

1999

# Unreviewability in State Administrative Law

Charles H. Koch Jr.

*William & Mary Law School*

---

## Repository Citation

Koch, Charles H. Jr., "Unreviewability in State Administrative Law" (1999). *Faculty Publications*. 725.  
<https://scholarship.law.wm.edu/facpubs/725>

Copyright c 1999 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.  
<https://scholarship.law.wm.edu/facpubs>

# UNREVIEWABILITY IN STATE ADMINISTRATIVE LAW<sup>1</sup>

By: Charles H. Koch, Jr.<sup>2</sup>

Unreviewability doctrine is not often important in either federal or state administrative law but, when it is important, it is very, very important. It determines whether an agency decision will receive any judicial scrutiny at all. Therefore, it raises a threshold question for each challenge to agency action. It establishes ultimate agency power and defines judicial authority over certain administrative programs.

## A. Three Categories of Unreviewability

The Federal APA, Section 701(a), defines the type of administrative action for which review is precluded. Section 701(a)(1) provides for statutory preclusion. Section 701(a)(2) provides that agency decisions are reviewable "except to the extent that—(2) agency action is committed to agency discretion by law." This section has been held to preclude review where the delegation of authority to the agency is so complete as to leave no role for a court.

From this is usually derived two categories of review preclusion. First, a statute may preclude review of either an entire category of administrative decisions or specific aspects of certain administrative decisions. Statutory preclusion is very closely circumscribed. Second, an administrative scheme may provide no basis on which to evaluate an agency's resolution and hence implies such complete administrative authority and decision making freedom, "discretion," that the courts are not left any role.<sup>3</sup>

---

<sup>1</sup>Derived from 3 Koch, ADMINISTRATIVE LAW AND PRACTICE, 2d §§ 13.1-13.6 (1997).

<sup>2</sup>Woodbridge Professor of Law, College of William and Mary.

<sup>3</sup>The term "discretion" pervades administrative law even more than other legal disciplines. Yet, it is one of the most unsatisfactory phrases in law. Discretion has many meanings, especially in application. In judicial review, for example, the existence of "discretion" may mean that the decision is unreviewable or reviewable only for abuse. The core meaning of the term discretion is some degree of decision making freedom and independence.

As will be discussed below, these two categories do not satisfactorily include all the administrative decisions the courts have found unreviewable. Another look at 701(a)(2) suggests an additional category that cover these cases. The term "by law" might be said to instruct a court to infer unreviewability from "law" other than a statutory delegation. That is, some doctrine, other than compliance with a statute, may dictate that courts have no function with respect to the controverted issues. A third category emerges in which the agency acquires complete administrative authority and decision making freedom by the operation of law, either judge-made common law or an interpretation of constitutional doctrine. This category then adds to the notion of "unreviewable discretion."<sup>4</sup>

These three categories organize state, as well federal, unreviewability doctrine. Even in the absence of statutory language like that in Section 701(a) of the Federal APA, state law can be found to establish all three forms of review preclusion.<sup>5</sup> A statute may preclude review or a statute may delegate such complete authority, discretion, that review is necessarily precluded. In addition, other legal principles embodied in state law may dictate against review.

## **B. Confining the Operation of Unreviewability**

Unreviewability doctrine is always guided by the principle that, although unreviewability is recognized, it is not preferred.<sup>6</sup> In state as

---

The degree of such decision making freedom and independence in the particular context emerges as a crucial question. Here, the decision making freedom must be found to be so complete that the courts may not perform a monitoring function.

<sup>4</sup>Some urge that all such decisions are reviewable for abuse. However, review for abuse is review and injects the courts into the decision making process in violation of the law discussed here.

<sup>5</sup>Neither the 1961 nor the 1981 version of the model state APA deal with unreviewability. A Westlaw search using a variety of search terms did not uncover such language in state APAs.

<sup>6</sup>The federal APA expressly recognizes unreviewability in 5 U.S.C. § 701(a) but very few decisions of federal agencies are unreviewable. The U.S. Supreme Court has repeatedly reaffirmed the presumption in favor of reviewability. *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 111 S.Ct. 888, 112 L.Ed.2d 1005 (1991); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670, 106 S.Ct. 2133, 2135, 90 L.Ed.2d 623 (1986). William Eskridge, however, observed that the "presumption of reviewability is not as robust as it once

well as federal law, the general principle is that: "All final administrative actions are presumptively reviewable."<sup>7</sup> In both state and federal law, only clear command may overturn this presumption.<sup>8</sup>

