DEADLINES IN ADMINISTRATIVE LAW

JACOB E. GERSEN[†] & ANNE JOSEPH O'CONNELL[††]

[†] Assistant Professor of Law, University of Chicago. Financial support has been provided by the John M. Olin Foundation, the Lynde and Harry Bradley Foundation, and the Robert B. Roesing Faculty Fund.

[††] Assistant Professor of Law, School of Law, University of California, Berkeley. Financial support has been provided by the Hellman Family Faculty Fund and the Boalt Hall Fund. Thanks to Roman Giverts, Peter Wilson, and John Yow for research assistance. Extremely useful comments were provided by Eric Biber, Mariano-Florentino Cuéllar, Daniel Farber, Philip Frickey, Daniel Ho, Gillian Metzger, Eric Posner, Cristina Rodriguez, Martin Shapiro, Matthew Stephenson, Cass Sunstein, Adrian Vermeule, and John Yoo.

INTRODUCTION

A cottage industry in administrative law studies the various mechanisms by which Congress, the President, and the courts exert control over administrative agencies. Restrictions on the appointment and removal of personnel,[1] the specification of requisite procedures for agency decision making,[2] presidential prompt letters,[3] ex ante review of proposed decisions by the Office of Management and Budget (OMB),[4] legislative vetoes,[5] and alterations in funding and jurisdic-

---

[1] *See* Steven Breker-Cooper, *The Appointments Clause and the Removal Power: Theory and Séance*, 60 TENN. L. REV. 841, 843-44 (1993); Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. 1779, 1783-85 (2006); *see also* Anne Joseph O'Connell, Qualifications (Dec. 14, 2007) (unpublished manuscript, on file with authors) (examining qualification requirements for appointed offices in administrative agencies).

[2] For overviews of the delegation literature, see generally DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS (1999) (developing and testing a theory of variation in delegation to agencies), and D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS (1991) (exploring the history and theory of delegation and delegation mechanisms). On bureaucratic drift particularly, see Mathew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 439 (1989) (discussing how agencies can "shift . . . policy outcome[s] away from the legislative intent").

[3] *See* Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1277-80 (2006) (discussing the effect of prompt letters on agency action); Robert W. Hahn & Robert E. Litan, *Counting Regulatory Benefits and Costs: Lessons for the US and Europe*, 8 J. INT'L ECON. L. 473, 476 (2005) (noting the use of prompt letters to spur regulation in new areas); Robert W. Hahn & Mary Beth Muething, *The Grand Experiment in Regulatory Reporting*, 55 ADMIN. L. REV. 607, 622, 624 (2003) (describing the use of prompt letters to encourage cost-efficient regulation); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2290-99 (2001) (discussing presidential directives of agency action).

[4] *See, e.g.*, Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1428-36 (1992) (describing incidents of regulatory delay as a result of OMB review). For a recent discussion, with citations to the literature, see Bagley & Revesz, *supra* note 3, at 1268-70.

[5] *See generally* Harold H. Bruff & Ernest Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977) (discussing the effect of the legislative veto on the rulemaking process and the relationships between the branches of government); Michael Herz, *The Legislative Veto in Times of Political Reversal:* Chadha *and the 104th Congress*, 14 CONST. COMMENT. 319 (1997) (discussing *Chadha* and the legislative veto in light of changes in the political composition of Congress); Robert F. Nagel, *The Legislative Veto, the Constitution, and the Courts*, 3 CONST. COMMENT. 61 (1986) (challenging the constitutional basis of *Chadha*).

tion[6] are all potential mechanisms for controlling agency behavior. This Article focuses on a more basic mechanism of control that has surprisingly gone comparatively unnoticed in the literature on administrative agencies: control of the *timing* of administrative action.[7] Deadlines requiring agencies to commence or complete action by a specific date are common in the modern administrative state. For example, deadlines are found throughout many modern environmental statutes.[8] Environmental legislation is hardly an exception in this regard, however. Unfortunately, even basic descriptive statistics about the frequency and nature of deadlines are lacking, never mind a fully elaborated theory of regulatory deadlines.[9] This Article provides a doctrinal, theoretical, and empirical analysis of deadlines in administrative law.

Administrative deadlines are important for several reasons. First, notwithstanding the range of potential tools Congress uses to control the bureaucracy, specifying the content of agency rulemakings or adjudications is often difficult, if not impossible, ex ante.[10] A central

---

[6] *See* Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201 (2007) (discussing the use of agency jurisdiction as a mechanism for congressional control of agencies).

[7] For examples of the scant research on the impact of deadlines, see Alden F. Abbott, *The Case Against Federal Statutory and Judicial Deadlines: A Cost-Benefit Appraisal*, 39 ADMIN. L. REV. 171 (1987) [hereinafter Abbott, *Cost-Benefit Appraisal*]; Alden F. Abbott, *Case Studies on the Costs of Federal Statutory and Judicial Deadlines*, 39 ADMIN. L. REV. 467 (1987) [hereinafter Abbott, *Case Studies*]; Eric Biber, *The Importance of Resource Allocation in Administrative Law: A Case Study of Judicial Review of Agency Inaction Under the Administrative Procedure Act*, 60 ADMIN. L. REV. (forthcoming 2008) (manuscript at 28-36), *available at* http://ssrn.com/abstract=981941; Gregory L. Ogden, *Reducing Administrative Delay: Timeliness Standards, Judicial Review of Agency Procedures, Procedural Reform, and Legislative Oversight*, 4 U. DAYTON. L. REV. 71 (1979); Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61 (1997); and Jason Webb Yackee & Susan Webb Yackee, Is Federal Rulemaking "Ossified"? The Effects on Congressional, Presidential, and Judicial Oversight on the Agency Policymaking Process (Jan. 3, 2008) (unpublished manuscript, on file with authors). The study of deadlines is related to the study of statutory hammers. *See, e.g.*, George A. Bermann, *Administrative Delay and Its Control*, 30 AM. J. COMP. L. 473 (Supp. 1982); M. Elizabeth Magill, *Congressional Control over Agency Rulemaking: The Nutrition Labeling and Education Act's Hammer Provisions*, 50 FOOD & DRUG L.J. 149 (1995).

[8] *See generally* Envtl. & Energy Study Inst. & Envtl. Law Inst., Statutory Deadlines in Environmental Legislation: Necessary but Need Improvement (Sept. 1985) (unpublished manuscript, on file with authors).

[9] The available evidence is almost exclusively focused on environmental policy, which is important, but far from the only substantive context for deadlines.

