ARTICLE

TWO SIDES OF THE SAME COIN: JUDICIAL REVIEW OF ADMINISTRATIVE AGENCY ACTION AND INACTION

*Eric Biber**

INTRODUCTION

Judicial review of agency inaction under § 706(1) of the Administrative Procedure Act (APA) is often doctrinally incoherent and unclear. There is confusion about the proper standard of review and the distinction between agency action and inaction, as well as the full scope of the presumption of unreviewability for agency non-enforcement decisions laid out by the U.S. Supreme Court in *Heckler v. Chaney*.[1] The result is not just problematic on an abstract level. Judicial review of agency inaction is increasingly important in regulatory fields such as environmental law, as shown by the Supreme Court's recent decision in *Massachusetts v. EPA*, which rejected the Environmental Protection Agency's (EPA) claim that it lacked jurisdiction to regulate greenhouse gases (GHGs) produced by automobiles.[2] This Article applies a framework that identifies judicial deference to agency resource allocation decisions as a crucial factor in administrative law and uses that framework to bring coherence and clarity to the doctrine of judicial review of agency inaction. In particular, this Article shows that there is no fundamental difference between judicial review of

* Assistant professor of law, Boalt Hall School of Law, University of California at Berkeley. The author assisted with legal research for the respondents in *Norton v. S. Utah Wilderness Alliance*. None of the opinions or views in this piece reflect those of the respondents in *Norton v. S. Utah Wilderness Alliance* or their legal counsel. Thanks to Anne Joseph O'Connell, Kenneth Bamberger, Molly van Houweling, Melissa Murray, Goodwin Liu, Catherine Albiston, Erin Murphy, Phil Frickey, Andrew Guzman, Christopher Elmendorf, Thomas Crocker, Amy Cohen, Jim Angell, and Dan Farber, as well as the participants at faculty workshops at the T.C. Williams School of Law at the University of Richmond, the University of Wisconsin Law School, the University of Georgia Law School, and Boalt Hall for their thoughts, suggestions, and comments. Any remaining errors or mistakes are my own.

[1] 470 U.S. 821 (1985).

[2] 127 S. Ct. 1438 (2007).

agency inaction or action under the APA. The same underlying principles of administrative law apply in both circumstances, with the level of deference varying depending on the importance that resource allocation plays in the agency's decision. Likewise, a wide range of exceptions to judicial review of agency decisions carved out by the Supreme Court can be properly understood as the result of judicial deference to agency resource allocation.

Administrative law is known for its impenetrability and lack of clarity. But even within administrative law, judicial review of agency inaction stands out for the confusion it causes. Aside from three leading Supreme Court cases—*Heckler*, *Norton v. Southern Utah Wilderness Association*,[3] and *Massachusetts v. EPA*—the Court provides little guidance on the issue. And the language of those cases—*Heckler* in particular—leaves the lower courts with little guidance as to the nature of the doctrinal structure they should be applying. Accordingly, a patchwork of cases currently applies different doctrinal schemes, including complex multi-factor balancing tests, and inconsistent standards to ever-shifting categories of law. The result is an impenetrable thicket of legal doctrine that is difficult for judges and practitioners to understand and navigate. This is unfortunate for a range of reasons—and not just for administrative law practitioners involved in cases concerning agency inaction. Agency inaction implicates a sweeping area of administrative law, including an agency's refusal to issue a regulation, an agency's interminable delay in hearing an adjudication, and an agency's mid-stream abandonment of a rulemaking. Moreover, in a number of important fields of regulatory law, agency inaction will only increase in importance as the focal-point for the initiation of regulatory or deregulatory steps shifts from Congress to the agencies. Thus, to the extent that individuals, interest groups, and corporations seek to change the nature and scope of the regulatory system, they will rely on prodding agencies themselves to take the initial steps; and this prodding may require a judicial component. Accordingly, practitioners and courts will increasingly need to analyze and decide questions about whether an agency has properly chosen to act or not.

One important area of regulatory law—environmental law—highlights this dynamic. Congress has not passed much in the way of significant new environmental law statutes since the reauthoriza-

[3] 542 U.S. 55 (2004).

tion of the Clean Air Act in 1990.[4] There appears to be little prospect of new regulatory statutes in the field in the near future, with the exception of the potential regulation of GHGs to control global climate change. Accordingly, to the extent that new issues or problems are to be tackled by the regulatory state, whether through new regulation or through deregulation, the initiative will lie with agencies, not the legislature. The future development of environmental law will therefore be critically affected by the nature and scope of judicial review of an agency's decision not to take on a new initiative, to abandon an initiative mid-stream, or to pursue it to conclusion.

This point is emphasized by *Massachusetts v. EPA*,[5] a classic example of judicial review of agency inaction. There, state and environmental plaintiffs challenged the EPA's refusal to issue standards regulating GHG emissions by automobiles under the Clean Air Act.[6] The plaintiffs chose a litigation strategy precisely because of the logjam in Congress about whether and how to address global warming through new legislation.[7] While the Court's ruling for the plaintiffs only means a remand to the Agency to reconsider its refusal to regulate GHGs, the press coverage and political fallout were enormous.[8] And little wonder. Whether the outcome is regulation or a break in the Congressional logjam, the consequences of judicial review of agency inaction in this context could be the imposition of regulatory controls on automobile manufacturing (one of the largest industries in the American economy). Accordingly, judicial review of agency inaction matters, and the question demands more attention than it currently receives.

This Article attempts to clear out the thicket of judicial review of agency inaction by adopting a theoretical framework developed in a companion piece that explains how courts should defer to an agency's allocation of resources among competing priorities.[9] This theoretical framework will be applied in detail to explain, under-

[4] *See* DANIEL A. FARBER ET AL., CASES AND MATERIALS ON ENVIRONMENTAL LAW 12 (7th ed. 2006).

[5] *See* 127 S. Ct. 1438 (2007).

[6] *Id.* at 1449.

[7] Richard Dahl, *A Changing Climate of Litigation,* 115 ENVTL. HEALTH PERSP. A204, A204-07 (2007), *available at* http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=1852662.

[8] *See* Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise*, 2008 SUP. CT. REV. (forthcoming Spring 2008).

[9] *See* Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. (forthcoming 2008).

stand, and refine the case law and provide sense and order to the doctrine. In doing so, this Article will argue that, in fact, judicial review of agency inaction is no different from judicial review of agency action in general. The same fundamental underlying principles apply to both types of judicial review. The payoff is a tremendous simplification of the doctrine of judicial review of agency inaction.

This Article begins with a quick overview of the current, confused status of judicial review of agency inaction. Then, Part II provides a brief overview of the theoretical framework for understanding how courts defer to agency resource allocation decisions. Part III applies this framework to show that there is no fundamental distinction between judicial review of agency action and inaction, and that the seemingly anomalous and complex doctrinal tests applied to judicial review of agency inaction are simply the application of general doctrines of administrative law that apply to all judicial review. Part IV will show that various Supreme Court cases immunizing certain types of agency decisions from judicial review are simply extreme examples of judicial deference to agency resource allocation. Finally, Part V concludes by showing the doctrinal benefits of this analysis and briefly explores its implications for an area of law where agency inaction is particularly important—environmental law.

I. The Confused State of Judicial Review Under Section 706(1)

A. A Primer on Judicial Review Under the APA

The judicial review provisions of the APA give courts the authority to review agency decisionmaking.[10] These provisions in turn define the scope and standard of judicial review. In general the APA sets out a broad scope for judicial review: courts may review any "final agency action,"[11] which includes not just affirmative action ("the whole or a part of any agency rule, order, license, sanction, relief or the equivalent or denial thereof"), but also an agency's "failure to act."[12] There are, however, some limitations to judicial review under the APA. Most relevant for the analysis here,

[10] 5 U.S.C.S. §§ 701-06 (2008).

[11] *Id.* § 704.

[12] 5 U.S.C.S. § 551(13) (2008).

§ 701 excludes from judicial review agency decisions that are "committed to agency discretion by law."[13]

The standard of judicial review is laid out in § 706 of the APA, which also sets out the types of remedies that courts may grant. Section 706(1) allows courts to "compel agency action unlawfully withheld and unreasonably delayed"[14]; Section 706(2) allows courts to "set aside agency action" and provides a list of specific grounds for courts to overturn an agency decision.[15]

Generally speaking, it is much more difficult for plaintiffs to obtain judicial review of agency inaction under § 706(1) than of agency action under 706(2). There are two ways in which courts make judicial review of agency inaction particularly difficult. First, courts generally only require an agency to act pursuant to § 706(1) where it is shown that the agency has some sort of "clear" or "non-discretionary" duty to act.[16] By contrast, judicial review of an agency action can occur even where an agency has broad discretion over how or whether to act, with courts taking a "hard look" to ensure that the agency decision is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[17] Second, the Supreme Court interprets § 701(a)(2), which excludes from judicial review agency decisions "committed to agency discretion by law," to cover judicial review of certain types of agency inaction.[18] In *Heckler*, for example, the Court held that plaintiffs challenging an agency's failure to exercise its enforcement powers must establish that the statute definitively provides for judicial review of the agency's decision, contrary to the standard presumption that judicial review is available.[19] The Court also relies on

[13] 5 U.S.C.S. § 701(a). It also excludes from judicial review agency decisions that are exempted from review by other statutory provisions. *Id.*

[14] *Id.* § 706(1).

[15] *Id*. § 706(2).

[16] *See, e.g*., San Francisco Baykeeper v. Whitman, 297 F.3d 877, 885-86 (9th Cir. 2002); *In re* Bluewater Network, 234 F.3d 1305, 1315 (D.C. Cir. 2000); Estate of Smith v. Heckler, 747 F.2d 583, 591 (10th Cir. 1984) (stating that § 706(1) relief appropriate where "ministerial, clearly defined and peremptory" duty exists).

[17] Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 411-14 (1971) (quoting 5 U.S.C. § 706(2)(A) (1964)).

[18] Interstate Commerce Comm'n v. Brotherhood of Locomotive Eng'rs 482 U.S. 270 (1987); Heckler v. Chaney, 470 U.S. 821 (1985); S. Ry. Co. v. Seaboard Allied Milling Corp., 442 U.S. 444 (1979).

[19] *Heckler*, 470 U.S. at 830-31 (distinguishing such suits from the analysis conducted under *Overton Park*). The decision at issue in *Heckler* was the FDA's refusal to undertake investigatory and enforcement actions against the use of drugs for human executions. *Id.* at 824.

§ 701(a)(2) to immunize a range of other agency decisions from judicial review.[20]

B. The Current Doctrinal State of Judicial Review of Agency Inaction

The conventional wisdom about judicial review of agency inaction under § 706(1) is that it is fundamentally different from judicial review of agency action under § 706(2).[21] For example, some courts hold that the doctrine of finality does not apply to challenges to agency inaction under § 706(1), unlike all challenges to completed agency action.[22]

This judicial dichotomy between review of agency action and review of agency inaction raises two significant questions. First, on a practical level, how are practitioners and courts to distinguish between action and inaction? One need not resort to the large body of literature in torts about the difficulties of distinguishing between the two fields to understand the problem here,[23] as there are many examples of courts in administrative law having difficulty drawing the dividing line. For instance, an agency's decision not to release information pursuant to the Freedom of Information Act (FOIA) could be treated either as an agency action (decision not to release), or a failure to act (failure to comply with the statute's requirements that information must be released). This ambiguity probably prompted the Ninth Circuit to apply both § 706(1) and § 706(2) to a FOIA claim.[24] The result of such dual-application is, needless to say, doctrinal confusion.

There are other confused aspects to the doctrine of judicial review of agency inaction. For example, how broadly should the *Heckler* presumption of non-reviewability sweep? Does an agency decision not to enforce include, for instance, a decision not to grant an exemption from a regulatory requirement? If so, how are such

[20] *See Brotherhood of Locomotive Eng'rs*, 482 U.S. at 277 (agency decision not to reconsider prior decision unreviewable); *see also S. Ry. Co.*, 442 U.S. at 454 (agency decision not to suspend rates after filing unreviewable).

[21] *See, e.g.*, PGBA, LLC v. United States, 389 F.3d 1219, 1227 n.5 (Fed. Cir. 2004); Georgia v. U.S. Army Corps of Eng'rs, 302 F.3d 1242, 1249 n.4 (11th Cir. 2002); Envtl. Def. Fund v. Costle, 657 F.2d 275, 283 (D.C. Cir. 1981).

[22] *See, e.g.*, Independence Mining Co. v. Babbitt, 105 F.3d 502, 507-11 (9th Cir. 1997).

[23] *See, e.g.*, MARC A. FRANKLIN & ROBERT A. RABIN, TORT LAW AND ALTERNATIVES: CASES AND MATERIALS 119-20 n.1 (6th ed. 1996).

[24] *See* Minier v. Cent. Intelligence Agency, 88 F.3d 796, 799 n.2, 803 (9th Cir. 1997). There are a range of other examples of courts being confused about where to draw the line between the two categories. *See* Biber, *supra* note 9, at 10-12.

decisions to be distinguished from, for example, an agency's decision to grant a party a license to undertake a regulated activity? The D.C. Circuit has held that an agency decision to waive a maritime transport licensing requirement is unreviewable,[25] yet it has also held that an agency refusal to revoke a license is reviewable.[26] Both decisions give a private party a special status under the law to undertake activities otherwise prohibited to the population at large. Why should one decision be presumptively unreviewable and the other presumptively reviewable? As a third example, consider the D.C. Circuit's *TRAC* doctrine, named after the D.C. Circuit case where it was first developed.[27] There, the court set forth a six-factor balancing test to determine whether or not an agency has unreasonably delayed acting and whether injunctive relief is accordingly appropriate.[28] The D.C. Circuit has since expanded the *TRAC* analysis to determine the proper remedy for an agency's failure to comply with a mandated deadline—i.e., "unlawfully withheld" action—while other courts continue to limit *TRAC* to "unreasonable delay" cases.[29] The result is considerable uncertainty at the circuit level regarding the remedies that courts may consider once they have concluded that an agency improperly failed to act.

