covered by a blanket. The ignition switch, radio and heater of the car were all turned on and the gasoline tank was empty. All of the doors and windows were closed with the exception of one side wing-window which was slightly open. Lund's clothes, boots, and gun were in the back of the car and under the seat. The deaths were attributed by the coroner to carbon monoxide poisoning, the vapor of which apparently had infiltrated into the car from the running motor and been inhaled while the deceased were lying on the bed. Approximate time of death was fixed as between 1 and 3 a.m. of June 14th. Herminia Miami, the sister of Chelsea, testified that Chelsea had received a telephone call at their home from Lund shortly before 9 p.m.; that he had asked Chelsea to meet him, and within a few minutes after receiving the call Chelsea had changed to slacks and left in her own car.

There was no rule or regulation of the department by whom Lund was employed which prohibited any of the game wardens, while on duty, from having company. Upon the facts adduced at the hearing, summary of which has been given above, respondent Industrial Accident Commission made its finding that Karl Lund had sustained injury occurring in the course of and arising out of employment proximately causing his death from inhalation of carbon monoxide fumes. A petition for rehearing was granted by respondent commission, and after a further hearing respondent affirmed its findings of fact theretofore made.

Petitioner contends that these findings are irrational for the reason that the evidence shows that deceased met his death while on a personal adventure, and that in so doing he had deviated from the scope of his employment and from his duties as fish and game warden. In reviewing the evidence we are not permitted to substitute our views for those of the commission and annul an award unless there is no substantial evidence to support the findings and order. On the contrary, we are required to indulge all reasonable inferences which may be drawn legitimately from the facts in order to support the findings of the commission, and in doing so all that is required is reasonable probability; not absolute certainty. It is the duty of a reviewing court to search the record to discover whether the evidence is reasonably susceptible of the inferences drawn by the commission in support of its conclusion, and upon favorable discovery to affirm the award. Neither may the award be annulled because there are two conclusions which fairly may be drawn from the evidence, both of which are reasonable, the one sustaining and the other opposing the right to compensation. Nor may an award be rejected solely on the basis of moral or ethical considerations. Measured by these rules we note in reviewing the record the following facts and circumstances in support of respondent's findings: That Lund, as a fish and game warden, had no regular or fixed hours of employment; that frequently he did patrol duty at night for the purpose of intercepting violators of the fish and game laws; that the last entry in his diary sets forth his itinerary for the 13th and concludes, "to Oakville night patrol Trinity Road"; that his diary also discloses that he had been on night patrol on the preceding evening. His death having occurred between 1 and 3 a.m. does not therefore justify any conclusion that it happened outside of the hours of his employment. As to the place of his death, the evidence shows that he had stationed himself in a territory which was under surveillance for the illegal spotlight killing of deer. The two-way radio with which the car was equipped was turned on so that Lund could not only have received messages from headquarters, but if need be could have sent them. While on such duty he was not only permitted to, but it was contemplated that he could convert the car into a bed (for it was so equipped), and that he might retire thereon or sleep.

There was no rule that forbade his having company while on duty. The testimony of Captain Shea in this regard is as follows: "[Mr. Faulkner] Q. . . . Now, would you—is there any order or rule or regulation of the department that prohibits you, while you're sitting there in your car or stationed in your car or in bed in your car, from talking to anybody that comes along? A. Definitely not. Q. Is there any rule or regulation prohibiting that person from getting into the car and sitting down with you, having a smoke or a chat? A. No, there isn't. Q. Is there any rule or regulation of the department that prohibits you or any of the men, any of the game wardens, from—while on duty—from talking or entertaining or enjoying the company of other people? A. No, there's no regulation to that effect. Q. No rule against it? A. No rule against it." And finally, his death was occasioned from carbon monoxide poisoning from the use of equipment furnished him by his employer. From this and other facts and circumstances in the record, we cannot say there was not substantial evidence to support the findings of the commission, or that the findings were irrational. In doing so we are well aware of the contrary inferences which might have been drawn from the same set of facts. The secluded spot in a remote area could have been selected by Lund for its advantages as a rendezvous in which to conduct an illicit love affair. The manner in which the cars were parked, the state of partial dishabille in which the bodies were found, the fact that Lund had divested himself of his uniform and placed his gun and boots underneath the seat, all are circumstances from which the trier of facts might have reasonably concluded that he had either abandoned or deviated from his duty. However, as stated above, it is not our province to resolve these facts or to substitute our own views for those of the commission. Lund, while acting in the scope of his employment, was permitted to drive to isolated spots where game violators might be found. It was a matter of discretion with him whether or not at such times he converted the car into a bed and slept. In so doing he was acting within the course of his employment. There was no rule which forbade him from having company while on duty, and the presence of a woman in the car with him does not necessarily compel a conclusion that he had thereby either abandoned his employment or deviated therefrom. There being a choice between two inferences reasonably deducible from the evidence, we cannot say that the commission acted without or in excess of its powers or that its findings of fact were unreasonable. The award is affirmed. Adams, P. J., and Peek, J., concurred.

United States ex rel. Exarchou v. Murff
265 F.2D 504 (1959)

George Exarchou entered the United States illegally in 1945. In 1949, the Immigration and Naturalization Service (INS) determined that he was deportable, but he petitioned the INS for eligibility for a discretionary grant of voluntary departure (which would allow him to reenter the United States legally at a later date). The INS found him to be qualified for a voluntary departure, but then it further recommended that his deportation be suspended. By 1953, Congress failed to pass a resolution approving the recommended suspension of deportation, so the INS again granted him permission to voluntarily depart the United States.

Just prior to his departure, however, his case was reopened at the INS by a letter written by his estranged wife. In the letter she charged him with infidelity and requested that her petitions of support on his behalf be withdrawn. A special inquiry officer conducted an investigation and found that in 1954 shortly after separation from his wife, Exarchou lived with a divorcée, her two children, and her mother. The inquiry officer found that Exarchou had engaged in adultery and hence was not of "good moral character," and that consequently he was not eligible for voluntary departure. The inquiry officer sent these findings to the INS, which then reversed its earlier position recommending voluntary departure. At a hearing in 1956, where Exarchou was again requesting voluntary departure and asking the INS to reconsider its findings, the testimony (and hence the written record) consisted of the following witnesses and their testimony:

Mr. Exarchou testified that his relationship with the divorcée was totally platonic and not adulterous, that they occasionally went dancing but nothing else, that he paid her rent, that he slept on the living room sofa and she slept in her bedroom on the second floor with her seven-year-old son, that the other two bedrooms were occupied by the divorcée's mother and her college-aged son.

The divorced woman in question was called to the stand, but she refused to testify based on her Fifth Amendment right against self-incrimination.

The estranged wife did not testify. In a hearing like this, the petitioner (Mr. Exarchou) has the burden of proving his good moral character. The INS found he failed to carry that burden and ordered him deported. That decision was sustained by the district court and was appealed to the circuit court.

The opinion of the court is by Chief Judge Clark.

As the Service concedes, no inference may be legally drawn from the refusal of the woman at whose home Exarchou briefly resided in 1954 to testify. *United States v. Maloney,* 2 Cir., 262 F.2d 535, 537. Actually the record indicates that avoidance of embarrassment was probably a stronger factor in her refusal than fear of self-incrimination. She had remarried by the time of the hearing and stated frankly that she was annoyed at being drawn into the proceedings and had sought and obtained advice as to means—which she took—to eliminate herself from a dispute in which she had no concern or interest. Exarchou's first wife did not testify at all after a hearing in 1954, nor was her actual testimony adverse then. Her only adverse comments were contained in her rambling, accusatory letter written when domestic ties between them were strained. Even if we overlook its hearsay quality we do not believe weight should attach to a letter written under such circumstances.

Hence the Service was thrown back completely on Exarchou's own testimony as to his conduct during the period in question. Perhaps the most doubtful fact here was the amount of money he admitted to having paid the woman, more than would be a reasonable rent under the circumstances. But he seems generally to have been free with his money. Beyond this his denials of adulterous conduct were steady, persistent, and unshaken. They would appear consistent with the surrounding facts and circumstances he disclosed. It is of course true that questions of a witness' credibility must be left to the administrative fact finder. Here, however, the Special Inquiry Officer's report demonstrates an incredulity not of the witness, but of the story itself.[1]

The Officer simply did not believe it possible that a man who behaved like relator (Exarchou) could not have been committing adultery. We do not think this finding of impossibility accords with the facts of human life. Moreover, we are disturbed by the insistence in the decision upon the appearance of good moral character. The statute makes good character itself, not a reputation for it, the finding necessary to the Service's decision. Thus we cannot accept the Service's alternative conclusion that, even if Exarchou truthfully described his conduct, "a married man is not free to carry on such a relationship and still be considered one of good character." We conclude only that Exarchou has sustained his burden of establishing good moral character under 19(c) of the Immigration Act of 1917 and is entitled to further consideration of his application.

[1] "I think I can best sum up my impressions of the respondent by saying that he tells an interesting, almost fantastic, story. Certainly not one that I consider credible. In fact, I do not believe it. The respondent would have me believe that he continued this so-called platonic relationship with this woman out of the goodness of his heart and out of his sympathy for her at a time when he was admittedly separated from his own wife. Even were it the truth, and as I say I do not believe it, it seems to me that a married man is not free to carry on such a relationship and still be considered one of good character. The mores of our times may well be most liberal but I do not think they have reached that degree of liberality as yet."

Question

1. For both preceding cases list the evidence in the record on a sheet of paper. Do it in columns so that you can clearly see the evidence in support of a board's decision and the evidence that does not support the decision. In either case, can you conclude that the reviewing court was in error?

If de novo review is rarely used and substantial evidence applies only in those situations in which agency action resulted from a quasi-judicial hearing, then the final standard of review, the arbitrary and capricious standard, must apply to all other agency decisions and actions (and inaction, when it is reviewed). This standard of review applies to court review of agency rule promulgation or quasi-legislative decision making. It also applies to more informal agency decisions or action, such as Secretary Volpe's decision to approve federal highway funds for a highway through Overton Park. Section 706 (2) (a) of the Administrative Procedure Act authorizes courts to void those actions of agencies that are found to be arbitrary or capricious. That is what the trial judge did with the EPA report on secondhand smoke. He voided the report because he thought the agency's manipulation of science produced an arbitrary decision that secondhand smoke is a known carcinogen. Unfortunately, describing what the arbitrary and capricious standard applies to is easier than describing the standard and how it is applied. You are already familiar with the *Overton Park* case presented earlier. What follows is that part of the *Overton Park* decision relating to the scope of review of the secretary's decision.

Citizens to Preserve Overton Park v. Volpe 401 U.S. 402 (1971)

[The facts in this case appear earlier in this chapter.]

. . . Scrutiny of the facts does not end, however, with the determination that the Secretary has acted within the scope of his statutory authority. Section 706 (2) (A) requires a finding that the actual choice made was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706 (2) (A). To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency. The administrative record is not, however, before us. The lower courts based their review on the litigation affidavits that were presented. These affidavits were merely "post hoc" rationalizations, *Burlington Truck Lines v. United States,* 371 U.S. 156, 168–169 (1962), which have traditionally been found to be an inadequate basis for review. And they clearly do not constitute the "whole record" compiled by the agency: the basis for review required by 706 of the Administrative Procedure Act.