[10] *See generally* Jacob E. Gersen & Eric A. Posner, *Timing Rules and Legal Institutions*, 121 HARV. L. REV. 543, 584-88 (2007) (arguing that by regulating the timing of regulation, Congress can affect its content).

premise of the administrative state is that agencies have better information and greater expertise than Congress, thus the need for delegation to agencies.[11] Because narrow delegations with extensive substantive restrictions would eliminate agency discretion and expertise in policymaking, it is rare that Congress specifies the actual content or substance of agency decisions. Absent the ability to regulate content directly, the most obvious way of controlling agency behavior is to regulate either the method or the timing of agency decision making. The former has received exhaustive attention in administrative law. Structure and process scholars have long emphasized the importance of procedural requirements in organic statutes, the Administrative Procedure Act (APA),[12] administrative common law,[13] and the Constitution.[14] Efforts to regulate the timing of agency decisions have received virtually no attention comparatively.[15]

---

[11] *See* Philippe Aghion & Jean Tirole, *Formal and Real Authority in Organizations*, 105 J. POL. ECON. 1 (1997) (analyzing authority delegated to agencies as a function of information distribution); Kathleen Bawn, *Political Control Versus Expertise: Congressional Choices About Administrative Procedures*, 89 AM. POL. SCI. REV. 62 (1995) (analyzing the tradeoff between political control and agency expertise); Jonathan Bendor & Adam Meirowitz, *Spatial Models of Delegation*, 98 AM. POL. SCI. REV. 293 (2004) (extending delegation models to consider costs of information gathering); Sean Gailmard, *Discretion Rather than Rules: Choice of Instruments To Constrain Bureaucratic Policy-Making*, POL. ANALYSIS (forthcoming 2008) (comparing "menu laws" (rules) and "action restrictions" (discretion) as tools of control in delegation); Matthew C. Stephenson, *Bureaucratic Decision Costs and Endogenous Agency Expertise*, 23 J.L. ECON. & ORG. 469 (2007) (analyzing the impact of decision costs on the development of agency expertise); Steven Callander, A Theory of Policy Expertise (June 11, 2007) (unpublished manuscript, on file with authors) (predicting delegation of complex matters to agencies expert in the policymaking process).

[12] *See generally* Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987); McCubbins et al., *supra* note 2; Emerson H. Tiller, *Controlling Policy by Controlling Process: Judicial Influence on Regulatory Decision Making*, 14 J.L. ECON. & ORG. 114 (1998).

[13] *See* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113 (1998); Richard W. Murphy, Hunters *for Administrative Common Law*, 58 ADMIN. L. REV. 917 (2006).

[14] *See, e.g.*, Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2111-14 (1990).

[15] There is a small literature on the timing of judicial review and its impact on administrative law. *Compare* JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 69-83 (1990) (lamenting that statutory deadlines hindered rulemaking by NHTSA in the 1960s and 1970s), *and* Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability*, 57 LAW & CONTEMP. PROBS., Spring 1994, at 185, 233-38 (criticizing the presumptive availability of preenforcement judicial review), *with* Mark Seidenfeld, *Playing Games with the Timing of Judicial Review: An Evaluation of Proposals To Restrict Pre-Enforcement Review of Agency*

Second, delay is an increasingly prominent fixture in administrative law.[16] A recurrent complaint about regulatory policy in the 1980s and 1990s was that agency decision making was crumbling under burdensome and time-consuming procedural requirements of the APA and organic statutes, as interpreted by the courts.[17] When agencies act slowly, or refuse to act at all,[18] courts are rarely in a position to dictate specific outcomes. Essentially the only remedy available is to order some agency action within a specified time period—that is, to impose a deadline. Although prior scholarship has occasionally analyzed the effects of deadlines,[19] the commentary contains virtually no consistent and systematic conclusions based on empirical data about the use and implications of deadlines in administrative law.[20]

Both of these justifications emphasize the use of deadlines to control agencies. Deadlines also illustrate several potential problems for the internal coherence of administrative law. A running theme in

---

Rules, 58 OHIO ST. L.J. 85 (1997) (arguing that delaying judicial review of agency rules until an agency brings enforcement proceedings will typically be inefficient).

[16] *Compare* McGarity, *supra* note 4, at 1387-88 (describing the factors that contribute to the increasingly long rulemaking process), *and* Richard J. Pierce, Jr., *Seven Ways To Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 65 (1995) (describing rulemaking as an "extraordinarily lengthy, complicated, and expensive process"), *with* William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability To Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 445 (2000) (arguing that there is no ongoing dilatory process of ossification), *and* Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1470 (1992) ("[I]nformal rulemaking, generally, is *not* ossified.").

[17] *See* STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE 57-59 (1993); MASHAW & HARFST, *supra* note 15, at 95-103; Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525 (1997); McGarity, *supra* note 4.

[18] *See generally* Biber, *supra* note 7 (arguing that the potential ramifications of agency inaction justify judicial review); Eric Biber, *Two Sides of the Same Coin: Judicial Review Under APA Sections 706(1) and 706(2)*, 26 VA. ENVTL. L.J. (forthcoming 2008), *available at* http://ssrn.com/abstract=981961 (exploring doctrine concerning agency inaction); Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657 (2004) (explaining how political accountability without judicial oversight encourages agency inaction).

[19] *See, e.g.*, Abbott, *Case Studies*, *supra* note 7; Magill, *supra* note 7.

[20] The few papers of which we are aware focus either on case studies, *see, e.g.*, Abbott, *Case Studies*, *supra* note 7, or on a single agency, *see, e.g.*, Magill, *supra* note 7; Daniel Carpenter et al., Deadline Effects in Regulatory Drug Review: A Methodological and Empirical Analysis (Mar. 2007) (unpublished manuscript, on file with authors) (discussing the effects of timing goals imposed on the Food and Drug Administration by the Prescription Drug User-Fee Act). We recently learned about an independent empirical study of the duration of rulemaking using data similar to ours that briefly considers the effect of statutory and judicial deadlines but that focuses on other constraints on agencies. *See* Yackee & Yackee, *supra* note 7.

administrative law cases and commentary is the preservation of agency flexibility.[21] Courts are typically hesitant to overrule agency decisions about whether to utilize rulemaking or adjudication to produce policy,[22] whether to utilize formal or informal methods,[23] or whether to pursue a given enforcement or adjudication.[24] The explanations for these doctrines are many, but one key reason is that agencies themselves (rather than external actors) should determine how best to allocate internal resources.[25] Administrative deadlines run counter to these strands of doctrine because in a world of limited resources, deadlines reshuffle agency resources from nondeadline actions to deadline actions. In certain contexts this may be desirable, but it is also at odds with core themes in the law of the administrative state.

Using newly assembled data,[26] this Article establishes how often deadlines are used, against which agencies they are levied, and what the direct and indirect effects of deadlines are on agency actions. Part I provides a theoretical framework for analyzing the use and misuse of deadlines. We focus on the reasons Congress might choose to control agencies using timing restrictions instead of either substantive constraints or structure and process restrictions.

Part II presents an empirical portrait of administrative deadlines. We present data on the frequency, nature, and type of deadlines used to structure agency decisions. Deadlines generally *do* increase the pace of agency action, but these effects are modest. Not surprisingly, deadlines tend to be imposed on more important and significant

---

[21] *See* Magill, *supra* note 7, at 186-89 (criticizing the constraints on agency action imposed by a hammer). For a recent variant on the theme, see Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272, 1274 (2002). *See generally* Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 544 (1978) (discussing the "very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure").

[22] *See* SEC v. Chenery Corp., 332 U.S. 194, 202 (1947) ("In performing its important functions . . . an administrative agency must be equipped to act either by general rule or by individual order."); Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 YALE L.J. 952, 1000-01 (2007).

[23] *See, e.g.*, United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 240 (1973).