In addition to this presumption, unreviewability is often further confined to specific issues so that other issues in a decision might be reviewable. Each administrative decision involves the resolution of a *bundle* of issues and only certain categories of issues within that bundle might be made unreviewable.<sup>9</sup> If the entire decision is made unreviewable or the controverted issues all fall into one of the categories discussed below, then the entire decision is unreviewable. In many cases, however, only some of the controverted issues are unreviewable and the decision is still reviewable as to the remainder of the controverted issues.<sup>10</sup> On the other hand, a court cannot create review authority by artificially carving out reviewable issues.<sup>11</sup>

Review of *constitutional* questions may be precluded by expressed language only. The Supreme Court in *Webster v. Doe* reaffirmed the general concept that constitutional questions may be made unreviewable but added that Congress must make such intentions clear.<sup>12</sup> "[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear."<sup>13</sup> The Court

---

was." William Eskridge, *Politics Without Romance: Politics of Public Choice Theory for Statutory Interpretation*, 74 Va.L.Rev. 275, 331 n.153 (1988).

<sup>7</sup>E.g., *Usibelli Coal Mine Inc. v. State*, 921 P.2d 1134, 1150 (Alaska 1996).

<sup>8</sup>*Hanrahan v. Williams*, 673 N.E. 2d 251, 254 (Ill. 1996).

<sup>9</sup>Contrast *Johnson v. Robison*, 415 U.S. 361, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974) (The constitutional issues were not unreviewable even though other parts of the administrative decision were made unreviewable by statute.) with *Heckler v. Ringer*, 466 U.S. 602, 614, 104 S.Ct. 2013, 2021, 80 L.Ed.2d 622 (1984) (Any claim "inextricably intertwined" with an unreviewable claim will also be unreviewable.).

<sup>10</sup>E.g., *Scarabin v. DEA*, 919 F.2d 337, 338 (5th Cir.1990), rehearing denied 925 F.2d 100 (5th Cir.1991); *Marble Mountain Audubon Soc. v. Rice*, 914 F.2d 179, 181-182 (9th Cir.1990); see, *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 111 S.Ct. 888, 112 L.Ed.2d 1005 (1991).

<sup>11</sup>*Crowley Caribbean Transport, Inc. v. Pena*, 37 F.3d 671, 675 (D.C.Cir.1994).

<sup>12</sup>*Webster v. Doe*, 486 U.S. 592, 601, 108 S.Ct. 2047, 2053, 100 L.Ed.2d 632 (1988), on remand 859 F.2d 241 (D.C.Cir.1988) (Following the law made as to statutory preclusion, 5 U.S.C.A. § 701(a)(1), in *Johnson v. Robison*, 415 U.S. 361, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974)).

<sup>13</sup>486 U.S. at 601.

reaffirmed that holding in *Lincoln v. Vigil*.<sup>14</sup>

### C. Review Precluded by Statute

Article III of the U.S. Constitution gives Congress power to create lower federal courts and thereby is generally interpreted as granting plenary legislative authority to define the jurisdiction of those courts. An act then may preclude review of specific agency action.<sup>15</sup>

This principle has been established in state law as well. One exception is Illinois where its Supreme Court has gone so far as to limit its legislature's power to preclude review because it found that any preclusion that infringed on the judiciary's "inherent powers" violated separation of powers principles.<sup>16</sup> Nonetheless, state legislatures are generally found empowered to preclude judicial review of some agency determinations.<sup>17</sup>

The extent of review preclusion in the states may be very limited. A Westlaw search using a variety of search terms uncovered no state APA provisions recognizing statutory unreviewability. In addition, that search found very few state statutory provisions explicitly precluding review of administrative decisions. In the absence of explicit language, however, state courts as well as federal courts, on occasion, find review preclusion in less direct statutory language.

The key question is how clear the intent to preclude must be. The U.S. Supreme Court consistently limits this authority. It has continually reiterated the general principle that review may only be precluded by "clear and convincing evidence" of legislative intent to do

---

<sup>14</sup>*Lincoln v. Vigil*, 508 U.S. 182, 195, 113 S.Ct. 2024, 2033, 124 L.Ed.2d 101 (1993), on remand 2 F.3d 1161 (10th Cir.1993).

<sup>15</sup>E.g., *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 114 S.Ct. 771, 127 L.Ed.2d 29 (1994).

<sup>16</sup>*Ardt v. Illinois Dept. of Professional Regulation*, 607 N.E.2d 1226, 1231-1232 (1992).