Thus it is necessary to remand this case to the District Court for plenary review of the Secretary's decision. That review is to be based on the full administrative record that was before the Secretary at the time he made his decision. But since the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence it may be necessary for the District Court to require some explanation in order to determine if the Secretary acted within the scope of his authority and if the Secretary's action was justifiable under the applicable standard. The court may require the administrative officials who participated in the decision to give testimony explaining their action. Of course, such inquiry into the mental processes of administrative decisionmakers is usually to be avoided. *United States v. Morgan,* 313 U.S. 409, 422 (1941). And where there are administrative findings that were made at the same time as the decision, as was the case in *Morgan,* there must be a strong showing of bad faith or improper behavior before such inquiry may be made. But here there are no such formal findings and it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves. See *Shaughnessy v. Accardi,* 349 U.S. 280 (1955).

The District Court is not, however, required to make such an inquiry. It may be that the Secretary can prepare formal findings including the information required by DOT Order 5610.1 that will provide an adequate explanation for his action. Such an explanation will, to some extent, be a "post hoc rationalization" and thus must be viewed critically. If the District Court decides that additional explanation is necessary, that court should consider which method will prove the most expeditious so that full review may be had as soon as possible.

Reversed and remanded.

Questions

1. Succinctly state the precise disposition of this case.
2. What will happen next?
3. In your opinion, was the secretary's decision arbitrary? Why?
4. Did the Supreme Court find the secretary's decision to be arbitrary?

Because of the decision in the *Overton Park* case and others like it, agency decision makers in today's world do not make decisions without at least some kind of paper trail, such as a written explanation for the decision. In informal rule making under Section 553 of the Administrative Procedure Act, there is somewhat of a record for a reviewing court to review, and, indeed, Subsection C of 553 requires the agency to "adopt a concise general statement of their (the rules') basis and purpose." However, the record generated by the notice and comment hearing is "indistinguishable . . . from [materials collected in] the proceedings before a legislative committee hearing on a proposed bill—letters, telegrams, and written statements from proponents and opponents, including occasional oral testimony not subject to adversary cross-examination."[35]

The point is that a court reviewing the record of an agency's decision arrived at through a 553 rule-making procedure is in exactly the same position as a court reviewing a legislative decision. The judge must be careful that he or she is not simply substituting his or her policy preferences for the preferences of the legislature (or administrative agency).

Occasionally, courts reviewing agency action will apply a standard of review that is different from what is required in the Administrative Procedure Act. For the past three decades, when the Census Bureau prepared to take the census, it considered using sampling techniques. The Bureau did this because the census, as it has traditionally been conducted, undercounts the population. Those who do not get counted are disproportionately poor, urban, and people of color. The use of sampling would fix this problem. This is important because the census determines the number of representatives each state will have in Congress. It also determines how much federal money will be returned to the states under various programs, but the constitutional purpose for the census is to determine representation. Prior to the 1990 census, the director of the Bureau of the Census decided to use sampling, but his decision was vetoed by his boss, the secretary of commerce. Parties that would have benefited from the use of sampling sued the secretary. The circuit court of appeals reviewing the secretary's decision said that because congressional districts must come as close as possible to "one person-one vote," the secretary could not justify any procedure that did not come as close as possible to numerical accuracy. Hence, the secretary would be forced to use sampling. The court had applied a higher standard of review than is required under the Administrative Procedure Act. It applied a "strict scrutiny" standard of review that accompanies litigation involving the right to vote. The Supreme Court reversed and said the secretary's decision was not arbitrary or capricious under the appropriate standard of review required by the Administrative Procedure Act and allowed the secretary's decision to stand.[36]

In another case, the Nuclear Regulatory Commission (NRC) was sued over its decision to approve the construction of a nuclear plant. An appeals court applied a standard of review more rigorous than the arbitrary standard required by the Administrative Procedure Act. The Supreme Court reversed the appeals court.[37]

The *California Dental Association* case was discussed above briefly and is presented at the end of this chapter. In that case, the FTC decided that because the dental association restricted truthful advertising, it had unlawfully restrained trade. That decision received what is called "quick look" review by the court of appeals, which sustained the FTC decision. The Supreme Court said quick-look review was insufficient and sent the case back for review on the substantial evidence standard. The point is that the Administrative Procedure Act specifies substantial evidence review for quasi-judicial decisions and the arbitrary and capricious standard for all others, and appeals courts are often reversed if they apply a standard either too high or too low.

Summary

1. *Jurisdiction.* This is the power of a court to resolve a dispute. Because federal courts have jurisdiction over any case or controversy under the laws or statutes of the United States and because all administrative actions are taken pursuant to congressional statute, federal courts have jurisdiction over conflicts arising under federal agencies. Normally, jurisdiction questions involve whether the agency overstepped its jurisdictional mandate from Congress.

2. *Standing.* This involves a determination of who is the proper party to challenge an administrative action. The court has created a two-pronged test for standing to challenge an administrative decision: (a) Can the plaintiff demonstrate an identifiable injury? (b) Is the agency action complained of arguably under the zone of interest meant to be protected by a particular statute? This test applied in those situations where agency action directly affected an individual, business, or group. The Court now applies a three-pronged test: injury in fact, traceability, and redressability. This test is most appropriate where government action has caused an intervening party to act, and the third party's action has allegedly caused injury to a plaintiff, who now sues the government. It should be clear, however that

without so much as a whisper about overruling precedent (the zone of interest test), the Court has moved to the three-pronged test in all situations. Indeed, in some cases, the Court uses both tests as it did in *FEC v. Akins,* which appears at the end of this chapter.

3. *Ripeness.* An injury cannot be too hypothetical or too far off in the future. There must either be a documentable injury, or injury must be imminent.

4. *Mootness.* The conflict that led to the lawsuit in the first place cannot already be resolved.

5. *Reviewability.* This is a legislative grant of authority to courts to review agency action. First, at the federal level prior to enactment of the Administrative Procedure Act (1947), there was a common law presumption that courts could not review the actions of administrative agencies unless the enabling legislation specifically provided for court review. In most states, there was also a presumption of unreviewability, which, at some levels in some states, still exists today due to a lack of legislation extending judicial review to all agency actions. Second, the intent and plain meaning of the Act is to extend court review to virtually all agency actions at the federal level with two exceptions: (a) cases in which Congress has forbidden court review for a specific agency and (b) a nebulous category of supposedly unreviewable situations in which the agency action is "committed to agency discretion by law."

6. *Exhaustion.* Before people can sue an agency in court, they must first have exhausted all avenues of appeal within the agency.

7. *Primary jurisdiction.* Within the federal system, in those situations in which people are in conflict with an agency, they can either exhaust remedies within the agency or turn to the courts. Two situations require the courts to defer to the agency first: (a) if the conflict involves subject matter that requires one uniform national standard (ICC rates, for example) and (b) if, for resolution, the subject matter requires agency expertise that courts are unlikely to possess.

8. *Scope of review.* There are, for all practical purposes, two standards of review that courts apply in reviewing agency activity: (a) The substantial evidence test applies to agency decisions, orders, or rulings that are made via a quasi-judicial procedure. (b) The arbitrary and capricious test applies to all other agency activity.

END-OF-CHAPTER CASES

City of Los Angeles v. Lyons
461 U.S. 55 (1983)

[The following facts of the case are taken from Justice Marshall's dissent.]

Respondent Adolph Lyons is a 24-year-old Negro male who resides in Los Angeles. According to the uncontradicted evidence in the record, at about 2 a.m. on October 6, 1976, Lyons was pulled over to the curb by two officers of the Los Angeles Police Department (LAPD) for a traffic infraction because one of his taillights was burned out. The officers greeted him with drawn revolvers as he exited from his car. Lyons was told to face his car and spread his legs. He did so. He was then ordered to clasp his hands and put them on top of his head. He again complied. After one of the officers completed a patdown search, Lyons dropped his hands, but was ordered to place them back above his head, and one of the officers grabbed Lyons' hands and slammed them onto his head. Lyons complained about the pain caused by the ring of keys he was holding in his hand. Within 5 to 10 seconds, the officer began to choke Lyons by applying a forearm against his throat. As Lyons struggled for air, the officer handcuffed him, but continued to apply the chokehold until he blacked out. When Lyons regained consciousness, he was lying face down on the ground, choking, gasping for air, and spitting up blood and dirt. He had urinated and defecated. He was issued a traffic citation and released.

Opinion by Justice White joined by Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor. Justices Marshall, Brennan, Blackmun, and Stevens dissented.

It goes without saying that those who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Art. III of the Constitution by alleging an actual case or controversy. *Flast v. Cohen,* 392 U.S. 83, 94–101 (1968); *Jenkins v. McKeithen,* 395 U.S. 411, 421–425 (1969). Plaintiffs must demonstrate a "personal stake in the outcome" in order to "assure that concrete adverseness which sharpens the presentation of issues" necessary for the proper resolution of constitutional questions. *Baker v. Carr,* 369 U.S. 186, 204 (1962). Abstract injury is not enough. The plaintiff must show that he "has sustained or is immediately in danger of sustaining some direct injury" as the result of the challenged official conduct and the injury or threat of injury must be both "real and immediate," not "conjectural" or "hypothetical." See, e.g., *Golden v. Zwickler,* 394 U.S. 103, 109–110 (1969). . . .

In *O'Shea v. Littleton,* 414 U.S. 488 (1974), we dealt with a case brought by a class of plaintiffs claiming that they had been subjected to discriminatory enforcement of the criminal law. Among other things, a county magistrate and judge were accused of discriminatory conduct in various respects, such as sentencing members of plaintiff's class more harshly than other defendants. The Court of Appeals reversed the dismissal of the suit by the District Court, ruling that if the allegations were proved, an appropriate injunction could be entered.

We reversed for failure of the complaint to allege a case or controversy. Although it was claimed in that case that particular members of the plaintiff class had actually suffered from the alleged unconstitutional practices, we observed that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." Past wrongs were evidence bearing on "whether there is a real and immediate threat of repeated injury." But the prospect of future injury rested "on the likelihood that [plaintiffs] will again be arrested for and charged with violations of the criminal law and will again be subjected to bond proceedings, trial, or sentencing before petitioners." The most that could be said for plaintiffs' standing was "that if [plaintiffs] proceed to violate an unchallenged law and if they are charged, held to answer, and tried in any proceedings before petitioners, they will be subjected to the discriminatory practices that petitioners are alleged to have followed." We could not find a case or controversy in those circumstances: the threat to the plaintiffs was not "sufficiently real and immediate to show an existing controversy simply because they anticipate violating lawful criminal statutes and being tried for their offenses. . . ." It was to be assumed "that [plaintiffs] will conduct their activities within the law and so avoid prosecution and conviction as well as exposure to the challenged course of conduct said to be followed by petitioners."

Another relevant decision for present purposes is *Rizzo v. Goode,* 423 U.S. 362 (1976), a case in which plaintiffs alleged widespread illegal and unconstitutional police conduct aimed at minority citizens and against city residents in general. The Court reiterated the holding in *O'Shea* that past wrongs do not in themselves amount to that real and immediate threat of injury necessary to make out a case or controversy. The claim of injury rested upon "what one of a small, unnamed minority of policemen might do to them in the future because of that unknown policeman's perception" of departmental procedures. This hypothesis was "even more attenuated than those allegations of future injury found insufficient in *O'Shea* to warrant [the] invocation of federal jurisdiction." The Court also held that plaintiffs' showing at trial of a relatively few instances of violations by individual police officers, without any showing of a deliberate policy on behalf of the named defendants, did not provide a basis for equitable relief.