[24] *See* Heckler v. Chaney, 470 U.S. 821, 831 (1985) ("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion.").

[25] *See* Biber, *supra* note 7, at 11-15.

[26] For a more general overview and discussion, see Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Administrative State*, 94 VA. L. REV. (forthcoming June 2008).

regulatory actions, and the vast bulk of deadlines are issued against just a handful of administrative agencies. Out of a concern for related changes in administrative decision making, we also ask whether agency decisions constrained by deadlines are more likely to be issued using different procedures than nondeadline decisions. Deadlines are associated with interim final rulemaking, a deviation from the ordinary mode of notice and comment informal rulemaking.

Part III examines "deadline doctrines": the way that courts address the presence of deadlines in administrative law. When a statutory deadline exists, many courts excuse agency failures to use required procedures; some courts relax the intensiveness of substantive review.[27] In other contexts, the presence of deadlines makes legal challenges both more likely to survive threshold questions, allowing litigation to proceed, and more likely to result in agency defeats.[28] Many of these deadline doctrines are in tension with standard themes in administrative law.

Against this backdrop, Part IV presents some tentative normative implications. For example, if courts tend to exempt deadline actions from notice and comment procedures, agencies may intentionally avoid the costly and time-consuming process of notice and comment regulation. To the extent that public input and reasoned agency deliberation are valuable, deadlines often undermine those goals. There are many nuances and countervailing effects discussed more extensively below. The analysis, however, illustrates many of the risks and benefits from deadlines. In any given policy domain, deadlines can force desirable agency action, prompting welfare-maximizing or accountability-enhancing action by recalcitrant agencies. Deadlines can, however, also produce undesirable side effects, such as costly uncertainty and delay in domains where action is important, lower-quality decisions for deadline-constrained actions, and procedural shifts toward less desirable modes of decision making.

I. THEORY

Deadlines for administrative agencies are generally imposed by Congress. Theories of congressional choice are legion, and we attempt to remain generally agnostic as between them. Perhaps Congress should be treated as a single institution for decision making; or

---

[27] *See infra* Part III.

[28] *See infra* Part III.

maybe it should be disaggregated, focusing on parties, interests, committees, or individual legislators. Perhaps congressional action is best understood from the perspective of public choice. At the margin, these theories trade off parsimony and accuracy. Although we assume the interaction between Congress and the bureaucracy is best modeled as a principal-agent problem, there is no question that these models abstract away from many institutional details. The discussion that follows is therefore somewhat heterogeneous, drawing on insights from several models of congressional behavior. In a sense, we are engaged in "off-the-rack" theorizing. Rather than advance a novel theory of congressional choice as correct, we take the most common theoretical frameworks and apply them to deadlines, progressively relaxing or expanding assumptions. The analysis begins with a simplified problem of institutional design, assuming a unitary Congress, agency, and court. This assumption is then relaxed, emphasizing how intra- and inter-institutional heterogeneity affects the use and misuse of deadlines.

A. *Institutional Design*

Suppose there are three actors—a principal, an agent, and a monitor—that correspond imperfectly to Congress, an administrative agency, and a court, respectively. The design problem for Congress involves four decisions: (1) delegation versus congressional casework, (2) substantive discretion, (3) procedural restrictions, and (4) judicial enforcement. Assume Congress prefers the policy that is implemented to be closer to its preferences (a simple spatial model).[29]

Suppose the principal seeks to accomplish some arbitrary end, a new policy problem. Congress must first decide whether to generate policy internally, using its own resources, or externally, by delegating to an agency. If Congress delegates, it must select the level of substantive restrictions on the agency. Substantive restrictions might derive from a narrow statutory mandate, from a low level of discretion (or, equivalently, a very high level of statutory detail), from the express prohibition of certain policies, or from a limited grant of jurisdiction or authority. Assume that agencies have information and expertise that Congress does not, but that a rational principal would want the agent to utilize in formulating policy. Congress cannot easily demand

[29] This simple model assumes that Congress cares about the substance of the regulatory system.

that regulatory outcomes coincide with its preferences simply because Congress prefers the agency to use its expertise in a certain way. Thus, some degree of substantive discretion almost always accompanies delegation to the bureaucracy.

Given a level of substantive constraint, Congress must select from a menu of familiar procedural restrictions. An agency's organic statute might require that specific decision-making procedures be utilized.[30] Alternatively, the organic statute might trigger requirements of the APA, mandating, for certain types of decisions, formal rulemaking,[31] formal adjudication,[32] or informal notice and comment rulemaking. The statute might require that certain substantive policy goals be considered prior to a final decision, as the National Environmental Policy Act (NEPA) does.[33] A statute might regulate the transparency of agency decisions, as do sunshine statutes.[34] Or the organic statute might mandate that specifically identified actors within the bureaucracy consider the evidence and make ultimate policy decisions.[35] In addition, statutes may restrict who can serve in these decision-making positions.[36] It is now conventional wisdom that restrictions on the process by which agencies make decisions constitute a powerful tool for affecting policy and limiting bureaucratic drift.

---

[30] *See, e.g.*, National Labor Relations Act, 29 U.S.C. §§ 151–169 (2000).

[31] *See* United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 241 (1973).

[32] *Compare* City of W. Chi. v. U.S. Nuclear Regulatory Comm'n, 701 F.2d 632, 641 (7th Cir. 1983) (permitting informal adjudication), *with* Union of Concerned Scientists v. U.S. Nuclear Regulatory Comm'n, 735 F.2d 1437, 1444 n.12 (D.C. Cir. 1984) (suggesting that the statute required formal adjudication).

[33] *See* 42 U.S.C. § 4332(2)(C) (2000) (requiring a detailed statement considering the environmental impact of major federal actions); *see also* Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 551 (1978) (delineating the scope of the statutory requirement to consider alternatives to proposed actions). *See generally* Celia Campbell-Mohn & John S. Applegate, *Learning from NEPA: New Guidelines for Responsible Risk Legislation*, 23 HARV. ENVTL. L. REV. 93 (1999) (describing the scope of NEPA's requirements).

[34] *See* Elizabeth Garrett & Adrian Vermeule, *Transparency in the U.S. Budget Process*, *in* FISCAL CHALLENGES: AN INTERDISCIPLINARY APPROACH TO BUDGET POLICY 68, 72 (Elizabeth Garrett et al. eds., 2008) (analyzing the impact of sunshine statutes on the budget process); Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CAL. L. REV. 1655, 1717-27 (2006) (analyzing the costs and benefits of transparency for democratic legitimacy and agency effectiveness).

[35] *See, e.g.*, *Fla. E. Coast Ry.*, 410 U.S. at 230-32 (describing authority granted to the Interstate Commerce Commission to regulate freight car rates).

[36] *See* O'Connell, *supra* note 1, at 14-22.

Within the structure and process literature, however, temporal restrictions have received far less attention.[37]

Congress must also decide whether to make such provisions judicially enforceable, which generates another set of agency problems.[38] Even if judges are faithful agents of Congress[39] (a claim of dubious accuracy), there is still a nontrivial risk of judicial error such that judges may strike down agency actions that Congress would prefer be upheld and uphold actions Congress would prefer be struck down. We assume that the risk of error is higher for the enforcement of substantive limitations on agencies (such as jurisdictional determinations) than for temporal restrictions on agencies (such as deadlines).[40] The timing of agency action will generally be easier to evaluate (against a statutory deadline) than the content of a rule (against substantive statutory standards).

