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Agency Inaction

Abner J. Mikva

AGENCY INACTION

by Hon. Abner J. Mikva*

The stereotype of the pointy-headed bureaucrat is the administrative official who spends his time searching for ways to avoid doing what the law seems to require him to do. An egregious example can be found at the Food and Drug Administration which, over the course of 22 years, kept extending the grace period for industry to prove the safety of color additives.[1] You may recall an older incident where the Secretary of Agriculture failed to suspend the registration of DDT despite having found a substantial question about the pesticide's safety.[2] Harry Truman had a sign on his desk that said: "The buck stops here." Today, the administrative counterpart to that would be a sign that said: "Not to decide is to decide."

Although posed in less philosophic and much drier prose, that assertion has been coming up more and more frequently in federal court. Instead of challenging particular agency actions — the traditional administrative law dispute — parties have begun to challenge the failure of agencies to act. While the terminology is more complex, essentially these litigants are making a simple claim: "Not to act is to act." As a result, the courts of appeals and the district courts have a docket full of cases asking for judicial intervention to get the agencies off their status quo. The relief these appeals seek from agency decisions not to act have created a whole set of new administrative law questions.

You would think that the matter would have been settled decisively by this time. The Administrative Procedure Act specifically authorizes legal challenges to agency inaction by defining "agency action" to include an agency's "failure to act."[3] Why, then, all the confusion? The difficulty stems from the fact that inaction can refer to many different things: the failure to promulgate a rule, confer a benefit, adjudicate a claim, file a complaint, or budget a particular project. Congress and the courts have responded in different ways to these different forms of inaction.

The Congress can authorize private rights of action for people left unhelped by the agency. For instance, individuals can bring Title VII suits against their employers upon receipt of a "right to sue" letter from the Equal Employment Opportunity Commission.[4] Courts sometimes imply private rights of action from statutes prohibiting

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* Circuit Judge, U.S. Court of Appeals, D.C. Circuit.

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1 McIlwain v. Hayes, 690 F.2d 1041 (D.C. Cir. 1982).

2 Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971).

3 5 U.S.C. Sec. 551(13) (1976).

4 42 U.S.C. Sec. 2000e-5 (1976).

certain types of behavior or providing certain types of benefits.[5] Whether express or implied, private rights of action permit parties to act like private attorneys general to vindicate rights established by statute and not fully enforced by the government.

The courts have responded in other ways to suits challenging government inaction. One recent example involved a hog farmer from Missouri. He had received seven loans from the Farmers Home Administration, only repaid one of them, and had over $300,000 in debts. The hog farmer applied for an additional loan from the FmHA. The request was denied, so the farmer appealed to the local and Washington offices of FmHA which upheld the denial. The hog farmer then sued in federal district court for judicial review of the agency's decision not to extend him a loan. In June, a panel of the 8th Circuit held, based on an interpretation of the governing statute, that the denial of his request was not subject to judicial review.[6]

The Second Circuit reached a different result in a case involving flights of the Concorde supersonic aircraft. You may recall the controversy. The Port Authority of New York banned flights of the Concorde for a year and a half pending the development of a noise standard for supersonic aircraft. The Port Authority kept "studying" the issue, exploring the changing technology that relates to development of such a standard. British Airways petitioned the district court to lift the ban. The Court of Appeals eventually granted the petition, arguing that the delay in developing a noise standard was unreasonable in light of the extensive injury to the affected airlines.[7] Judge Kaufman, writing for the court, declared: "The law simply will not tolerate the denial of rights by unwarranted official inaction."

This is not an effort to compare the Second and Eighth Circuits or to distinguish hogs from supersonic aircraft. Rather, these cases illustrate the myriad of suitors that can come before the court to seek relief when the administrator refuses to administer.

Administrative Law Judges, to a great extent, have been insulated from this growing number of challenges to agency inaction. Since the agency has refused to play, the umpire remains on the sidelines. But the insulation has not been complete. Lawsuits challenging delays in the adjudication of disputes constitute an exception to this insulation. In such cases, courts look to the reasonableness of the delay and, if necessary, will use their authority under Section 706(1) of the APA to compel agency action "unlawfully withheld or unreasonably denied." Relying on this section of the APA, courts have directed the Social Security Administration to expedite hearings on the termination of disability benefits[8] and have commanded the Interstate Commerce Commission to reach a final determination on a seven year old rate protest, rather than incur further delays by remanding to the ALJ for further proceedings.[9] Even though most challenges to agency inaction have not been directed at administrative adjudications,

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5 See, e.g., J. I. Case Co. v. Borak, 377 U.S. 426 (1964) and Cannon v. University of Chicago, 441 U.S. 677 (1979).