There is a more fundamental question raised by the judicial distinction between agency action and inaction: why draw such a distinction in the first place? What possible basis is there for marking out this variable and as a result adding complexity and difficulty to a field that is already full of complexity and difficulty?

II. A Theoretical Framework for Judicial Deference to Agency Resource Allocation

The answer to the fundamental question above is that courts defer to agency decisions regarding resource allocations. Such decisions are almost always implicated when a court is considering a claim that an agency has not acted, or has not acted quickly enough.

An agency's decision about how to allocate its resources among competing priorities is at the core of the policymaking discretion

[25] *See* Crowley Caribbean Transp., Inc. v. Pena, 37 F.3d 671, 674-76 (D.C. Cir. 1994),

[26] *See* Transp. Intelligence, Inc. v. FCC, 336 F.3d 1058, 1062-64 (D.C. Cir. 2003).

[27] Telecomms. Research & Action Ctr. v. FCC, 750 F.2d 70 (D.C. Cir. 1984).

[28] *Id*. at 79-80.

[29] *Compare In re* Barr Labs., Inc., 930 F.2d 72, 74-76 (D.C. Cir. 1991), *with* Forest Guardians v. Babbitt, 174 F.3d 1178, 1190-91 (10th Cir. 1999).

that the executive branch of government and any administrative agency must have.[30] Accordingly, it is worthy of great deference by the courts. Resource allocation, however, cannot be the only factor courts consider in determining whether judicial review of agency decisionmaking is appropriate. If that were the case, courts would not review agency decisionmaking at all.[31] Any judicial review, and even the mere possibility of judicial review, will necessarily have an impact on how an agency allocates its resources. Yet if this impact on agency resource allocation is an inevitable cost of judicial review, the benefits must also be considered.

There are a wide range of possible benefits, but this analysis will only focus on one—upholding "statutory supremacy," which requires the executive branch to comply with legislative pronouncements made by Congress.[32] Judicial review will accordingly be more deferential where there are fewer benefits, and where the costs with respect to agency resource allocation are higher—and vice versa.

This simple framework leads to three important principles for judicial review of agency decisionmaking:

1. The farther an agency progresses towards a final decision, the less deference it will receive based on resource allocation, with minimal deference provided once a completed decision has been made. As the agency progresses towards a final decision, it expends many or most of the resources required for the decision, and in so doing, the agency makes it clear that the issue is of high priority and that judicial review of its decision to enter into that activity does not fundamentally undermine its priority-setting.[33]
2. Where an agency decision involves general decisions about policy that are broadly applicable—for example, when an agency issues a regulation—the benefits of ensuring that the agency decision complies with the law are greater, and deference will be reduced. Reciprocally, where an agency decision involves determinations about whether and how

[30] The discussion that follows is drawn heavily from a companion article. *See* Biber, *supra* note 9, at 16-21.

[31] *See* Biber, *supra* note 9, at 21-23.

[32] *See id*. at 23-24. *See also* Lisa Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. Rev. 461 (2003). To the extent that courts are concerned about arbitrary behavior by agencies rather than Congress, they will be focused on requiring agencies to comply with the mandates and instructions handed to them by Congress. Biber, *supra* note 9, at 23-24.

[33] *See* Biber, *supra* note 9, at 23-24.

individual parties complied with the law—for example, in an agency adjudication—the benefits of ensuring that the agency decision complies with the law are reduced, and deference based on resource allocation will be greater. The reason for this difference is that regulations and similar decisions by agencies provide sweeping standards that may cover large numbers of regulated parties, are more likely to depend on interpretations of relevant legal provisions than particularized facts, and are harder to correct by the agency if later found to be improper.[34]

3. Where Congress has clearly spoken on a particular question—for example, commanding an agency to undertake a particular action by a particular deadline—concerns about statutory supremacy are directly implicated and trump any concerns about resource allocation. The rationale here is based on public choice theory. If agencies and Congress are able to create a significant gap between the implementation of a statute and its express terms and mandates to the agency, then that gap will create a level of obfuscation that makes it even more difficult for diffuse interest groups to mobilize, organize, and monitor governmental performance. Because diffuse interest groups tend to be beneficiaries of government regulation, this in turn would create a systematic bias against government intervention to prevent diffuse harms or provide diffuse benefits, simply because of the manipulation of the governmental process.[35]

III. Action Is Indistinguishable From Inaction

The observant reader will note that the principles developed in Part II are not described in terms that are limited to agency inaction. That is not an accident. Judicial deference to agency allocation of resources is not limited to agency inaction, and the principles should and do apply across the range of different types of judicial review. Accordingly, there really should be no fundamental distinction between judicial review of agency action and inaction. And indeed, a careful examination of the text of the APA, its legislative history, the pre-APA case law of mandamus, and the APA case law on judicial review of agency inaction make it

[34] *See id*. at 31-33.

[35] *See id*. at 38-49.

clear that there is no fundamental difference between inaction and action for judicial review purposes.

Once the importance of resource allocation in administrative law is recognized, Sections 706(1) and 706(2) turn out to be two sides of the same judicial review coin. Rather than providing different standards of judicial review, they lay out different remedies that a court may impose on an agency if and when the court concludes that an agency's action or inaction violates the law.[36] In other words, other than the higher level of deference for agency resource allocation that applies in most § 706(1) cases because of resource allocation concerns, the exact same principles of judicial review apply both to Sections 706(1) and 706(2). What has appeared to many courts to be a sharp dichotomy between two very different standards of judicial review under the two sections[37] is in fact a sliding scale of increasing deference, as agency resource allocation questions become more and more important. Once this principle is understood, the doctrine of judicial review under § 706(1) becomes much easier to comprehend.

This Part begins with an analysis of the text of the APA, demonstrating that it does not require a fundamental distinction between judicial review of action and inaction. It will then analyze pre-APA mandamus case law—case law that the APA intended to codify—to demonstrate that it too does not mandate such a dichotomy. Finally, this Part examines in detail the case law of judicial review of agency inaction and shows that the various doctrines developed by the courts are simply applications of more general principles of administrative law.

A. The Statutory Language of Section 706 Sets a Unitary Standard for Judicial Review Under the APA

The traditional interpretation of the language of § 706 of the APA emphasizes the dichotomy between § 706(1) and § 706(2), each set forth below:

The reviewing court shall:

[36] *See* Lisa Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. Rev. 1657, 1661, 1697 (2004) (arguing that "courts eschew any special prohibitions against judicial review of agency inaction," but adding that courts should defer to legitimate resource allocation concerns).

[37] For courts that hold that fundamentally different standards apply to cases under §§ 706(1) and 706(2), see PGBA, LLC v. United States, 389 F.3d 1219, 1227 n.5 (Fed. Cir. 2004); Georgia v. U.S. Army Corps of Eng'rs, 302 F.3d 1242, 1249 n.4 (11th Cir. 2002); Envtl. Def. Fund v. Costle, 657 F.2d 275, 283 (D.C. Cir. 1981).

1. compel agency action unlawfully withheld or unreasonably delayed; and
2. hold unlawful and set aside agency action, findings, and conclusions found to be:
    a. arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
    b. contrary to constitutional right, power, privilege, or immunity;
    c. in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
    d. without observance of procedure required by law;
    e. unsupported by substantial evidence in a case . . . reviewed on the record of an agency hearing provided by statute; or
    f. unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.[38]

A cursory review of this text leads the reader to distinguish between § 706(1) as simply requiring courts to "compel agency action unlawfully withheld or unreasonably delayed," and § 706(2) as providing a long list of specific grounds for "setting aside" agency action. After all, Congress listed the various specific grounds for concluding that an agency acted improperly under § 706(2), and the locution of the Section, which requires a court to "set aside agency action" that is "found to be" within one or more of the specific enumerated grounds, encourages this reading. Under this reading, §§ 706(1) and 706(2) have very different standards, with only § 706(2) including the traditional grounds for judicial review (such as "arbitrary and capricious" agency action).

Yet on the other hand, both §§ 706(1) and 706(2) are part of the same section of the APA that is denominated "Scope of review".[39] This title implies that a unitary standard applies to the entire section. Moreover, § 706(1) uses very vague terms: "unlawfully withheld or unreasonably delayed." Those terms must have some sort of meaning. And since the legislative history makes it clear that § 706(1) intended to codify the existing mandamus case law, that case law must inform the meaning of the Section.[40]

---

[38] 5 U.S.C.S. § 706 (2008).

[39] *Id.*

[40] *See* U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 108 (1947) [hereinafter DOJ MANUAL] (provision was intended to be a "restatement of existing judicial practice" prior to the enactment of the APA). The Supreme Court has extensively relied on the Manual to interpret the meaning of the APA.

B. The Historical Use of Mandamus to Review Action and Inaction

Judicial practice prior to the enactment of the APA allowed private parties to use the writ of mandamus to "compel an administrative agency to act, or to assume jurisdiction, or to compel an agency or officer to perform a ministerial or non-discretionary act. [Section 706(1)] was apparently intended to codify these judicial functions."[41] The writ of mandamus was limited, however, and could not be used by a court "to substitute its discretion for that of an administrative agency and thus exercise administrative duties."[42]

A review of the pre-APA mandamus caselaw shows that mandamus was not limited to requiring an agency to act. Instead, a plaintiff could raise a mandamus claim to challenge a range of agency decision-making that might be characterized as action, inaction, or something in between. The Supreme Court, for example, granted petitions for mandamus to enjoin agency decisions best described as affirmative agency actions, such as the revocation of a land patent.[43] And while the Court denied on the merits similar mandamus

---

See, e.g., Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 63-64 (2004) (describing the Manual as "a document whose reasoning we have often found persuasive"). The rest of the legislative history for § 706(1) confirms that it intended to codify existing judicial practice. A Senate Judiciary Committee print, discussing a preliminary version of the APA, responded to comments that § 706(1) "unduly extends the scope of review by authorizing courts to specify the administrative action to be taken." ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, 79TH CONGRESS 1944-46, at 40 (1946). The committee replied that the provision only allows the courts to "compel the agency to act . . . rather than to both direct action and state what it shall be in detail. The court may require agencies to act, but may not under this provision tell them how to act in matters of administrative discretion." *Id*. The Senate committee report for the APA simply states that the bill "expressly recognizes the right of properly interested parties to compel agencies to act where they improvidently refuse to act." *Id*. at 214. The House committee report for the APA makes the same exact comment. *Id*. at 278. The discussion on the House floor either repeats these general statements, *see id*. at 370, 377 (the latter stating that the provision applies where "there has been a withholding or long delay, and that particular feature is intended to hasten action on the part of these agencies"), or repeats the statement that there are no major changes in existing law intended. *See id*. at 415.

Contemporary § 706(1) case law still relies on the section's historic roots in mandamus. *See* Carpet, Linoleum & Resilient Tile Layers, Local Union No. 419 v. Brown, 656 F.2d 564, 566-67 (10th Cir. 1981) (stating that § 706(1) allows court to impose mandatory injunction, which is governed by same standard as for mandamus relief). Likewise, the D.C. Circuit applies the standards of its § 706(1) case law to mandamus petitions. *See* Telecomms. Research & Action Ctr. v. FCC, 750 F.2d 70, 76-78 (D.C. Cir. 1984).

[41] DOJ MANUAL, *supra note* 40, at 108 (citations omitted).

[42] *Id*.

[43] Wilbur v. United States *ex rel.* Krushnic, 280 U.S. 306, 315 (1930) (affirming grant of mandamus petition to prevent agency from revoking a land patent); Lane v. Hoglund, 244 U.S. 174, 176-77 (1917) (affirming a grant of mandamus where agency had revoked a land

petitions seeking reversal of agency action, significantly the Court did not dismiss those cases for a failure to state a claim or lack of jurisdiction, which it should do if mandamus does not apply to agency action.[44] And mandamus applied to the situation where the plaintiff sought to require an agency to take an affirmative action.[45] The key question was not whether an agency acted or failed to act, but whether the agency violated a ministerial, as opposed to discretionary, duty.

Moreover, courts gradually expanded the scope of mandamus to include situations where a ministerial duty was not obvious from the face of the statute. Courts, for example, would examine whether the governing statute had reasonable ambiguity; if reasonable ambiguity existed in the underlying statute, then the court would conclude that the agency decision was discretionary and mandamus would not lie for an alleged error based on that statutory interpretation by the agency.[46] Indeed, the approach the

grant to petitioner); *see also* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 176-77 (1965) (noting that mandamus could be used to review agency action).

[44] *See, e.g.*, Interstate Commerce Comm'n v. Members of the Waste Merchants Ass'n, 260 U.S. 32, 33-34 (1922) (denying on grounds of discretion a mandamus petition that sought to overturn an ICC denial of a rate challenge); United States *ex rel.* Cleary v. Weeks, 259 U.S. 336, 341 (1922) (denying on the merits a petition for mandamus to vacate an order discharging a military officer); United States *ex rel.* Milwaukee Soc. Democratic Publ'g Co. v. Burleson, 255 U.S. 407, 409-10 (1921) (denying on the merits a mandamus petition where petitioner newspaper sought to challenge revocation of mailing privileges).