This is true for courts, but it is true for Congress as well. There is a tradeoff between the temporal dimension and the substantive dimension of policy. To illustrate, suppose Congress has a temporal preference as well as a substantive preference. It is easier to specify and monitor compliance for the temporal preference (say with a quick deadline), but doing so may produce shirking or reductions in quality along the substantive dimension. Congressional choice about whether to regulate substance, timing, or procedure depends in part on the costs of specifying the rule ex ante and monitoring agency compliance along each dimension ex post.

Consider a conservative Congress in favor of deregulation and a pro-regulation agency. When Congress enacts a deregulatory statute, the agency can shirk in one of two ways. It can pass new regulations that have the appearance of deregulating, but not the effect. Alterna-

---

[37] *But see* EPSTEIN & O'HALLORAN, *supra* note 2, at 14-33 (arguing that the politics of temporal delay insulate bureaucrats from external, inexpert control).

[38] *See* Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1036 (2006) (comparing the consequences of delegating statutory interpretation authority to agencies rather than courts).

[39] *See, e.g.*, William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975) (exploring whether independent judges undermine legislative policy choices).

[40] *See* Gersen & Posner, *supra* note 10, at 579-82 (arguing that courts have more difficulty with substantive review than with the enforcement of timing rules because of doctrine requiring judges to "determine whether a state interest is 'compelling enough' or whether a statute is 'related enough,' for example, to interstate commerce").

tively, the agency can delay deregulation. An agency might shirk either because of laziness or because of preference divergence, but in either case it will generally be more difficult for Congress to distinguish "good delay" from "bad delay" than "good regulation" from "bad regulation." Delay may be a better way of shirking than producing low-quality regulations. If so, statutory deadlines affect the vehicle that agencies use to shirk, shifting shirking from harder-to-monitor to easier-to-monitor behavior.

This direct effect is almost an unqualified good from the principal's perspective; however, deadlines can produce other, negative side effects. Suppose Congress imposes extensive procedural requirements and a quick deadline. A straightforward potential result is to decrease the quality of agency deliberations and decisions.[41] If a task that normally takes six hours to finish must be completed in one hour, a natural inference is that the quality of the output will be sacrificed. Indeed, emerging empirical evidence suggests precisely this conclusion in the context of certain Food and Drug Administration (FDA) decisions under deadline constraints.[42] If agencies must attempt to satisfy extensive procedural requirements in an unrealistic timeframe, the quality of agency decisions will likely fall, all else being equal.[43]

These deadline dynamics also have implications for agency actions not constrained by deadlines. In addition to the direct effect on the timing and quality of agency action, deadlines will often change the internal allocation of resources.[44] If agencies allocate resources according to the temporal priority of different programs, a close deadline will draw resources from other policy areas; a far-off deadline will allocate resources to other areas in the interim. If there is a correla-

---

[41] *See* Frank B. Cross, *Pragmatic Pathologies of Judicial Review of Administrative Rulemaking*, 78 N.C. L. REV. 1013, 1047 (2000) (describing the "sham regulations" resulting from judicial intervention in the Environmental Protection Agency's regulation of radionuclides); McGarity, *supra* note 4, at 1456 ("[L]imited agency resources may be expended in litigation over deadlines rather than in writing regulations."). It is possible, however, that deadlines make it easier for an agency to act, functioning perhaps as a necessary credible commitment device. *Cf.* O'Connell, *supra* note 26, at 17 n.82 (explaining that the transition period between an end-of-term election and a new President's inauguration can be a "needed credible commitment device" for agencies to promulgate rules).

[42] Carpenter et al., *supra* note 20, at 21.

[43] *See id.*

[44] *Cf.* Biber, *supra* note 7 (describing judicial review of agency choices between deadlines and resource allocation); Pierce, *supra* note 7, at 77-84 (discussing the difficulties that agencies face when Congress confuses their lack of resources with unproductiveness and imposes temporal restrictions).

tion between timing and quality, the use of deadlines in one policy area may affect the quality of decisions in others. In a world of limited resources, rational agencies will be forced to allocate time and energy away from agency programs without deadlines and toward programs with deadlines.

Because of the link between timing rules and substance, there is also a danger that deadlines can allow some legislators to make an end run around existing procedural requirements. For example, the legislative rule doctrine in administrative law requires notice and comment rulemaking for the promulgation of certain types of agency decisions.[45] For legislators seeking to avoid the lengthy process of informal rulemaking, but who (for one reason or another) prefer not to directly exempt the agency action from notice and comment requirements,[46] imposing a deadline might obviate those requirements indirectly,[47] at least so long as courts exempt these decisions from such requirements because of the deadline.

B. *Extensions*

The common assumption that Congress is a unitary actor corresponds poorly to reality. There is heterogeneity both within a given Congress, as partisan and ideological differences abound, and across Congresses over time, as policy views shift and controlling majorities shift from Democrat to Republican or vice versa. Within a given Congress, partisanship is a main—if not dominant—determinant of legislative behavior.[48] Legislators from different states and districts should, by design, represent different public and private interest groups. The median preferences of the House of Representatives are typically thought to differ significantly from the median preferences of the

---

[45] The importance of distinguishing legislative and nonlegislative rules has been the subject of scholarly debate. *See, e.g.*, William Funk, *Legislating for Nonlegislative Rules*, 56 ADMIN. L. REV. 1023 (2004); William Funk, *When Is a "Rule" a Regulation? Marking a Clear Line Between Nonlegislative Rules and Legislative Rules*, 54 ADMIN. L. REV. 659 (2002); John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 914-27 (2004); *see also* Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 520, 542 (1977); Jacob E. Gersen, *Legislative Rules Revisited*, 74 U. CHI. L. REV. 1705 (2007); Kevin W. Saunders, *Interpretative Rules with Legislative Effect: An Analysis and a Proposal for Public Participation*, 1986 DUKE L.J. 346, 352.

[46] *See infra* note 128.

[47] *See infra* Part III.

[48] *See generally* JOHN H. ALDRICH, WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA (1995).

Senate.[49] Modeling congressional decision making, then, might require an explicit focus on coalitional bargaining within the legislature.

Just as there will be bargaining about the substantive requirements of the bill, there will also be bargaining over procedural provisions, such as whether the statute will contain a sunset clause, a deadline for agency action, or other reporting and deliberation requirements. Sometimes legislators will be indifferent between substance and procedure: legislators should be willing to trade off gains along one of these dimensions for gains along another. If the imposition of deadlines on agencies produces a net reduction in agency effectiveness, then a skeptical legislator may be willing to vote for a stronger substantive bill that also includes an unrealistic deadline. Deadlines should be as much a point of legislative bargaining as other statutory provisions. Statutory deadlines affect the timing of the distribution of benefits. Private or public actors with varying time preferences may prefer to solidify the timing of a regulatory benefit, even at the cost of a higher substantive guarantee.