<sup>17</sup>See *New York City Department of Environmental Protection v. New York City Civil Serv. Comm'n*, 78 N.Y.2d 318, 574 N.Y.S.2d 664, 579 N.E.2d 1385 (1991) (Review of personnel decisions precluded.).

so.<sup>18</sup> The classic *Abbott Laboratories* opinion suggested to some that review preclusion must be found within the statutory language itself.<sup>19</sup> In general, the Court has not limited itself to the statutory language but has attempted to discover legislative intent where the language is not clear. It has looked beyond the words of the statute to legislative history and even the nature of the administrative scheme.<sup>20</sup> State courts can be expected to do likewise.

The Virginia Supreme Court, for example, was not reluctant to find review preclusion from the statutory scheme. The opinion of the Virginia Supreme Court in the *Virginia Beach* case took a decidedly formalistic approach.<sup>21</sup> A not-for-profit conservation group sought to challenge a zoning board decision granting a variance which allowed a hotel to erect a neon sign. The Court held that the organization did not have "standing" under the state APA to challenge the decision because it found that statute precluded challenges by such groups.

The Virginia Courts approach is reminiscent U.S. Court's approach in *Block v. Community Nutrition Institute*.<sup>22</sup> There, consumers sought to challenge a milk "market order" but the Court found that the statute limited challenges to producers and wholesale marketers of milk products. The Court analyzed this case as a reviewability question, relying on the federal APA § 701(a)(1), even though it confronted a standing like question in that, while such agency decisions were reviewable, they were not reviewable through an action by these

---

<sup>18</sup>*Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 64, 113 S.Ct. 2485, 2499, (1993)(Citing a long line of authority).

<sup>19</sup>*Abbott Laboratories v. Gardner*, 387 U.S. 136, 141, 87 S.Ct. 1507, 1511 (1967).

<sup>20</sup>For example, in *Block v. Community Nutrition Institute*, it said:

"Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block v. Community Nutrition Institute*, 467 U.S. 340, 345, 104 S.Ct. 2450, 2453, 81 L.Ed.2d 270 (1984).

<sup>21</sup>*Virginia Beach Beautification Commission v. Board of Zoning Appeals of the City of Virginia Beach*, 344 S.E.2d 899 (1986).

<sup>22</sup>*Block v. Community Nutrition Institute*, 467 U.S. 340, 345-346, 104 S.Ct. 2450, 2453-2454, 81 L.Ed.2d 270 (1984).

litigants.

While the Virginia Court's result was the same, unlike the U.S. Court in *Block*, the Virginia Court confined itself to the statutory language.<sup>23</sup> It found that since the statute provided for actions by "aggrieved" parties only, an action by those without a legal interest was not reviewable.<sup>24</sup> Since the organization owned no real estate and indeed had no commercial interest, it could not be a party aggrieved within this statutory language. Unfortunately, Virginia has no legislative history for the Court to consult had it been disposed to do so. However, a fair reading of the statute and consideration of the intent of statutory scheme should have driven the Virginia Court to conclude that review was not so limited. Indeed, the Virginia APA was designed to subject agencies to judicial scrutiny and organize, rather than block, challenges.

The breadth of the search for legislative intent will, of course, cut both ways and lead to a finding against an effort to preclude review. In *Bowen v. Michigan Academy of Family Physicians*,<sup>25</sup> the Supreme Court found that the statute did not preclude review. Although it started with the statutory language, it looked at the administrative scheme and the legislative history before concluding that review was not precluded. The Supreme Court has also found that silence about the type of review available will not establish the intent to preclude review.<sup>26</sup>

Even if the statute precludes some review, the review preclusion should be confined to the extent consistent with the best administration of the particular program. The Immigration Reform and Control Act of

---

<sup>23</sup>It should be noted also that the Virginia Court saw the issue as "standing," and *Block* could also be so classified, showing the interrelationship between reviewability and fundamental "justiciability" principles, such as standing (who may seek review), ripeness (when may they do so) and political question (scope of "judicial power").

<sup>24</sup>344 S.E.2d at , 902-903.

<sup>25</sup>*Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 106 S.Ct. 2133, 90 L.Ed.2d 623 (1986).

<sup>26</sup>*Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 56-57, 113 S.Ct. 2485, 2495, 125 L.Ed.2d 38 (1993), on remand 996 F.2d 221 (9th Cir.1993).