[45] *See, e.g.*, Miguel v. McCarl, 291 U.S. 442, 450-51 (1934) (granting mandamus where petitioner's claim was originally approved by a subordinate official but was then reversed by a higher official who refused to allow payment); Work v. United State *ex rel.* Lynn, 266 U.S. 161, 163-64 (1924) (affirming a grant of mandamus to require agency to restart payments to petitioner after agency had improperly stopped payments); United States *ex rel.* St. Louis Sw. Ry. Co. v. Interstate Commerce Comm'n, 264 U.S. 64, 75-76 (1924) (denying on the merits a mandamus petition by railway that sought to require the ICC to provide internal materials prior to an ICC hearing, contrary to an ICC order); Work v. United States *ex rel.* McAlester-Edwards Co., 262 U.S. 200 (1923) (affirming a grant of a mandamus petition that required the agency to sell land where the agency originally accepted part of the payment for the land); N. Pac. Ry. Co. v. North Dakota *ex rel.* Langer, 250 U.S. 135, 142 (1919) (denying on the merits a mandamus petition to require a federal official to submit to state railroad regulation, despite a contrary federal order); Lane v. Mickadiet, 241 U.S. 201, 204-07 (1916) (denying on the merits a mandamus petition seeking to prevent an agency from reopening an adjudicatory proceeding); Garfield v. United States *ex rel.* Goldsby, 211 U.S. 249, 255-56 (1908) (affirming grant of mandamus petition to require Interior Secretary to restore individual to tribal rolls after Secretary removed individual from the roll); Butterworth v. United States *ex rel.* Hoe, 112 U.S. 50, 51-53 (1884) (affirming grant of mandamus petition where patent application was originally approved, and then denied on appeal by a higher official).

[46] The general principle adopted by the Court was that if the statute was susceptible of interpretation by the agency, then the agency has discretion and mandamus will not lie to enforce any duties. *See* Wilbur v. United States *ex rel.* Kadrie, 281 U.S. 206, 218-19 (1930) (footnotes omitted); *see also* United States *ex rel.* Hall v. Payne, 254 U.S. 343, 347-48

courts took appears quite similar to the modern *Chevron* doctrine.[47] Eventually, courts even expanded the meaning of a mandatory or ministerial duty to include agency action that was arbitrary or capricious, even if the decision in question was discretionary.[48] The rationale appears to have been that an agency's arbitrary and capricious action violated an underlying mandatory duty to act reasonably.

Pre-APA case law thus indicates that judicial review of agency inaction was not fundamentally different from judicial review of agency action.[49] Given the fact that the APA intended to codify this pre-existing case law under § 706(1), this is strong evidence that the same principles should apply under the APA.

C. Current Section 706(1) Case Law: Superficial Dichotomy and Underlying Unity

As noted above, the doctrinal framework that courts generally operate under is an action/inaction distinction grounded in purportedly fundamentally different standards for judicial review under § 706(1) (for action) and § 706(2) (for inaction). But a close examination of the actual outcomes of cases under § 706(1) shows that courts are in fact applying the same underlying administrative law doctrines that they apply to § 706(2) claims, with only an added

(1920); United States *ex rel.* Alaska Smokeless Coal Co. v. Lane, 250 U.S. 549, 552-54 (1919). However, the Court often undertook (sometimes significant) statutory interpretation in order to conclude that a duty was "clear." *See* Roberts v. United States, 176 U.S. 221, 231 (1900) ("Every statute to some extent requires construction by the public officer whose duties may be defined therein. . . . But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one.)" For examples of statutory interpretation in mandamus cases leading to clear duties, see Wright v. Ynchausti & Co., 272 U.S. 640, 644-50 (1926); *Work v. Lynn*, 266 U.S. at 167-69; *Work v. McAlester-Edwards*, 262 U.S. at 207-09.

[47] Chevron v. Natural Res. Def. Council, 467 U.S. 837 (1984).

[48] *See* Work v. United States *ex rel*. Rives, 267 U.S. 175, 183 (1925); *Hall v. Payne*, 254 U.S. at 347; *Garfield v. Goldsby*, 211 U.S. at 262; Ickes v. Underwood, 141 F.2d 546, 547-48 & n.1 (D.C. Cir. 1944); Hammond v. Hull, 131 F.2d 23, 28 (D.C. Cir. 1942). A similar pattern occurred earlier, when judicial review that was limited to whether the agency exceeded its jurisdiction was expanded to include substantive review of the underlying agency decision under the rationale that a blatant substantive error by the agency was equivalent to exceeding its jurisdiction. *See* Ann Woolhandler, *Judicial Deference to Administrative Action: A Revisionist History*, 43 ADMIN. L. REV. 197, 219-20 (1991).

[49] While the above case law discusses mandamus remedy, the same principles applied if private parties sought a mandatory or prohibitory injunction against agency inaction or action. *See, e.g*., Bates & Guild Co. v. Payne, 194 U.S. 106, 108-10 (1904); Noble v. Union River Logging R.R., 147 U.S. 165, 171-72 (1893); *see also* Gaines v. Thompson, 74 U.S. 347, 352 (1868) (stating explicitly that the same principles as to ministerial/discretionary duties apply to injunction as well as mandamus).

level of deference to take into account potential concerns about interfering with agency resource allocation. Thus, the real dynamic at play is the balancing, laid out above, between deference to resource allocation and upholding statutory supremacy.

This Part begins with an analysis of court cases under § 706(1), and examines the parallels between § 706(1) and § 706(2) as well as the role that judicial deference plays in § 706(1) cases. It then provides a more detailed analysis of the particularly complex doctrinal area of judicial review of claims of unreasonable delay.

1. Judicial Review of Claims Pursuant to § 706(1)

Judicial review of claims that an agency failed to act or delayed acting are, as noted above, generally brought under § 706(1)—if only for the fact that the relief sought by a plaintiff in such instances is a mandatory injunction requiring an agency action. Under the action/inaction dichotomy, these cases should be treated as fundamentally different from § 706(2) challenges to completed agency action. Yet courts regularly apply the standards and doctrines that apply to § 706(2) cases in the § 706(1) context—displaying the unitary nature of judicial review under the APA.

Most instructive are cases where courts explicitly recognize that judicial review under § 706(1) requires application of the same standards and analytic structures as judicial review under § 706(2). For instance, in *NAACP v. Secretary of Housing and Urban Development*, the First Circuit, per then-Judge Stephen Breyer, discussed why the court could review HUD's alleged failure to enforce non-discrimination standards in public housing in the Boston area.[50] The court stated that under § 706(2)(A) it could "set aside" an agency's pattern and practice of failing to properly enforce the law because it was arbitrary and capricious.[51] The court reasoned that under the APA purposes agency action included a "failure to act" and therefore an arbitrary and capricious failure to act could be "set aside."[52] Thus, in conducting review under §706(1) analysis, the court followed the same doctrinal analysis it would undertake for § 706(2)

[50] 817 F.2d 149, 160 (1st Cir. 1987).

[51] *Id.*

[52] *Id.*; *see also id.* at 161 (where the court states that it is "not sure what difference, if any , there maybe be between [the agency's] failure to exercise the discretion conferred upon it [by the statute] and its abuse of that discretion as revealed in a pattern of [agency] activity").

Likewise, in ruling on the validity of § 706(1) claims, courts explicitly or implicitly rely on the lettered subdivisions of § 706 that declare improper agency action that is, for instance, "arbitrary and capricious." In *Ligon Specialized Hauler*,[53] a challenge to an agency's policy of delaying approval of license and permit applications, agency action was "unlawfully withheld" for purposes of § 706(1) precisely because the agency action "was effected 'without observance of procedure required by law'" pursuant to § 706(2)(D).[54] And in *Oil, Chemical & Atomic Workers Union*,[55] a challenge to an agency's delay in issuing a workplace safety regulation, the Third Circuit refused to compel agency action under § 706(1) where there was no "inaction that is either contrary to a specific Congressional mandate, in violation of a specific court order or unduly transgressive of the agency's own tentative deadlines."[56] The first is obviously equivalent to a finding that an agency acted "contrary to law" under § 706(2); the second would apply to either § 706(1) or § 706(2); and the third would qualify as arbitrary and capricious action under § 706(2) absent an adequate agency explanation.[57]

Consider also claims under § 706(1) that an agency failed to comply with a set statutory deadline and therefore "unlawfully withheld" action. In such a case, any claim about agency inaction could be considered as "not in accordance with law" under letter § 706(2)(A). And in fact, that is how many courts consider this type of claim. The D.C. Circuit explicitly made this connection in *In re Center for Auto Safety*, concluding that an agency's violation of a statutory deadline was "not in accordance with law" under § 706(2) and therefore warranted judicial action pursuant to

[53] Ligon v. Interstate Commerce Comm'n, 587 F.2d 304 (6th Cir. 1978)

[54] *See id*. at 319; *see also id.* at 320 (concluding agency action was unlawfully withheld because "the manner in which the ICC withheld action constituted an abuse of discretion under 5 U.S.C. § 702(2)(A)"); Biodiversity Legal Found. v. Babbitt, 146 F.3d 1249, 1252 (10th Cir. 1998) ("Section 706(1) is a source of injunctive relief to remedy an arbitrary or capricious delay or denial of agency action." (quotation omitted); Kenney v. Glickman, 96 F.3d 1118, 1121-22 & n.3 (D.C. Cir. 1996).

[55] Oil, Chem. & Atomic Workers Union v. OSHA, 145 F.3d 120 (3d Cir. 1998)

[56] *Id.* at 124.

[57] *See* Motor Vehicle Mfrs. Ass'n v. State Farm, 463 U.S. 29, 40-42 (1983). In *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 471, 477-78 (D.C. Cir. 1998), the court applied the same principle that agencies may properly address problems in a piecemeal or stepwise fashion to claims under Sections 706(1) and 706(2). The court also stated that it would be "arbitrary and capricious for an agency simply to thumb its nose at Congress and say – without any explanation – that is simply does not intend to achieve a congressional goal on any timetable at all." *Id.* at 477-78.

§ 706(1).[58] Once the court concludes that an agency violated a statutory deadline—usually a fairly simple analysis—the only question is the proper remedy to apply.[59]

There are other examples of the parallel analyses that apply to both Sections 706(1) and (2). Courts apply the two-step *Chevron* test to both § 706(1) and § 706(2) claims for agency interpretations of statutes.[60] The only difference is the specific statutory interpretation question the courts examine. In a § 706(1) case, the two-step *Chevron* analysis usually must result in finding either that under step one, Congress imposed a clear duty on the agency, or that under step two, the agency's interpretation of the statute as not imposing a clear duty was unreasonable.[61]

Finally, courts under both § 706(1) and § 706(2) require agencies to comply with the regulatory standards they have set out for themselves. Courts, for instance, will require agencies to comply with duties that they impose upon themselves through a regulation or other binding rule-making proceeding.[62] While enforcement of

[58] 793 F.2d 1346, 1353 (D.C. Cir. 1986).

[59] *See In re* United Mine Workers of Am., 190 F.3d 545, 550-51 (D.C. Cir. 1999) (statutory deadline determines whether violation of § 706(1) has occurred, remainder of court's analysis determines the proper remedy imposed by the court). In the context of an agency violation of a statutory deadline, there is a circuit split as to whether equitable remedial discretion is available to the court when an agency has "unlawfully withheld" action. *Compare* Forest Guardians v. Babbitt, 164 F.3d 1261, 1270-71 (10th Cir. 1999) (no discretion as to whether agency action can be compelled if there is a violation of a clear statutory deadline), *with In re* Barr Labs., 930 F.2d 72, 73-75 (D.C. Cir. 1991) (discretion does exist). Courts that conclude that discretion exists usually apply the same multi-factor balancing test that they apply to claims that an agency has unreasonably delayed action, a test discussed *infra*, pp. 15-19.

[60] *See* Or. Natural Res. Council v. Bureau of Land Mgmt., 150 F.3d 1132, 1139 (9th Cir. 1998); *see also* San Francisco Baykeeper v. Whitman, 297 F.3d 877, 885-86 (9th Cir. 2002); Firebaugh Canal Co. v. United States, 203 F.3d 568, 573 (9th Cir. 2000); Mt. Emmons Mining Co. v. Babbitt, 117 F.3d 1167, 1170-72 (10th Cir. 1997); R.T. Vanderbilt Co. v. Babbitt, 113 F.3d 1061, 1065-67 (9th Cir. 1997); *see also* Edgewater Hosp. v. Bowen, 857 F.2d 1123, 1129-30, 1139 (7th Cir. 1989) (despite deference to agency's interpretation of statute, court requires agency to hold hearing on plaintiff's claims); *cf.* Nat'l Wildlife Fed'n v. Browner, 127 F.3d 1126, 1129-31 (D.C. Cir. 1997) (deferring to agency's interpretations of its own regulations in determining whether there is a mandatory duty actionable under a statute's citizen-suit provision); Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants, 17 F.3d 130, 134 n.11 (5th Cir. 1994) (applying *Chevron* analysis to statutory interpretation question raised in mandamus claim).

[61] *See* Biodiversity Legal Found. v. Babbitt, 146 F.3d 1249, 1254-56 (10th Cir. 1998) (applying Chevron to determine the meaning of statutory language and whether it establishes a deadline that is enforceable under § 706(1)).

