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WAIVERS, FLEXIBILITY, AND REVIEWABILITY

JIM ROSSI*

Professor Harold J. Krent's article, *Reviewing Agency Action for Inconsistency with Prior Rules and Regulations*,¹ addresses some of the unintended consequences of the presumption of reviewability that generally applies under the Administrative Procedure Act ("APA") when agencies fail to comply with their own published rules.² Consistent with his earlier work on separation of powers,³ Krent suggests that external review of agency decisions that depart from published regulations need not always come from courts—the President, Congress and even interest groups can also provide checks on agency decisionmaking.⁴ Ultimately, because of his concerns with the adverse consequences of a broad presumption in favor of reviewability, Krent urges that courts determine whether agency action is "committed to agency discretion by law" under the APA⁵—and hence unreviewable—on the basis of whether the agency has afforded sufficient consideration and deliberation to its departure from published rules.⁶

Krent justifies his call for reform with his claims about the impact of broad judicial review. He claims that it encourages agencies both to rescind regulations to prevent review and to adopt fewer published rules.⁷ He also claims that it invites courts themselves to effect policy by substituting their interpretation of a prior rule for that of the agency.⁸ In other words Krent, like many commentators in administrative law,⁹ is concerned with "ossification"—an oft vilified move-

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1. 72 CHI.-KENT L. REV. 1187 (1997).

2. See 5 U.S.C. § 706(2) (1994) (authorizing reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion . . . [or] without observance of procedure required by law").

3. See Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253 (1988).

4. See Krent, *supra* note 1, at 1187.

5. 5 U.S.C. § 701(a)(2) (1994) (precluding judicial review of those issues "committed to agency discretion by law"). Krent also addresses reviewability under the Federal Torts Claims Act and in the due process context. See Krent, *supra* note 1, at 1201-11. This Comment addresses reviewability under the APA only.

6. See Krent, *supra* note 1, at 1244-51 (calling this the "process approach").

7. See Krent, *supra* note 1, at 1213-20.

8. See Krent, *supra* note 1, at 1228-29.

9. See, e.g., JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 19 (1990); Thomas O. McGarity, *Some Thoughts on 'Deossifying' the Rulemaking Process*, 41

ment away from agency regulation through published utterances adopted by notice and comment rulemaking and towards ad hoc, less visible ways of lawmaking. While others have proposed reforms to the scope of judicial review to address this problem, such as relaxing the hard look test courts use to evaluate whether agency decisions are arbitrary and capricious,¹⁰ Krent believes that a nuanced approach to reviewability—a more selective approach to opening the gateway to judicial review—should be a part of the solution.¹¹

In this Comment, I shall explore the issue of reviewability, as discussed by Krent, in the context of one flexible approach to regulation—express agency waiver of regulations. Part I of this Comment addresses the increased need for flexible solutions in the administrative context, such as waiver of rules, and provides some examples. Part II argues that, especially in the context of flexible regulatory approaches, *Heckler v. Chaney*,¹² a key case for determining whether courts will review agency decisions, should not be given a reading that precludes review of agency inaction. It should be read to value consistency with program purposes and across similar adjudicative cases, as well as consistency with the letter of published regulations. In Part III, I suggest that Krent's process proposal may provide for too little oversight of agency decisionmaking in the waiver context. In considering appeals of agency flexibility decisions, such as administrative waiver of regulation, courts should generally err in favor of, rather than against, reviewability; in the waiver context, the third-party reliance approach examined by Krent provides a more legitimate approach than the process approach for determining the appropriateness of review.

DUKE L.J. 1385 (1992); Richard J. Pierce, Jr., *The Unintended Effects of Judicial Review of Agency Rules: How Federal Courts Have Contributed to the Electricity Crisis of the 1990s*, 43 ADMIN. L. REV. 7 (1991). For summary and criticism, see Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 WIS. L. REV. 763 (criticizing Pierce's account of ossification at the Federal Energy Regulatory Commission ("FERC")); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483 (1997) (providing a systematic defense of the hard look doctrine in response to ossification critics, particularly McGarity).

10. See McGarity, *supra* note 9, at 1453 (suggesting "[i]t may be time for courts to replace the 'hard look' metaphor with a more deferential image.").

11. See Krent, *supra* note 1, at 1244-51.

12. 470 U.S. 821 (1985).

I. FLEXIBILITY THROUGH WAIVER OF REGULATIONS

The need for increased flexibility in administrative processes is well documented. Dissatisfaction with the adversarial nature of many regulatory programs,¹³ a concern not unlike Krent's, has led many commentators to urge enhanced flexibility in the application of published regulations.¹⁴ Flexible regulatory solutions are seen as providing a legitimate alternative to programs that have placed too much focus on rigid rules as the primary mechanism for regulating private conduct.¹⁵

Many commentators embrace express agency waiver of published regulations¹⁶ as a means for introducing flexibility to the rigid adherence of agencies to previously published regulations.¹⁷ In many agency contexts, a regulated interest will seek waiver of a regulation by petitioning an agency to suspend application of a rule permanently or temporarily, or will attempt to raise waiver as an equitable defense in an enforcement proceeding. For example, in *WAIT Radio v. FCC*, the Court of Appeals for the D.C. Circuit noted:

The salutary presumptions [of regularity inherent to rulemaking] do not obviate the need for serious consideration of meritorious applications for waiver, and a system where regulations are maintained inflexibly without any procedure for waiver poses legal difficulties. The Commission is charged with administration in the "public interest." That an agency may discharge its responsibilities by promulgating rules of general application which, in the overall perspective, establish the "public interest" for a broad range of situations, does

13. See MASHAW & HAREST, *supra* note 9, at 19 (exploring the "legal-culture" hypothesis—that the litigious, adversarial nature of the system contributed to ossification by making the adoption of rules containing regulatory standards difficult, but facilitated the recall of defective automobiles); see also Robert A. Kagan, *Adversarial Legalism and American Government*, 10 J. POL'Y ANALYSIS & MGMT. 369 (1991) (criticizing efforts to turn administrative process into legal wrangling).

14. A nice summary is Marshall J. Breger, *Regulatory Flexibility and the Administrative State*, 32 TULSA L.J. 325 (1996). See also IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1992).

15. This position is perhaps most popularly chronicled by PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* (1994).

16. Waiver is express or formal when a written request, in the form of a stylized proceeding or letter request, is filed with an agency pursuant to the agency's rules of practice and procedure. Tacit or informal waiver, by contrast, occurs when contacts with agency staff result in a tacit agreement to suspend or not suspend a regulation. While informal waiver is a common occurrence in practice, complete discussion of it is beyond the scope of this Comment.

17. See Alfred C. Aman, Jr., *Administrative Equity: An Analysis of Exceptions to Administrative Rules*, 1982 DUKE L.J. 277; Breger, *supra* note 14, at 340-44; Jim Rossi, *Making Policy Through the Waiver of Regulations at the Federal Energy Regulatory Commission*, 47 ADMIN. L. REV. 255 (1995); Peter H. Schuck, *When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy Through an Exceptions Process*, 1984 DUKE L.J. 163.

not relieve it of an obligation to seek out the "public interest" in particular, individualized cases.¹⁸

Thus, the authority of a federal agency to grant exceptions or waivers to regulations may be implied by Congress's directive to the agency to regulate in the public interest.¹⁹

As an example of inherent agency authority to waive rules, consider the Federal Energy Regulatory Commission's ("FERC") implementation of regulations determining qualifying facilities ("QFs") which receive many benefits under the Public Utility Regulatory Policies Act of 1978 ("PURPA").²⁰ FERC promulgated rules to encourage QFs, such as cogenerators and power producers using renewable energy sources, to advance PURPA's goals of energy conservation, increased efficiency, and consumer protection.²¹ Among those rules are several operating and efficiency standards for cogenerators of electricity and secondary fuel use limitations that apply to renewable energy generators.²² The rules do not expressly contain a safety valve providing for waiver. However, because otherwise legitimate QFs sometimes face technological difficulties—such as unanticipated fuel, engineering, or weather problems—FERC developed a set of standards, in adjudicative proceedings, for waiving rigid application of its QF criteria. The availability of waiver has allowed FERC to take a flexible approach that met PURPA's goals and helped avoid the bankruptcy or shutdown of independent generators of electricity.²³

Where agencies do not have such inherent authority, statutes may expressly authorize agency waiver in limited circumstances. The Mine Safety and Health Act of 1977 ("MSHA")²⁴ provides an example of waiver authorized expressly by statute. Under the MSHA, the Secretary of Labor is authorized to modify a mine safety standard if the

18. 418 F.2d 1153, 1157 (D.C. Cir. 1969).

19. The fact that such authority exists does not compel agencies to provide for waiver. As the Supreme Court has noted, agencies may adopt regulations without providing a safety valve in the rules allowing for individualized, case-by-case relief. *See FCC v. WNCN Listeners Guild*, 450 U.S. 582, 603 (1981) (holding that the FCC was not required to waive its policy of not reviewing program content when considering license renewals, even in the face of listener complaints).

20. Pub. L. No. 95-617, 92 Stat. 3117 (1978) (codified as amended at scattered sections of 15, 16, & 42 U.S.C. (1994)); *see also* 18 C.F.R. §§ 292.101-.211 (1997).

21. *See, e.g.*, 18 C.F.R. § 292.204.

22. *See, e.g.*, *Nelson Industrial Steam Co.*, 39 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,201 (1987).

23. For a description of this program, see Rossi, *supra* note 17. The D.C. Circuit considered a case similar to the one here described in *New Charleston Power I, L.P. v. FERC*, 56 F.3d 1430 (D.C. Cir. 1995), without addressing the issue of reviewability.

24. 30 U.S.C. §§ 801-962 (1994).

Secretary "determines that an alternative method of achieving the result [of the standard] . . . will . . . guarantee no less than the same measure of protection afforded . . . by such standard, or that the application of such standard . . . will result in a diminution of safety to the miners in such mine."²⁵ Over 600 applications for modification were approved in the first five years of the MSHA's implementation.²⁶

As the availability of waiver illustrates, agencies are often legally authorized to adopt results that are inconsistent with the letter of their published regulations. Variation from the language of rules in implementing regulatory programs is one way of achieving equitable and fair results in the regulatory process. Waiver also allows agencies to adapt regulation to contemporary technological and financial circumstances. Further, the flexibility provided by waiver may help to minimize the amount of dissatisfaction with rigid regulation among private, regulated interests. Without flexibility in the implementation and application of regulation, regulated interests are encouraged to seek preenforcement review of rules, ultimately contributing to additional ossification in the regulatory process.