1986 expressly precluded review of INS denials of special status except in the context of a deportation order.<sup>27</sup> The Supreme Court, in *McNary v. Haitian Refugee Center, Inc.*, determined that review was permissible in a class action alleging that the agency's procedures violated the Act and the due process clause.<sup>28</sup> The Court found that Congress intended to preclude review for individual denials only.<sup>29</sup> It seemed to require very explicit congressional language for those situations where the intent is to preclude "generic constitutional and statutory claims."<sup>30</sup> Thus, review of general policy or agency practice is not precluded by statutory language precluding review of individual decisions.<sup>31</sup> Chief Justice Rehnquist, dissenting in *McNary*, disagreed that Congress had not intended to preclude this type of review. He read the statute as providing very limited review and thereby "Congress intended to foreclose all other avenues of relief."<sup>32</sup>

#### **D. Unreviewable Discretion Created by the Absence of a Meaningful Basis for Review**

A statute might give total authority to the administrative decision maker so as to leave no role for the courts. That is, the statute may not expressly preclude review as discussed above but may delegate so much authority to the agency that there is none left for the courts. Such a grant is said to create "unreviewable discretion." Unreviewable discretion exists when the decision maker is to have complete authority and not share its authority with the courts.<sup>33</sup>

---

<sup>27</sup>100 Stat. 3359.

<sup>28</sup>*McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 111 S.Ct. 888, 112 L.Ed.2d 1005 (1991).

<sup>29</sup>498 U.S. at 492, 111 S.Ct. at 896.

<sup>30</sup>498 U.S. at 493-499, 111 S.Ct. at 897-899.

<sup>31</sup>*Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 56, 113 S.Ct. 2485, 2495, 125 L.Ed.2d 38 (1993), on remand 996 F.2d 221 (9th Cir.1993) (Reaffirming the decision in *McNary*).

<sup>32</sup>498 U.S. at 501, 111 S.Ct. at 901.

<sup>33</sup>E.g., *Dalton v. Specter*, 511 U.S. 462, 114 S.Ct. 1719, 128 L.Ed.2d 497 (1994), rehearing denied 512 U.S. 1247, 114 S.Ct. 2771, 129 L.Ed.2d 884 (1994). All nine justices, in one way or another, agreed that base closing decisions under the Defense Base Closure and Realignment Act of 1990 were committed to the President's unreviewable discretion.



In the search for unreviewable discretion, however, it must be remembered that the mere fact that the statute grants "discretion" does not necessarily make the agency's action unreviewable.<sup>34</sup> The term "discretion" has several meanings involving a range of administrative authority and decision making freedom. Sometimes courts must recognize that the agency's authority and decision making freedom is so complete that they have no function in that particular decision. Usually, however, an administrative exercise of discretion may be reviewed. The federal APA recognizes reviewable discretion as well as unreviewable discretion and provides in § 706 for review of certain types of discretion for "abuse".

### 1. No meaningful standards

The existence of unreviewable discretion often derives from the absence of standards by which a court may evaluate the agency decision. The *Overton Park* opinion is the seminal case recognizing this basis for unreviewable discretion. There, the Supreme Court found that unreviewable "absolute discretion" exists when the statute left the courts "no law to apply."<sup>35</sup> That is, a court should not attempt to review where the statute lacks meaningful standards whereby a reviewing court might evaluate the agency's exercise of discretion. The theory is that since Congress provided no basis upon which courts can evaluate the agency resolution it intended no role for the courts.

The *Overton Park* test established a fairly straightforward and often cited test for determining whether Congress had so committed the decision to the agency's authority as to preclude review. Federal courts frequently apply that test in order to determine unreviewability.<sup>36</sup>

---

<sup>34</sup>*Beno v. Shalala*, 30 F.3d 1057, 1066 (9th Cir.1994).

<sup>35</sup>*Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413, 91 S.Ct. 814, 822, 28 L.Ed.2d 136 (1971), on remand 335 F.Supp. 873 (W.D.Tenn.1972), opinion supplemented 357 F.Supp. 846 (W.D.Tenn.1973), order reversed 494 F.2d 1212 (6th Cir.1974), cert. denied 421 U.S. 991, 95 S.Ct. 1997, 44 L.Ed.2d 481 (1975).

<sup>36</sup>*Padavan v. U.S.*, 82 F.3d 23, 29 (2d Cir. 1996); *Diebold v. United States*, 947 F.2d 787, 789 (6th Cir.1991), rehearing denied 961 F.2d 97 (6th Cir.1992) (Army decision to privatize food services); *Scalise v. Thornburgh*, 891 F.2d 640, 648 (7th Cir.1989), cert. denied 494 U.S. 1083, 110 S.Ct. 1815, 108 L.Ed.2d 945 (1990) (international prisoner transfers); *Greenwood v. FAA*, 28 F.3d 971, 975 (9th Cir.1994) (FAA suspension of pilot examiner