No extension of *O'Shea* and *Rizzo* is necessary to hold that respondent Lyons has failed to demonstrate a case or controversy with the City that would justify the equitable relief sought. Lyons' standing to seek the injunction requested depended on whether he was likely to suffer future injury from the use of the chokeholds by police officers. Count V of the complaint alleged the traffic stop and choking incident five months before. That Lyons may have been illegally choked by the police on October 6, 1976, while presumably affording Lyons standing to claim damages against the individual officers and perhaps against the City, does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part. The additional allegation in the complaint that the police in Los Angeles routinely apply chokeholds in situations where they are not threatened by the use of deadly force falls far short of the allegations that would be necessary to establish a case or controversy between these parties.

In order to establish an actual controversy in this case, Lyons would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion either, (1) that all police officers in Los Angeles always choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation, or for questioning, or (2) that the City ordered or authorized police officers to act in such manner. Although Count V alleged that the City authorized the use of the control holds in situations where deadly force was not threatened, it did not indicate why Lyons might be realistically threatened by police officers who acted within the strictures of the City's policy. If, for example, choke holds were authorized to be used only to counter resistance to an arrest by a suspect, or to thwart an effort to escape, any future threat to Lyons from the City's policy or from the conduct of police officers would be no more real than the possibility that he would again have an encounter with the police and that either he would illegally resist arrest or detention or the officers would disobey their instructions and again render him unconscious without any provocation.

Lyons fares no better if it be assumed that his pending damages suit affords him Art. III standing to seek an injunction as a remedy for the claim arising out of the October 1976 events. The equitable remedy is unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again—a "likelihood of substantial and immediate irreparable injury." *O'Shea v. Littleton,* 414 U.S., at 502. The speculative nature of Lyons' claim of future injury requires a finding that this prerequisite of equitable relief has not been fulfilled.

Nor will the injury that Lyons allegedly suffered in 1976 go unrecompensed; for that injury, he has an adequate remedy at law. Contrary to the view of the Court of Appeals, it is not at all "difficult" under our holding "to see how anyone can ever challenge police or similar administrative practices." 615 F.2d, at 1250. The legality of the violence to which Lyons claims he was once subjected is at issue in his suit for damages and can be determined there.

Absent a sufficient likelihood that he will again be wronged in a similar way, Lyons is no more entitled to an injunction than any other citizen of Los Angeles; and a federal court may not entertain a claim by any or all citizens who no more than assert that certain practices of law enforcement officers are unconstitutional. *Cf. Warth v. Seldin*, 422 U.S. 490 (1975); *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974). This is not to suggest that such undifferentiated claims should not be taken seriously by local authorities.

Indeed, the interest of an alert and interested citizen is an essential element of an effective and fair government, whether on the local, state, or national level. A federal court, however, is not the proper forum to press such claims unless the requirements for entry and the prerequisites for injunctive relief are satisfied.

Federal Election Commission v. Akins
524 U.S. 11 (1998)

Justice Breyer delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices Stevens, Kennedy, Souter, and Ginsburg joined. Justice Scalia filed a dissenting opinion, in which Justices O'Connor and Thomas joined.

The Federal Election Commission (FEC) has determined that the American Israel Public Affairs Committee (AIPAC) is not a "political committee" as defined by the Federal Election Campaign Act of 1971, 86 Stat. 11, as amended, 2 U.S.C. § 431(4) (FECA), and, for that reason, the Commission has refused to require AIPAC to make disclosures regarding its membership, contributions, and expenditures that FECA would otherwise require. We hold that respondents, a group of voters, have standing to challenge the Commission's determination in court, and we remand this case for further proceedings.

I

In light of our disposition of this case, we believe it necessary to describe its procedural background in some detail. As commonly understood, the Federal Election Campaign Act seeks to remedy any actual or perceived corruption of the political process in several important ways.

The Act imposes limits upon the amounts that individuals, corporations, "political committees" (including political action committees), and political parties can contribute to a candidate for federal political office. The Act also imposes limits on the amount these individuals or entities can spend in coordination with a candidate. (It treats these expenditures as "contributions to" a candidate for purposes of the Act.). As originally written, the Act set limits upon the total amount that a candidate could spend of his own money, and upon the amounts that other individuals, corporations, and "political committees" could spend independent of a candidate—though the Court found that certain of these last-mentioned limitations violated the First Amendment. *Buckley v. Valeo*, 424 U.S. 1, 39-59. . . .

This case concerns requirements in the Act that extend beyond these better-known contribution and expenditure limitations. In particular the Act imposes extensive recordkeeping and disclosure requirements upon groups that fall within the Act's definition of a "political committee."

Those groups must register with the FEC, appoint a treasurer, keep names and addresses of contributors, track the amount and purpose of disbursements, and file complex FEC reports that include lists of donors giving in excess of $200 per year (often, these donors may be the group's members), contributions, expenditures, and any other disbursements irrespective of their purposes.

The Act's use of the word "political committee" calls to mind the term "political action committee," or "PAC," a term that normally refers to organizations that corporations or trade unions might establish for the purpose of making contributions or expenditures that the Act would otherwise prohibit. But, in fact, the Act's term "political committee" has a much broader scope. The Act states that a "political committee" includes "any committee, club, association or other group of persons which receives" more than $1,000 in "contributions" or "which makes" more than $1,000 in "expenditures" in any given year.

This broad definition, however, is less universally encompassing than at first it may seem, for later definitional subsections limit its scope. The Act defines the key terms "contribution" and "expenditure" as covering only those contributions and expenditures that are made "for the purpose of influencing any election for Federal office."

Moreover, the Act sets forth detailed categories of disbursements, loans, and assistance-in-kind that do not count as a "contribution" or an "expenditure," even when made for election-related purposes. In particular, assistance given to help a particular candidate will not count toward the $1,000 "expenditure" ceiling that qualifies an organization as a "political committee" if it takes the form of a "communication" by an organization "to its members"—as long as the organization at issue is a "membership organization or corporation" and it is not "organized primarily for the purpose of influencing the nomination . . . or election, of any individual."

This case arises out of an effort by respondents, a group of voters with views often opposed to those of AIPAC, to persuade the FEC to treat AIPAC as a "political committee." Respondents filed a complaint with the FEC, stating that AIPAC had made more than $1,000 in qualifying "expenditures" per year, and thereby became a "political committee." They added that AIPAC had violated the FEC provisions requiring "political committees" to register and to make public the information about members, contributions, and expenditures to which we have just referred. Respondents also claimed that AIPAC had violated § 441b of FECA, which prohibits corporate campaign "contributions" and "expenditures." They asked the FEC to find that AIPAC had violated the Act, and, among other things, to order AIPAC to make public the information that FECA demands of a "political committee."

AIPAC asked the FEC to dismiss the complaint. AIPAC described itself as an issue-oriented organization that seeks to maintain friendship and promote goodwill between the United States and Israel. AIPAC conceded that it lobbies elected officials and disseminates information about candidates for public office. But in responding to the § 441b charge, AIPAC denied that it had made the kinds of "expenditures" that matter for FECA purposes (i.e., the kinds of election-related expenditures that corporations cannot make, and which count as the kind of expenditures that, when they exceed $1,000, qualify a group as a "political committee").

To put the matter more specifically: AIPAC focused on certain "expenditures" that respondents had claimed were election-related, such as the costs of meetings with candidates, the introduction of AIPAC members to candidates, and the distribution of candidate position papers. AIPAC said that its spending on such activities, even if election-related, fell within a relevant exception. They amounted, said AIPAC, to communications by a membership organization with its members, which the Act exempts from its definition of "expenditures," In AIPAC's view, these communications therefore did not violate (the) corporate expenditure prohibition. (And, if AIPAC was right, those expenditures would not count towards the $1,000 ceiling on "expenditures" that might transform an ordinary issue-related group into a "political committee.")

The FEC's General Counsel concluded that, between 1983 and 1988, AIPAC had indeed funded communications of the sort described. The General Counsel said that those expenditures were campaign related, in that they amounted to advocating the election or defeat of particular candidates. He added that these expenditures were "likely to have crossed the $1,000 threshold." At the same time, the FEC closed the door to AIPAC's invocation of the "communications" exception. The FEC said that, although it was a "close question," these expenditures were not membership communications, because that exception applies to a membership organization's communications with its members, and most of the persons who belonged to AIPAC did not qualify as "members" for purposes of the Act.

Still, given the closeness of the issue, the FEC exercised its discretion and decided not to proceed further with respect to the claimed "corporate contribution" violation.

The FEC's determination that many of the persons who belonged to AIPAC were not "members" effectively foreclosed any claim that AIPAC's communications did not count as "expenditures" for purposes of determining whether it was a "political committee." Since AIPAC's activities fell outside the "membership communications" exception, AIPAC could not invoke that exception as a way of escaping the scope of the Act's term "political committee" and the Act's disclosure provisions, which that definition triggers.

The FEC nonetheless held that AIPAC was not subject to the disclosure requirements, but for a different reason. In the FEC's view, the Act's definition of "political committee" includes only those organizations that have as a "major purpose" the nomination or election of candidates. Cf. *Buckley v. Valeo,* 424 U.S. at 79. AIPAC, it added, was fundamentally an issue-oriented lobbying organization, not campaign-related organization, and hence AIPAC fell outside the definition of a "political committee" regardless. The FEC consequently dismissed respondents' complaint.

Respondents filed a petition in Federal District Court seeking review of the FEC's determination dismissing their complaint.

The District Court granted summary judgment for the FEC, and a divided panel of the Court of Appeals affirmed, 66 F.3d 348 (CADC 1995). The *en banc* Court of Appeals reversed, however, on the ground that the FEC's "major purpose" test improperly interpreted the Act's definition of a "political committee." 101 F.3d 731 (CADC 1997). We granted the Government's petition for *certiorari,* which contained the following two questions:

"1. Whether respondents had standing to challenge the Federal Election Commission's decision not to bring an enforcement action in this case."

"2. Whether an organization that spends more than $1,000 on contributions or coordinated expenditures in a calendar year, but is neither controlled by a candidate nor has its major purpose the nomination or election of candidates, is a 'political committee' within the meaning of the [Act]."

We shall answer the first of these questions, but not the second.

II

The Solicitor General argues that respondents lack standing to challenge the FEC's decision not to proceed against AIPAC. He claims that they have failed to satisfy the "prudential" standing requirements upon which this Court has insisted. See, e.g., *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150, 153 (1970) (Data Processing). He adds that respondents have not shown that they "suffer injury in fact," that their injury is "fairly traceable" to the FEC's decision, or that a judicial decision in their favor would "redress" the injury. E.g., *Bennett v. Spear,* 520 U.S. 154, 1997 (1997); *Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992).

In his view, respondents' District Court petition consequently failed to meet Article III's demand for a "case" or "controversy."

We do not agree with the FEC's "prudential standing" claim. Congress has specifically provided in FECA that "any person who believes a violation of this Act . . . has occurred, may file a complaint with the Commission." § 437g(a)(1). It has added that "any party aggrieved by an order of the Commission dismissing a complaint filed by such party . . . may file a petition" in district court seeking review of that dismissal. § 437g(8)(A). History associates the word "aggrieved" with a congressional intent to cast the standing net broadly—beyond the common-law interests and substantive statutory rights upon which "prudential" standing traditionally rested. *Scripps-Howard Radio, Inc. v. FCC,* 316 U.S. 4 (1942); *FCC v. Sanders Brothers Radio Station,* 309 U.S. 470 (1940); *Office of Communication of the United Church of Christ v. FCC,* 359 F.2d 994 (CADC 1966)

(Burger, J.); *Associated Industries of New York State v. Ickes,* 134 F.2d 694 (1943) (Frank, J.). Cf. Administrative Procedure Act, 5 U.S.C. § 702 (stating that those "suffering legal wrong" or "adversely affected or aggrieved . . . within the meaning of a relevant statute" may seek judicial review of agency action).