For these and other reasons, agency waiver of regulation has become an increasingly important policy alternative for those who wish to enhance flexible approaches to regulation. The Clinton Administration, in 1993, issued an executive order requiring each agency to "review its waiver application process and take appropriate steps to streamline that process."²⁷ Florida adopted a waiver supermandate as a part of its comprehensive 1996 APA reforms,²⁸ and other states may follow suit.²⁹

II. WAIVER AND REVIEWABILITY UNDER *HECKLER V. CHANEY*

Krent's article assesses current judicial review doctrine, particularly exceptions to the presumption of reviewability in the APA's § 701(a)(2) "committed to agency discretion by law" language. Since *Heckler v. Chaney*, where the Supreme Court held that an agency fail-

25. *Id.* at § 811(c).

26. AYRES & BRAITHWAITE, *supra* note 14, at 116.

27. Exec. Order No. 12,875, 58 Fed. Reg. 58,093 (1993); *see also* REPORT OF THE NATIONAL PERFORMANCE REVIEW, CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS 167 (1993) (noting need for "selective relief from regulations or mandates" in agency programs).

28. *See* FLA. STAT. ANN. § 120.542 (West Supp. 1996).

29. Such states include Iowa. *See* IOWA STATE BAR ASSOCIATION, TASKFORCE ON ADMINISTRATIVE LAW REFORM, PROPOSED NEW IOWA ADMINISTRATIVE PROCEDURE ACT (SF 2404), Dec. 1, 1996, at 95-99 (proposing waiver provision); *see also* Thomas A. Fogarty, *Proposal Would Shorten Reach of State Government*, DES MOINES REG., Dec. 15, 1996, at 1, available in LEXIS, News Library, Dmoirg File (discussing Iowa waiver proposal).

ure to initiate enforcement proceedings was presumptively unreviewable,³⁰ courts have construed § 701(a)(2) to preclude review where decisions, for some of the political and institutional reasons discussed by Krent,³¹ are best left to the agency.

However, as Krent suggests, under *Chaney* when agencies adopt positions that are inconsistent with prior rules and regulations, they generally open themselves to judicial review by courts.³² *Chaney* carved out an exception to “committed to agency discretion by law” for agency failure to initiate enforcement where the agency’s rules are being violated,³³ but it also mentioned exceptions for an agency refusal “based solely on the belief that it lacks jurisdiction,”³⁴ if an agency’s inaction violated the Constitution,³⁵ if the agency refused to commence rulemaking proceedings,³⁶ or if the agency “‘consciously and expressly adopted a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.”³⁷

Any discussion of the role of courts reviewing agency discretion owes a heavy intellectual debt to the contribution of Louis Jaffe, whose writings in the 1950s and 1960s were the first efforts to articulate a comprehensive theory of judicial control of administration.³⁸ Jaffe, Professor Daniel Rodriguez observes, was no fan of agency discretion; he attacked independent agencies and expressed skepticism about the ability of agencies alone to make legitimate decisions.³⁹ For Jaffe, I would surmise, decisions such as *Chaney*, which by implication give agencies broad discretion *to opt not* to pre-commit themselves to a course of action (and thus avoid judicial review), go too far. Congress created a presumption of review under § 701, and *only Congress* can create exceptions. In other words, “by law” in § 701(a)(2) can only mean by Congress’s suggestion—not by rule (or absence thereof) as *Chaney* would suggest. And Rodriguez, in an early article on the

30. See 470 U.S. 821, 837-38 (1985) (refusing to require the Food and Drug administration to initiate enforcement against drugs used in lethal injections).

31. See Krent, *supra* note 1, at 1194-1201.

32. See Krent, *supra* note 1, at 1194-95. *Chaney* noted that judicial review of a refusal to enforce may still be available where a determination to enforce is inconsistent with an agency’s published rules. See 470 U.S. at 836.

33. See *Chaney*, 470 U.S. at 836.

34. *Id.* at 833 n.4.

35. See *id.* at 838.

36. See *id.* at 825 n.2.

37. *Id.* at 833 n.4.