State courts are also likely to judge whether a delegation is so complete as to preclude review by searching for meaningful standards. In *Greer v. Illinois Housing Development Authority*, for example, the state agency asserted that it had exercised unreviewable discretion.<sup>37</sup> Neighborhood residents challenged a decision by a housing authority to fund a proposed low income housing project in their area. The state housing authority asserted that the act committed decisions about its projects to its "sole discretion." The Illinois Supreme Court applied the *Overton Park* "no law to apply" test to determine whether the agency's discretion was indeed so complete as to preclude review. It found meaningful standards whereby it could evaluate the decision and that the standards were "mandatory."<sup>38</sup> It therefore concluded that "[The agency's] decision ... is obviously entitled to great deference. But this deference is best assured by subjecting that decision only to review to determine whether it is arbitrary or capricious and not by insulating it from judicial review altogether."<sup>39</sup>

In contrast, the Illinois Supreme Court found unreviewable discretion in *Hanrahan v. Williams*.<sup>40</sup> Hanrahan sought review of the Illinois Prisoner Review Board's decision to deny him parole. The Board claimed that it had absolute discretion in parole decisions. The appellate court found sufficient standards to support review and noted that federal courts reviewed similar decisions in *habeas corpus* actions. The Illinois Supreme Court disagreed. It concluded that whereas the statute provides standards for denying parole the act did not "state when the Board must grant parole."<sup>41</sup> Because the guidelines were not mandatory, the Board was not compelled to grant a parole and hence a

---

designation); *Sierra Club v. Yeutter*, 911 F.2d 1405, 1410-1412 (10th Cir.1990) (whether United States possesses federal reserve water rights under the wilderness act); *Chiles v. U.S.*, 69 F.3d 1094, 1096 (11th Cir. 1995); *Clifford v. Pena*, 77 F.3d 1414, 1417 (D.C. Cir. 1996).

<sup>37</sup>*Greer v. Illinois Housing Development Authority*, 122 Ill.2d 462, 120 Ill.Dec. 531, 524 N.E.2d 561 (1988).

<sup>38</sup>534 N.E.2d at 578.

<sup>39</sup>524 N.E.2d at 578.

<sup>40</sup>*Hanrahan v. Williams*, 673 N.E. 2d 251, 254 (Ill. 1996), citing *Greer v. Illinois Housing Dev. Auth.*, 524 N.E. 2d 561 (1988) (Citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 91 S.Ct. 814 (1971) and *Heckler v. Chaney*, 470 U.S. 821, 105 S.Ct. 1649 (1985)).

<sup>41</sup>673 N.E.2d at 255.

court has “no law to apply.”<sup>42</sup> Thus, it concluded that “the legislature, in drafting the statutory language, intended the Board to have complete discretion in determining whether to grant parole when the denial of parole is not mandated by statute.”<sup>43</sup> This conclusion, as discussed below, was bolstered by existing Illinois law precluding review of parole decisions.

## 2. Decisions for which review standards are impossible

A similar but fundamentally different case is presented by those discretionary decisions that seem by their nature impossible to review.<sup>44</sup> Because meaningful standard cannot be rendered for some decisions, there cannot be “law to apply” for the purposes of review. Thus, those decisions are made through the exercise of absolute decision making freedom but not because the legislature *did* not provide standards but because it *cannot* provide standards. By empowering the agency to make a decision of this nature, the legislature can be said to have intended that the agency have absolute discretion.

The Illinois Supreme Court in *Hanrahan* was driven to its determination that parole decisions were unreviewable partly because it was confronted with decision making of this variety.<sup>45</sup> The Court noted: “the highly subjective and predictive nature of the parole-release decision, along with the fact that there are no standards sufficiently objective to allow a court to evaluate the Board’s decision ..., sets the

---

<sup>42</sup>The Court also noted that the board’s rules provided that paroles would be granted “as an exercise of grace and executive discretion.” Agency rules, however, cannot be allowed to affect reviewability. That the rules assert absolute discretion cannot be used to conclude that the agency has such discretion. On the other hand, that the agency promulgates rules to guide the exercise of absolute discretion granted by statute cannot be used as standards for the purpose of establishing reviewability. Not only would such an approach distort the legislative will in allocating authority between the agency and the courts but it would create regrettable disincentives to the agency.

<sup>43</sup>673 N.E.2d at 255.

<sup>44</sup>Charles Koch, *Judicial Review of Administrative Discretion*, 54 G.W.L.Rev. 469, 502 (1986). Dworkin calls this a strong sense of discretion. Ronald Dworkin, *TAKING RIGHTS SERIOUSLY*, at 32 (1977). Jaffe, writing directly about administrative discretion, observed that a special discretion exists when an agency is to make an “intuitive leap” from relevant factors to a decision. Louis Jaffe, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION*, 556 (1965).