[62] *See, e.g.*, Ctr. for Auto Safety v. Dole, 846 F.2d 1532, 1534 (D.C. Cir. 1988) (holding that regulations may restrict an agency's discretion not to enforce). *See also* Harold J. Krent, *Reviewing Agency Action for Inconsistency with Prior Rules and Regulations*, 72 CHI.-KENT L. REV. 1187, 1196 (1997).

these types of deadlines or duties cannot be justified on the grounds that the courts are merely enforcing congressional will, they can be justified under the standard administrative law doctrine that agencies must comply with their own rules and cannot change course absent a reasoned explanation.[63]

2. Deference to Agency Resource Allocation Decisions

Of course, it is not the case that there is no difference between judicial review under Sections 706(1) and 706(2). But instead of the difference being a simplistic distinction between "action" and "inaction," the difference should reflect the judicial balancing between upholding statutory supremacy and deferring to agency resource allocation decisions. Courts will accordingly generally provide greater deference where questions of agency resource allocation are greater in importance. And, as noted above, those circumstances are more likely to occur where an agency did not initiate action on an issue, as is often the case where a plaintiff initiates a § 706(1) claim.

Such increased deference is generally reflected by statements in the case law that courts will generally require an agency to take an action that it has not yet begun only where Congress imposed a "clear duty" on the agency to act.[64] Absent such a "clear duty," courts are very reluctant to interfere with an agency's ordering of its priorities. But with such an expression of congressional intent, the principle of statutory supremacy trumps deference to resource allocation.

Judicial reluctance to require agency action in the absence of a "clear duty," however, is not judicial abdication of the court's responsibility to provide meaningful judicial review. Even where a court's *Chevron* analysis reveals that there is no explicit "clear duty" imposed by Congress, courts may still conduct a (very deferential) review of the agency decisionmaking process. In *United*

[63] Motor Vehicle Mfrs. Ass'n v. State Farm, 463 U.S. 29, 40-42 (1983); Ariz. Grocery Co. v. Atchison, Topeka & Santa Fe R.R., 284 U.S. 370 (1932) (agency must follow its own rules unless they are altered). Courts also defer to agency expertise in both § 706(1) and § 706(2) cases. *See* Grand Canyon Air Tour Coalition v. FAA, 154 F.3d 455, 477 (D.C. Cir. 1998) (despite court's § 706(1) power, refusing to require agency to promulgate regulations because court is "acutely aware of the limits of [its] institutional competence in the highly technical area at issue in this case" and "we have no idea what the unintended consequences" of requiring an agency to act immediately are); Public Citizen Health Research Group v. Brock, 823 F.2d 626, 629 (D.C. Cir. 1987). *Cf.* Huls Am., Inc. v. Browner, 83 F.3d 445, 452 (D.C. Cir. 1996) (deference under § 706(2) paid to agency expertise).

[64] *See supra* note 61 and accompanying text.

Auto Workers v. Chao,[65] for example, a union petitioned the Occupational Safety and Health Administration (OSHA) to issue a regulatory standard for industrial waste products, but the agency rejected the proposal despite an advisory committee's recommendation that regulation was warranted.[66] The court concluded that, under the relevant statutory language, OSHA was not under a duty to promulgate a regulation to address the potential hazards.[67] In concluding that no clear duty existed, the court essentially concluded that Congress did not mandate a particular prioritization of resources by the agency. But even after reaching this conclusion, the court nonetheless reviewed OSHA's refusal to issue a regulation—albeit under a standard "at the most deferential end of the arbitrary and capricious spectrum"—because the claim was pursuant to § 706(1) and the agency was refusing to issue a regulation.[68] In *United Auto Workers*, it was significant that the agency decision that the plaintiffs sought to force was the issuance of a regulation: as noted above, the statutory supremacy benefits of judicial review are much greater in the context of rules, and courts accordingly will be more willing to review judicial decisionmaking. Moreover, under the APA, the agency has an obligation to at least respond to petitions for rulemaking.[69]

As a practical matter, of course, without a showing that Congress intended to require the agency to commit resources to the action in question and to place a high priority on that action, plaintiffs will usually be unsuccessful in seeking to compel the agency to act—even in challenges to an agency's failure to issue a regulation.[70] The "clear duty" standard is thus a short-hand way for courts to take into account deference towards resource allocation.

---

[65] 361 F.3d 249 (3d Cir. 2004).

[66] *Id.* at 251-52.

[67] *Id.* at 254.

[68] *Id.* at 254-55.

[69] *See* 5 U.S.C.S. § 553(e) (2008) (requiring agencies to accept petitions for rulemaking); *id.* § 555(e) (requiring agencies to respond to petitions made "in connection with any agency proceeding"). The two provisions are generally read together by courts to require agencies to respond to petitions for rulemaking. Massachusetts v. Envtl. Prot. Agency, 127 S. Ct. 1438, 1459 (2007).

[70] Thus, in *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004), the Supreme Court stated that for a plaintiff to succeed in raising a § 706(1) claim, the plaintiff must show that the agency failed to perform a duty that is "legally required." *Id.* at 63; *see also* Confederated Tribes of the Umatilla Indian Reservation v. Bonneville Power Admin., 342 F.3d 924, 930 (9th Cir. 2003) (without clear statutory duty, plaintiffs' 706(1) claim fails); Sierra Club v. Thomas, 828 F.2d 783, 798 (D.C. Cir. 1987) (refusing to require agency to act expeditiously on rulemaking where court "perceive[s] no statutory command that EPA assign this rulemaking a higher priority than any of its other activities.").

3. Agency Action "Unreasonably Delayed"

So far, this Article has considered general claims by plaintiffs that an agency did not act at all—agency action "unlawfully withheld" in the words of the APA. Another major type of challenge to agency decisionmaking, however, is a claim that an agency is taking too long to act—agency action "unreasonably delayed." Generally speaking, in these types of cases, courts rely on a detailed multi-factor balancing test—a test that at first glance has little or no relation to the overarching principles of administrative law. The existence of such a unique and different test in the APA would appear to support an action/inaction dichotomous view of judicial review. But in fact, a close analysis of those factors reveals that each of them are simply restatements of general principles of administrative law.

In deciding whether an agency unreasonably delayed a decision whether to take action, most circuit courts use some form of the D.C. Circuit's six-factor TRAC test[71] for determining whether an agency action was unreasonably delayed:

> (1) the time agencies take to make decisions must be governed by a "rule of reason;" (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.[72]

Each of these six *TRAC* factors corresponds with either one of the grounds for judicial review under § 706 or general provisions of the APA that apply to all claims for judicial review.

First, the extent of time by which an agency delayed acting goes to determine whether the agency "inaction" or "delay" is final for judicial review purposes.[73] If the agency did not delay action for a

[71] Telecomms. Research & Action Ctr. v. FCC, 750 F.2d 70 (D.C. Cir. 1984).

[72] *Id.* (citations and quotations omitted).

[73] *See* 5 U.S.C.S. § 551(13) (2008) (defining agency inaction as an action); *id*. § 704 (limiting judicial review under the APA to "final" agency action). Note that the APA by its

particularly long time, then it might well be that the agency will act in the near future, before any delay becomes unreasonable. Delay only becomes judicially reviewable once it goes so long that an agency may properly be considered to have effectively refused to act.[74] This factor blurs together with the merits question of whether the agency's delay was unreasonable. After all, if an agency might still be able to fulfill its duty in a reasonable amount of time, then a court (rightly) will refrain from deciding whether it will force the agency to act until it has to.[75] If an agency unreasonably delayed on the merits, a court will not conclude that additional time should be granted to the agency to fulfill its duties.[76] In

text does not appear to require that the allegedly unreasonably delayed agency action to be a "final" agency action.

[74] *See Sierra Club v. Thomas*, 828 F.2d at 793 (stating that review of agency inaction "relate[s], one way or another, to [the court's] ability to provide effective review of final action" and that "agency inaction may represent effectively final agency action that the agency has not frankly acknowledged."); Ligon Specialized Hauler v. Interstate Commerce Comm'n, 587 F.2d 304, 314 (6th Cir. 1978) (concluding that agency delay "must at some point be judicially reviewable if Section 706(1) is to have effect" and that "[t]hat point is reached . . . where the decision to delay or withhold action has become concrete" such that it becomes final); *see also* Sierra Club v. Peterson, 228 F.3d 559, 568 (5th Cir. 2000) ("In certain circumstances, agency inaction may be sufficiently final to make judicial review appropriate."); William D. Araiza, *In Praise of a Skeletal APA:* Norton v. Southern Utah Wilderness Alliance*, Judicial Remedies for Agency Inaction, and the Questionable Value of Amending the APA*, 56 ADMIN. L. REV. 979, 987-88 (2004) (noting that agency delay in making a decision eventually ripens into a final act).

The Ninth and Third Circuits take the position that there is an exception to the APA's finality requirement in § 706(1) challenges. *See* Independence Mining Co. v. Babbitt, 105 F.3d 502, 511 (9th Cir. 1997); Thompson v. U.S. Dep't of Labor, 813 F.2d 48, 52 (3d Cir. 1987). However, this approach contradicts the APA's limitation of judicial review to "final agency action." 5 U.S.C.S. § 704. "Agency action," in turn, is defined in part as a "failure to act." 5 U.S.C.S. § 551(13).

[75] An exception might be where an agency definitively states that it will not act until a time X, and the court determines that time X is an unreasonable delay.

[76] Situations where an agency partially completed its statutory obligations are particularly tricky. The key here is that courts should focus on the progress being made by the agency rather than how much of the obligation was actually completed. If an agency completed some of its work and the court is convinced that the agency is still progressing towards completing its duties, there is not final agency "inaction." Partial action by an agency towards completion of a mandatory duty is not "final" agency action that is reviewable, as long as the court is assured that the agency is still progressing towards completing its duties. *Cf.* Envtl. Def. Fund v. U.S. Nuclear Regulatory Comm., 902 F.2d 785, 790 (10th Cir. 1990) (refusing to issue mandamus where agency has promulgated some regulations in compliance with its statutory duties and is reviewing its other regulations for compliance with statutory standards) ("The [agency] is complying on a reasonable schedule with its . . . duty in that its comparability study is still in progress and, such being the case, there is no reason for this court to intervene."). Courts will often tailor their remedy to take into account the conclusion that the agency is about to complete its duties or is making good progress to correct its inadequacies, refraining from imposing injunctions when it appears that an agency is about to fulfill its duties and instead imposing less intrusive reme-

other words, based on prudential concerns, a reasonable delay will generally be a non-final agency action, and an unreasonable delay will be a final agency action.[77]

Second, courts look to the particular statutory scheme in order to determine on the merits whether an agency "unreasonably delayed" action. An agency's decision whether or not to act promptly on a statutory responsibility that does not have a set deadline is part of its discretion as to how to allocate its resources. But even without a specific deadline, the court might conclude from the statutory language that Congress intended the agency to place a high priority on the decision and therefore that an agency has unreasonably delayed[78]–absent such a conclusion, a court will

dies, such as maintaining jurisdiction and requiring status reports on the agency's progress. *See, e.g.*, *In re* Am. Fed'n of Gov't Employees, 790 F.2d 116, 117-18 (D.C. Cir. 1986) (noting agency's past history of "intolerable" delay but refusing to issue a writ of mandamus because agency "is proceeding successfully to achieve effective management and timely disposition" of cases); *TRAC*, 750 F.2d at 80 (agency assurances that it is "moving expeditiously" means that delay is not "egregious enough to warrant mandamus" but "delays are serious enough for us to retain jurisdiction over this case until final agency disposition").

[77] The overlap between finality and merits analysis for "unreasonable delay" cases may explain the curious result in *Ecology Ctr. v. U.S. Forest Serv.*, 192 F.3d 922, 926 (9th Cir. 1999). In *Ecology Center*, environmental groups sued the Forest Service, claiming that it had failed to meet its statutory duties to monitor a national forest. *Id.* at 924. The agency admitted that it had failed to publish annual reports in 1988 and 1993, and it also admitted that some of its reports "presented inadequate results with regard to some of the monitoring items." *Id.* The Ninth Circuit dismissed for lack of subject-matter jurisdiction, asserting that because the agency had "merely failed to conduct its duty in strict conformance with the Plan and NFMA Regulations," jurisdiction under § 706(1) was not proper. *Id.* at 926. But the court provided no explanation of why the agency's admitted failures to meet the statutory requirements would not warrant review under § 706(1), and why at the very least the claims should not have been dismissed on the merits, rather than for lack of subject-matter jurisdiction. However, the agency had taken steps to compensate for failures to provide adequate reports, including providing supplemental reports to make up for the years that it had missed issuing reports. *Id.* at 924. Accordingly, the agency had sufficiently completed enough of its obligations under the statute that the court could conclude that the agency had not "unreasonably delayed" in performing its duties, and therefore both on the merits and for finality purposes, the claims against the agency failed, with the later grounds being jurisdictional. *Id.* at 924-25 (noting that finality is jurisdictional).

Courts also consider the complexity of the task facing the court in determining whether an agency decision is final. *See* Mashpee Wampanoag Tribal Council v. Norton, 336 F.3d 1094, 1102 (D.C. Cir. 2003) (the court stated that "the complexity of the task at hand" will also be relevant to determining whether an agency action is unreasonably delayed). If an agency is faced with a particularly complex obligation, a court will be much more likely to conclude that the agency is still productively working on the issue, rather than simply not acting at all. *See In re* Monroe Commc'n Corp. 840 F.2d 942, 945-46 (D.C. Cir. 1988); *Sierra Club v. Thomas*, 828 F.2d at 799; Public Citizen Health Research Group v. Brock, 823 F.2d 626, 629 (D.C. Cir. 1987).