Moreover, prudential standing is satisfied when the injury asserted by a plaintiff "arguably [falls] within the zone of interests to be protected or regulated by the statute . . . in question." NCUA, Data Processing, supra, at 153. The injury of which respondents complain—their failure to obtain relevant information—is injury of a kind that FECA seeks to address. *Buckley,* 424 U.S. at 66-67 ("political committees" must disclose contributors and disbursements to help voters understand who provides which candidates with financial support). We have found nothing in the Act that suggests Congress intended to exclude voters from the benefits of these provisions, or otherwise to restrict standing, say, to political parties, candidates, or their committees.

Given the language of the statute and the nature of the injury, we conclude that Congress, intending to protect voters such as respondents from suffering the kind of injury here at issue, intended to authorize this kind of suit. Consequently, respondents satisfy "prudential" standing requirements. . . .

Nor do we agree with the FEC or the dissent that Congress lacks the constitutional power to authorize federal courts to adjudicate this lawsuit. Article III, of course, limits Congress' grant of judicial power to "cases" or "controversies." That limitation means that respondents must show, among other things, an "injury in fact"—a requirement that helps assure that courts will not "pass upon . . . abstract, intellectual problems," but adjudicate "concrete, living contests between adversaries."

. . . In our view, respondents here have suffered a genuine "injury in fact." The "injury in fact" that respondents have suffered consists of their inability to obtain information—lists of AIPAC donors (who are, according to AIPAC, its members) and campaign-related contributions and expenditures—that, on respondents' view of the law, the statute requires that AIPAC make public. There is no reason to doubt their claim that the information would help them (and others to whom they would communicate it) to evaluate candidates for public office, especially candidates who received assistance from AIPAC, and to evaluate the role that AIPAC's financial assistance might play in a specific election. Respondents' injury consequently seems concrete and particular. Indeed, this Court has previously held that a plaintiff suffers an "injury in fact" when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute. *Public Citizen v. Department of Justice,* 491 U.S. 440, 449 (1989) (failure to obtain information subject to disclosure under Federal Advisory Committee Act "constitutes a sufficiently distinct injury to provide standing to sue"). See also *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 373-374 (1982) (deprivation of information about housing availability constitutes "specific injury" permitting standing). . . .

Thus respondents' "injury in fact" is "fairly traceable" to the FEC's decision not to issue its complaint, even though the FEC might reach the same result exercising its discretionary powers lawfully. For similar reasons, the courts in this case can "redress" respondents' "injury in fact." Finally, the FEC argues that we should deny respondents standing because this case involves an agency's decision not to undertake an enforcement action—an area generally not subject to judicial review.

In *Heckler,* this Court noted that agency enforcement decisions "have traditionally been 'committed to agency discretion,'" and concluded that Congress did not intend to alter that tradition in enacting the APA. *Heckler,* 470 U.S. 821 at 832, 5 U.S.C. § 701(a) (courts will not review agency actions where "statutes preclude judicial review," or where the "agency action is committed to agency discretion by law"). We deal here with a statute that explicitly indicates the contrary. . . .

In sum, respondents, as voters, have satisfied both prudential and constitutional standing requirements. They may bring this petition for a declaration that the FEC's dismissal of their complaint was unlawful. . . .

The upshot, in our view, is that we should permit the FEC to address, in the first instance, the issue presented by Question Two. We can thereby take advantage of the relevant agency's expertise, by allowing it to develop a more precise rule that may dispose of this case, or at a minimum, will aid the Court in reaching a more informed conclusion. In our view, the FEC should proceed to determine whether or not AIPAC's expenditures qualify as "membership communications," and thereby fall outside the scope of "expenditures" that could qualify it as a "political committee." If the FEC decides that despite its new rules, the communications here do not qualify for this exception, then the lower courts, in reconsidering respondents' arguments, can still evaluate the significance of the communicative context in which the case arises. If, on the other hand, the FEC decides that AIPAC's activities fall within the "membership communications" exception, the matter will become moot.

For these reasons, the decision of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Author's Note: Justice Scalia's dissent argues that this is an action to require an agency to enforce and as such is not reviewable. Whether to begin enforcement proceedings is an action committed to agency discretion by law according to *Heckler V. Chaney.*

Tozzi v. U. S. Department of Health and Human Services 271 F. 3d 301 (D.C. Circuit 2001)

Opinion delivered by Judge Tatel, after hearing with Senior Circuit Judges Silberman and Williams.

Acting pursuant to a provision of the Public Health Service Act that requires the Secretary of Health and Human Services to publish a list of substances "known" or "reasonably anticipated to be" human carcinogens, the Secretary upgraded the chemical dioxin from the "reasonably anticipated" to the "known" category. A manufacturer of products that release dioxin when incinerated, together with others allegedly affected by the upgrade, argue that the Secretary, in violation of HHS regulations, acted without sufficient epidemiological evidence that dioxin is a known human carcinogen. Although we reject the Secretary's arguments that the manufacturer lacks standing and that the upgrade decision is unreviewable, we agree with the district court that, given the deference owed an agency's interpretation of its own regulations, the Secretary acted neither arbitrarily nor capriciously.

I

In 1978, Congress amended the Public Health Service Act to require the Secretary of Health, Education, and Welfare, now Health and Human Services, to publish a list of known and suspected carcinogens. . . . Entitled the Report on Carcinogens, the list is prepared biennially by the Department's National Toxicology Program ("NTP"). Although HHS does not regulate substances based upon their inclusion in the Report, a listing—or in some instances an upgrade—may trigger obligations under other agency regulations. For example, OSHA's Hazard Communication Standard requires manufacturers to label as a carcinogen every substance listed in the Report. . . . A listing can also trigger obligations under state regulations.

Before the Secretary may list (or delist) a substance, the substance undergoes a multi-step review process. See HHS Eighth Report on Carcinogens (1998). Acting on recommendations from the scientific community, the NTP begins by publishing in the Federal Register a list of substances that the agency believes merit consideration. At about the same time, an NTP committee, the Report on Carcinogens Review Committee, reviews the scientific literature and prepares a background document discussing the literature and recommending substances for listing. These recommendations, together with the background document and any public comments received in response to the Federal Register notice, are sent to two peer review committees: the NTP's Interagency Working Group (a committee composed of scientists from several federal agencies) and a subcommittee of the NTP's Board of Scientific Counselors (a chartered advisory committee). The subcommittee holds public hearings and receives written comments. Then, the subcommittee and the Working Group make formal recommendations to the NTP Executive Committee, which in turn makes a recommendation to the NTP Director. After independently evaluating the Executive Committee's recommendation, the Director submits a final draft of the Report to the Secretary. If the Secretary approves the Report, a notice is published in the Federal Register identifying all newly listed (or delisted) substances classifying them as either "known" or "reasonably anticipated to be" human carcinogens, and announcing the availability of the latest Report. Of significance to this case, the Secretary may not move substances from one category to the other without going through the same formal review process.

The Secretary has issued "criteria" for classifying substances as "known" or "reasonably anticipated to be" human carcinogens. As originally issued in 1982, the criteria provided:

Known to be Carcinogens:

There is sufficient evidence of carcinogenicity from studies in humans which indicates a causal relationship between the agent and human cancer.

Reasonably Anticipated to be a Human Carcinogen:

A. There is limited evidence of carcinogenicity from studies in humans, which indicates that causal interpretation is credible, but that the alternative explanations, such as chance, bias or confounding, could not adequately be excluded, or

B. There is sufficient evidence of carcinogenicity from studies in experimental animals which indicates that there is an increased incidence of malignant tumors: (a) in multiple species or strains, or (b) in multiple experiments (preferably with different routes of administration or using different dose levels), or (c) to an unusual degree with regard to incidence, site or type of tumor, or age at onset. Additional evidence may be provided by data concerning dose-response effects, as well as information on mutagenicity or chemical structure.

Eighth Report

The parties agree that under these criteria only epidemiological studies were considered when placing a substance in the first category. Many in the scientific community, however, began to urge revision of the criteria to provide for broader consideration of "mechanistic" evidence—that is, evidence of the actual biochemical processes by which a substance causes cancer. In response, the Secretary published revised criteria in 1996. Because the differences between these criteria and the 1982 version are central to this case, we quote the new version in full:

Known to be a Human Carcinogen:

There is sufficient evidence of carcinogenicity from studies in humans which indicates a causal relationship between exposure to the agent, substance or mixture and human cancer.

Reasonably Anticipated to be a Human Carcinogen:

There is limited evidence of carcinogenicity from studies in humans, which indicates that causal interpretation is credible, but that alternative explanations, such as chance, bias or confounding, could not adequately be excluded; or

There is sufficient evidence of carcinogenicity from studies in experimental animals which indicates that there is an increased incidence of malignant and/or combined benign and malignant tumors: (a) in multiple species or at multiple tissue sites, or (b) by multiple routes of exposure, or (c) to an unusual degree with regard to incidence, site or type of tumor, or age at onset; or

There is less than sufficient evidence of carcinogenicity in humans or laboratory animals; however, the agent belongs to a well defined structurally-related class of substances whose members are listed in a previous Annual or Biennial Report on Carcinogens as either known to be human carcinogen, or reasonably anticipated to be human carcinogen or there is convincing relevant information that the agent acts through mechanisms indicating it would likely cause cancer in humans.

Conclusions regarding carcinogenicity in humans or experimental animals are based on scientific judgment, with consideration given to all relevant information. Relevant information includes but is not limited to dose response, route of exposure, chemical structure, metabolism, pharmacokinetics, sensitive subpopulations, genetic effects, or other data relating to mechanism of action or factors that may be unique to a given substance. For example, there may be substances for which there is evidence of carcinogenicity in laboratory animals but there are compelling data indicating that the agent acts through mechanisms which do not operate in humans and would therefore not reasonably be anticipated to cause cancer in humans.

The precise question before us is whether the final, unindented paragraph modifies both categories (as the Secretary interprets it) or only the "reasonably anticipated" category (as appellants claim).

This case involves the Secretary's decision to upgrade dioxin from the "reasonably anticipated" to the "known" category. A colorless, needle-shaped chemical not commercially produced, dioxin is released as a by-product of paper and pulp bleaching. Dioxin is also emitted during incineration of chlorine-containing materials, such as polyvinyl chloride ("PVC") plastic. Incineration of hospital waste, which usually contains PVC plastic, produces large quantities of dioxin.

Chemically stable, dioxin persists in the environment for long periods of time. Because dioxin settles into soil and water, it ends up in animal fatty tissue and eventually meat and dairy products. According to the Ninth Report, human exposure occurs in several ways:

Food is the major source (> 90%) of human exposure to [dioxin] . . . Other pathways of exposure include inhalation of [dioxin] from municipal, medical, and industrial waste incinerators and other incineration and combustion processes . . . and ingestion of drinking water (0.01% of the daily intake).

Most people have some level of dioxin in their tissues.