38. See, e.g., LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965).

39. See Daniel B. Rodriguez, *Jaffe’s Law: Reflections on a Generation of Administrative Law Scholarship*, 72 CHI.-KENT L. REV. 1159 (1997).

presumption of reviewability,⁴⁰ seems to endorse this view in reconciling the exception to judicial review when an action is “committed to agency discretion by law” with the exception in § 701(a)(1), which allows a statute to preclude review. Rodriguez suggested that congressional choice, not agency action, is key to whether a court should review agency decisions.⁴¹

Krent, by contrast, is agnostic about *Chaney*’s normative message. Given the Court’s decision in *Chaney*, he begins from the following premise: agencies themselves are able to decide whether to subject themselves to external review by courts, by issuing rules which pre-commit them to a course of action and by their subsequent compliance or noncompliance with these rules. Krent’s article thus provides a propitious opportunity to focus attention on one specific issue of paramount importance in ensuring agency accountability in the implementation of waiver programs. Specifically, to what extent is an express agency decision to grant or deny a waiver—i.e., to take action expressly inconsistent with the language of rules, or to take action consistent with the language of rules when requested to do otherwise—“committed to agency discretion by law,” as *Chaney* elucidates that standard, and, thus, unreviewable?⁴²

One way of understanding *Chaney*’s message is that judicial review is precluded in the context of an agency’s failure to take enforcement action. In other words, agency inaction that is otherwise in compliance with the letter of published rules will not open the gateway to judicial review. On the other hand, affirmative regulatory action that is inconsistent with published rules will often open the gateway to review by a court.⁴³ This simplistic reading of *Chaney*, which distinguishes between agency inaction, which is unreviewable,

40. See Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and its Consequences*, 45 VAND. L. REV. 743 (1992).

41. According to Rodriguez’s earlier article, the two parts of § 701 “are explicable if read to require Congress, if it desires to preclude judicial review, to do so expressly or to provide reasons sufficient to persuade a court that review is implicitly precluded, that is, committed to agency discretion by law.” *Id.* at 757.

42. As agencies increasingly turn to flexible approaches to regulation, such as the consideration of waivers to published rules, legal issues regarding the role of the courts in promoting accountability in deviations from rules are likely to arise. For example, is an agency’s failure to waive a regulation “final” agency action, subject to judicial review under the APA? Do third-party intervenors have standing to challenge an agency’s decision to waive the application of a regulation? Such questions will need to be addressed to ensure that agency flexibility is balanced with accountability to the purposes of the regulatory programs, but are beyond the scope of this Comment.

43. On the action/inaction reading of *Chaney*, see Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653 (1985).

and action, which is generally reviewable, has been in and out of fashion in the courts over the years.⁴⁴ Apart from the exceptions the Court articulated in *Chaney*, some courts have deemed agency failure to act nonreviewable. For example, although courts have, from time to time, reviewed agency inaction based on a legal interpretation,⁴⁵ the Supreme Court expressed its disapproval of this approach in *ICC v. Brotherhood of Locomotive Engineers ("BLE")*.⁴⁶ The Court of Appeals for the D.C. Circuit has since endorsed this approach, refusing to review agency inaction in the context of a request for waiver that was denied because of an agency's legal determination that a rule was not applicable.⁴⁷

Nevertheless, despite these signals that reviewability of inaction based on a legal stance is unreviewable, courts have continued to err in favor of exercising review over agency waiver decisions. Where waiver criteria are articulated in rules or published guidelines, courts are most likely to exercise review because they will have a judicially manageable standard to apply.⁴⁸ If an agency has granted a request for waiver that contradicts the letter of published rules, courts will also exercise review because it lies within their institutional compe-

44. The action/inaction distinction to determining reviewability is irrelevant under a textual reading of the APA, which defines "agency action" as "an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13) (1996). Further, as Ron Levin observes in his exhaustive survey of the case law, the distinction between agency action and inaction in *Chaney* is dubious, especially given increasing legal recognition of "new property" interests. See Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 716-17 (1990).

45. In *UAW v. Brock*, 783 F.2d 237, 239-41 (1986), the Court of Appeals for the D.C. Circuit found reviewable a "shifting rationale" given by the Director of the Labor Management Services Administration for the Department of Labor's failure to bring enforcement proceedings in response to a private complaint against an alleged industry effort to thwart a union's organizing drive. The court concluded, "Nothing in the Administrative Procedure Act or in the holding or policy of *Heckler v. Chaney*, precludes review of a proper plaintiff's timely challenge of an agency's announcement of its interpretation of a statute." *Id.* at 245; see also *Montana Air Chapter No. 29 v. Federal Labor Relations Auth.*, 898 F.2d 753, 756 (9th Cir. 1990) (recognizing that review of an agency's legal stance falls within one of *Chaney*'s exceptions allowing for review).

46. 482 U.S. 270 (1987). In writing the majority opinion, Justice Scalia rejected an argument, endorsed in Justice Stevens' concurrence by a reference to *UAW v. Brock*, see *id.* at 289 n.1 (Stevens, J. concurring), that "if the agency gives a 'reviewable' reason for otherwise unreviewable action, the action becomes reviewable." *Id.* at 283.

47. See *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 677 (D.C. Cir. 1994). The court speculated that the explanation of the denial of waiver may have been nothing more than an advisory opinion, and thus the appellant may not have suffered sufficient injury in fact to appeal. See *id.* at 674. Assuming, arguendo, injury in fact, the court reasoned that *Chaney* and *BLE* preclude review and repudiated its position in *UAW v. Brock*. See *id.* at 675-76.

48. This standard for determining reviewability, Levin aptly illustrates, is also questionable, because there is always some law to apply. See Levin, *supra* note 44, at 713. The better approach, he concludes, is a pragmatic one, see *id. passim*, that is not inconsistent with the ultimate conclusion of this Comment.

tence to evaluate the agency's deviation from its rules. Further, although there are some exceptions, courts have found agency waiver decisions reviewable even when legal criteria may not be articulated in statutes or rules or the agency has failed to take affirmative action.