[78] *See, e.g.*, Potomac Elec. Power Co. v. Interstate Commerce Comm'n, 702 F.2d 1026, 1033-35 (D.C. Cir. 1983) (requiring agency to act after 10 year delay although refusing to rely explicitly upon deadlines in underlying statutory scheme); Blankenship v. Sec'y of

rarely find unreasonable delay.[79] In particular, the court will analyze the statute to determine if Congress had a particular time frame in mind—i.e. days, weeks, months, or years—for the agency to act. If a court concludes that, in the context of the particular underlying statute, the agency delayed too long in fulfilling its responsibilities, then the court necessarily concludes that the agency abused its discretion, acted arbitrarily and capriciously, and/or acted contrary to law.[80]

Third, whether health and safety are at issue is a part of the underlying statutory scheme and therefore part of Congress' determination as to the priority that should be placed on the agency action in question.[81] This analysis is thus really a subset of the second *TRAC* factor above. It also goes to whether there is prejudice to the plaintiffs, as discussed below.[82]

Fourth, one factor explicitly takes into account judicial deference to agency priority-setting. A court will defer to an agency's statements that it is proceeding at an appropriate pace to fulfill its statutory duties given its other obligations and its reasonable setting of priorities for allocation of limited agency resources.

Fifth, harm to the petitioner/plaintiff by an agency's failure to act is based on the APA requirement that, in devising remedies, courts

HEW, 587 F.2d 329, 335 (6th Cir. 1978) (finding delays in Social Security disability hearings to be unreasonable because it is "contrary to the agency's statutory mandate" under the Social Security Act, although recognizing that Congress did not impose a specific deadline in the statute).

[79] For example, where the relevant statute did not set a specific deadline or otherwise indicate a "special priority" for the action in question, a court was much more reluctant to require an agency to act. *See Sierra Club v. Thomas*, 828 F.2d at 797 & n.99; Cutler v. Hayes, 818 F.2d 879, 897 (D.C. Cir. 1987) (reasonableness of delay "must be judged in the context of the statute which authorizes the agency's action" and this "entails an examination of any legislative mandate in the statute and the degree of discretion given the agency by Congress"). *See also* Oil, Chem. & Atomic Workers Int'l Union v. Zegeer, 768 F.2d 1480, 1488 (D.C. Cir. 1985) (looking to statute's legislative history to determine that agency delay might be overly long).

[80] *See* MCI Telecomm. Corp. v. FCC, 627 F.2d 322, 343-44 (D.C. Cir. 1980) (concluding that agency delay does not meet statutory standards and imposing remedy).

[81] *See* Public Citizen Health Research Group v. Auchter, 702 F.2d 1150, 1158 n. 30 (D.C. Cir. 1983) (concluding that agency delay in issuing work safety regulations was not reasonable in part because "in the context of the [statute], designed to protect workers' health, . . . the [agency's] protracted course in face of potentially grave health risks cannot be characterized as reasonable"); *see also In re* Int'l Chem. Workers Union, 958 F.2d 1144, 1149 (D.C. Cir. 1992) (noting that worker safety statutes were intended to protect the public health). *But see* Public Citizen Health Research Group v. Brock, 823 F.2d 626, 629 (D.C. Cir. 1987) (stating that when "lives are at stake," agency must act "with energy and perseverance" without mentioning any statutory provisions, but citing *Auchter*).

[82] *See In re* United Mine Workers of Am., 190 F.3d 545, 552 n.6 (D.C. Cir. 1999) (noting the overlap between the third and fifth *TRAC* factors).

shall pay due attention to concept of harmless error.[83] If there is no harm to the plaintiff, then there is no reason for the court to intervene, even if there is a violation of the APA or an underlying statute.[84] Courts will place particular weight on whether the harm alleged by the plaintiff is connected to rights established in the underlying statutory scheme.[85]

Sixth, the bad faith factor appears to be another way in which the courts examine whether they should defer to agency priority-setting. An agency that is shown to act in bad faith will not have its claims for priority-setting deferred to, because the court will not trust the agency's statements.[86] Examples of bad faith may include when an agency dislikes particular parties, does not want to address an issue at all that Congress stated that it must address, or is using delay/inaction to effectively deny relief to a party while attempting to avoid judicial review. In such situations, the agency is relying on improper factors to make a decision, and accordingly its decision not to act is arbitrary and capricious.[87]

---

[83] *See* 5 U.S.C.S. § 706 (2008) ("due account shall be taken of the rule of prejudicial error"). The D.C. Circuit called this prong of the analysis "perhaps most critical[ ]," adding that where "injury likely will result from avoidable delay" then the "deference traditionally accorded an agency to develop its own schedule is sharply reduced." *Cutler v. Hayes*, 818 F.2d at 898.

[84] *See, e.g.*, In re *United Mine Workers of Am.*, 190 F.3d at 552 n.6 (examining harm to petitioners in determining the proper remedy for a clear violation of 706(1)); Caswell v. Califano, 583 F.2d 9, 17-18 & n.15 (1st Cir. 1978) (in determining that agency has unreasonably delayed in providing Social Security disability hearings, court examines harm to plaintiffs in order to determine what remedy is equitable, and relying in particular on the "severe hardships which must obviously attend the erroneously delayed payment of disability benefits").

[85] Courts have also framed the issue of harm to the plaintiff as a question of whether the agency inaction is ripe for judicial review. *See* Public Citizen Health Research Group v. Comm'r of the FDA, 740 F.2d 21, 32, 34 (D.C. Cir. 1984) (stating that prejudice to regulatory beneficiaries may make agency inaction final and ripe for agency review); Envtl. Def. Fund v. Hardin, 428 F.2d 1093, 1098-1100 (D.C. Cir. 1970) (delay in agency decision as to whether to suspend registration of a pesticide could cause "irreparable injury on a massive scale" and therefore was ripe for review).

[86] Independence Mining Co. v. Babbitt, 105 F.3d 502, 510 (9th Cir. 1997) (stating that where an agency had in bad faith singled out a party for "bad treatment" or "assert[ed] utter indifference to a congressional deadline, the agency will have a hard time claiming legitimacy for its priorities" (quoting *In re* Barr Labs., Inc., 930 F.2d 72, 76 (D.C. Cir. 1991)); *see also In re* Monroe Commc'ns Corp., 840 F.2d 942, 946 (D.C. Cir. 1988) ("It is the suggestion the [agency] is purposely shrinking its obligation under the [APA] to avoid unreasonable delay–that it seeks to evade the event it finds undesirable by refusing ever to reach the issue–that disconcerts us." (citations omitted)).

[87] *See* Motor Vehicle Mfrs. Ass'n v. State Farm, 463 U.S. 29, 43 (1983) (agency acts arbitrarily and capriciously when it "relie[s] on factors which Congress has not intended it to consider"); *see also* Heckler v. Cheney, 470 U.S. 821, 839 (1985) (Brennan, J., concurring) (stating that judicial review of non-enforcement decisions may be available where

IV. Nonreviewability Under Section 701(a)(2): When Resource Allocation Justifies Excluding Judicial Review Altogether.

The difficulty of drawing the border between action and inaction also creates fundamental problems in trying to understand the scope of Supreme Court cases that hold certain types of agency decisions are presumptively or definitively exempt from judicial review.[88] The most prominent of these is *Heckler*, where the Court held that agency decisions not to enforce the law were presumptively unreviewable unless Congress explicitly indicated to the contrary. Of course, the category of what it means for an agency not to enforce the law has tremendous potential scope and could sweep within it a wide range of agency decisionmaking.

However, as described below, deference to resource allocation not only explains many of the most important non-reviewability doctrines under the APA, but also defines the scope of those doctrines. In fact, resource allocation creates a coherent way to view these cases in the context of the overall structure of the APA, just as it reveals § 706(1) and § 706(2) to be parallel applications of the same underlying administrative law doctrines. Many of the nonreviewability doctrines under § 701(a)(2) turn out to be extreme examples of judicial deference to agency resource allocation decisions—where agencies are required to make large numbers of informal decisions in short periods of time, such that even the prospect of judicial review would fundamentally alter the way in which an agency would allocate its resources.

A. Heckler v. Chaney

By far the most important Supreme Court case to find nonreviewability under § 701(a)(2) is *Heckler*—it has been cited in hundreds of federal appellate court decisions.[89] In *Heckler*, the Court dismissed as unreviewable a complaint by death-row prisoners that the Food and Drug Administration failed to exercise its enforcement powers to prohibit the apparently illegal use of regulated drugs in executions.[90] According to the Court, such a claim improperly interfered with an agency's discretion to decide how to

there are based on "entirely illegitimate reasons, for example, nonenforcement in return for a bribe").

[88] *See supra* notes 13-15 and accompanying text.

[89] The total number is 462 based on a Westlaw search conducted on April 19, 2007.

[90] 470 U.S. at 823-24.

enforce the law.[91] The Supreme Court explained its decision in *Heckler* as based on four separate factors: resource allocation, prosecutorial discretion, ease of judicial review, and the proper role of the courts in protecting individual liberty. Of the four factors that the *Heckler* court put forward to defend its result, only resource allocation can explain why *Heckler* was correctly decided, and accordingly, how broadly *Heckler* should be applied.

First, a careful examination of the concept of prosecutorial discretion shows that it is not separable from resource allocation. Indeed, the justification that courts and legal scholars use for prosecutorial discretion generally boils down to deference to how prosecutors should allocate their scarce resources among varying objectives, such as maximizing the probability of winning cases, producing deterrence of future violations, and responding to public pressures and political priorities for prosecutions.[92]

The Court's second explanation is that, compared to agency inaction, agency action is more reviewable because the action "itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner."[93] Lower courts interpret this *Heckler* rationale to mean that an agency rendered a decision in such a manner that it created a record or similar material that can be reviewed by the court.[94] Having a record, according to at least one court, reduces the risk that the court will be called to make a "focusless evaluation of agency policy and priorities—a role for which courts are not suited."[95]

The problems with this rationale begin with the fact that the lack of an existing record or formal findings by the agency did not prevent the Court in *Overton Park*, for example, from requiring judicial review of the agency action. Instead, the Court stated that the agency should either compile the best record that it could, or

[91] *Id*. at 831-32.

[92] *See* Biber, *supra* note 9, at 12-13.

[93] 470 U.S. at 832.

[94] *See* Transp. Intelligence, Inc. v. FCC, 336 F.3d 1058, 1063 (D.C. Cir. 2003) (concluding that agency's denial of petition to revoke a license was reviewable because the agency's grant of the license in the first place "provides a focus for judicial review"); Crowley Caribbean Transp., Inc. v. Pena, 37 F.3d 671, 677 (D.C. Cir. 1994) ("an agency will generally present a clearer (and more easily reviewable) statement for its reasons for acting when formally articulating a broadly applicable enforcement policy" in contrast to "individual decisions to forego enforcement [which] tend to be cursory, ad hoc, or post hoc" confronting courts "with the task of teasing meaning out of agencies' side comments, form letters, litigation documents, and informal communications").

[95] Robbins v. Reagan, 780 F.2d 37, 47 (D.C. Cir. 1985) (concluding that an agency decision to close a homeless shelter provided "focused action").

instead submit testimony from the relevant agency officials.[96] In the context of agency action, courts rarely, if ever, rely upon the lack of an existing record to eliminate the possibility of judicial review. There is no indication of why this should be any different in the context of agency inaction challenged under § 706(1), and it certainly is not a strong enough explanation to justify exempting a significant range of agency action or inaction from judicial review.[97] As with prosecutorial discretion, moreover, it is not clear that this factor is separable from resource allocation. If courts, following *Overton Park*, disregarded the lack of a record and required judicial review, agencies would respond in a predictable manner—they would begin developing records to justify their decisions, just as they did after *Overton Park*. And in so formalizing their decision-making to develop a record, agencies would necessarily divert resources from other programs.[98]

The third rationale posited by the *Heckler* Court was a desire to avoid having courts force agencies to impose sanctions or coercive force on private parties. In applying *Heckler*, however, relatively few courts actually explicitly rely on this rationale. Those that apply this rationale focus on whether the government's action or failure to act will result in negative consequences for outside parties.[99] But there are serious concerns with relying on this rationale to justify exempting certain decisions of an agency from judicial review. Focusing on the negative consequences of an agency act or failure to act to determine whether it is "coercive" first requires the courts to analyze the significance of a party's interest to determine whether they have been affected negatively; while this is done in due process law, it is nonetheless a difficult analysis to undertake.[100] Further, this analysis requires an artificial distinction

[96] *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 417-20 (1971).

[97] Of course, the fact that judicial review might require agencies to develop records implicates resource allocation concerns, as discussed *infra* notes 104-06 and accompanying text.

[98] *See* Biber, *supra* note 9, at 25-27.

[99] *Compare* Robbins v. Reagan, 780 F.2d 37, 47 (D.C. Cir. 1985) (concluding that agency decision to close homeless shelter constituted "coercion" such that decision was reviewable), *and* Scoop-Gonzalez v. INS, 208 F.3d 838, 845 (9th Cir. 2000) (concluding that agency decision not to reopen deportation proceedings was reviewable because it resulted in threatened deportation of alien, which was "coercive"), *with* Claybrook v. Slater, 111 F.3d 904, 909 (D.C. Cir. 1997) (finding agency decision not to terminate an advisory committee meeting pursuant to FACA was not "coercive," at least compared to a decision to terminate the meeting, and therefore was unreviewable).