More importantly, for an enacting legislative coalition, there are always at least two threats to a new statute. The first is bureaucratic drift—the risk that agencies implementing the statute will alter it. There is also a corresponding threat of legislative drift. A future legislature might amend or repeal the statute once control of the legislature shifts.[50] Congressional preferences also vary over time as control of the legislature shifts or policy views change. Decisions about the content of substantive and procedural restrictions must reflect a balance between these two types of threats.

---

[49] *Cf.* Keith Krehbiel, *Are Congressional Committees Composed of Preference Outliers?*, 84 AM. POL. SCI. REV. 149, 155 (1990) (finding considerable ideological variation in congressional committees); John Londregan & James M. Snyder, Jr., *Comparing Committee and Floor Preferences*, 19 LEGIS. STUD. Q. 233, 262 (1994) (finding that at least one-third of House committees are preference outliers).

[50] *See* Murray J. Horn & Kenneth A. Shepsle, *Commentary on "Administrative Arrangements and the Political Control of Agencies": Administrative Process and Organizational Form as Legislative Responses to Agency Costs*, 75 VA. L. REV. 499, 503-04 (1989) (addressing the problems of legislative drift and how legislatures can impose costs and rules to influence future coalitions); Kenneth A. Shepsle, *Bureaucratic Drift, Coalitional Drift, and Time Consistency: A Comment on Macey*, 8 J.L. ECON. & ORG. 111, 116 (1992) (supporting a judicial role in reducing legislative drift); *see also* J.R. DeShazo & Jody Freeman, *The Congressional Competition To Control Delegated Power*, 81 TEX. L. REV. 1443, 1457-59 (2003) (arguing that scholars too often forget about legislative drift and that agencies rarely respond to a "consistent voice" in Congress); O'Connell, *supra* note 26, at 52-53 (presenting empirical evidence of the unique demands placed on agencies as a result of legislative drift).

The bureaucratic drift versus legislative drift tradeoff is a standard and general point. Deadlines, however, can balance these risks in an innovative way. An agency could be required to issue its rule during the current congressional session. In that case, the deadline guards against bureaucratic drift by ensuring that the enacting Congress gets to see (and possibly object to) the final regulation. In this way, the timing rule affects monitoring: deadlines allow legislators to respond to criticism and complaints by private parties.[51]

Short statutory deadlines can also mitigate the risk of legislative drift by ensuring that agency action is implemented during the current Congress. The conventional wisdom is that Congress must choose between giving up legislative control, which creates a risk of bureaucratic drift, or maintaining long-term legislative control, which creates a risk of legislative drift. This is not necessarily true of temporal restrictions. Unlike other tools that tend to control one type of drift at the expense of another, statutory deadlines have the potential to jointly manage both.[52]

While this is a real effect in theory, most deadlines appear to be set in one Congress but impose obligations during a future Congress. These latter deadlines may serve more traditional political ends. Suppose the deadline comes due before the next presidential election. So long as a congressional election takes place during the deadline time period, the risk of legislative drift increases and the role of parties in managing that risk grows. Consider a time period of frequent political turnover (high instability) during which Congress enacts legislation authorizing the regulation of some facet of the financial services industry. Setting a deadline for the issuance of new Securities and Exchange Commission regulations prior to the next congressional election provides more protection for the regulatory regime.[53] The future legislature can always repeal or alter the program, but once regulations have been implemented, some form of status quo

---

[51] *See* Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 173-76 (1984).

[52] To the extent that deadlines are set and terminate during the same Congress, the timeframe for agency action is very short. Deadlines of this sort, say six to fourteen months, are possible. However, short deadlines may cause courts to sympathize with agency arguments that there is good cause to avoid notice and comment procedures. The short deadline provides political benefits, but also comes with some procedural costs. In part, oversight hearings and more careful monitoring of agency action can compensate for these costs.

[53] *Cf.* O'Connell, *supra* note 26, at 53-56 (presenting the implications of midnight and crack-of-dawn congressional action).

bias may make it marginally harder to eliminate them—especially during periods of divided government.[54] Similarly, within the bureaucracy, certain agencies are perceived to be friendly to business or to labor, in favor of more regulation or laissez-faire. If the use of deadlines is political, then it should vary across agencies and legislatures. Democratic legislatures should use deadlines more often to constrain pro-business agencies; Republican legislatures should use deadlines to control pro-labor or pro-environment agencies.

The willingness of judges to enforce deadlines aggressively will have an obvious impact on the willingness of legislators to rely on deadlines. To the extent that statutory deadlines require judicial enforcement, the degree of heterogeneity within the judiciary or judicial doctrine over time will make deadlines more or less attractive to legislators.

In sum, deadlines are an important element of the legislative toolkit, whose use and misuse implicate core problems of institutional design. The optimal use of deadlines by Congress will depend on how courts treat deadlines, how agencies respond to judicial doctrines, and the underlying political dynamics within and across the branches of government. This Part has emphasized the range of relevant variables that constrain congressional choice about deadlines. Ultimately, however, to say that deadlines are used too much or too little, in the right circumstances or the wrong ones, a systematic empirical analysis is required.

II. EMPIRICAL ANALYSIS

Although a nascent literature studies the use of deadlines in applied contexts,[55] there is little systematic evidence on the prevalence and implications of administrative deadlines for agency rulemaking.[56] How frequently are deadlines imposed on agencies? Which agencies

---

[54] *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 5-7 (1982).

[55] *See, e.g.*, Abbott, *Case Studies*, *supra* note 7 (using case studies of eleven federal agencies to show the ineffectiveness of administrative deadlines); *cf.* Amy Whritenour Ando, *Waiting To Be Protected Under the Endangered Species Act: The Political Economy of Regulatory Delay*, 42 J.L. & ECON. 29 (1999) (finding that public pressure plays a major role in the length of agency delays); Daniel P. Carpenter, *Groups, the Media, Agency Waiting Costs, and FDA Drug Approval*, 46 AM. J. POL. SCI. 490 (2002) (analyzing the effect of political influence on FDA delays); Mary K. Olson, *Managing Delegation in the FDA: Reducing Delay in New-Drug Review*, 29 J. HEALTH POL. POL'Y & L. 397 (2004) (examining whether budgetary constraints or revised procedures were responsible for the increased speed of new-drug review by the FDA).