Where, as in the MSHA context, waiver is authorized pursuant to criteria articulated in a statute, courts are most likely to find the matter is not "committed to agency discretion by law" and exercise review. In such cases, courts will review the agency's decision according to the statutory criteria, which are generally recognized as judicially manageable standards for evaluation. For example, in *Dickson v. Secretary of Defense*,⁴⁹ the U.S. Court of Appeals for the D.C. Circuit considered a program similar to MSHA mine safety standard waiver. The Army Board for Correction of Military Records ("Board") is authorized by statute to waive the three-year limitations period for applications for upgrades of discharge classifications when "in the interest of justice."⁵⁰ A panel of the D.C. Circuit rejected the Secretary of Defense's arguments that a decision to deny a waiver request that cited this statutory language, but gave no other explanation, was "committed to agency discretion by law" and hence unreviewable.⁵¹ Because Congress had given at least some standard in the statute authorizing waiver, the court believed it appropriate to exercise review of the agency's explanation even though the agency still retained substantial discretion.⁵² In such cases, because courts have some standard to apply in the authorizing statute, they will be most willing to engage in external review.⁵³

In considering agency decisions pursuant to waiver authority not expressly governed by a statute, courts have also exercised review of the agency action. As in *WAIT Radio*, agency waiver programs often are not expressly authorized by Congress's provision of legislative criteria to guide the agency in granting waiver; instead, the agency may have adopted waiver criteria by rules or published guidelines in order to provide a safety valve in the implementation of rules. For example, in *Clifford v. Peña*,⁵⁴ the Court of Appeals for the D.C. Circuit addressed the Maritime Administration's waiver authority under

49. 68 F.3d 1396 (D.C. Cir. 1995).

50. *Id.* at 1399 (quoting 10 U.S.C. § 1552(b) (1994)).

51. *See id.* at 1399-1402.

52. *See id.* at 1402 n.8.

53. *See also* *Beno v. Shalala*, 30 F.3d 1057, 1067 (9th Cir. 1994) (finding waivers "likely to assist in promoting the objectives" of the AFDC program," as authorized by 42 U.S.C. § 1315(a) and § 601, reviewable) (quoting 42 U.S.C. § 601 (1988)).

54. 77 F.3d 1414 (D.C. Cir. 1996).

§ 804(b) of the Merchant Marine Act of 1936.⁵⁵ Although the language of the Merchant Marine Act is extremely broad—authorizing Administration waiver of restrictions on foreign ownership and operation by U.S. ship contractors “[u]nder special circumstances and for good cause shown . . .”—a panel of the D.C. Circuit held that a waiver decision was reviewable because the Maritime Commission had published a list of factors to guide its exercise of judgment in granting waiver.⁵⁶ In such cases, there are at least some standards, articulated in the agency’s publication on interpretive rules, against which courts can measure the reasonableness of the agency’s decision. Courts generally find the agency’s waiver decision in such a context reviewable.⁵⁷

Courts have also reviewed waiver decisions that are based in law developed from a series of agency adjudicative decisions, even though the agency may not have published rules or guidelines that provide standards for granting or denying waiver. In many instances, agencies develop the practice of granting waivers in the absence of specific statutory provisions, rules, or guidelines regarding waiver. For example, suppose a renewable power generator, which burns biomass, is forced to burn levels of nonrenewable fuel that exceed FERC’s cogeneration criteria because of a fuel shortage. The generator requests from FERC a temporary waiver of its cogeneration rules, arguing that waiver is necessary because of technological hardship. Further, the generator suggests that granting a waiver is fully consistent with PURPA’s purposes and is consistent with FERC’s course of action in granting waivers to similarly situated facilities in the past.⁵⁸ In such a situation, either of two scenarios might arise on appeal. FERC grants the requested waiver and, say, an aggrieved consumer seeks judicial review of FERC’s decision. Alternatively, FERC refuses to grant the waiver, citing its rules and finding that PURPA’s purposes have been met, but the generator seeks review, arguing that application of the regulation thwarts PURPA’s goals or that FERC has failed to ade-

55. *See id.* at 1415; 46 U.S.C. app. § 1222(b) (1994).

56. *Clifford*, 77 F.3d at 1417 (quoting *Certain Bulk Operators*, 25 Shipping Reg. (P & F) 1261, 1264 (Mar. Admin. 1990)).

57. *See, e.g., Rendelman v. Shalala*, 21 F.3d 957 (9th Cir. 1994) (finding the Secretary of Health and Human Services’ denial of waiver of a triple-payback obligation in a scholarship grant program for medical students reviewable because agency regulations prescribed the criteria for considering waiver requests). *But see United States v. Arron*, 954 F.2d 249 (5th Cir. 1992) (finding the same program nonreviewable).

58. FERC has decided such waiver cases and developed criteria in adjudicative proceedings without publishing them in rules. *See Rossi, supra* note 17, at 265-71 (discussing FERC’s development of policy through adjudication).

quately distinguish this case from previous cases in which waiver has been granted.

