



Judicial Review of Actions Legally Committed to an Agency's Discretion

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Individuals and entities affected by a federal agency's action sometimes may be able to challenge that action in federal court. In some cases, an agency's governing statute specifically authorizes affected parties to bring suit challenging a particular agency action. But even when specific statutory authority is unavailable, a [person](#) generally can challenge an [agency's action](#) in federal district court under the [Administrative Procedure Act](#) (APA). On review, the APA empowers courts to [set aside](#) agency action that is, among other things, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

The Supreme Court has explained that the APA "embodies the basic [presumption](#) of judicial review" of agency action, meaning that judicial review under the APA generally will be available to a party. But not every legal challenge of an agency's action is reviewable. [Constitutional and prudential](#) considerations may limit when a court will entertain such a suit. [Jurisdictional](#) requirements must also be satisfied.

The [APA itself](#) limits judicial review of certain types of agency action. Specifically, the APA bars judicial review of an agency's action when (1) a particular statute precludes review of that action or (2) the action "is committed to agency discretion by law." While the first exception applies when a statute reflects Congress's intent to preclude judicial review, the second—codified at 5 U.S.C. § 701(a)(2)—often requires a more searching examination about whether "the statute is drawn so that a court would have [no meaningful standard](#) against which to judge the agency's exercise of discretion." (The APA also bars judicial review in other ways, including by limiting court review to agency actions that are "[final](#).")

Some commentators have criticized the Supreme Court's general approach to assessing when a particular action is committed to agency discretion under Section 701(a)(2), which typically consists of reviewing an underlying statute to determine if guidelines or standards exist that allow judicial evaluation of the action. But the Court's approach offers Congress guidance for crafting statutes in a way that reviewing courts may read as preventing or, alternatively, authorizing court review of particular actions.

The Supreme Court's Interpretation of Section 701(a)(2)

The Supreme Court has often been tasked with considering whether an agency's action has been "committed to agency discretion" under Section 701(a)(2). In [Citizens to Preserve Overton Park v. Volpe](#),

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the Court emphasized that the provision provides a “very narrow” exception to the presumptive reviewability of agency action under the APA. In that and later cases, the Court has described Section 701(a)(2) with reference to Section 706 of the APA, which gives courts the power to review agency actions for “abuse of discretion.” The Court has explained that judges cannot determine if an agency has abused its discretion without “judicially manageable standards”; an action is deemed as “committed to agency discretion by law” when the authorizing statute is “drawn in such broad terms that in a given case there is no law to apply.”

The Supreme Court typically has construed Section 701(a)(2) to cover actions that courts “traditionally” have considered unreviewable. One such category concerns an agency’s decision to refuse to institute enforcement proceedings. In *Heckler v. Chaney*, the Court held that judicial review of such decisions generally was inappropriate for several pragmatic reasons. First, the Court explained that such decisions typically involve “a complicated balancing of a number of factors which are peculiarly within [the agency’s] expertise,” including whether the agency has sufficient resources to pursue enforcement. Next, while acknowledging that an agency’s affirmative enforcement action supplies a basis for court review, the Court reasoned “that when an agency refuses to act it generally does not exercise its coercive power over an individual’s liberty or property rights,” rights that parties regularly ask courts to safeguard. An agency’s enforcement action, the Court reasoned, “at least can be reviewed to determine whether the agency exceeded its statutory powers.” Lastly, the Court believed that an agency’s non-enforcement decision was similar in some respects to a federal prosecutor’s decision not to issue an indictment. The latter decision, wrote the Court, “has long been regarded as the special province of the Executive Branch.”

The Court in *Chaney* did not hold that judicial review of agency non-enforcement decisions was always unavailable. Instead, the Court characterized such decisions as *presumptively* unreviewable, but recognized that “the presumption may be rebutted where the substantive statute [at issue] has provided guidelines for the agency to follow in exercising its enforcement powers.” If Congress has “indicated an intent to circumscribe agency enforcement discretion” and “provided meaningful standards for defining the limits of that discretion,” the *Chaney* Court explained, the statute will supply the “law” sufficient to enable a court to review an agency’s non-enforcement decision. The Court also identified other situations that might possibly rebut the presumption of unreviewability of non-enforcement decisions, including where an agency “consciously and expressly” adopts a non-enforcement policy “so extreme as to amount to an abdication of its statutory responsibilities.”

Over the years, the Court has recognized other types of agency decisions that fall within Section 701(a)(2)’s ambit. In *Webster v. Doe*, the Court held that the decision of the Director of the Central Intelligence Agency (CIA) to dismiss an employee due to his sexual orientation was shielded from review (except on constitutional grounds) where a statute had provided that the “Director may, in his discretion, terminate [a CIA employee or officer] whenever he shall deem such termination necessary or advisable in the interests of the United States.” Additionally, in *Lincoln v. Vigil*, while noting that agencies may not “disregard statutory responsibilities,” the Court held that an agency’s distribution of money from a lump-sum appropriation is “traditionally regarded as committed to agency discretion.” The Court has also found a “tradition of nonreviewability” in an agency’s refusal to reconsider a prior decision when the petition for reconsideration was based “on the same record that was before the agency when it rendered its original decision.”