The Secretary originally listed dioxin in the "reasonably anticipated" category. See Ninth Report supra. In 1997, however, the International Agency for Research on Cancer ("IARC"), a division of the World Health Organization that has its own carcinogen classification scheme, upgraded dioxin to its highest category based on "limited" epidemiological evidence and "strong" evidence that dioxin acts "through a relevant mechanism of carcinogenicity." In response, the NTP proposed upgrading dioxin to the "known" category. After approval by the Report on Carcinogens Review Committee, the proposed listing was forwarded to the Working Group and the subcommittee of the Board of Scientific Counselors. The Working Group approved the upgrade, and after notice and public comment, so did the Board. The draft background document relied on both epidemiological and mechanistic evidence:

[Dioxin] is known to be a human carcinogen based on several types of evidence:

Human studies have found an association between dioxin exposure and cancer mortality with respect to all cancers combined, non-Hodgkin's lymphoma, and lung cancer;

Studies in experimental animals have shown that [dioxin] induces benign and malignant neoplasms at multiple issue [sic] sites in multiple species;

A compelling body of evidence indicates a basic similarity in the mechanism of induction of animal and human tissue biochemical and toxicological responses to [dioxin] at comparable doses and tissue levels.

Following the Board's approval, Jim Tozzi, a "regulatory consultant" and an appellant in this case, sent a letter to the NTP Director stating that the Secretary may not list substances in the known category without "sufficient" evidence from epidemiological studies. Tozzi also complained that "too much was crammed into too little time" and that the NTP failed to provide certain "key" documents to the public. Responding to Tozzi's letter and conceding that "review had been inadequate," the NTP Director announced a "re-review" of dioxin "including another open, public review by the NTP Board Subcommittee." At the same time, the Director emphasized his belief that "the criteria [had been] appropriately applied." After the additional round of notice and comment, the Board of Scientific Counselors voted against the upgrade, but both the NTP Executive Committee and the NTP Director approved it. Concurring with the Director, the Secretary listed dioxin in the Ninth Report as a known carcinogen.

Tozzi, together with Brevet Industries, a manufacturer of disposable plastic connectors used during open heart surgery, the Empire State Restaurant & Tavern Association, and Greenbaum & Gilhooleys, a New York restaurant, then filed suit in the United States District Court for the District of Columbia pursuant to the Administrative Procedure Act, 5 U.S.C. 702-706, claiming that the Secretary acted arbitrarily and capriciously by upgrading dioxin without sufficient epidemiological evidence that it causes cancer in humans. Finding the Secretary's interpretation of the criteria "eminently reasonable," the district court granted summary judgment for the Department. See *Tozzi v. United States Dep't of Health and Human Servs.*, 180 F. Supp. 2d 1, 2000.

II

We begin with two threshold issues. The Department argues that none of the appellants has standing to challenge the dioxin upgrade and that, in any case, listing decisions are unreviewable. We consider each argument in turn.

Standing

To have Article III standing, a plaintiff must demonstrate an "actual or immediate" "injury-in-fact" that is "fairly traceable" to the challenged conduct and "likely" to be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). The plaintiff's allegations must not be purely "speculative—the ultimate label for injuries too implausible to support standing." Applying this standard, the district court found that Brevet had standing.

The Department first argues that Brevet has failed to show actual or immediate injury. We disagree. According to an affidavit submitted by Brevet's president, over ninety-five percent of the company's sales depend on the continued use of PVC plastic by the medical establishment. The president also states that health care companies, pressured by environmental groups, have expressed concern over the dioxin hazards associated with incineration of PVC medical supplies; that some municipalities have adopted resolutions calling for the phasing out of all, or nearly all, PVC containing products, including medical supplies; and that Brevet's "profits, reputation and goodwill" would be adversely affected if an "authoritative U.S. government agency issued and widely disseminated a report implying . . . that Brevet's products are responsible for introducing a known human carcinogen into the environment."

Record evidence supports Brevet's claims. Three California municipalities—San Francisco, Oakland and Berkeley—adopted resolutions forcefully calling for health care institutions to eliminate their use of PVC plastic. . . . Supporting Brevet's claim that environmental groups are pressuring healthcare providers to reduce or eliminate the use of PVC plastic, record evidence demonstrates that Tenet Healthcare Corporation, which annually purchases over three billion dollars worth of medical supplies, has announced that it will seek to purchase PVC-free products. Other Brevet customers (actual and potential) including Baxter International, Universal Health Services, Kaiser

Permanente and Catholic Healthcare West have announced similar . . . moves. We thus think it not at all speculative . . . to expect that Brevet, a company whose revenues depend almost entirely on the continued use of PVC plastic in the medical industry, will experience reduced profits.

The Department next argues that even if Brevet's profits were to decline, that injury would not be "fairly traceable" to the dioxin upgrade. *Lujan,* 504 U.S. at 590. The Department points out that the anti-dioxin movement predates the listing process. It also claims that pressure on government agencies to regulate dioxin and on healthcare companies to reduce the use of PVC products will continue whether or not dioxin remains listed as a known human carcinogen.

Even if the Department's claims were true, we disagree that Brevet has failed to show that its injury is fairly traceable to the dioxin upgrade. . . . Where, as here, the alleged injury flows not directly from the challenged agency action, but rather from independent actions of third parties, we have required only a showing that "the agency action is at least a substantial factor motivating the third parties' actions." . . .

Applying this standard to the facts of this case, we have little doubt that the dioxin upgrade will represent a "substantial factor" in the decisions of state and local agencies to regulate products containing dioxin or of healthcare companies to reduce or end purchases of PVC plastics. . . .

Equally without merit is the Department's contention that even assuming a likely injury fairly traceable to the dioxin upgrade, Brevet's injury is not "redressable." *Lujan,* 504 U.S. at 561. While it may be true, as the Department insists, that municipalities and healthcare providers will not reverse decisions to limit PVC use, we do not agree that "Brevet's alleged future harm could not be redressed by a decision of this Court." . . . Thus, were we to set aside the Secretary's upgrade decision, dioxin activists could no longer point to an authoritative determination by the United States government that dioxin is "known" to cause cancer in humans. . . .

Reviewability

Reviewability under the APA hinges upon whether the listing has "legal effect, which in turn is a function of the agency's intention to bind either itself or regulated parties." *Kennecott Utah Copper Corp. v. United States Dep't of Interior,* 319 U.S. App. D.C. 128, 88 F.3d 1191, 1223 (D.C. Cir. 1996). In making this determination, we have sometimes looked to "the agency's own characterization of its action" and to "publication or the lack thereof in the Federal Register or the Code of Federal Regulations." Where the agency characterizes its action as non-binding or does not publish in the Federal Register, we have found the action unreviewable.

Seizing upon these two indicia of unreviewability, the Department argues that the listing is unreviewable. It points out that the Report's preamble states that it is "for informational purposes only" and that the Secretary never published the entire report in the Federal Register. Taken alone, the characterization of the Report as informational might well support a conclusion that the Report has no "legal effect." Additional considerations, however, lead us to conclude otherwise.

To begin with, although the final Report was not published in the Federal Register, the Secretary did publish a notice proposing a dioxin upgrade and, once finalized, a summary of the decision. Equally important, even though the Secretary takes no action pursuant to a listing, the contention that a listing has no "binding effect" is inaccurate: Listing a substance as a human carcinogen triggers obligations under OSHA, Department of Labor and state regulations. Additional evidence of a listing's "legal effect" comes from the fact that in order to remove a substance from either category, the Secretary must undertake the same elaborate procedure—including notice and comment—required for an initial listing.

Having found that Brevet has standing and that the listing is reviewable, we turn to the merits.

III

Brevet argues that by upgrading dioxin on the basis of mechanistic rather than epidemiological evidence, the Secretary acted arbitrarily and capriciously. According to Brevet, the criteria's final paragraph, which permits the use of mechanistic evidence, applies only to the "reasonably anticipated" category, leaving unaffected the traditional understanding that the Secretary may list a substance in the "known" category only if there is "sufficient" evidence from epidemiological studies. Interpreting the criteria differently, the Department insists that the last paragraph applies to both categories, thus permitting reliance on mechanistic evidence when classifying substances as known carcinogens. In support of this interpretation, the Department points out that the version appearing in the published Report, quoted in full earlier in this opinion, shows the last paragraph with wider margins than the preceding paragraphs.

Because Brevet challenges the Secretary's interpretation of an HHS regulation (Brevet nowhere argues that the criteria are not a regulation), we owe the Secretary "substantial deference." We need not find that the agency's construction is the only possible one, or even the one that the court would have adopted in the first instance. Indeed, we give the agency's interpretation "controlling weight," unless an "alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation." Brevet falls far short of meeting this highly deferential standard.

For one thing, not only does the absence of indentation support the Secretary's interpretation, but Brevet points to no textual evidence demonstrating that the last paragraph applies only to the "reasonably anticipated" category. Brevet argues that the Secretary's interpretation completely defeats language in the "known" category, which the company says requires "studies in humans" (meaning, according to Brevet, exclusively epidemiology), that are "sufficient" to "indicate a causal relationship" between the substance and cancer. Thus, Brevet says, a substance that fails that test cannot be classified as such. At most, however, Brevet has shown an inconsistency between the criteria's formatting (the absence of indentation) and the "known" category's text, in which case we would defer to the Secretary's resolution of the contradiction. . . .

Brevet next argues that "contemporaneous evidence" indicates that the Secretary had no intention of broadening the "known" criteria through the 1996 revisions. In support of this argument, Brevet points to a press release issued by the Secretary's Office on the day the revised criteria were published and to an article in *Environmental Health Perspectives,* the NTP's official newsletter, both of which state that the criteria for listing in the "known" category remain "unchanged." We see nothing in either document demonstrating that the interpretation the Department offers here "marks a departure from [the Secretary's] stated prior understanding in enacting the regulation." Although portions of the press release quote the Secretary, the statement that the criteria for the "known" category remain unchanged was not a quotation, nor does anything in the record indicate that the Secretary or any official with authority to interpret the criteria authorized the statement. In addition to suffering from the same defect, the newsletter is at best ambiguous. Although saying that the 1996 criteria for the "known" category are substantively unchanged, the newsletter, after quoting the criteria's final paragraph in full, states that "the last factor is especially important" for the reasonably anticipated to be a human carcinogen category. The phrase "especially important" suggests that the final paragraph applies to the "known" category as well.

The decision of the district court is affirmed.

So ordered.

California Dental Association v. Federal Trade Commission 526 U.S. 756 (1999)

Justice Souter delivered the opinion for a unanimous Court with respect to Parts I and II, and the opinion of the Court with respect to Part III, in which Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas joined. Justice Breyer filed an opinion concurring in part and dissenting in part, in which Justices Stevens, Kennedy, and Ginsburg joined.

There are two issues in this case: whether the jurisdiction of the Federal Trade Commission extends to the California Dental Association (CDA), a nonprofit professional association, and whether a "quick look" sufficed to justify finding that certain advertising restrictions adopted by the CDA violated the antitrust laws. We hold that the Commission's jurisdiction under the Federal Trade Commission Act (FTC Act) extends to an association that, like the CDA, provides substantial economic benefit to its for-profit members, but that where, as here, any anticompetitive effects of given restraints are far from intuitively obvious, the rule of reason demands a more thorough enquiry into the consequences of those restraints than the Court of Appeals performed.

The CDA is a voluntary nonprofit association of local dental societies to which some 19,000 dentists belong, including about three-quarters of those practicing in the State. The CDA is exempt from federal income tax under 26 U.S.C. § 501(c)(6), covering "business leagues, chambers of commerce, real-estate boards, [and] boards of trade," although it has for-profit subsidiaries that give its members advantageous access to various sorts of insurance, including liability coverage, and to financing for their real estate, equipment, cars, and patients' bills. The CDA lobbies and litigates in its members' interests and conducts marketing and public relations campaigns for their benefit.