[100] *See, e.g.*, RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 9.5 619-21 (4th ed. 2002) (noting that the Supreme Court requires a balancing of the harm to private interests from government action with the benefit of additional procedure to determine what

between whether a private party had a "right" that the government took away (i.e., negatively affected the person) and whether the person had a "privilege" that the government has simply refused to grant (i.e., no negative effect). The artificiality of such a distinction is amply shown by the D.C. Circuit waiver cases mentioned above.[101] Finally, and most importantly, there is no reason to assume that judicial review of agency enforcement will necessarily line up with the imposition of sanctions or coercive force on private parties. Again, as the D.C. Circuit waiver cases show, an agency's decision not to act might result in more regulation (where it declines to issue a waiver from regulatory enforcement) or less regulation (where it declines to enforce a regulation). Because the areas of operation of agency action and the preservation of individual liberty do not map onto each other consistently, "protecting liberty" cannot be the driving rationale behind the *Heckler* exception.[102]

That leaves the rationale that most appellate courts have relied upon in deciding to apply *Heckler* to agency decisions—resource allocation.[103] Resource allocation explains very well judicial reluctance to review agency decisions about whether or not to pursue enforcement proceedings (civil or criminal) against private parties.[104] Agency decisions not to prosecute frequently involve the processing of large numbers of informal reports of violations by outsiders and agency enforcement staff. Even the mere possibility of review could prompt the agency to significantly formalize its prosecutorial decisionmaking process in order to "paper" the record for possible judicial review. The result, of course, would be a significant increase in resources the agency would spend on such

due process requires, and noting that the test "is difficult to apply, unpredictable in its results, [and] dependent on the subjective values of the decisionmaker").

[101] *See supra* notes 13-15 and accompanying text.

[102] *See* Biber, *supra* note 9, at 40-41.

[103] *See, e.g.*, Cobell v. Norton, 428 F.3d 1070, 1076 (D.C. Cir. 2005) (stating that "judgment about the allocation of scarce resources" is a "classic reason[ ] for deference to administrators" and citing *Chaney*); Sierra Club v. Whitman, 268 F.3d 898, 902-03 (9th Cir. 2001) (concluding the EPA's decision not to enforce Clean Water Act against alleged violators was unreviewable in part because of need for agency to focus resources where they might be most effective); Am. Med. Ass'n v. Reno, 57 F.3d 1129, 1135 (D.C. Cir. 1995) (characterizing *Chaney* as a resource allocation case, and allowing judicial review of whether the agency properly included certain categories within its budget for determining fees for private parties because that question did not implicate resource allocation).

[104] *See* Biber, *supra* note 9, at 25-27.

a vital part of its decisionmaking process, at the expense of resources spent elsewhere in its regulatory program.[105]

Accordingly, it is no surprise that courts consistently rely on resource allocation to determine whether or not the *Heckler* exception would apply and focus on the area where resource allocation is of most concern: situations where agencies make large numbers of informal decisions about whether to enforce against individual parties that allegedly violate the law or agency regulations.[106] By contrast, courts are much more reluctant to invoke *Heckler* in situations where an agency develops a general rule or policy as to when it will invoke its enforcement powers.[107] In such situations, generally speaking, because a general rule or policy is involved, one can assume that the benefits to upholding statutory supremacy are much greater and judicial review is accordingly more appropriate.[108]

There are a few examples of courts applying the *Heckler* presumption outside the context of a factual determination of whether

---

[105] *See id.*

[106] Courts applying *Heckler* almost always apply it in the context of an agency deciding to act (or not act) against an individual private party or a state or local governmental unit. *See, e.g.*, Laskowski v. Spellings, 443 F.3d 930, 933-35 (7th Cir. 2006) (agency refusal to require repayment of money from universities); Jerome Stevens Pharm. v. FDA, 402 F.3d 1249, 1251-52, 1256-57 (D.C. Cir. 2005) (agency refusal to enforce drug laws against pharmaceutical companies); Riverkeeper v. Collins, 359 F.3d 156, 164-68 (2d Cir. 2003) (agency refusal to issue show cause order or license suspension to nuclear power plant operator to investigate and respond to safety concerns); Andrews v. Consol. Rail Corp., 831 F.2d 678, 686 (7th Cir. 1987) (agency decision not to file civil suit over employment discrimination claim); Marlow v. U.S. Dep't of Educ., 820 F.2d 581, 582-83 (2d Cir. 1987) (agency refusal to pursue an administrative complaint concerning employment discrimination); Harmon Cove Condominium Ass'n v. Marsh, 815 F.2d 949, 952-53 (3d Cir. 1987) (agency decision not to enforce terms of Clean Water Act permit); Schering Corp. v. Heckler, 779 F.2d 683, 685-86 (D.C. Cir. 1985) (agency action entering into settlement agreement); Ry. Labor Executives Ass'n v. Dole, 760 F.2d 1021, 1023-24 (9th Cir. 1985) (agency decision refusing to enforce railroad safety laws). *But see* Collins Music Co. v. United States, 21 F.3d 1330, 1335-36 (4th Cir. 1993) (agency's refusal to create a new category under the tax code for depreciation purposes unreviewable); California v. United States, 104 F.3d 1086, 1094-95 (9th Cir. 1997) (state challenge to agency immigration enforcement policies unreviewable).

[107] *See* Massachusetts v. EPA, 127 S. Ct. 1438, 1459 (2007) (in contrast to "nonenforcement decisions" that are unreviewable pursuant to *Heckler*, "[r]efusals to promulgate rules are . . . susceptible to judicial review, though such review is 'extremely limited' and 'highly deferential'"); *see also* Kenney v. Glickman, 96 F.3d 1118, 1122-24 & n.4 (8th Cir. 1996) (allowing judicial review of food inspection regulations, even though they involve enforcement and investigation, because the language in *Heckler* about prosecutorial discretion "applies to individual case-by-case determinations rather than permanent policies or standards"). The review of regulation-setting enforcement priorities, however, would still receive great deference. *See* Shell Oil Co. v. EPA, 950 F.2d 741, 764-65 & n.11 (D.C. Cir. 1992).

[108] *See* Biber, *supra* note 9, at 22-23.

an agency should pursue enforcement against a particular party or parties. Examining these can help illuminate the distinction that courts generally do and should draw in such situations. In *Collins Music Co. v. United States*, a corporation challenged the Internal Revenue Service's failure to create a tax deduction category for entertainment machines that the corporation had bought.[109] The court dismissed the complaint on the grounds that "inaction of an agency under such circumstances is analogous to the decision of an agency not to undertake enforcement steps," citing *Heckler*.[110] The problem in that case was that the plaintiff requested the agency set out a general policy (for the tax treatment of a type of machine), not the enforcement (or lack thereof) against a particular party. Accordingly, the court erred in invoking *Heckler*.[111]

In *California v. United States*, the state of California brought a raft of claims against the United States based on allegations that the federal government was not adequately enforcing its immigration laws.[112] The vast majority of the claims were either without any basis in existing constitutional law, or demanded that the United States enforce immigration laws against illegal aliens.[113] For the purposes of this analysis, only one claim appeared to apply incorrectly *Heckler*. One of California's claims was that the federal government improperly "adopt[ed] a policy of not commencing deportation proceedings until shortly before convicted illegal aliens [were] to be released from confinement," in violation of the relevant federal statute.[114] The Ninth Circuit dismissed the claim as barred by *Heckler*.[115] But California's claim was a challenge to a generally applicable standard the federal government had developed; review of such a general standard would hardly raise concerns about formalizing a large range of informal, individual decisions. Of course, invalidating the policy would certainly have had serious resource allocation concerns, since it would have fundamentally changed how the agency dealt with illegal immigration. But that is a question properly dealt with on the merits, with the

[109] 21 F.3d 1330, 1331 (4th Cir. 1994).

[110] *Id*. at 1336.

[111] However, the court may have reached the right result, given the agency's broad discretion under the statute as to whether it should reclassify the tax treatment for business equipment. *See id*. at 1335-36 (quoting the statutory language and noting the precatory language allowing, but not requiring, the agency to reclassify tax property).

[112] 104 F.3d 1086, 1089 (9th Cir. 1997).

[113] *Id*.

[114] *See id.* at 1094.

[115] *Id*. at 1094-95.

proper deference provided to an agency's decision about how to allocate its resources.[116]

Perhaps the most extreme example of a court allowing a characterization of a generalized policy decision as discretionary "enforcement" is the recently-decided D.C. Circuit case *Association of Irritated Residents v. EPA*.[117] The EPA proposed a "consent agreement" in which it invited all large-scale "animal feeding operations" to provide it with information about the pollutants they produced in return for a blanket immunity from enforcement from the EPA for a set period of time.[118] "Although each participating [operation] signs an individual Agreement with EPA, all the Agreements have identical terms," and several thousand operations signed up.[119] The majority concluded that the EPA proposal was non-reviewable under *Heckler*.[120] But as the dissent noted, the EPA proposal "involved neither the EPA's decision to bring or not to bring an enforcement action based on an investigation giving rise to a belief that a regulated party failed to comply with statutory requirements, nor was it a decision by the EPA to settle an enforcement action that it brought against a particular entity or prepared to file in view of evidence of a violation."[121] Indeed, the lack of any "particularized enforcement determination" in this case,[122] the identical terms offered to an indeterminate and large number of private parties, the fact that the EPA announced and offered the consent decree to those parties through a Federal Register notice,[123] and the significant legal questions about the propriety of the agreement all weigh heavily in favor of concluding that the EPA's proposal was an agency decision reviewable under *Heckler*.

Finally, cases exist that are on the borderline between general standards or policies and enforcement against individual parties. For example, the Clean Air Act requires the EPA to review state

[116] Again, the court likely reached the right result here. Given the deference that courts do (and should) provide to these types of decisions by agencies about how to allocate their resources, and the fact that the relevant federal statute at the time only required the federal government after convicting an alien of a crime to "begin any deportation proceeding *as expeditiously as possible* after the date of conviction," *id*. at 1094 (quoting 8 U.S.C. § 1252(I) (1994)) (emphasis added), the court should not have overturned the INS policy.

[117] 494 F.3d 1027 (D.C. Cir. 2007) (decided on July 17,2007).

[118] *Id*. at 1029.

[119] *Id*.

[120] *Id*. at 1029-33.

[121] *Id*. at 1040 (Rogers, J., dissenting).

[122] *Id*.

[123] *Id*. at 1030.

air pollution permitting programs to determine whether they meet minimum standards and to initiate administrative enforcement proceedings against states that fail to comply.[124] Where plaintiffs challenged the EPA's refusal to find violations in two different state programs, the courts in both cases rejected the challenges relying on *Heckler*.[125] On the one hand, the EPA made individualized enforcement decisions against particular parties (albeit states). On the other hand, the EPA's decisions reviewed statewide regulations that set general standards applicable to all regulated parties within the states. In such cases, it is informative to return to the underlying reason why the *Heckler* doctrine exists: concern about ossifying the administrative process with the possibility of judicial review. To the extent that the EPA's process requires the informal review of large numbers of particular cases, it appears that it should be exempt from judicial review. However, an administrative program that reviews large regulatory programs issued by a relatively small number (less than sixty states and territories) of parties, and that also involves a fairly formal decision process (including the issuance of notices of deficiency) appears not to be a good candidate for exemption under *Heckler*.[126]

Other important elements of the *Heckler* exemption are consistent with the framework laid out above. Courts are appropriately much less likely to apply *Heckler* where an agency has already acted, as opposed to before it makes an initial decision not to act at all[127] – in such a situation, an agency's claim that it has not yet determined whether or not to place a high priority on the issue has much less plausibility. Moreover, the risk of interfering with large

[124] *See, e.g.*, Ohio Public Interest Group v. Whitman, 386 F.3d 792, 793-94 (6th Cir. 2004) (describing the program).

[125] *Id*. at 797-98; Public Citizen v. EPA, 343 F.3d 449, 464-65 (5th Cir. 2003).

[126] *See id.* at 453-54 (describing the program). The statute in question appears to grant the agency broad discretion to determine whether violations have occurred and whether enforcement is appropriate. *See* 42 U.S.C.S. § 7661a(i)(1) (2008). Accordingly, it seems likely that the courts generally would defer to EPA decisions not to enforce, and thus perhaps the right result was reached in both of these cases as well. Indeed, given the relevant statutory language, it is possible that judicial review should have been foreclosed because there was "no law to apply." *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

[127] Robbins v. Reagan, 780 F.2d 37, 46-47 (D.C. Cir. 1985) (concluding agency decision to close homeless shelter was reviewable because agency had already committed resources to shelter, and court was only considering rescission of that commitment); *see also* N.Y. State Dep't of Law v. FCC, 984 F.2d 1209, 1214 (D.C. Cir. 1993) (stating that an agency decision to settle an administrative proceeding may be reviewable where the agency has completed much of the proceeding); Inv. Co. Inst. v. FDIC, 728 F.2d 518, 527-28 (D.C. Cir. 1984) (same).

number of informal agency decisions is much reduced: by deciding to act, the agency has already greatly narrowed the number of decisions that might be impacted by the possibility of judicial review.