<sup>45</sup>*Hanrahan v. Williams*, 673 N.E.2d 251, 256-257 (Ill. 1996).

parole-release decisions apart from other cases."<sup>46</sup> Decisions such as predictions can be judged correct only after the anticipated event and hence cannot be evaluated in the normal sense (although a court might monitor factors such as process and adequacy of the agency's consideration). A court can only substitute its prediction for that of the agency assigned that responsibility and to do so would be arrogating decision making authority granted to the agency.

The reality of such decision making is difficult to accept. Nonetheless, Justice O'Connor, among others, has conceded that such discretion does exist in the administrative law system. She observed: "Some decisions, in short, may turn more on experience and intuition than on any listing of reasons, factors, standards, or the like."<sup>47</sup> Others have wrestled with the indisputable existence of "unknowable" elements in administrative decisions.<sup>48</sup> Several observers have urged the benefits of such bureaucratic decision making.<sup>49</sup> Such a decision making process takes advantage of the agency as a decision making community to create a "decisional synergism."<sup>50</sup> In reviewing this type of decision making, the important consideration is not the decision itself but the proper merging of administrative decision making elements. If a court attempts to do more, it would rob the process of its intended richness.<sup>51</sup>

---

<sup>46</sup>73 N.E. 2d at 257.

<sup>47</sup>Sandra Day O'Connor, *Reflections on Preclusion of Judicial Review in England and the United States*, 27 Wm. & Mary L.Rev. 643, 655 (1986).

<sup>48</sup>See Richard Pierce, Sidney Shapiro, & Paul Verkuil, ADMINISTRATIVE LAW AND PROCESS § 7.3.4 (1985).

<sup>49</sup>E.g., Jerry Mashaw, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS, 75-75 (1983); Thomas McGarity, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY, 179 (1991).

<sup>50</sup>Stephen Breyer, REGULATION AND ITS REFORM, 112 (1982) ("The Environmental Protection Agency, for example, divided the problem of setting water pollution standards among several of its divisions; it staffed different divisions with people possessing different professional backgrounds (lawyers, business graduates, scientists); and it deliberately encouraged argument among them, in hope of giving top decision makers a more objective view."). See Frug, *The Ideology of Bureaucracy in American Law*, 97 Harv.L.Rev. 1277, 1318 (1984) ("Bureaucracy ... is not an impersonal machine but a social system, a way of mobilizing all aspects of human personality in order to transform individuals into a functioning group.").

<sup>51</sup>For further discussion see Charles Koch, *Judicial Review of Administrative Discretion*, 54 G.W.L.Rev. 469, 505-507 (1986).

### **E. Unreviewable Discretion Created by Operation of Law**

The absence of a statutory basis upon which to evaluate the agency decision is not the only test for unreviewable discretion.<sup>52</sup> Complete administrative authority and decision making freedom is sometimes created by operation of law. For certain categories of administrative decisions, tradition or common law has ordained a system of unreviewable discretion. Similarly, constitutional principles might operate to deprive the judiciary of a role in certain types of administrative decisions.

#### **1. Review precluded by traditional law**

Traditional or common law has evolved unreviewability for the exercise of "prosecutorial" discretion. The *Hanrahan* opinion, relying on the federal authority discussed below, found that traditional understanding supported its finding of unreviewability.<sup>53</sup> As with this federal authority, the Illinois Supreme Court attempted to apply the *Overton Park* "no law to apply" test. Yet, it was even more difficult than in the federal cases to claim that there were no standards. First, the appeals court found standards to apply and federal courts in similar cases had found standards. Several state courts had found standards although others had not. The Illinois Supreme Court's opinion lists several fairly explicit standards. In the end, the Illinois Court rejected the notion that these potential standards created "law to apply" because the standards were not mandatory. This conclusion is extremely unsatisfying.

The Illinois Court, like the key U.S. Supreme Court opinions it applied, actually found that review of parole decisions was precluded by operation of Illinois law.<sup>54</sup> After noting the difference among the

---

<sup>52</sup>Ronald Levin, *Understanding Unreviewability in Administrative Law*, 74 Minn.L.Rev. 734 (1990) ("The Court could clarify its analysis by explicitly acknowledging what it is already doing implicitly: it should cease treating the 'law to apply' test as the exclusive standard for identifying actions that are 'committed to agency discretion.'").

<sup>53</sup>*Hanrahan v. Willaims*, 673 N.E.2d 251, 256-257 (Ill. 1996).

<sup>54</sup>673 N.W.2d at 255.

several states, the Court observed: "It is apparent that each state must decide, based on its own statutory scheme, whether the merits of parole-release decisions are reviewable." In Illinois, the traditional law is that parole decisions are unreviewable as determined by its Supreme Court.