The dentists who belong to the CDA through these associations agree to abide by a Code of Ethics (Code) including the following:

"Although any dentist may advertise, no dentist shall advertise or solicit patients in any form of communication in a manner that is false or misleading in any material respect. In order to properly serve the public, dentists should represent themselves in a manner that contributes to the esteem of the public. Dentists should not misrepresent their training and competence in any way that would be false or misleading in any material respect."

The CDA has issued a number of advisory opinions interpreting this section, and through separate advertising guidelines intended to help members comply with the Code and with state law the CDA has advised its dentists of disclosures they must make under state law when engaging in discount advertising:

"Any communication or advertisement which refers to the cost of dental services shall be exact, without omissions, and shall make each service clearly identifiable, without the use of such phrases as 'as low as,' 'and up,' 'lowest prices,' or words or phrases of similar import.

"Any advertisement which refers to the cost of dental services and uses words of comparison or relativity—for example, 'low fees'—must be based on verifiable data substantiating the comparison or statement of relativity. The burden shall be on the dentist who advertises in such terms to establish the accuracy of the comparison or statement of relativity."

"Advertising claims as to the quality of services are not susceptible to measurement or verification; accordingly, such claims are likely to be false or misleading in any material respect."

Responsibility for enforcing the Code rests in the first instance with the local dental societies, to which applicants for CDA membership must submit copies of their own advertisements and those of their employers or referral services to assure compliance with the Code. The local societies also actively seek information about potential Code violations by applicants or CDA members. Applicants who refuse to withdraw or revise objectionable advertisements may be denied membership; and members who, after a hearing, remain similarly recalcitrant are subject to censure, suspension, or expulsion from the CDA.

The Commission brought a complaint against the CDA, alleging that it applied its guidelines so as to restrict truthful, nondeceptive advertising, and so violated § 5 of the FTC Act, 15 U.S.C. § 45.

The complaint alleged that the CDA had unreasonably restricted two types of advertising: price advertising, particularly discounted fees, and advertising relating to the quality of dental services. An Administrative Law Judge (ALJ) held the Commission to have jurisdiction over the CDA, which, the ALJ noted, had itself "stated that a selection of its programs and services has a potential value to members of between $22,739 and $65,127," 121 F.T.C. at 207. He found that, although there had been no proof that the CDA exerted market power, no such proof was required to establish an antitrust violation under *In re Mass. Bd. of Registration in Optometry,* 110 F.T.C. 549 (1988), since the CDA had unreasonably prevented members and potential members from using truthful, nondeceptive advertising, all to the detriment of both dentists and consumers of dental services. He accordingly found a violation of § 5 of the FTC Act. 121 F.T.C. at 272- 273.

The Commission adopted the factual findings of the ALJ except for his conclusion that the CDA lacked market power, with which the Commission disagreed. The Commission treated the CDA's restrictions on discount advertising as illegal per se. 128 F.3d at 725. In the alternative, the Commission held the price advertising (as well as the nonprice) restrictions to be violations of the Sherman and FTC Acts under an abbreviated rule-of-reason analysis. One Commissioner concurred separately, arguing that the Commission should have applied the Mass Bd. standard, not the per se analysis, to the limitations on price advertising. Another Commissioner dissented, finding the evidence insufficient to show either that the restrictions had an anticompetitive effect under the rule of reason, or that the CDA had market power.

The Court of Appeals for the Ninth Circuit affirmed, sustaining the Commission's assertion of jurisdiction over the CDA and its ultimate conclusion on the merits. 128 F.3d at 730. The court thought it error for the Commission to have applied per se analysis to the price advertising restrictions, finding analysis under the rule of reason required for all the restrictions. But the Court of Appeals went on to explain that the Commission had properly "applied an abbreviated, or 'quick look,' rule of reason analysis designed for restraints that are not per se unlawful but are sufficiently anticompetitive on their face that they do not require a full-blown rule of reason inquiry. See *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.,* 468 U.S. 85 (1984)]" ...

The Court of Appeals thought truncated rule-of-reason analysis to be in order for several reasons. As for the restrictions on discount advertising, they "amounted in practice to a fairly 'naked' restraint on price competition itself." The CDA's procompetitive justification, that the restrictions encouraged disclosure and prevented false and misleading advertising, carried little weight because "it is simply infeasible to disclose all of the information that is required," 128 F.3d at 728, and "the record provides no evidence that the rule has in fact led to increased disclosure and transparency of dental pricing," ibid. As to non-price advertising restrictions, the court said that "these restrictions are in effect a form of output limitation, as they restrict the supply of information about individual dentists' services. See *Areeda & Hovenkamp,* Antitrust Law P1505 at 693-694 (Supp. 1997) . . . The restrictions may also affect output more directly, as quality and comfort advertising may induce some customers to obtain nonemergency care when they might not otherwise do so. . . . Under these circumstances, we think that the restriction is a sufficiently naked restraint on output to justify quick look analysis." Ibid.

The Court of Appeals went on to hold that the Commission's findings with respect to the CDA's agreement and intent to restrain trade, as well as on the effect of the restrictions and the existence of market power, were all supported by substantial evidence. 128 F.3d at 728-730.

In dissent, Judge Real took the position that the Commission's jurisdiction did not cover the CDA as a nonprofit professional association engaging in no commercial operations. 128 F.3d at 730. But even assuming jurisdiction, he argued, full-bore rule-of-reason analysis was called for, since the disclosure requirements were not naked restraints and neither fixed prices nor banned nondeceptive advertising. 128 F.3d at 730-731.

We granted *certiorari* to resolve conflicts among the Circuits on the Commission's jurisdiction over a nonprofit professional association and the occasions for abbreviated rule-of-reason analysis. We now vacate the judgment of the Court of Appeals and remand.

II

The FTC Act gives the Commission authority over "persons, partnerships, or corporations," 15 U.S.C. § 45(a)(2), and defines "corporation" to include "any company . . . or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members." Although the Circuits have not agreed on the precise extent of this definition, the Commission has long held that some circumstances give it jurisdiction over an entity that seeks no profit for itself. While the Commission has claimed to have jurisdiction over a nonprofit entity if a substantial part of its total activities provide pecuniary benefits to its members, see *In re American Medical Assn.*, 94 F.T.C. 701, 983-984 (1980), respondent now advances the slightly different formulation that the Commission has jurisdiction "over anticompetitive practices by nonprofit associations whose activities provide substantial economic benefits to their for-profit members' businesses." Respondent urges deference to this interpretation of the Commission's jurisdiction as reasonable. Brief for Respondent 25–26 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988). But we have no occasion to review the call for deference here, the interpretation urged in respondent's brief being clearly the better reading of the statute under ordinary principles of construction. . . .

Just as the FTC Act does not require that a supporting organization must devote itself entirely to its members' profits, neither does the Act say anything about how much of the entity's activities must go to raising the members' bottom lines. There is accordingly no apparent reason to let the statute's application turn on meeting some threshold percentage of activity for this purpose, or even satisfying a softer formulation calling for a substantial part of the nonprofit entity's total activities to be aimed at its members' pecuniary benefit. To be sure, proximate relation to lucre must appear; the FTC Act does not cover all membership organizations of profit-making corporations without more, and an organization devoted solely to professional education may lie outside the FTC Act's jurisdictional reach, even though the quality of professional services ultimately affects the profits of those who deliver them.

There is no line drawing exercise in this case, however, where the CDA's contributions to the profits of its individual members are proximate and apparent. Through for-profit subsidiaries, the CDA provides advantageous insurance and preferential financing arrangements for its members, and it engages in lobbying, litigation, marketing, and public relations for the benefit of its members' interests. This congeries of activities confers far more than *de minimis* or merely presumed economic benefits on CDA members; the economic benefits conferred upon the CDA's profit-seeking professionals plainly fall within the object of enhancing its members' "profit," which the FTC Act makes the jurisdictional touchstone. There is no difficulty in concluding that the Commission has jurisdiction over the CDA. . . .

III

The Court of Appeals treated as distinct questions the sufficiency of the analysis of anticompetitive effects and the substantiality of the evidence supporting the Commission's conclusions. Because we decide that the Court of Appeals erred when it held as a matter of law that quick-look analysis was appropriate (with the consequence that the Commission's abbreviated analysis and conclusion were sustainable), we do not reach the question of the substantiality of the evidence supporting the Commission's conclusion.

In *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984), we held that a "naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis." Elsewhere, we held that "no elaborate industry analysis is required to demonstrate the anticompetitive character of" horizontal agreements among competitors to refuse to discuss prices, *National Soc. of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978), or to withhold a particular desired service, *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 459 (1986) (quoting *National Soc. of Professional Engineers*, supra, at 692). In each of these cases, which have formed the basis for what has come to be called abbreviated or "quick-look" analysis under the rule of reason, an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets. In *National Collegiate Athletic Assn.*, the league's television plan expressly limited output (the number of games that could be televised) and fixed a minimum price. 468 U.S. at 99-100. In *National Soc. of Professional Engineers*, the restraint was "an absolute ban on competitive bidding." 435 U.S. at 692. In *Indiana Federation of Dentists*, the restraint was "a horizontal agreement among the participating dentists to withhold from their customers a particular service that they desire." 476 U.S. at 459. As in such cases, quick-look analysis carries the day when the great likelihood of anticompetitive effects can easily be ascertained. . . .

The case before us, however, fails to present a situation in which the likelihood of anticompetitive effects is comparably obvious. Even on Justice Breyer's view that bars on truthful and verifiable price and quality advertising are prima facie anticompetitive (opinion concurring in part and dissenting in part) and place the burden of procompetitive justification on those who agree to adopt them, the very issue at the threshold of this case is whether professional price and quality advertising is sufficiently verifiable in theory and in fact to fall within such a general rule. Ultimately our disagreement with Justice Breyer turns on our different responses to this issue. Whereas he accepts, as the Ninth Circuit seems to have done, that the restrictions here were like restrictions on advertisement of price and quality generally, it seems to us that the CDA's advertising restrictions might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition. The restrictions on both discount and nondiscount advertising are, at least on their face, designed to avoid false or deceptive advertising in a market characterized by striking disparities between the information available to the professional and the patient. . . .

In a market for professional services, in which advertising is relatively rare and the comparability of service packages not easily established, the difficulty for customers or potential competitors to get and verify information about the price and availability of services magnifies the dangers to competition associated with misleading advertising. What is more, the quality of professional services tends to resist either calibration or monitoring by individual patients or clients, partly because of the specialized knowledge required to evaluate the services, and partly because of the difficulty in determining whether, and the degree to which, an outcome is attributable to the quality of services (like a poor job of tooth-filling) or to something else (like a very tough walnut). . . .

The existence of such significant challenges to informed decisionmaking by the customer for professional services immediately suggests that advertising restrictions arguably protecting patients from misleading or irrelevant advertising call for more than cursory treatment as obviously comparable to classic horizontal agreements to limit output or price competition.