[56] This Article is limited to agency rulemaking. Agencies also face deadlines for adjudications, policy statements, reports, and other actions.

are most likely to be constrained by deadlines? A preliminary but extremely important question is whether deadlines matter at all. Do deadlines produce faster agency decisions? If so, do deadlines change other aspects of the administrative process by shifting agency decision making away from certain conventional procedures like notice and comment and toward less time-consuming mechanisms? Although the answers to these questions are necessarily tentative, our analysis suggests that there are critical tradeoffs between the timing of agency action, the procedures used to make agency decisions, and the quality of regulatory policy.[57]

---

[57] The data are drawn from agency semiannual reports from April 1983 to October 2003 in the *Unified Agenda of Federal Regulatory and Deregulatory Actions*, which is published in the *Federal Register*. For a detailed description of the data and their advantages and limitations, see O'Connell, *supra* note 26, at 22-25 & nn.99-108. The *Unified Agenda* reports represent a successive picture of agency activity; therefore, there is considerable overlap among the semiannual reports. In other words, a rule may appear multiple times in various editions of the *Unified Agenda*: the first appearance may reflect the Notice of Proposed Rulemaking (NPRM), the second may indicate the end of the comment period, and the third may describe the final promulgation of the rule. Each appearance typically includes all previously disclosed information. Thus, it is critical to remove duplicate entries in the analysis so that particular rulemaking actions, such as an NPRM, are counted only once. For most of the analysis presented here, where there are multiple entries using the same Regulation Identifier Number (RIN) (a unique identifier), only the most recent *Unified Agenda* report entry was retained for each RIN. This means, however, that if an earlier entry for a RIN contained information on a deadline but a later entry for that same RIN did not, that deadline information would not be captured in the data. For some of the analysis (e.g., Tables 1-2 and Figures 1-2), if there was no deadline reported, the most recent *Unified Agenda* entry was retained for each RIN; if there was a deadline reported, however, the most recent of all *Unified Agenda* entries with the same RIN and deadline information (deadline type, deadline stage, and deadline date) was retained. For this subset of the analysis, deadline information therefore is not lost. In order to pair deadline information with other attributes of regulatory actions, the more crude duplication rule (i.e., the deletion of all previous entries of the same RIN) had to be applied. Thus, for most of the analysis (other than Tables 1-2 and Figures 1-2), we are undercounting the presence of deadlines. Agencies did not report on deadlines until the 1988 *Unified Agenda*. The information reported starting in 1988, however, contains some data on deadlines prior to 1988.

Legislative and judicial deadlines are primarily classified in the data files under one of three categories: commencement of action, completion of action, and other. The "commencement" category usually refers to deadlines for the issuance of NPRMs. The "completion" category includes mandates for completed rules (including interim final rules) and other final agency actions (including announcements). The "other" category includes such items as Advance Notices of Proposed Rulemaking.

In addition to classifying the type of deadline, agencies often also report the date of the deadline. Some agencies, however, do not provide dates for some of the deadlines they report. The Department of Commerce, for example, lists a significant number of deadlines, but does not report dates for many of those deadlines.

A. *Descriptive Overview*

1. Deadlines over Time

Table 1 presents the number of statutory, judicial, and total deadlines by year.[58] The use of deadlines was highest in the early 1990s, with 296 in 1991 and 298 in 1992, and in 2000, with 317. After the early 1990s, the use of deadlines appears to fall off somewhat. In 1998 and 1999 there were only 194 and 151 deadlines due, respectively, but the number increased again by 2000. While the existence of deadlines varied significantly from year to year, the use of deadlines did not seem to be uniformly increasing or decreasing.

The second thing to note from Table 1 is the relative composition of deadlines. In any given year, most of the deadlines faced by agencies were statutory rather than judicial deadlines (thus the emphasis on congressional choice in Part I). Figure 1 presents a graph of deadlines over time, decomposing the total deadlines into statutory and judicial deadlines. In most years, statutory deadlines constituted the vast bulk of deadlines imposed on agencies, hovering between 70% and 95%. Interestingly, however, there were exceptions. For example, judicial deadlines constituted over 40% of all deadlines imposed in 1998, 2001, and 2003, suggesting that judicially imposed deadlines, though less common than statutory deadlines, are a real and important conceptual category.

2. Deadlines by Agency

Table 2 disaggregates deadlines by the agency on which they were imposed. Most agencies reported few statutory or judicial deadlines during the covered time period. However, a handful of agencies listed more than 100 deadlines during this relatively brief period. The Environmental Protection Agency (EPA) faced over 1000 deadlines, more than any other agency. In addition, the Department of Commerce confronted over 950 deadlines, the Department of Interior received nearly 500 deadlines, and the Department of Transportation (DOT) and the Department of Agriculture (USDA) each received more than 350 deadlines. The Department of Health and Human Services (HHS) faced 335 deadlines in aggregate.

---

[58] The Table contains deadline counts where the agencies reported specific dates (including month, day, and year). Because agencies often report deadlines without specific dates, these numbers do not reflect the full scope of actual deadlines.

For most agencies, deadlines are imposed by Congress rather than courts. There are, however, a few obvious outliers. The Department of Interior, for example, reported 209 judicial deadlines and 279 statutory deadlines, suggesting an ongoing dispute with the courts. The only other agency with a significant number of judicially imposed deadlines is the EPA. The EPA's Air and Radiation division listed 309 deadlines from the courts, and its Water division submitted information on 243 deadlines from the courts. Most of these deadlines presumably derive from the almost perpetual litigation over rules promulgated pursuant to the Clean Air Act and Clean Water Act. The EPA's Solid Waste and Emergency Response division reported 169 judicial deadlines. Only this division and the Water division listed more judicial deadlines than statutory deadlines.

Figure 2 traces the number of statutory deadlines reported for four major agencies from 1988 to 2003: the USDA, EPA, HHS, and DOT. A few points are noteworthy. First, there are two evident spikes in the plot. One affected three, possibly four, agencies in the late 1980s and early 1990s, including the USDA, EPA, DOT, and arguably the HHS (though the increase in deadlines is lower for HHS than the other three agencies). Given the relatively steady use of deadlines throughout the other years in the sample for all agencies (except the EPA), the graph suggests an uptick in the use of deadlines at or around the late 1980s and early 1990s. The other spike occurred around the year 2000, but only for the EPA. If one were to draw a regression line through these data points, it would be very slightly downward sloping, but virtually flat. For single agencies, the line would be more sharply downward sloping for the DOT and USDA. Figure 2 is useful as an initial overview, but it also may mask a good deal of potential variation. For example, even if the use of deadlines has not changed over time, rules with deadlines might still differ from nondeadline rules, or agency responses to deadlines could change over time, even if aggregate congressional usage did not.

3. Overlap of Statutory and Judicial Deadlines

Table 2 suggests that most agencies that are subject to deadlines are subject to statutory deadlines. If judges are merely enforcing statutorily specified deadlines as opposed to creating a different set of obligations, then it makes sense to focus most of our conceptual attention on statutory deadlines, albeit with an emphasis on judges as potential enforcers. A basic way to explore this question is to ask whether the presence of a statutory deadline usually implies the pres-

ence of a judicial deadline and vice versa. A low correlation between statutory and judicial deadlines would mean that judges are rarely imposing judicial deadlines in the absence of an existing statutory deadline. As Table 3 indicates, there is a positive and statistically significant correlation between statutory and judicial deadlines, but the degree of correlation is fairly modest.[59]

Table 4 presents data on deadline overlap categorically. More than 90% of all unique regulatory actions are not associated with a deadline. Nearly 8% are associated with only statutory deadlines; about 1% are associated with only judicial deadlines; and fewer than 0.25% are associated with both judicial and statutory deadlines.[60]

4. Importance of Deadline Actions

Evaluating the practical importance of deadlines necessitates knowing about the deadlines' targets. If deadlines are not only rare, but also regulate trivial agency actions, then perhaps the topic is theoretically intriguing, but not especially important practically.