In the first scenario, the agency has taken action that is inconsistent with its regulations. Under *Chaney*, the arguments for reviewability are strong because the agency has made a decision that contradicts its published regulations. Because the grant of the request for waiver is agency action inconsistent with a regulation, a court would likely be comfortable evaluating the consistency of the agency departure from the rule against the purpose of the regulatory program and past adjudicative cases. Even though a court may need to reassess the propriety of waiver against the yardstick of past adjudicative decisions, courts possess the institutional capacity to evaluate adjudicative decisions in a manner similar to their evaluation of rules and guidelines.

In the alternative scenario, courts should also review the agency's decision, even though it is agency inaction. *Chaney* addressed the issue of agency inaction in the context of regulated conduct that is inconsistent with published regulations. However, an important issue likely to arise in the context of waiver programs that are not authorized in and given guidance by rules falls outside *Chaney's* fact pattern.⁵⁹ Should an agency's refusal to grant a waiver request be subject to judicial review? In such a case, the agency acts in a manner that is fully consistent with the letter of previously published regulations. However, because of the unfairness or hardship caused by application of the regulation, the person to whom the regulation is applied seeks relief from the agency. If the agency refuses to grant the request for waiver, the agency's refusal to suspend the regulation may be deemed inaction and hence unreviewable under *Chaney*.

Chaney's apparent distinction between agency action, which is reviewable, and inaction should not be taken literally in any context, but this is especially so in determining reviewability of agency waiver decisions. Such an approach would suggest that inaction consistent with rules or a statute, such as a decision to deny a waiver request—for example, a QF request for waiver—is unreviewable under the APA.⁶⁰

59. If, as discussed above, a waiver program is authorized by and given guidance in rules, the agency will have a judicially manageable standard to apply in the language of the rules.

60. Of course, later cases reviewing agency failure to respond adequately to a petition for rulemaking suggest that reviewability under *Chaney* is not limited to cases in which the agency has taken affirmative action. See, e.g., *American Horse Protection Ass'n v. Lyng*, 812 F.2d 1 (D.C. Cir. 1987); *Farmworker Justice Fund, Inc. v. Brock*, 811 F.2d 613, *vacated as moot* by 817 F.2d 890 (D.C. Cir. 1987). However, these cases are distinguishable from the failure to grant waiver because the APA requires agencies to consider rulemaking petitions, see 5 U.S.C.

Although courts and commentators generally disfavor the action/inaction reading of *Chaney*, some courts, implicitly accepting this approach, have refused to find agency denial of waiver applications reviewable. In *Texas v. United States*, the U.S. Court of Appeals for the Fifth Circuit held unreviewable the Department of Agriculture's refusal to waive the state of Texas' liability for losses under the U.S. Food Stamp Program.⁶¹ Although the statute authorizing the Food Stamp program provided for waiver to serve the purposes of the statute and the Secretary of Agriculture had issued a policy memorandum describing the circumstances in which requests for waiver would be granted,⁶² the court held that there were "no judicially manageable standards . . . under which the Court can evaluate this case."⁶³ Likewise, in *North Dakota ex rel. Board of University and School Lands v. Yeutter*, the Court of Appeals for the Eighth Circuit found an agency denial of waiver "committed to agency discretion by law" and hence unreviewable.⁶⁴ The Food Security Act authorizes the Secretary of Agriculture to waive a requirement that land enrolled in the Conservation Reserve Program be held by the same owner for three years if the Secretary determines that the land was acquired under circumstances that give adequate assurances it was not acquired for purposes of placing it in the Program.⁶⁵ The court found this standard too broad to provide any judicially meaningful guidance and refused to review the agency's waiver denial.⁶⁶

This approach to denying reviewability, however, is misguided because in each of these cases the court has some standard to apply in evaluating the reasonableness of the agency's decision. Krent's analysis focuses on the institutional issue of when courts can provide accountability benefits in excess of costs by exercising review, rather

§ 553(e) (1994), and to give notice of denial of such petitions and "a brief statement of the grounds for denial." 5 U.S.C. § 555(e) (1994). There is no such provision in the federal APA for waiver, although some states, such as Florida, do have such a provision in their APAs. See FLA. STAT. ANN. § 120.542 (West Supp. 1997).

Courts have also premised review of agency inaction on the agency's legal stance. See *UAW v. Brock*, 783 F.2d 237 (D.C. Cir. 1986) (allowing review based on an agency's legal stance). However, the Supreme Court has suggested that agency reliance on legal reasons, giving the court something to review, did not justify review of action otherwise committed to agency discretion by law. See *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270 (1987). The Court of Appeals for the D.C. Circuit has subsequently repudiated the approach of *UAW v. Brock*. See *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 677 (D.C. Cir. 1994).

61. See 951 F.2d 645, 646-47 (5th Cir. 1992), *rev'd on other grounds*, 507 U.S. 529 (1993).

62. See *id.* at 648.

63. *Id.* at 648-49.

64. 914 F.2d 1031, 1035 (8th Cir. 1990).