Finally, where Congress clearly states that an agency must proceed with enforcement in a certain situation, *Heckler* requires courts to scrutinize decisions not to enforce, and where necessary, to force agencies to comply with that duty.[128] The enforcement of an explicit statutory duty in this context, in spite of resource allocation concerns, is parallel to the "clear duty" standard for requiring an agency to act under § 706(1).

B. Southern Railway

The second major non-reviewability case under § 701(a)(2) is the Supreme Court's opinion in *Southern Railway*, where the Court held that decisions by the Interstate Commerce Commission (ICC) not to suspend proposed rates filed by railroads were unreviewable. At issue were provisions of the Interstate Commerce Act that, after regulated railroads had filed their rates with the ICC as required, allowed the agency to suspend the effectiveness of those rates pending an investigation of the reasonableness of the rates.[129] The investigation would be conducted at a hearing held by the ICC, and could then lead to a final decision as to whether the rate would take effect, with the burden of ultimately showing that the rate was reasonable being placed on the filing railroad.[130] The ICC declined to suspend or investigate a filed rate increase, and a customer of the railroad company challenged the ICC's decision.[131] The Court concluded that the ICC's decision not to suspend or investigate the filed rate increase was unreviewable. While noting the possibility of alternative channels to challenge the filed rate and the agency's statutory discretion to investigate filed rates, the Court also emphasized that the ICC received "over 50,000 rate-schedule filings each year" with many containing "thousands of individual rates."[132] Judicial review of the ICC's refusal to investigate any of those would produce "disruptive practical consequences" that would "effectively nullify" the ICC's powers under

[128] *See* Heckler v. Chaney, 470 U.S. 821, 823 (1985); *see also* Harrington v. Chao, 372 F.2d 52, 55-56 (D.C. Cir. 2004) (allowing judicial review of agency enforcement decision because of statutory standards, but noting deferential standard of review).

[129] S. Ry. Co. v. Seaboard Allied Milling Corp., 442 U.S. 444, 446 & n.1, 458 (1979).

[130] *Id.* at 446 n.1, 454-55.

[131] *Id.* at 446-47.

[132] *Id*. at 454-57.

this provision, particularly given the fact that the ICC was required to make decisions about investigating filed rates in a thirty-day time period.[133] In this context, the Court concluded that judicial review would require the agency to "carefully analyze and explain its actions with regard to each component of each proposed schedule," possibly resulting in an "increase [of] the number of investigations it conducts, all in order to avoid judicial review and reversal," causing a "tremendous[ ]" increase in the agency's workload.[134]

Given what has already been laid out, it is clear why the *Southern Railway* court concluded that the ICC's decision not to suspend the rates was unreviewable. First, this is not a situation where the agency could commit legal errors that would prejudice private parties without any possibility of judicial review—alternate routes for challenging rate filings existed. The benefits from judicial review of ensuring legal compliance by the agency were thus minimal. Moreover, the decisions in question were particular to individual rate filings rather than generally applicable regulations. Thus, again the benefits from judicial review were minimal. And, finally, the court explicitly noted the harm to the agency's ability to allocate resources should judicial review be allowed—the same harm presented by judicial review of enforcement decisions in *Heckler*. In other words, *Southern Railway* is just another application of the same resource allocation doctrine present in *Heckler*.

Appellate courts apply *Southern Railway* to similar statutory schemes where agencies have the ability to temporarily suspend and investigate filed rates pending a determination of reasonableness, and rely on similar rationales.[135] This rationale is also applied outside the context of rate suspension, for example, to decisions by

[133] *Id.* at 456-57.

[134] *Id.* at 457.

[135] *See, e.g.*, Cities of Anaheim, Riverside, Banning, Colton & Azusa v. FERC, 723 F.2d 656, 661 (9th Cir. 1984) (applying *Southern Railway* to FERC, stating that to "subject a rough, preliminary decision to judicial scrutiny, particularly where the final rate decision is reviewable, would disrupt the administrative process unnecessarily," and noting the discretionary statutory language and alternative remedies); Papago Tribal Utility Auth. v. FERC, 628 F.2d 235, 240-43 (D.C. Cir. 1980) (applying *Southern Railway* to FERC, noting that the agency's decision is "undeniably interlocutory," the possible alternatives for later review of the rate, the interim nature of the relief provided by the agency, and the lack of standards for judicial review).

Here again, however, statutory language trumps resource allocation concerns. *See* Minneapolis, Northfield & S. Ry. v. ICC, 707 F.2d 984, 987-88 (8th Cir. 1983) (holding ICC decision not to suspend a different type of rate filing was reviewable because of mandatory statutory language).

an agency to issue affirmances of administrative law judge decisions without opinions.[136]

C. Reconsideration cases

In *Interstate Commerce Commission v. Brotherhood of Locomotive Engineers*,[137] the Supreme Court faced the question of whether an agency decision not to reconsider a past decision was itself reviewable.[138] The Court concluded that an agency's decision not to reconsider a prior decision was unreviewable.[139] In large part, the Court relied upon the particular statutory provisions that allowed for judicial review of the ICC's decision, noting that the statute required the filing of a petition for judicial review within a set time period after the agency's decision.[140] Allowing judicial review of a motion to reconsider a decision would allow litigants to circumvent that limited window of time for judicial review—they could simply petition for reconsideration of an agency decision where the time for a petition for judicial review had long since passed, and then seek judicial review of the denial of that petition and therefore obtain judicial review (albeit probably with a more deferential standard of review) of the underlying decision.[141] The Court refused to amend the time limitations period for the statute in such a manner.

However, the Court added another rationale for its decision based on APA § 701(a)(2): there was a "tradition of nonreviewability" for agency refusals to reconsider prior decisions.[142] The Court noted that review of agency refusals to reconsider would be "not workable" because in the "vast majority of cases," an agency's denial of a motion to reconsider is made "without statement of reasons."[143]

---

[136] *See* Ngure v. Ashcroft, 367 F.3d 975, 982-83 (8th Cir. 2004) (agency decision to affirm without opinion was unreviewable under § 701(a)(2) because of agency's need to "allocate its scarce resources" in a context where it receives "over 28,000 appeals and motions" annually).

[137] 482 U.S. 270 (1987).

[138] A railroad union sought "clarification" and reopening of a prior ICC decision, and when that initial petition did not go the union's way, it sought reconsideration of the denial of its initial petition. That reconsideration was itself denied *Id.* at 276-77.

[139] *Id.* at 277. The Court did distinguish a situation where the agency reopened the prior decision, but affirmed it nonetheless. *Id.* at 278.

[140] *Id.* at 279-80.

[141] *Id.*

[142] *Id.* at 282.

[143] *Id.* at 283.

This additional rationale implicitly touches on similar resource allocation concerns as in *Heckler* and *Southern Railway*. If courts were to provide searching judicial review of all agency denials of motions to reconsider, and if those denials were to be struck down where the agency did not provide any reasons for its decision, then agencies would quickly learn to provide some explanation of their reasons for denying reconsideration. But of course, that would require significantly greater resources from the agency, diverting those resources from an agency's proactive efforts to deal with new problems or new cases to reacting to challenges to the agency's prior decisions. Accordingly, denials of motions to reconsider are (arguably) properly exempt from judicial review on resource allocation grounds.[144]

D. Conclusion: Identifying the proper scope for § 701(a)(2) non-reviewability

Non-reviewability under § 701(a)(2) has long been a puzzle for administrative law scholars. Indeed, the exemption from judicial review of agency decisions "committed to agency discretion by law" is the basis for a puzzling question oft-referred to by teachers of administrative law—how can an agency decision be exempt from judicial review because it was "committed to agency discretion by law" when the APA at the same time allows courts to overturn agency decisions for an "abuse of discretion"?[145]

A proper understanding of the interaction of § 701(a)(2) with the rest of the APA, and with judicial deference to agency resource allocation decisions, helps explain, at least in part, the enigmatic § 701(a)(2).[146] The most important non-reviewability exemptions

[144] I say "arguably" because it is unclear that the reasons for unreviewability apply here. Unlike in *Heckler* or *Southern Railway*, there is no evidence that agencies are swamped with petitions for reconsideration, or that agencies treat petitions for reconsideration in a very informal manner. Accordingly, I am skeptical that imposing judicial review really would require the agency to dramatically greatly increase the formality of its decisionmaking in a vast number of cases, as is the case with enforcement decisions or the rate suspension decisions. Thus, *Brotherhood of Locomotive Engineers* may properly be seen as standing on the outer limits of when resource allocation concerns dictate that agency decisions should be unreviewable. However, combined with the concerns the Court raised about the evasion of statutory time periods for judicial review, the decision to render denials of reconsideration unreviewable becomes more explicable.

[145] *Compare* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971), *with* 5 U.S.C. § 706(2)(A) (2008).

[146] Of the other examples of non-reviewability under § 701(a)(2), the most significant is judicial review of agency action under statutes which are "drawn in such broad terms that in a given case there is no law to apply." *Overton Park*, 401 U.S. at 410 (quotation omitted). Because this branch of § 701(a) depends (at least explicitly) more on the particulari-

under the provision apply where the mere possibility of judicial review would so undermine agency resource allocation that judicial review cannot be allowed at all—situations where agencies are required (by statute or by practical imperatives) to make large numbers of informal decisions in a rapid period of time. While this is an important subset of agency decisions, it is only a subset and should not sweep broadly across the landscape of judicial review.

V. Resolving the Ambiguities and Broader Implications

The lessons drawn above can now be applied to some of the conundrums laid out in Part I.B., such as how to deal with cases that appear to fall between action and inaction, or cases that are ambiguous as to whether they involve decisions to enforce or not. And now that the reader understands the doctrinal landscape of judicial review of agency inaction, this Article will explore in more detail why judicial review of agency inaction matters for how government regulatory policy in general (and environmental law in particular) will develop in the future.

A. Making Sense of the Confused Case Law of Judicial Review of Agency Inaction

In many cases, the mere fact that judicial review under § 706(1) and § 706(2) can be seen as points along a spectrum rather than dichotomous opposites will make the doctrinal analysis much easier. Take the example of FOIA cases mentioned before. Instead of a complicated and difficult analysis as to whether an agency's

ties of individual statutes than on general principles of administrative law, it is set it aside for purposes of this article. Milk Train, Inc. v. Veneman, 310 F.3d 747, 749-52 (D.C. Cir. 2002) (concluding that court could not review agency decision as to milk subsidies under a statute that allowed agency to allocate funds "in a manner determined by the Secretary" because the statute provided no "no relevant 'statutory reference point' for the court other than the decision maker's own views of what is an 'appropriate' manner of distribution"). Note, however, that there might well be a connection between a court determining that the judicial action in question implicates resource allocation decisions and the court's determination that the statutory language is unsuitable for judicial review. Courts appear to be much more likely to conclude that statutory language provides "no law to apply" where resource allocation issues are in play. *See* Ward v. Skinner, 943 F.2d 157, 159-61 (1st Cir. 1991) (stating that "practical considerations of an agency's administrative needs, a broadly worded statute, and experience drawn from tradition may combine to suggest" unreviewability).

Other examples of non-reviewability not discussed here include exceptions for executive action in foreign affairs, as in *Webster v. Doe*, 486 U.S. 592 (1988), and executive decisions about how to allocate lump-sum appropriations, as in *Lincoln v. Vigil*, 508 U.S. 182 (1993). The later case directly implicates resource allocation concerns. *See* Biber, *supra* note 9, at 21.

refusal to release information is a form of action or inaction, courts can focus on the real issue at hand—whether judicial review of an agency's decision not to release information implicates significant resource allocation concerns. And here, the clear answer is no. Most agencies use a relatively formal process to deal with the large numbers of FOIA requests they receive every year.[147] Judicial review of an agency's final decision will not implicate concerns about the allocation of resources within the FOIA request process as a whole. Requiring an agency to, for example, reconsider its denial will add one additional item to a process that already deals with many individual items, and the marginal impact of that one item will be small. Accordingly, as with judicial review of Social Security disability decisions, there is no reason for courts to defer to agency resource allocation decisions.[148]

As a second example, consider the status of agency decisions to grant or deny waivers from regulations. As noted above, courts struggle with whether these decisions should be reviewable under *Heckler*. A decision to grant a waiver, for example, could be seen as an agency refusal to enforce, and therefore unreviewable; on the other hand, an agency denial of a waiver could be seen as agency inaction and therefore also unreviewable (or reviewable with a high degree of deference).[149] But considering the underlying purposes of the *Heckler* exemption, waiver decisions should generally be reviewable. An agency's decision as to whether or not to waive compliance with statutes or regulations generally will not implicate resource allocation issues. Denial of a waiver does not mean that the agency will be required to undertake enforcement proceedings against the private party, since the denial only puts the private

[147] *See, e.g.*, Open Am. v. Watergate Special Prosecution Force, 547 F.2d 605, 612-13 (D.C. Cir. 1976) (describing the process developed by the FBI to respond to FOIA requests).

[148] Note that this is a different question from whether courts should require agencies to process FOIA requests outside of their normal system. For example, the FBI's policy of addressing FOIA requests on a "first come, first served" basis was challenged in court because the queue for processing would result in the agency violating the statutory deadlines in FOIA. *See Open America*, 547 F.2d at 607-09. In such a case, resource allocation concerns would be implicated, because granting the plaintiffs relief would have created an incentive for all FOIA requesters to "jump the queue" with litigation. *Id*. at 615. That indeed was the rationale behind the court's rejection of the plaintiffs' request. *Id*.; *see also* Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61, 78-81, 86-87 (1997). The court avoided the statutory language in FOIA by interpreting it to provide great leeway for the agency in complying with the deadlines. *Open America*, 547 F.2d at 615-16.