Table 5 categorizes regulatory actions according to whether or not they are "significant."[61] Of those actions accompanied by any deadline (statutory, judicial, or both), about 34% are significant regulatory actions, compared to about 20% of actions with no deadline. Although most agency actions are not significant actions, deadline actions are much more likely to be significant regulatory actions than are non-

---

[59] We use three common tests: (1) Pearson correlation with a one-tailed test for statistical significance, (2) Kendall's tau B, and (3) Spearman's rho. The Pearson statistic is technically inappropriate, given its assumption of normality in the underlying distribution, but we nonetheless report it, as it is a commonly reported—and misreported—statistic.

[60] To see why this could produce a positive correlation coefficient, note that the absence of a statutory deadline is generally associated with the absence of a judicial deadline. Thus, the two variables are positively correlated despite the fact that only 0.25% of unique RINs are associated with both judicial and statutory deadlines.

[61] The law defines "significant," or "major," rules as those that have at least a $100 million annual effect on the economy, or otherwise "adversely affect [it] in a material way." Exec. Order No. 12,866, § 3(f), 58 Fed. Reg. 51,735, 51,738 (Sept. 30, 1993), *amended by* Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 18, 2007). In the database created from the *Unified Agenda* reports, actions were deemed significant if Priority Code = 10 (Economically Significant) or 20 (Otherwise Significant), or if Major = Yes. *See* O'Connell, *supra* note 26, at 2 n.8, 62. For this analysis, we looked at reports from April 1995 to October 2003 because information on significance was not routinely reported until 1995.

deadline actions.[62] Another basic way to make this point is in Table 6, which contains simple correlations between deadlines and significant regulatory actions. All three measures produce identical and statistically significant correlation coefficients. Deadlines more often accompany significant regulatory actions than more mundane agency decisions.

Congress is also more likely to use deadlines to constrain regulatory actions that impinge on core values of democratic institutions. Table 7 contains simple correlations between underlying statutory or regulatory characteristics and the presence of an administrative deadline.[63] Each association in Table 7 is positive; deadlines are more likely to be associated with each of the regulatory category types. For example, deadlines are more likely when the regulatory policy implicates state, local, federal, or tribal governmental concerns, or unfunded mandates. The simple story is that when Congress uses a deadline, it is usually to constrain agency actions that have a broad effect on powerfully situated political interests.

B. *Changes in Agency Process*

The theoretical discussion emphasized that deadlines may change the agency decision-making process, shifting agency resources and perhaps even reducing regulatory quality. To evaluate these theoretical propositions, this Section considers the effects of deadlines on the procedures used to issue policy, the extent of public participation, and the duration of agency decisions. Deadlines alter agency behavior on all three fronts.

---

[62] This difference in means is significant in an independent samples *t*-test (RINs with any deadline (with and without an actual date) versus RINs with no deadline) at $p < 0.0001$. The test does not assume equal variances between the two samples, as that assumption is rejected by Levene's Test for Equality of Variances with $F = 504.922$ ($p < 0.0001$).

[63] All of the listed associations are statistically significant ($p < 0.001$), and although we use several different estimators to calculate the correlations, the value never varies across estimates. Agencies did not report on deadlines in the *Unified Agenda* until 1988. To compare the particular attributes of regulatory actions with the presence of deadlines, we had to restrict ourselves to data from *Unified Agenda* reports after both began to be reported, which was 1988 for government characteristics and 1995 for unfunded mandates.

1. Alternative Procedures

"Interim final rules" and "direct final rules" are two large categories of legally binding rules that are issued without prior comment.[64] One important potential change in agency process would be less reliance on standard notice and comment rulemaking procedures. Table 8 presents a breakdown of deadline and nondeadline actions and the use of interim and direct final rulemaking.[65] For purposes of discussion, focus on the columns labeled "Any Deadline" and "No Deadline." Of the agency actions accompanied by any deadline, slightly over 12% issued interim final rules, compared to under 8% of actions not accompanied by a deadline.[66]

As the bottom half of Table 8 illustrates, direct final rulemaking is used less often and is significantly less likely to be used for deadline actions. In part, this is probably because direct final rules are supposed to be used for nonsignificant actions and deadlines tend to get placed on significant regulatory actions. Although the actual percentages are extremely small—all less than 1%—the proportion of actions without a deadline for which direct final rules were issued (0.77% of Regulation Identifier Numbers (RINs)) is more than three times the proportion of actions with a deadline for which direct final rules were issued (0.21% of RINs).[67] The simple correlation between deadlines

---

[64] "Direct final rules" become effective some time after publication in the *Federal Register* unless the agency receives "adverse" comments. "Interim final rules" take effect immediately upon publication but the agencies receive comments on them after the fact. Interim final rules are supposed to be used when the agency has good cause to enact rules immediately, such as in emergency situations. U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-98-126, FEDERAL RULEMAKING: AGENCIES OFTEN PUBLISHED FINAL ACTIONS WITHOUT PROPOSED RULES 6-7 (1998); *see also* Michael Asimow, *Public Participation in the Adoption of Temporary Tax Regulations*, 44 TAX LAW. 343, 343-44 (1991) (discussing the use of interim final rules in the Treasury Department); Lars Noah, *Doubts About Direct Final Rulemaking*, 51 ADMIN. L. REV. 401, 401-02 (1999) (investigating the tendency to evade procedural requirements through direct final rulemaking).

[65] On direct final rules, see Ronald M. Levin, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1 (1995) (advocating the broad use of direct final rules in noncontroversial situations).

[66] A *t*-test of the difference in means of interim final rules in the two samples (RINs with any deadline (with and without an actual date) and RINs with no deadline) is significant at $p < 0.0001$. The test does not assume equal variances between the two samples, as that assumption is rejected by Levene's Test for Equality of Variances with $F = 293.420$ ($p < 0.0001$).

[67] The difference is significant. A *t*-test of the difference in means of direct final rules in the two samples (RINs with any deadline (with and without an actual date) and RINs with no deadline) is significant at $p < 0.0001$. The test does not assume equal

and interim final rules is positive and statistically significant, and the simple correlation between deadlines and direct final rules is negative and statistically significant, as Table 9 shows. By displacing rules from the normal notice and comment process, deadlines seem to change agency process, at least for some portion of the underlying distribution of agency actions.[68]

2. Extent of Public Participation

Different procedures do not necessarily mean lower-quality decisions. Deadlines may, however, also reduce traditional commenting and public participation in agency decision making.[69] Somewhat counterintuitively, deadlines are actually associated with a higher number of comment periods, as Table 10 illustrates.[70] Recall, however, that deadlines are more often associated with significant actions, and significant actions tend to have more extensive comment periods than nonsignificant actions.[71] The real question is whether, within the class of significant regulatory actions, deadlines generate more or fewer opportunities for public participation. Among significant actions, deadline actions are issued with significantly fewer comment periods.[72] Within the relevant subset, deadlines produce fewer chances

---

variances between the two samples, as that assumption is rejected by Levene's Test for Equality of Variances with $F = 48.105$ ($p < 0.0001$).

[68] This is not to say that all interim or direct final rules are of low quality. If, however, notice and comment is taken as the appropriate baseline, downward procedural deviations from that norm will be more likely to produce errors.

[69] *See generally* Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411 (2005) (emphasizing the importance of allowing for full public comment before issuing rules).