6 Tuepker v. Farmers Home Administration, No. 82-1900 (8th Cir. June 6, 1983).

7 British Airways v. Port Authority of New York, 564 F.2d 1002 (2nd Cir. 1977).

8 Caswell v. Califano, 583 F.2d 9 (1st Cir. 1978).

9 Potomac Electric Power Co. v. Interstate Commerce Commission, 702, F.2d 1026 (D.C. Cir. 1983).

the number and variety of such challenges are increasing and eventually may affect you more directly.

The availability, scope and standards of judicial review of agency inaction will differ depending on a variety of factors. The statute authorizing the agency to act spells out the parameters for a reviewing court. The kind of action refused, the basis for refusal, the level at which the action was refused — these all vary the measure of judicial review. I will not try to exhaust all the variations on this theme; I can point you to some good law review articles if your interest is titillated by this speech.[10] Rather, I would like to paint with a broad brush in describing some general concerns and observations after having served four years on the court which is most often asked to address the question of agency inaction.

Perhaps the best place to start is with the dilemma which a court confronts when faced with a challenge to agency inaction. On the one hand, courts frequently act to ensure that an agency fulfills its statutory mandate. Thus, for example, if a statute states plainly: "The agency shall do X," a court can compel the agency to do X since that is action "unlawfully withheld." The more troublesome questions arise under a statute granting the agency some discretion in deciding how, when, and even whether to do X. The threat that an agency will undermine the purposes of the legislation by failing to act may be just as serious as in those cases where the statutory directive is clear.

But judicial review of every decision not to act could hamstring an agency entirely. Plaintiffs would be empowered to set an agency's agenda by compelling particular action or tying up agency resources in endless litigation. If a judicial remedy were available to private parties every time an agency failed to act, the establishment of agency priorities might turn on who wins the race to the courthouse door.

This dilemma is not easily resolved. Congress grants considerable discretion to agencies to make policy judgments and allocate scarce resources. In certain respects the agency's decisions as to how and when to act are analogous to a prosecutor's decision to file or not to file charges against a particular individual. Rarely will a court interfere with the exercise of prosecutorial discretion. Similarly, courts have been reluctant to interfere with an agency's decision not to initiate a particular action, especially in the area of administrative adjudications.

However, the prosecutorial discretion analogy only goes so far. An agency has a different and more specific mandate than a criminal prosecutor who has general authority to enforce the law. Criminal statutes apply equally; an agency's organic act is likely to establish agency priorities. Judicial review is sometimes necessary to ensure that agency inaction does not undermine the statutory scheme established by Congress.

Where the Congress has granted an agency considerable discretion, the courts' role in reviewing agency inaction, if it exists at all, must be extremely limited. A delicate balance must be struck between permitting the agency to exercise its discretion and not allowing an agency to circumvent the purposes of the underlying statute. In striking this balance it is important to distinguish two separate questions. First, is the challenged inaction subject to judicial review? Second, if so, what is the proper scope of review of such inaction?

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[10] Stewart and Sunstein, Public Programs and Private Rights, 95 Harv. L. Rev. 1193 (1982); Note, Judicial Review of Agency Inaction, 83 Colum. L. Rev. 627 (1983); See also Natural Resources Defense Council v. Securities and Exchange Commission, 606 F.2d 1031 (D.C. Cir. 1979).

The first question — whether inaction is reviewable by a court — is answered through a combination of statutory interpretation and the application of traditional doctrines of justiciability and jurisprudential self-restraint such as standing, ripeness, mootness and exhaustion of administrative remedies. The place to begin this analysis is with the organic statute which authorizes the agency to act. Some statutes explicitly preclude judicial review of a particular decision. In most cases, however, the statute is silent about the availability of judicial review. The Supreme Court has stated repeatedly that, in such cases, there is a strong presumption that Congress intended to make judicial review available. The Court has imposed a heavy burden on the party opposing judicial review to show by "clear and convincing evidence" that Congress intended to preclude review. That burden is difficult to meet.

There are numerous opinions in which a court finds that judicial review is either unavailable or inappropriate because the challenged actions are "committed to agency discretion" within the meaning of Sec. 701(a)(2) of the APA. The hog farmer case is one example. Another case, which I sat on, involved the Clean Water Act. We held, after a careful review of the legislative history, that EPA's decision not to veto a state pollution discharge permit is committed to agency discretion by law.[11] The "committed to agency discretion" language, if used in conclusory fashion, can become the excuse for a result-oriented opinion. It is not a substitute for careful analysis of legislative intent. There ought to be clear and convincing evidence that Congress intended to commit something solely to an agency's discretion and thereby preclude review by a court.

Several factors may guide a court in determining whether agency inaction is subject to judicial review. None is dispositive, but each may play a part in the court's analysis. Perhaps the most important factor is the availability of an agency record. The more complete the record, the more competent a court is to review an agency's decision. In particular, if the agency's decision not to act was based on factual findings, a court may review the factual record to see if it is consistent with the agency's determination. Courts facing challenges to agency inaction frequently rely on the existence of an extensive, narrowly-focused record when determining that the decision not to act is reviewable. This may have significant repercussions on Administrative Law Judges, since you help create extensive factual records in order to make various kinds of decisions.