65. See *id.* at 1032; 16 U.S.C. § 3835(a)(1)(C) (1994).

66. See *Yeutter*, 914 F.3d at 1035.

than a formalistic reading of *Chaney* that limits reviewability to agency action inconsistent with legal utterances published in rules. In the context of agency waiver decisions, such an approach is of paramount importance. Private expectations have often been shaped by agency articulation of a regulatory program's goals or by previous waiver (or negotiated) decisions that appear to be completely at odds with the letter of the agency's published rules, even though these decisions advance the regulatory program's goals. Focusing solely on the agency's actions or on consistency to the letter of regulation as threshold determinations for reviewability may preclude accountability to a regulatory program's goals. It may also invite agencies to engage in selective deregulation or favoritism in the implementation of regulatory programs. Moreover, waiver decisions, including denials, may allow agencies to engage *sub silentio* in the creation of new rules or interpretations outside of the rulemaking process. Such concerns most likely arise when agencies have acted in a manner that is inconsistent with statutory purposes or inconsistent across similar cases. Courts possess the skill and institutional competence to evaluate the consistency of agency waiver decisions against the yardstick of statutory goals or past agency conduct. Failure of courts to review agency consideration of requests for waiver—even where accompanied by action that is fully consistent with the letter of published regulations—may have significant accountability costs.

I would hesitate to suggest a presumption in favor of waivers⁶⁷ or a full judicial inquiry into the hardship or unfairness caused by application of a regulation in a specific case.⁶⁸ However, inquiry into an agency's reasons for denying waiver where a regulated interest has a good faith claim that application of a rule to a specific case will thwart a regulatory program's goals or is inconsistent with past agency practice may be necessary to ensure evenhanded application of cooperative and flexible approaches to regulation.⁶⁹ While the President or Congress may be able to perform this function, courts perhaps provide the best forum for evaluating *the reasons* for flexibility decisions, in-

67. See Jeffrey M. Sellers, Note, *Regulatory Values and the Exceptions Process*, 93 YALE L.J. 938, 957 (1984) (suggesting that the burden of proof should fall on those who wish to exclude exceptions or waivers from statutes or regulations).

68. Florida recently adopted such an approach. See FLA. STAT. ANN. § 120.542 (West Supp. 1997); Jim Rossi, *The 1996 Revised Florida Administrative Procedure Act: A Rulemaking Revolution or Counter-Revolution?*, 49 ADMIN. L. REV. 345, 353-58 (1997).

69. Krent, following Levin, observes that there will always be *some* law to apply. See Krent, *supra* note 1, at 1194. This law may take the form of agency adjudicative decisions (i.e., treatment of past waiver applications), guidelines, or argument from a statutory or regulatory program's purposes.

cluding the denial of waiver, to ensure evenhandedness in the application of regulation across private interests. And, if an agency has failed to provide reasons, a reviewing court can monitor to make sure that it does.

III. DOES THE PROCESS APPROACH PROVIDE ENOUGH ACCOUNTABILITY FOR AGENCY WAIVER PROGRAMS?

As Krent suggests, however, to create a presumption in favor of reviewability under the APA in all cases would have adverse policy consequences.⁷⁰ Most importantly, the anticipation of review can drive agencies away from articulating policies in rules and towards less accountable decisionmaking. To avoid some of these adverse policy consequences, Krent endorses a process approach, which focuses on the degree of consideration and deliberation afforded to an issue prior to agency departure from rules.⁷¹ Basically, under Krent's approach, so long as an agency has provided some deliberation in making a decision, courts should refuse to review the agency's action.

It is a useful exercise to explore how this approach might apply to agency waiver of rules. Consider, for example, FERC's decision to waive application of a published rule regarding engineering and operating standards to a particular cogeneration facility that is seeking QF certification under PURPA. Under Krent's process approach, a court will only exercise review of FERC's decision to waive its regulations under the APA if the agency gives some reasons for granting a waiver request. If an agency grants a waiver without explanation, judicial review—say, by a consumer group that claims it is aggrieved—may be appropriate. However, applying Krent's proposal, if FERC provides sufficient deliberative explanation for granting a waiver, the court should refuse to review the agency's decision. As long as FERC has give some reasons—presumably a lower threshold of reasons than necessary to survive judicial review under § 706 of the APA—courts should refuse to review the agency's decisions because the ossification costs of review exceed any offsetting benefit.

There are, of course, potential problems with the workability of Krent's process approach for determining reviewability. If courts are simply to evaluate whether the agency has given *some* reasons, the

70. See Krent, *supra* note 1, at 1230-31. One of these consequences may be to encourage agencies to promulgate fewer rules and to consider negotiated solutions and petitions for waiver more often—a consequence proponents of flexibility would certainly favor.

71. See Krent, *supra* note 1, at 1191 (tentatively concluding that “the process approach is best tailored” to the APA context).

process approach is too weak and may encourage agencies to give any rationale—however farfetched—in order to avoid review. On the other hand, if the role of courts is to evaluate the *quality* of the reasons given by an agency, the effect of Krent's process proposal may be to push back the standard of review to a determination of reviewability. To the extent that courts inquire into the reasons behind the agency's decision, this is not a proposal that addresses *whether* courts should review agency action but is a proposal that addresses the *kind* of review courts should afford.