[149] *See* Jim Rossi, *Waivers, Flexibility, and Reviewability*, 72 CHI-KENT L. REV. 1359, 1369-70 (1997) (noting the difficulties in this analysis).

party on notice that it must comply with the relevant standards, just as the rest of the regulated community will have to comply. A grant of a waiver would likewise not implicate resource allocation issues, since the agency will be waiving the applicability of regulations and therefore any possibility of enforcement. And, the agency's decision about whether or not to grant a waiver usually will not implicate significant resource allocation decisions—presumably the agency will already have a regular process to consider waivers. Finally, absent an indication that (as in the rate-filing case law) an agency must deal informally with a large number of waiver applications, the mere existence of judicial review of the decision is unlikely to consume significant amounts of agency resources.[150]

Third, the confusion in the courts of appeals about when to apply the *TRAC* factors—to cases involving claims of unreasonable delay or to challenges to an agency's alleged unlawful withholding of action—may now be seen as relatively unimportant. All of the factors used in the *TRAC* analysis are in fact simply applications of more general administrative law doctrines that should be considered no matter what the plaintiff's claim is.[151] To the extent that the factors implicate questions about how much to defer to an agency's decision about how to allocate its resources, those too are questions that courts can and should consider no matter what type of claim the plaintiff is raising.[152]

---

[150] *See id.* at 1371-72 (concluding that waiver decisions should generally be reviewable in court).

[151] *See supra* Part III(C)(3).

[152] The dispute among the circuits about the proper scope of the *TRAC* factor analysis in part represents a conflict over an entirely different type of problem–whether or not courts have equitable discretion, in the face of an agency's disregard of a statutory deadline, to refuse to order the agency to comply with the deadline. *Compare In re* Barr Labs., Inc., 930 F.2d 72, 74 (D.C.Cir.1991) (concluding courts have such discretion), *with* Forest Guardians v. Babbitt, 174 F.3d 1178, 1190-91 (10th Cir. 1999) (concluding courts must issue an injunction to order compliance with a deadline). The courts that state that they have discretion as to whether or not they can issue an injunction in deadline cases rely on the *TRAC* factor analysis to reach their decision. *Barr Laboratories*, 930 F.2d at 74-76. However, in the end the distinction may be mostly of theoretical import–even courts that conclude that they must issue an injunction for violations of statutory deadlines nonetheless conclude that they may exercise their equitable discretion as to whether to enforce the injunction with contempt. *See Forest Guardians*, 174 F.3d at 1192-93. In particular, courts might rely on agency claims that Congress has denied them the resources to comply with deadlines in deciding not to find the agency in contempt. *Id.* (noting this "impossibility" defense). The approach of the Tenth Circuit in *Forest Guardians* appears more appropriate, given the possibility of abuse that might occur if agencies (and Congress) concluded that they could routinely ignore statutory deadlines with no consequence whatsoever. *See* Biber, *supra* note 9, at 39-49. With an injunction–even if it carries only the possibility of enforcement by contempt–there is at least some symbolic (if not practical) pressure on the agency to act.

Finally, consider the interaction between the doctrine of finality and agency inaction. The APA limits judicial review to "final" agency action, which in turn is defined to include agency inaction.[153] Accordingly, it would seem to make sense that the APA only authorizes judicial review of "final" agency inaction. Yet, the Ninth Circuit holds that there is no finality requirement for a § 706(1) challenge to an agency failure to act.[154] The analysis here indicates that, at least doctrinally, the Ninth Circuit's conclusion is simply incorrect. Finality applies across the board to all judicial review of agency decisionmaking, whether it is agency action, agency inaction, or something in between. As noted above, where the plaintiff's claim is that the agency improperly failed to act or unreasonably delayed in acting, the court's conclusion that the delay is unreasonable or that a deadline has been violated by the agency will necessarily also lead to the conclusion that the agency's delay or failure to act is "final."[155]

B. Why Understanding Judicial Review of Agency Inaction Matters for the Future Scope of Government Regulatory Policy

There is a broader importance, however, to resolving the doctrinal confusion in this area, and that is connected to the rising impor-

[153] *See* 5 U.S.C.S. §§ 704 (2008) (requiring review of only "final agency action"), 551(13) (defining "agency action" as including a "failure to act").

[154] *See* Independence Mining Co. v. Babbitt, 105 F.3d 502, 511 (9th Cir. 1997) ("Judicial review of an agency's actions under § 706(1) for alleged delay has been deemed an exception to the 'final agency decision' requirement."); *see also* Public Citizen v. Bowen, 833 F.2d 364, 367 (D.C. Cir. 1987) ("want of finality in the conventional sense cannot be a bar" to a § 706(1) claim); Thompson v. U.S. Dep't of Labor, 813 F.2d 48, 52 (3d Cir. 1987). The Ninth Circuit reached its conclusion in rejecting a plaintiff's argument that an agency declaration was an improper "post hoc rationalization" that should not be considered by the court. *Independence Mining Co*., 105 F.3d at 511. The court concluded that the "post hoc rationalization" argument failed because in a § 706(1) challenge, there is no "final agency decision" at issue. Without a "final agency decision," the court argued that there can be no "post hoc" rationalization. *Id*. at 511-12.

[155] *See supra* notes 74-78 and accompanying text. Accordingly, the date of the "final" agency action for a claim of unreasonable delay would usually be the court's determination that the agency had unreasonably delayed. Under this analysis, the outcome in Independence Mining would likely have been the same, since the agency declaration was submitted during the course of litigation and therefore could not have been "post hoc." These examples are only a sample of the ways in which the doctrinal analysis is made easier for the most familiar agency failure to act cases under § 706(1). A wide range of other situations can now be seen, not as peculiar sui generis cases that are difficult for courts to tackle, but instead as part of an overall framework. For instance, claims that an agency has improperly abandoned a rulemaking proceeding mid-stream can now be seen as an intermediate case, where resource allocation requires somewhat higher deference, but not complete deference. *See* Biber, *supra* note 9, at 28-31.

tance that judicial review of agency inaction has and will continue to play in the regulatory state, particularly in the field of environmental law. There was a wave of regulatory statute enactment in the 1970s: in the environmental law field, for example, Congress passed or substantially overhauled the Clean Air Act, the Clean Water Act, the Endangered Species Act, and the Resource Conservation and Recovery Act.[156] Since then, however, Congress fell into a relative state of regulatory quiescence, particularly in the field of environmental law, with major regulatory statutes being the exception, not the rule. Many regulatory efforts have been focused instead in the areas of economic regulation, such as communications and banking.[157] As a result, to the extent there is regulatory initiative—or, for that matter, deregulatory initiative—it comes from the executive, not the legislative, branch.

Yet, while Congress has become relatively passive in its regulatory activities, new challenges in fields such as environmental law continue to arise and require response. In environmental law, for example, emerging issues such as global climate change and the collapse of global and domestic fisheries require solutions. Even for older issues, scientific advances make clear that the understanding of harm from human activities in the past is inadequate, and that new and different ways of preventing or ameliorating those harms are required.[158] And even for issues for which regulatory systems are established and appear to be relatively functional, there are other regulatory tools—such as tradable permit rights or pollution taxes—that are increasingly attractive as lower-cost and perhaps even more effective solutions. In all of these situations, the primary initiative in attempting to address new problems or improve our responses to old problems laid with the regulatory agencies.[159]

---

[156] *See* DANIEL A. FARBER ET AL., CASES AND MATERIALS ON ENVIRONMENTAL LAW 9-11 (7th ed. 2006).

[157] *See, e.g.*, Sarbanes-Oxley Act of 2002, P.L. 107-204, 116 Stat. 745 (2002); Gramm-Leach-Bliley Financial Act, P.L. 106-102, 113 Stat. 1338 (1999); Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56.

[158] *See, e.g.*, Whitman v. Am. Trucking Ass'n, 531 U.S. 457 (2001) (reviewing the new EPA ozone and particulate matter regulations issued in response to new scientific information about the public health concerns of those pollutants). For a discussion of the specifics surrounding this case, see Patricia Ross McCubbin, *The D.C. Circuit Gives New Life and Meaning to the Nondelegation Doctrine in American Trucking Associations v. EPA*, 19 VA. ENVTL. L.J. 57 (2000).

[159] *See, e.g.*, Alliance Against IFQs v. Brown, 84 F.3d 343 (9th Cir. 1996) (challenge to agency promulgation of regulation that allowed the development of transferable rights in fishing quotas); Sea Watch Int'l v. Mosbacher, 762 F. Supp. 370 (1991) (same); Federal Plan

Accordingly, if a private party seeks to address the continual process of change in the issues faced in environmental law and other regulatory fields, then the most promising venue will be the agency, not Congress, through tools such as petitions for rulemaking.[160] This is the case whether the private party believes regulation or deregulation would be the most fruitful course of action. And if the agency rejects the proposal, then the next most promising venue will be a suit in court, challenging the agency's decision not to act. Judicial review of agency inaction has accordingly become more and more important in understanding the nature and scope of federal regulation in general, and environmental regulation in particular.

Two examples help illuminate this trend, both from environmental law, and both involving recent Supreme Court cases. The first case involves the question of off-road vehicle (ORV) use on federal public lands. ORV use has exploded recently,[161] with damage resulting to soils, habitat, and water quality on large sections of the public lands.[162] While federal land management agencies attempt to control ORV use and limit environmental damage, many environmental groups argue that far too little effort has been made so far.[163] Accordingly, environmental groups resort to petitioning various agencies to take steps to reduce harm, such as closing areas to ORV use, and also sue the agencies for failing to prevent damage to many pristine federal lands from ORV use.[164] It was one of

Requirements for Clean Air Mercury Rule, 71 Fed. Reg. 77,100 (Dec. 22, 2006) (agency proposal to introduce tradable rights for mercury emissions); Alison Rieser, *Prescriptions for the Commons: Environmental Scholarship and the Fishing Quotas Debate*, 23 HARV. ENV. L. REV. 393 (1999) (describing the development of property rights in fishing quotas).

[160] *See* 5 U.S.C.S. § 553(e) (2008) (requiring agencies to accept petitions for rulemaking); *id.* § 555(e) (requiring agencies to respond to petitions made "in connection with any agency proceeding"). The two provisions have generally been read together by courts to require agencies to respond to petitions for rulemaking. Massachusetts v. EPA, 127 S. Ct. 1438, 1459 (2007).

[161] *See, e.g.*, Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 59 (2004) (noting sales of ORVs doubled from 1998 to 2003).

[162] *See, e.g.*, *id.* (noting harm from ORVs).

[163] *See, e.g.*, The Wilderness Society, ORVs, http://www.wilderness.org/OurIssues/index.cfm (last visited Jan. 15, 2008) (website of The Wilderness Society, a major national environmental group, listing the restriction and reduction of ORV use on federal public lands as one of the organization's main priorities).

[164] *See, e.g., S. Utah Wilderness Alliance*, 542 U.S. at 59 (describing procedural history of that case); The Wilderness Society, ORV Campaign, http://www.wilderness.org/OurIssues/ORV/policy.cfm?TopLevel=Policy (last visited Jan. 15, 2008) (describing efforts of The Wilderness Society to lobby federal land management agencies to restrict ORV use both through national regulations and through site-specific decisions for areas such as National Monuments).

these lawsuits—against the Bureau of Land Management for failing to protect wilderness-quality lands in Utah from ORV damage—eventually reached the Supreme Court, prompting one of the two Court decisions that actually considered the scope and role § 706(1) plays in the APA.[165]

The second example involves climate change—the highest profile environmental issue today. As alluded to in the introduction, *Massachusetts v. EPA* is the result of litigation initiated by states and environmental groups frustrated by President Bush's rejection of international agreements to control the emission of GHGs that contribute to climate change, and by the lack of any significant action in Congress on the issue over the past ten years. Accordingly the states and environmental groups petitioned the EPA to initiate regulation of the emission of GHGs from mobile sources (i.e., automobiles) pursuant to its authority under the Clean Air Act.[166] The EPA rejected the petition on the grounds that there was not conclusive evidence that anthropogenic emissions of carbon dioxide were contributing to climate change, and that the statute did not give the EPA the authority to regulate those emissions in any case.[167] The states and environmental groups sued, challenging the EPA's refusal to grant the petition.

Norton v. SUWA did not turn out so well for the environmental groups, with the Court rejecting their claims and emphasizing the importance of judicial deference to agency resource allocation decisions.[168] On the other hand, in *Massachusetts v. EPA*, the Court agreed with the environmental and state plaintiffs and required the EPA to re-evaluate its refusal to regulate GHG emissions.[169] Neither of these cases, however, is an aberration—litigation that seeks to force agency action will continue to be an increasingly important determinant of the shape and scope of environmental regulatory policy in the United States, absent Congress reasserting its role in initiating policy changes—a change that appears unlikely for environmental issues other than climate change. Accordingly, the doctrinal niceties of judicial review of agency inaction are not just academic puzzles to delight scholars and specialized practitioners—they will help determine the future quality of the lands we use and the air we breathe.

---

165 *S. Utah Wilderness Alliance*, 542 U.S. at 59.
166 *See Massachusetts v. EPA*, 127 S. Ct. at 1449.
167 *See id.* at 1450-51.
168 *See S. Utah Wilderness Alliance*, 542 U.S. at 62-66.
169 *See Massachusetts v. EPA*, 127 S. Ct. at 1459-63.