The U.S. Supreme Court opinions it relied on similarly state the "no law to apply" test but ultimately decide on the basis of traditional law or common law. The U.S. Supreme Court's *Heckler v. Chaney* opinion, for example, looked to the tradition of unreviewable prosecutorial discretion.<sup>55</sup> Prison inmates brought actions to compel the Food and Drug Administration (FDA) to take enforcement action against the use of lethal injections to carry out the death penalty, arguing that the drugs used were not approved by the FDA for human executions. The issue was whether the decision not to act against this drug use was committed to agency discretion in a way that precluded review.<sup>56</sup> The district court, the circuit court and the Supreme Court all began with the test for reviewability in *Overton Park* i.e. whether there was a meaningful standard by which to evaluate the agency's decision.<sup>57</sup> Applying this test, the Court in *Heckler* found no controlling standard and hence held that the FDA's decision was unreviewable.

However, the Federal Food, Drug, and Cosmetic Act includes standards that judges could apply.<sup>58</sup> The real basis of the opinion was the well-established principle against review of prosecutorial-type discretion. This unreviewability, it found, has evolved into a well-established doctrine that was not changed by the APA.<sup>59</sup> As

---

<sup>55</sup>*Heckler v. Chaney*, 470 U.S. 821, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985).

<sup>56</sup>470 U.S. at 827, 105 S.Ct. at 1653.

<sup>57</sup>*Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410-413, 91 S.Ct. 814, 820-822, 28 L.Ed.2d 136 (1971), on remand 1971 WL 2720 (W.D.Tenn.1971).

<sup>58</sup>While it is true that, as Justice Rehnquist points out, nothing in the statute compels the Secretary to bring a case, the sections cited by the Court itself contain meaningful standards. The injunction section, 21 U.S.C.A. § 332, refers to a section listing "prohibited acts" (21 U.S.C.A. § 331), and the seizure section, 21 U.S.C.A. § 334, creates liability for "adulterated or misbranded" goods (as the Court recognized § 352 further defines misbranded). These are standards that courts regularly find meaningful and apply. In short, there was sufficient "law to apply" and hence a court would have the capacity to review in accordance with these standards but for the traditional acceptance of unbridled prosecutorial discretion.

<sup>59</sup>470 U.S. at 831-832, 105 S.Ct. at 1655-1656.

Justice Rehnquist stated: "For good reasons, such a decision [whether to bring enforcement action or not] has *traditionally* been 'committed to agency discretion,' and we believe that the Congress enacting the APA did not intend to alter that *tradition*.... (APA did not significantly alter the 'common law' of judicial review of agency action)."<sup>60</sup> Thus, the Court actually based its finding of unreviewability on tradition and not on the absence of standards.

Tradition as the basis for unreviewability was also the actual concept at work in the more recent *Webster v. Doe* opinion.<sup>61</sup> The majority held that a CIA termination decision was so committed to agency discretion as to preclude review, except for serious constitutional questions.<sup>62</sup> Justice Scalia, dissenting, found constitutional questions precluded as well. He agreed with the assertion made above that the "no law to apply" test does not describe the full reach of the unreviewable discretion concept and he recognized that the "law" that precludes review may be common law.<sup>63</sup> This common law, he observed, constitutes "a body of jurisprudence that had marked out, with more or less precision, certain issues and certain areas that were beyond the range of judicial review."<sup>64</sup> The personnel decision at issue in *Webster*, like prosecutorial decisions, were traditionally unreviewable.

The Supreme Court in *Lincoln v. Vigil* found unreviewable a HHS's Indian Health Service decision to discontinue a program through which disabled Indian children received clinical services.<sup>65</sup> It noted: "The allocation of funds from a lump-sum appropriation is another administrative decision *traditionally* regarded as committed to [unreviewable] agency discretion."<sup>66</sup> It reasoned that the same factors existed in such decisions as counseled against review in the type of

---

<sup>60</sup>470 U.S. at 832, 105 S.Ct. at 1656 (emphasis added).

<sup>61</sup>*Webster v. Doe*, 486 U.S. 592, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1988), on remand 859 F.2d 241 (D.C.Cir.1988).

<sup>62</sup>486 U.S. at 601, 108 S.Ct. at 2053.

<sup>63</sup>486 U.S. at 607, 108 S.Ct. at 2056 (Scalia J., dissenting).

<sup>64</sup>486 U.S. at 607, 108 S.Ct. at 2056 (Scalia J., dissenting).

<sup>65</sup>*Lincoln v. Vigil*, 508 U.S. 182, 113 S.Ct. 2024, 124 L.Ed.2d 101 (1993).