The explanation proffered by the Court of Appeals for the likely anticompetitive effect of the CDA's restrictions on discount advertising began with the unexceptionable statements that "price advertising is fundamental to price competition," 128 F.3d at 727, and that "restrictions on the ability to advertise prices normally make it more difficult for consumers to find a lower price and for dentists to compete on the basis of price," ibid. The court then acknowledged that, according to the CDA, the restrictions nonetheless furthered the "legitimate, indeed procompetitive, goal of preventing false and misleading price advertising." 128 F.3d at 728. The Court of Appeals might, at this juncture, have recognized that the restrictions at issue here are very far from a total ban on price or discount advertising, and might have considered the possibility that the particular restrictions on professional advertising could have different effects from those "normally" found in the commercial world, even to the point of promoting competition by reducing the occurrence of unverifiable and misleading across-the-board discount advertising. Instead, the Court of Appeals confined itself to the brief assertion that the "CDA's disclosure requirements appear to prohibit across-the-board discounts because it is simply infeasible to disclose all of the information that is required," ibid., followed by the observation that "the record provides no evidence that the rule has in fact led to increased disclosure and transparency of dental pricing." . . .

Whether advertisements that announced discounts for, say, first-time customers, would be less effective at conveying information relevant to competition if they listed the original and discounted prices for checkups, X-rays, and fillings, than they would be if they simply specified a percentage discount across the board, seems to us a question susceptible to empirical but not a priori analysis. In a suspicious world, the discipline of specific example may well be a necessary condition of plausibility for professional claims that for all practical purposes defy comparison shopping. It is also possible in principle that, even if across-the-board discount advertisements were more effective in drawing customers in the short run, the recurrence of some measure of intentional or accidental misstatement due to the breadth of their claims might leak out over time to make potential patients skeptical of any such across-the-board advertising, so undercutting the method's effectiveness. Cf. Akerlof, 84 Q. J. Econ., at 495 (explaining that "dishonest dealings tend to drive honest dealings out of the market"). It might be, too, that across-the-board discount advertisements would continue to attract business indefinitely, but might work precisely because they were misleading customers, and thus just because their effect would be anticompetitive, not procompetitive. Put another way, the CDA's rule appears to reflect the prediction that any costs to competition associated with the elimination of across-the-board advertising will be outweighed by gains to consumer information (and hence competition) created by discount advertising that is exact, accurate, and more easily verifiable (at least by regulators). As a matter of economics this view may or may not be correct, but it is not implausible, and neither a court nor the Commission may initially dismiss it as presumptively wrong. . . .

The question is not whether the universe of possible advertisements has been limited (as assuredly it has), but whether the limitation on advertisements obviously tends to limit the total delivery of dental services. The court came closest to addressing this latter question when it went on to assert that limiting advertisements regarding quality and safety "prevents dentists from fully describing the package of services they offer," 128 F.3d at 728, adding that "the restrictions may also affect output more directly, as quality and comfort advertising may induce some customers to obtain nonemergency care when they might not otherwise do so," ibid. This suggestion about output is also puzzling. If quality advertising actually induces some patients to obtain more care than they would in its absence, then restricting such advertising would reduce the demand for dental services, not the supply; and it is of course the producers' supply of a good in relation to demand that is normally relevant in determining whether a producer-imposed output limitation has the anticompetitive effect of artificially raising prices. . . .

The point is not that the CDA's restrictions necessarily have the procompetitive effect claimed by the CDA; it is possible that banning quality claims might have no effect at all on competitiveness if, for example, many dentists made very much the same sort of claims.

And it is also of course possible that the restrictions might in the final analysis be anticompetitive. The point, rather, is that the plausibility of competing claims about the effects of the professional advertising restrictions rules out the indulgently abbreviated review to which the Commission's order was treated. The obvious anticompetitive effect that triggers abbreviated analysis has not been shown. . . .

As the circumstances here demonstrate, there is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint. The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one. And of course what we see may vary over time, if rule-of-reason analyses in case after case reach identical conclusions. For now, at least, a less quick look was required for the initial assessment of the tendency of these professional advertising restrictions. Because the Court of Appeals did not scrutinize the assumption of relative anticompetitive tendencies, we vacate the judgment and remand the case for a fuller consideration of the issue.

Norton, Secretary of the Interior, v. Southern Utah Wilderness Alliance 124 S. Ct. 2373 (2004)

Justice Scalia delivered the opinion for a unanimous Court.

In this case, we must decide whether the authority of a federal court under the Administrative Procedure Act (APA) to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), extends to the review of the United States Bureau of Land Management's stewardship of public lands under certain statutory provisions and its own planning documents.

I

Almost half the State of Utah, about 23 million acres, is federal land administered by the Bureau of Land Management (BLM), an agency within the Department of Interior. For nearly 30 years, BLM's management of public lands has been governed by the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1701 which "established a policy in favor of retaining public lands for multiple use management." "Multiple use management" is a deceptively simple term that describes the enormously complicated task of striking a balance among the many competing "uses to which land can be put, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and [uses serving] natural scenic, scientific and historical values." A second management goal, "sustained yield," requires BLM to control depleting uses over time, so as to ensure a high level of valuable uses in the future. To these ends, FLPMA establishes a dual regime of inventory and planning. Sections 1711 and 1712, respectively, provide for a comprehensive, ongoing inventory of federal lands, and for a land use planning process that "projects" "present and future use," given the lands' inventoried characteristics.

Of course not all uses are compatible. Congress made the judgment that some lands should be set aside as wilderness at the expense of commercial and recreational uses.

A pre-FLPMA enactment, the Wilderness Act of 1964, provides that designated wilderness areas, subject to certain exceptions, "shall [have] no commercial enterprise and no permanent road," no motorized vehicles, and no manmade structures. The designation of a wilderness area can be made only by Act of Congress.

Pursuant to § 1782, the Secretary of the Interior has identified so-called "wilderness study areas" (WSAs), roadless lands of 5,000 acres or more that possess "wilderness characteristics," as determined in the Secretary's land inventory. As the name suggests, WSAs (as well as certain wild lands identified prior to the passage of FLPMA) have been subjected to further examination and public comment in order to evaluate their suitability for designation as wilderness. In 1991, out of 3.3 million acres in Utah that had been identified for study, 2 million were recommended as suitable for wilderness designation. This recommendation was forwarded to Congress, which has not yet acted upon it. Until Congress acts one way or the other, FLPMA provides that "the Secretary shall continue to manage such lands . . . in a manner so as not to impair the suitability of such areas for preservation as wilderness." This nonimpairment mandate applies to all WSAs identified under § 1782, including lands considered unsuitable by the Secretary.

Aside from identification of WSAs, the main tool that BLM employs to balance wilderness protection against other uses is a land use plan—what BLM regulations call a "resource management plan." 43 CFR § 1601.0-5(k) (2003). Land use plans, adopted after notice and comment, are "designed to guide and control future management actions." Generally, a land use plan describes, for a particular area, allowable uses, goals for future condition of the land, and specific next steps. Under FLPMA, "the Secretary shall manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans . . . when they are available."

Protection of wilderness has come into increasing conflict with another element of multiple use, recreational use of so-called off-road vehicles (ORVs), which include vehicles primarily designed for off-road use, such as lightweight, four-wheel "all-terrain vehicles," and vehicles capable of such use, such as sport utility vehicles. According to the United States Forest Service's most recent estimates, some 42 million Americans participate in off-road travel each year, more than double the number two decades ago. H. Cordell, *Outdoor Recreation for 21st Century America* 40 (2004). United States sales of all-terrain vehicles alone have roughly doubled in the past five years, reaching almost 900,000 in 2003. See Tanz, "Making Tracks, Making Enemies," *N. Y. Times,* Jan. 2, 2004, p. F1, col. 5. . . . The use of ORVs on federal land has negative environmental consequences, including soil disruption and compaction, harassment of animals, and annoyance of wilderness lovers. Thus, BLM faces a classic land use dilemma of sharply inconsistent uses, in a context of scarce resources and congressional silence with respect to wilderness designation.

In 1999, respondents Southern Utah Wilderness Alliance and other organizations (collectively SUWA) filed this action in the United States District Court for Utah against petitioners BLM, its Director, and the Secretary. In its second amended complaint, SUWA sought declaratory and injunctive relief for BLM's failure to act to protect public lands in Utah from damage caused by ORV use. SUWA made three claims that are relevant here: (1) that BLM had violated its nonimpairment obligation under § 1782(a) by allowing degradation in certain WSAs; (2) that BLM had failed to implement provisions in its land use plans relating to ORV use; (3) that BLM had failed to take a "hard look" at whether, pursuant to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321, it should undertake supplemental environmental analyses for areas in which ORV use had increased. SUWA contended that it could sue to remedy these three failures to act pursuant to the APA's provision of a cause of action to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

The District Court entered a dismissal with respect to the three claims. A divided panel of the Tenth Circuit reversed. 301 F.3d 1217 (2002).

II

All three claims at issue here involve assertions that BLM failed to take action with respect to ORV use that it was required to take. Failures to act are sometimes remediable under the APA, but not always. We begin by considering what limits the APA places upon judicial review of agency inaction.

The APA authorizes suit by "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. Where no other statute provides a private right of action, the "agency action" complained of must be "final agency action." "Agency action" is defined in § 551(13) to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." The APA provides relief for a failure to act in § 706(1): "The reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed."

Sections 702, 704, and 706(1) all insist upon an "agency action," either as the action complained of (in §§ 702 and 704 or as the action to be compelled (in § 706(1)). The definition of that term begins with a list of five categories of decisions made or outcomes implemented by an agency—"agency rule, order, license, sanction [or] relief." All of those categories involve circumscribed, discrete agency actions, as their definitions make clear: "an agency statement of . . . future effect designed to implement, interpret, or prescribe law or policy" (rule); "a final disposition . . . in a matter other than rule making" (order); a "permit . . . or other form of permission" (license); a "prohibition . . . or taking [of] other compulsory or restrictive action" (sanction); or a "grant of money, assistance, license, authority," etc., or "recognition of a claim, right, immunity," etc., or "taking of other action on the application or petition of, and beneficial to, a person" (relief).

The terms following those five categories of agency action are not defined in the APA: "or the equivalent or denial thereof, or failure to act." But an "equivalent . . . thereof" must also be discrete (or it would not be equivalent), and a "denial thereof" must be the denial of a discrete listed action (and perhaps denial of a discrete equivalent).

The final term in the definition, "failure to act," is in our view properly understood as a failure to take an agency action—that is, a failure to take one of the agency actions (including their equivalents) earlier defined in § 551(13). Moreover, even without this equation of "act" with "agency action" the interpretive canon of *ejusdem generis* would attribute to the last item ("failure to act") the same characteristic of discreteness shared by all the preceding items. . . . A "failure to act" is not the same thing as a "denial." The latter is the agency's act of saying no to a request; the former is simply the omission of an action without formally rejecting a request—for example, the failure to promulgate a rule or take some decision by a statutory deadline. The important point is that a "failure to act" is properly understood to be limited, as are the other items in § 551(13), to a discrete action.

A second point central to the analysis of the present case is that the only agency action that can be compelled under the APA is action legally required. This limitation appears in § 706(1)'s authorization for courts to "compel agency action unlawfully withheld." . . . As described in the Attorney General's Manual on the APA, a document whose reasoning we have often found persuasive, . . . § 706(1) empowers a court only to compel an agency "to perform a ministerial or non-discretionary act," or "to take action upon a matter, without directing how it shall act." *Attorney General's Manual on the Administrative Procedure Act* 108 (1947).

Thus, a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take. These limitations rule out several kinds of challenges. The limitation to discrete agency action precludes the kind of broad programmatic attack we rejected in *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871 (1990). There we considered a challenge to BLM's land withdrawal review program, couched as unlawful agency "action" that the plaintiffs wished to have "set aside" under § 706(2). We concluded that the program was not an "agency action":

"Respondent cannot seek wholesale improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made. Under the terms of the APA, respondent must direct its attack against some particular 'agency action' that causes it harm."