The Court has identified many types of agency actions that are *not* exempt from review under Section 701(a)(2). For example, the Court recently held that statutory and constitutional challenges may be brought against census-related decisions by the Department of Commerce, as the taking of the census is not a matter committed to agency discretion. And in *Department of Homeland Security (DHS) v. Regents of the University of California*, the Court held that DHS’s rescission of the Deferred Action for Childhood Arrivals (DACA) program was reviewable, explaining that DACA “created a program for conferring

affirmative immigration relief” and that, therefore, its rescission “provides a focus for judicial review.” (For more on the *Regents* decision, see CRS Legal Sidebar LSB10497, *Supreme Court: DACA Rescission Violated the APA*, by Ben Harrington.)

Criticism of the Supreme Court’s Interpretation of Section 701(a)(2)

As explained above, when the Supreme Court has analyzed whether Section 701(a)(2) bars judicial review of an agency’s action, it generally seeks to determine if the underlying statute is “drawn in such broad terms that in a given case there is no law to apply.” When a statute lacks helpful guideposts to support judicial evaluation of an agency’s action, the relevant action is “committed to agency discretion by law” and therefore may not be reviewed by the court.

Commentators have criticized the Court’s interpretation and application of Section 701(a)(2) on a variety of grounds, including constitutional ones. For example, in his dissent in *Webster v. Doe*, Justice Scalia criticized the “no law to apply” test for being underinclusive of the variety of actions courts traditionally hold are not subject to review. He argued that the “law” in Section 701(a)(2)’s “committed to agency discretion by law” embraces a “body of jurisprudence” that includes “principles ranging from the ‘political question’ doctrine, to sovereign immunity . . . , to official immunity, to prudential limitations upon the courts’ equitable powers, to what can be described no more precisely than a traditional respect for the functions of the other branches” of government. This large body of judicial-review common law, remarked Justice Scalia, “cannot possibly be contained within the phrase ‘no law to apply.’”

Relatedly, some commentators have argued that the “no law to apply” language is too restrictive. One scholar contended that a test that limits judicial review to instances where there is “law to apply” conflicts with the APA’s abuse-of-discretion standard of judicial review. Whether an agency abused its discretion, he wrote, is often “a matter for *judicial discretion*” and “may not be guided by law.” As another commentator has explained, judicial review under the abuse-of-discretion standard often does not concern whether an agency complied with relevant statutory factors, such as when courts examine whether an agency supplied adequate reasons for changing course from a prior policy.

Critics have also opined that, while the Court typically recites the “no law to apply” test (or “no meaningful standard” language) in its Section 701(a)(2) analyses, it has often rested its ultimate determinations of an action’s nonreviewability on other or additional factors. For example, the Court in *Chaney* discussed several pragmatic considerations for why agency non-enforcement decisions are presumptively unreviewable that were not explicitly related to the presence of helpful legal guideposts for judicial review.

Considerations for Congress

As discussed, the standard the Court generally applies in determining whether an agency action is unreviewable under Section 701(a)(2) is whether there is “law to apply” by which to review the action or, put another way, whether a statute contains a “meaningful standard against which to judge the agency’s exercise of discretion.” Congress can expressly provide for or, conversely, preclude judicial review of an agency’s action in statute. However, if Congress does not include such an explicit grant or prohibition, it can seek to ensure parties may or may not challenge an agency’s action under the APA by setting forth additional standards and criteria for judicial review of agency actions. For example, a court may be more willing to review an agency’s decision not to pursue an enforcement action if the governing statute imposes clear standards on the agency’s exercise of its enforcement discretion—i.e., how or when the agency is to initiate enforcement actions—or creates clear conditions that trigger enforcement actions.

Relevant guidelines for judicial review may stem from sources other than Congress. The U.S. Court of Appeals for the District of Columbia Circuit looks not only to statutes for guidelines, but also to agency

regulations and “other binding expressions of agency viewpoint.” Interpreting Section 701(a)(2) to allow such nonlegislative sources to supply the necessary “law” for reviewing agency actions imparts significant authority to administrative agencies. The existence of such standards, however, may not override Congress’s foreclosure of review of a particular type of action in statute. And Congress can, via statute, authorize or limit an agencies’ creation of such criteria in accordance with its [authority](#) to define and [prescribe](#) agencies’ powers and responsibilities.

The Supreme Court’s “no law to apply” test stems from its interpretation of Section 701(a)(2). It is not based on constitutional considerations, and Congress can displace that test and any other judicial interpretation of Section 701(a)(2) by amending that section. If Congress eliminated the section from the APA, the only exception to judicial review contained in Section 701 of the APA would be for actions that are [precluded](#) from review by statute (regardless of whether the action is committed to an agency’s discretion). Without Section 701(a)(2), courts would determine whether a specific action is reviewable by interpreting the text of the statute and [also](#), perhaps, “the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved.” But reviewing courts would not, presumably, explicitly rely on the Court’s “no law to apply” test. Congress could also amend Section 701(a)(2) to provide that it does or does not apply to certain types of actions (e.g., particular types of non-enforcement decisions). Still, regardless of any legislative modifications, courts may conclude that [constitutional and other considerations](#) make judicial review of some agency actions inappropriate, even if review is no longer foreclosed by Section 701(a)(2).

Author Information

Daniel J. Sheffner
Legislative Attorney

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