A second consideration is the nature of the interest affected by agency inaction. A court may be more likely to review decisions affecting personal liberty and entitlements than those regulating economic behavior. The underlying concern is whether judicial supervision is necessary to protect the plaintiffs' interests.

Third, if the decision not to act depended on the application of agency expertise, a court is less likely to subject that decision to judicial review.

Finally, if the decision not to act is based on internal management and budgetary considerations, a court, in all likelihood, will decline to review that decision. This factor, more than any other, grows out of the notion of prosecutorial discretion. Unless the governing statute specifically sets the agency's agenda, courts should avoid intruding on internal management and personnel considerations.

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[11] District of Columbia v. Schramm, 631 F.2d 854 (D.C. Cir. 1980).

Once a court determines that judicial review is appropriate, the second question comes into play: what is the proper scope of that review? The same factors that suggest that judicial review is inappropriate will lead a court to apply a very narrow scope of review. Particularly where the agency's decision constitutes an exercise of discretion, the remedy imposed by a court simply may be to require the agency to explain the reasons for its decision. Once those reasons are provided, a court can determine whether the decision was arbitrary or capricious or an abuse of discretion. In Environmental Defense Fund v. Ruckelshaus, the DDT case I described at the beginning of my remarks, the D.C. Circuit directed the agency to articulate the standards and principles it applied in deciding whether to suspend the registration of a pesticide.

Some agencies are more prone to having their judgment calls reviewed because the Congress makes their responsibility to act very specific. When Congress gets specific the court can get pretty far down in the trenches. A good example is Dunlop v. Bachowski,[12] a 1975 case in which the Supreme Court held that the Labor Department's failure to file a complaint to set aside a union election was reviewable. The statute in Bachowski, the Labor Management Reporting and Disclosure Act, requires the Secretary of Labor to investigate any complaints of violations of the statute. After the investigation, the statute requires the Secretary to bring a suit to set aside the challenged election "if he finds probable cause to believe" that a violation has occurred. The Court held, based on a construction of the statutory scheme, that the Secretary's discretion in making his probable cause determination is subject to judicial review. As in the DDT case, the Court in Bachowski concluded that the Secretary should have given the reasons for his decision so that the reviewing court could determine whether the decision was arbitrary and capricious.

If you suspect from reading the cases that courts are more sensitive to agency inaction in the environmental field than in rates and tariffs cases, you may be right. That may be a function of the specific statutory language; it may be the result of more aggressive lawyering by the public interest bar; it may even reflect the leanings of the judicial players. But it does add still another confusing variable in the effort to find out when courts will act as a result of an agency's failure to act.

Like many other pieces of the administrative law jigsaw puzzle, there are no black letter rules that measure the manner in which courts supervise agency inaction. When agency law was young, the main arguments were over how much the Congress could delegate and how far the agency could stretch its statutory power. Today the roles are often reversed as the timid agency is being pushed to act by a reviewing court. The change is more fundamental and far-reaching than a mere twist in administrative law precedents. In some sense it is at the heart of the changes in our judicial system.

My colleague, Judge Frank Coffin, in his book, The Ways of a Judge, describes this change as follows:

> /I/n the late 1960s and 1970s there developed a new dimension to the courts' monitoring activities, added not by activist judicial decisions but by the Congress. Within not much more than a decade, the enactment of fifty or more major, people-oriented

[12] Dunlop v. Bachowski, 421 U.S. 560 (1975).

> federal statutes — dealing with environmental protection, health and occupational safety; banning discrimination on the basis of race, sex, and age; and providing a right of access to information held by the government — has added up to an impressive statutory bill of rights, the enforcement of which Congress has entrusted to the courts.
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> /Over the past few years/ the individual plaintiff has yielded to a broad class; the defendant is likely to be not merely one individual or institution but another class; the relief sought is not so likely to be an order preventing certain conduct as one commanding certain conduct; and the impact on society of a successful suit is apt to be much more significant. This kind of litigation goes beyond invoking the courts as monitors; it is no less than an engine of structural change.[13]

The decision to review the decision not to act has become the very point position of judges in their forays with administrative law. Decisions in such cases will be labelled "activist" or "cop-out" depending on the cause and one's point of view. But mostly they will reflect the judicial struggle to find the right position between creating the law and ignoring the law. And to those in the Executive Branch who have the initial responsibility for administering the laws of Congress: my advice is that when you decide not to do it, don't do it right.

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13 FRANK M. COFFIN, THE WAYS OF A JUDGE 223-25 (1980) (footnote omitted).