<sup>66</sup>508 U.S. at 192, 113 S.Ct. at 2031 (Emphasis added).

decisions confronted by the *Heckler* opinion.<sup>67</sup> Thus, the unreviewability was justified by balancing a number of factors, including agency expertise, the statutory mandate, and advantages the agency has over the courts in making such decisions.<sup>68</sup> Supervision of such decisions, it felt, is for Congress and not the courts.<sup>69</sup>

## 2. Review precluded by constitutional principles

In some cases, the law that creates the unreviewable discretion is based on constitutional interpretation. Such decisions differ from traditionally unreviewable discretion in that the "law" making the decision unreviewable has some constitutional force.<sup>70</sup> Often there is a very strong separation of powers argument that supports the conclusion that such decisions are entirely within the constitutional powers of the executive and the judicial branch is precluded from involving itself in them.

Uniquely executive decisions would generally fall into this category.<sup>71</sup> A number of cases have upheld the strength of this doctrine. Some involve questions of foreign affairs.<sup>72</sup> Others involve issues related to the military.<sup>73</sup> General considerations of "national security"

---

<sup>67</sup>*Heckler v. Chaney*, 470 U.S. 821, 831, 105 S.Ct. 1649, 1655, 84 L.Ed.2d 714 (1985).

<sup>68</sup>508 U.S. at 192, 113 S.Ct. at 2032.

<sup>69</sup>508 U.S. at 193, 113 S.Ct. at 2032.

<sup>70</sup>In our early constitutional history, there was no acceptance of absolute prosecutorial discretion. See *Heckler v. Chaney*, 470 U.S. 821, 844–849, 105 S.Ct. 1649, 1663–1665, 84 L.Ed.2d 714 (1985) (Marshall, J., concurring).

<sup>71</sup>*Dina v. Attorney General of United States*, 793 F.2d 473, 477 (2d Cir.1986).

<sup>72</sup>*Miranda v. Secretary of Treasury*, 766 F.2d 1, 3 (1st Cir.1985) (upholding license denial by the secretary of state acting under the authority of the Trading With the Enemy Act); *Dickson v. Ford*, 521 F.2d 234, 235 (5th Cir.1975), cert. denied 424 U.S. 954, 96 S.Ct. 1428, 47 L.Ed.2d 360 (1975) (upholding the dismissal of a taxpayer challenge to military and economic assistance to Israel); *U.S. Information Agency v. Krc*, 905 F.2d 389, 396 (D.C.Cir.1990), on remand 1991 WL 166683 (D.D.C.1991) (Foreign Service personnel decisions); see *Bagguley v. Bush*, 953 F.2d 660, 662 (D.C.Cir.1991), cert. denied 503 U.S. 995, 112 S.Ct. 1698, 118 L.Ed.2d 408 (1992) (The court relied on the Convention on the Transfer of Sentenced Persons.).

<sup>73</sup>*National Federation of Federal Employees v. United States*, 905 F.2d 400, 406 (D.C.Cir.1990) (base closing recommendations); *Hudson River Sloop Clearwater, Inc. v. Department of Navy*, 891 F.2d 414, 423 (2d Cir.1989) (Navy's failure to consider certain



might support unreviewability.<sup>74</sup> Decisions involving "political questions" may involve the exercise of unreviewable discretion.<sup>75</sup> Unlike the common law sources of unreviewability, constitutionally based unreviewability is unassailable directly.<sup>76</sup>

## F. Summary

There is a strong presumption in favor of review of administrative action and the law in both the federal and state systems precludes review in only three categories of cases. First, a statute may preclude review of either an entire category of administrative decisions or specific aspects of administrative decisions. Second, an administrative scheme may provide no basis on which to evaluate an agency's resolution, "no law to apply," and hence will imply such complete administrative authority and decisionmaking freedom, "discretion," that the courts have no basis on which to review. Third, the "operation of law," either judge-made common law or an interpretation of constitutional doctrine, may leave the courts no role.

---

classified aspects in an environmental impact statement).

<sup>74</sup>Webster v. Doe, 486 U.S. 592, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1988), on remand 859 F.2d 241 (D.C.Cir.1988); Doe v. Cheney, 885 F.2d 898, 903-904 (D.C.Cir.1989).

<sup>75</sup>Gilligan v. Morgan, 413 U.S. 1, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1973).

<sup>76</sup>Webster v. Doe, 486 U.S. 592, 618-621, 108 S.Ct. 2047, 2062-2063 (1998) (J. Scalia, dissenting, severely criticized the majority for failing to recognize the constitutional imperative for unreviewability in the case before them.).