In any event, it is useful to explore whether Krent's process proposal, if workable, is the best way to ensure accountability in the waiver context. The recent turn towards flexible approaches to agency regulation, such as agency waiver of rules, shares concerns in common with Krent's article. The litigious nature of the legal profession may have encouraged too adversarial a stance between private interests and government regulation by agencies. This adversarial stance, as those who chronicle ossification suggest, has led regulators to retreat, publishing fewer rules and in some cases regulating less. At the same time, however, ossification may have led to more ad hoc efforts at regulation, including flexible solutions to regulatory problems. If flexible regulation, including waivers, is a desirable goal, the ossification concern may be misplaced in this context because too many—not too few—rules is the problem. So here, Krent's proposal may be a solution in search of a problem.

Admittedly, judicial review of agency waiver decisions may have other costs. It could, for example, discourage agencies from engaging in express formal waiver and encourage them instead to use even more informal mechanisms to enhance flexibility. Despite these costs, though, a retreat to agency discretion is not always in order.⁷² The benefits of judicial review in the waiver context may be much greater than in the ordinary enforcement context. Legislative oversight of waiver programs is generally ineffective; Congress is generally unable to consider the merits of individual cases and, absent high-profile and controversial efforts to implement policy through waiver programs, it is unlikely that legislative committees will actively supervise agency waiver decisions. Enforcement decisionmaking, by contrast, might be expected to be the subject of regular legislative consideration, particu-

72. As Ed Rubin argues, a focus on discretion *qua* legal discretion is of no value to the modern administrative state and should not blind us from analysis of control and policymaking mechanisms. Edward L. Rubin, *Discretion and Its Discontents*, 72 CHI.-KENT L. REV. 1299 (1997).

larly in the context of appropriation or reauthorization decisions. Executive branch oversight, while quite adept at implementing global regulatory programs, is also suspect in the waiver context; executive involvement in waiver cases will seldom address more than the political aspects of individual, high-profile cases. By contrast, global executive decisions often work to set agency enforcement agendas.

To the extent that legislative and executive oversight fail in the waiver context, judicial review will be important to ensuring the accountability of flexibility approaches to regulation. Because of the risks of favoritism, selective deregulation, or *sub silentio* rulemaking, the presence of judicial review of agency waiver decisions is important to ensure accountability to the goals of regulatory programs and consistency in agency treatment of similarly situated interests. Courts possess the institutional competence to evaluate the consistency of agency waiver decisions, thus helping to enhance the accountability of agency flexibility programs; in the ordinary enforcement context, by contrast, courts would bring little skill or competence in exercising review.

Although flexible regulation is not inconsistent with the approaches Krent discusses in his article, some degree of tension between accountably flexible approaches to regulation and proposals to reduce the degree of judicial review, such as Krent's, may be inevitable. To the extent Krent's concerns are relevant in the waiver context, perhaps some refinement to Krent's proposal may simultaneously encourage accountability and minimize the propensity of judicial review to ossify the regulatory process. In the context of flexibility initiatives, such as waiver programs, justifiable reliance interests by third parties are often affected. This is especially true in the context of economic, health, safety, or environmental regulation. Here, waiver of regulations by agencies is likely to influence the interests of parties not privy to the agency proceeding as well as the expectations of similarly situated private interests.

Consider, again, FERC's decision to grant waiver to a QF from PURPA's criteria. Such a decision may have an effect on the reliance interests of third parties, such as utilities, other independent power producers and consumers. These interests may or may not have had a full opportunity to participate in the agency proceeding. In any event, if the agency has given any reasons for rejecting the arguments of third parties, the process approach would presumably preclude judicial review, even where third party interests have a strong argument that waiver of the rule is inconsistent with the regulatory program's

goals or where their concerns have been given short shrift by the agency. Likewise, waiver of health or environmental regulations may influence not only the regulated firm but also workers, consumers, or landowners. While a threshold focus on deliberation, as Krent's process proposal urges, is important, the third-party interests implicated by regulatory solutions such as waiver programs may necessitate broader judicial review as a means for enhancing accountability.⁷³

Thus, if there are any limitations on reviewability in the context of flexibility approaches, such as waiver, courts should not hesitate to review in any instance where justifiable third party interests are affected, as Krent's alternative to the process proposal envisions. In cases where third party interests are not implicated, Krent's process proposal is a sound way of ensuring deliberation, if courts can find a workable way of implementing it.

IV. CONCLUSION

Flexible approaches to regulation can co-exist with some exceptions to the presumption of reviewability. Krent's analysis of reviewability is sound, but absent effective presidential or legislative oversight, flexible solutions to regulation will depend on external oversight by courts for legitimacy. His proposals thus require clarification and refinement in the waiver context. First, reading *Chaney* as both allowing for review of agency inaction and valuing judicial inquiry into consistency with regulatory purposes and across cases may further accountability in the flexibility context. Second, in the context of flexible regulatory solutions including waiver, courts should err in favor of a presumption of reviewability or third-party, rather than process, concerns should dominate any judicial inquiry into reviewability. Although courts should defer to reasonable agency approaches in implementing flexible regulation, to protect accountability the gateway to meaningful judicial review must be open.

73. Compared to other cooperative approaches, such as negotiated regulation, the third party concerns may be least acute in the waiver context; traditional adjudication protections before the agency provide at least some protection for third party interests with standing to participate.