The plaintiffs in *National Wildlife Federation* would have fared no better if they had characterized the agency's alleged "failure to revise land use plans in proper fashion" and "failure to consider multiple use," in terms of "agency action unlawfully withheld" under § 706(1), rather than agency action "not in accordance with law" under § 706(2).

The limitation to required agency action rules out judicial direction of even discrete agency action that is not demanded by law (which includes, of course, agency regulations that have the force of law). Thus, when an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be. For example, 47 U.S.C. § 251(d)(1), which required the Federal Communications Commission "to establish regulations to implement" interconnection requirements "within 6 months" of the date of enactment of the Telecommunications Act of 1996, would have supported a judicial decree under the APA requiring the prompt issuance of regulations, but not a judicial decree setting forth the content of those regulations.

III

A

With these principles in mind, we turn to SUWA's first claim, that by permitting ORV use in certain WSAs, BLM violated its mandate to "continue to manage [WSAs] . . . in a manner so as not to impair the suitability of such areas for preservation as wilderness," SUWA relies not only upon § 1782(c) but also upon a provision of BLM's Interim Management Policy for Lands Under Wilderness Review, which interprets the nonimpairment mandate to require BLM to manage WSAs so as to prevent them from being "degraded so far, compared with the area's values for other purposes, as to significantly constrain the Congress's prerogative to either designate [it] as wilderness or release it for other uses."

Section 1782(c) is mandatory as to the object to be achieved, but it leaves BLM a great deal of discretion in deciding how to achieve it. It assuredly does not mandate, with the clarity necessary to support judicial action under § 706(1), the total exclusion of ORV use.

SUWA argues that § 1782 does contain a categorical imperative, namely the command to comply with the nonimpairment mandate. It contends that a federal court could simply enter a general order compelling compliance with that mandate, without suggesting any particular manner of compliance. It relies upon the language from the Attorney General's Manual quoted earlier, that a court can "take action upon a matter, without directing how [the agency] shall act," and upon language in a case cited by the Manual noting that "mandamus will lie . . . even though the act required involves the exercise of judgment and discretion." *Safeway Stores v. Brown,* 138 F.2d 278, 280. The action referred to in these excerpts, however, is discrete agency action, as we have discussed above. General deficiencies in compliance, unlike the failure to issue a ruling that was discussed in *Safeway Stores,* lack the specificity requisite for agency action.

The principal purpose of the APA limitations we have discussed—and of the traditional limitations upon mandamus from which they were derived—is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve. If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved—which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management. To take just a few examples from federal resources management, a plaintiff might allege that the Secretary had failed to "manage wild free-roaming horses and burros in a manner that is designed to achieve and maintain a thriving natural ecological balance," or to "manage the [New Orleans Jazz National] Historical Park in such a manner as will preserve and perpetuate knowledge and understanding of the history of jazz," or to "manage the [Steens Mountain] Cooperative Management and Protection Area for the benefit of present and future generations." The prospect of pervasive oversight by federal courts over the manner and pace of agency compliance with such congressional directives is not contemplated by the APA.

B

SUWA's second claim is that BLM failed to comply with certain provisions in its land use plans, thus contravening the requirement that "the Secretary shall manage the public lands . . . in accordance with the land use plans when they are available." The relevant count in SUWA's second amended complaint alleged that BLM had violated a variety of commitments in its land use plans, but over the course of the litigation these have been reduced to two, one relating to the 1991 resource management plan for the San Rafael area, and the other to various aspects of the 1990 ORV implementation plan for the Henry Mountains area. . . .

The statutory directive that BLM manage "in accordance with" land use plans, and the regulatory requirement that authorizations and actions "conform to" those plans, prevent BLM from taking actions inconsistent with the provisions of a land use plan. Unless and until the plan is amended, such actions can be set aside as contrary to law pursuant to 5 U.S.C. § 706(2). The claim presently under discussion, however, would have us go further, and conclude that a statement in a plan that BLM "will" take this, that, or the other action, is a binding commitment that can be compelled under § 706(1). In our view it is not—at least absent clear indication of binding commitment in the terms of the plan.

FLPMA describes land use plans as tools by which "present and future use is projected." 43 U.S.C. § 1701(a)(2). The implementing regulations make clear that land use plans are a preliminary step in the overall process of managing public lands—"designed to guide and control future management actions and the development of subsequent, more detailed and limited scope plans for resources and uses." The statute and regulations confirm that a land use plan is not ordinarily the medium for affirmative decisions that implement the agency's "projections." Title 43 U.S.C. § 1712(e) provides that "the Secretary may issue management decisions to implement land use plans"—the decisions, that is, are distinct from the plan itself, picking up the same theme; the regulation defining a land use plan declares that a plan "is not a final implementation decision on actions which require further specific plans, process steps, or decisions under specific provisions of law and regulations." The BLM's *Land Use Planning Handbook* specifies that land use plans are normally not used to make site-specific implementation decisions. . . .

Quite unlike a specific statutory command requiring an agency to promulgate regulations by a certain date, a land use plan is generally a statement of priorities; it guides and constrains actions, but does not (at least in the usual case) prescribe them. It would be unreasonable to think that either Congress or the agency intended otherwise, since land use plans nationwide would commit the agency to actions far in the future, for which funds have not yet been appropriated. Some plans make explicit that implementation of their programmatic content is subject to budgetary constraints. While the Henry Mountains plan does not contain such a specification, we think it must reasonably be implied. A statement by BLM about what it plans to do, at some point, provided it has the funds and there are not more pressing priorities, cannot be plucked out of context and made a basis for suit under § 706(1).

We therefore hold that the Henry Mountains plan's statements to the effect that BLM will conduct "use supervision and monitoring" in designated areas—like other "will do" projections of agency action set forth in land use plans—are not a legally binding commitment enforceable under § 706(1). That being so, we find it unnecessary to consider whether the action envisioned by the statements is sufficiently discrete to be amenable to compulsion under the APA.

IV

Finally, we turn to SUWA's contention that BLM failed to fulfill certain obligations under NEPA. Before addressing whether a NEPA-required duty is actionable under the APA, we must decide whether NEPA creates an obligation in the first place. NEPA requires a federal agency to prepare an environmental impact statement (EIS) as part of any "proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. sec.4332(2)(c). Often an initial EIS is sufficient, but in certain circumstances an EIS must be supplemented. See *Marsh v. Oregon Natural Resources Council,* 490 U.S. 360, 370-374 (1989). A regulation of the Council on Environmental Quality requires supplementation where "there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." In *Marsh,* we interpreted § 4332 in light of this regulation to require an agency to take a "hard look" at the new information to assess whether supplementation might be necessary.

SUWA argues that evidence of increased ORV use is "significant new circumstances or information" that requires a "hard look." We disagree. As we noted in *Marsh,* supplementation is necessary only if "there remains 'major Federal action' to occur," as that term is used in § 4332(2)(C). 490 U.S., at 374. In *Marsh,* that condition was met: the dam construction project that gave rise to environmental review was not yet completed. Here, by contrast, although the "approval of a [land use plan]" is a "major Federal action" requiring an EIS, that action is completed when the plan is approved. The land use plan is the "proposed action" contemplated by the regulation. There is no ongoing "major Federal action" that could require supplementation (though BLM is required to perform additional NEPA analysis if a plan is amended or revised).

The judgement of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Notes

1. But for a different view, see, Malcolm M. Feeley and Edward L. Rubin, *Judicial Policy Making in the Modern State: How the Courts Reformed America's Prisons* (New York: Cambridge University Press, 2000).

2. Richard A. Brisbin, Jr., "The Conservatism of Antonin Scalia," 105 *Political Science Quarterly* 13 (Spring 1990).

3. *Steel Company v. Citizens for a Better Environment,* 523 U.S. 88,107–8 (1998).

4. *California Dental Association v. Federal Trade Commission,* 526 U.S. 757 (1999).

5. *Bowen v. American Hospital Association,* 476 U.S. 610 (1986).

6. *Clinton v. Goldsmith,* 526 U.S. 529 (1999).

7. *Shalala v. Illinois Council on Long Term Care, Inc.,* 120 S.Ct. 1738 (2000).

8. *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150, 152 (1970).

9. Ibid.

10. *Linda R. S. v. Richard D.,* 410 U.S. 614 (1973).

11. *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26 (1976).

12. *Allen v. Wright et al.,* 468 U.S. 737 (1984).

13. 508 U.S. 656 (1993).

14. John Dean, *The Rehnquist Choice: The Untold Story of the Nixon Appointment That Redefined the Supreme Court* (New York: The Free Press, 2001), p. 16.

15. *United Public Workers v. Mitchell,* 330 U.S. 75 (1947).

16. *International Longshoremen's & Warehousemen's Union v. Boyd,* 347 U.S. 222 (1954).

17. *National Park Hospitality Association v. Department of Interior,* 538 U.S. 803 (2003).

18. 416 U.S. 312 (1974).

19. Lee Epstein and Thomas Walker, *Constitutional Law for a Changing America: Rights, Liberties, and Justice,* 3d ed. (Washington, D.C.: Congressional Quarterly Press, 1998), p. 62.

20. *Decatur v. Paulding,* 39 U.S. 497, 516 (1840).

21. 5 U.S.C. 702.

22. 38 U.S.C. 211(a).

23. Anthony Lewis, *The New York Times,* 11 November 1996, p. A11.

24. *Webster v. Doe,* 486 U.S. 592 (1988).

25. 509 U.S. 579 (1993).

26. Susan Welch and John Comer, *Quantitative Methods for Public Administration: Techniques and Applications,* 3d ed. (Mason, Ohio: South-Western, Thompson Learning, 2001), 41–43.

27. *Flue-Cured Tobacco Cooperative Stabilization Corporation v. the Environmental Protection Agency,* 313 F. 3rd. 852 (Fourth Cir., 2002).

28. *Flue-Cured Tobacco v. EPA,* 4 F. Supp 2d. 435, 465–66 (1998).

29. *Flue-Cured Tobacco v. EPA,* 313 F. 3rd. 852, 859.

30. *Tozzi v. U.S. Department of Health and Human* Services, 271 F. 3rd. 301 (D.C. Cir., 2001).

31. Michelle Laco, "The Data Quality Act: Prologue to a Farce or a Tragedy?" 53 *Emory Law Journal* 305, 307 (Winter 2004); see also, Wendy Wagner, "Science in the Regulatory Process: Reclaiming the Debate over the Role of Science in Public Health and Environment Regulation," 66 *Law and Contemporary Problems* 63 (Fall 2003); Thomas McGarity, "Science in the Regulatory Process: On the Prospect of '*Daubertizing*' Judicial Review of Risk Assessment," 66 *Law and Contemporary Problems* 155 (Fall 2003).

32. *Booth v. Churner,* 532 U.S. 731 (2001).

33. *United States v. Western Pacific Railroad Company,* 352 U.S. 59 (1956).

34. Daniel Oran, *Oran's Dictionary of the Law* (St. Paul, Minn.: West, 1983), p. 116.

35. Ernest Gellhorn and Ronald Levin, *Administrative Law and Process: In a Nutshell* (St. Paul, Minn.: West, 1990), p. 110.

36. *Wisconsin v. New York,* 517 U.S. 1 (1996).

37. *Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council,* 435 U.S. 519 (1978).