[70] The two variables are significantly correlated, with a simple correlation coefficient between 0.043 and 0.050 (depending on the estimator). *See infra* Table 10. The "comments" variable's value increases by one for a new comment period, a reopened comment period, or an extended comment period.

[71] *See supra* Part II.A.4.

[72] The data contain only the number of comment periods, not the number of comments. The mean number of comment periods for all significant regulatory actions with at least one deadline is 0.408, and the mean number of comment periods for significant regulatory actions without a deadline is 0.410; the difference is not statistically significant. However, there is a much larger, statistically significant difference if we restrict the data to significant regulatory actions with an NPRM with an actual date. In that case, the mean number of comment periods for significant actions with at least one deadline is 0.625, and the mean number of comment periods for such actions without a deadline is 0.815. Not every significant action actually has a comment period; for instance, an agency could issue a significant regulation as an interim final

for public input and less agency process,[73] two variables typically associated with higher-quality and more legitimate decisions. At a minimum, deadlines likely involve a tradeoff between the pace of agency action and the extent of public participation in the policymaking process.

3. Duration of Agency Actions

Because deadlines are a proposed solution to the problem of agency delay, an important question is whether deadlines actually speed up decisions. If deadlines do not change the timing of agency decisions, then the range of potential negative side effects is all the more worrisome.

Table 11 provides basic correlations of duration with regulatory significance and deadlines.[74] Significant regulatory actions take longer to complete and deadline actions finish more quickly than nondeadline actions. Expressed differently, in this same subset of data, the average duration for rulemakings that do not have any deadline reported is 528 days (95% confidence interval ranges from 511 to 546 days). By contrast, the average duration for rulemakings that have a deadline is 427 days (95% confidence interval ranges from 396 to 459).[75]

Table 12 presents disaggregated results for four agencies facing a considerable number of deadlines. Deadlines shorten duration for all these agencies, but in many cases the effect is relatively modest. The

---

rule with no previous comment periods. Also, agencies may not report comment periods to the *Unified Agenda*.

[73] A *t*-test of the difference in means of comment periods in the two samples (RINs with any deadline (with and without an actual date) and RINs with no deadline) is significant at $p < 0.0001$. The test does not assume equal variances between the two samples, as that assumption is rejected by Levene's Test for Equality of Variances with $F = 196.241$ ($p < 0.0001$).

[74] As an indicator of duration, we compute the time between the initial NPRM and a traditional final rule, final action, interim final rule, or direct final rule for RINs reporting such actions with actual dates. In the database created from the *Unified Agenda* reports, actions were counted as a final rule or final action if the rulemaking action listed in the Timetable field was coded as 330 (Final Rule) or 600 (Final Action), respectively; actions were counted as an interim final rule or a direct final rule if the rulemaking action listed in the Timetable field was coded as 50 (Interim Final Rule) or 325 (Direct Final Rule), respectively. *See* O'Connell, *supra* note 26, at 62. For this analysis, we looked only at reports to the *Unified Agenda* from April 1995 to October 2003 and retained RINs only if they had an NPRM with an actual date reported. Agencies did not report on the significance of actions, a key explanatory variable, until 1995.

[75] The confidence intervals around these means do not overlap.

average duration of USDA nondeadline actions is 401 days, versus 376 days for deadline actions. EPA nondeadline actions take an average of 685 days, versus 611 days for deadline actions. The difference for DOT is somewhat larger—586 days with no deadlines versus 440 days with deadlines. For HHS, deadlines seem to have a very large effect. HHS deadline actions are completed in an average of 445 days, while nondeadline actions take an average of 817 days. Although preliminary, these data suggest that deadlines reduce the duration of HHS action by more than 40%, but for many other agencies, deadlines reduce average length of action only modestly.

These results are suggestive, but to say anything rigorous about differential duration, multivariate analysis is needed. We therefore estimate two competing risks Cox Proportional Hazard (CPH) models, where the possible outcomes are rule completion and rule withdrawal.[76] Duration or hazard models estimate the hazard rate—here, the instantaneous rate at which an agency action ends after time *t*, given that the agency action has been ongoing until *t*.[77] The basic question here is simply whether deadlines increase the hazard rate, or, put differently, shorten the duration of agency actions.[78] Positive

---

[76] For this analysis, we looked at reports to the *Unified Agenda* from April 1995 to October 2003, and from April 1988 to October 2003, and retained RINs only if they had an NPRM with an actual date reported. Agencies did not report on the significance of actions, a key explanatory variable, until 1995, so significance of the regulatory action can be included as a covariate in only the first set of data. Both sets of data contain information about regulatory actions that occurred in earlier years, including some actions from many years earlier. It is conceivable that these much earlier observations could produce selection bias in our regression results because they represent only a small portion of regulatory actions in those years. We ran the various regression models on only the more recent regulatory actions (after 1990, 1993, and 1995) and obtained similar results. Thus, for the analysis described here, we retained all the observations obtained from the two subsets of reports, irrespective of the dates of the regulatory actions. Independent from our research, Yackee and Yackee also have used a Cox Proportional Hazard model (but without the competing risks framework) to examine the duration of particular regulatory actions reported in the *Unified Agenda*. *See* Yackee & Yackee, *supra* note 7, at 17 (finding that actions governed by statutory or judicial deadlines take less time to complete).

[77] For good statistical sources on hazard analysis, see WILLIAM H. GREENE, ECONOMETRIC ANALYSIS 715-27 (2d ed. 1993), and Janet M. Box-Steffensmeier & Bradford S. Jones, *Time Is of the Essence: Event History Models in Political Science*, 41 AM. J. POL. SCI. 1414 (1997).

[78] Hazard analysis differs from standard ordinary least squares analysis in that it treats the dependent variable, length of the rulemaking process (in days), as a temporal variable, which permits the inclusion of censored observations and avoids the prediction of negative duration. GREENE, *supra* note 77, at 715-16. Unlike the exponential, lognormal, log-logisitic, and Weibull hazard models, the CPH model does not impose a particular functional form on the baseline hazard function. Box-

Steffensmeier & Jones, *supra* note 77, at 1432-33. The model does, however, assume that the proportionality of hazards across cases does not vary over time. *Id.* at 1433. In other words, hazard functions of any two individuals with different covariate values differ only by a proportional factor. Janet M. Box-Steffensmeier & Christopher J.W. Zorn, *Duration Models and Proportional Hazards in Political Science*, 45 AM. J. POL. SCI. 972, 974-75 (2001). The hazard rate for case i with the CPH model is $h_i(t) = e^{\beta' x_i} h_0(t)$, where $\beta' x_i$ is the matrix of coefficients and covariates for the ith case and $h_0(t)$ is the baseline hazard rate. *Id.* at 974. Due to the model's partial likelihood estimation, the baseline hazard function is estimated nonparametrically. Box-Steffensmeier & Jones, *supra* note 77, at 1432-33.

The competing risks aspect of the CPH model accounts for the fact that an NPRM in the *Unified Agenda* can result in one of several ultimate outcomes: a traditional final rule or action, an interim final rule, a direct final rule, or a deletion or withdrawal. To estimate the current model, we compress these outcomes into two categories: final rule/action (traditional, interim, or direct) and deletion/withdrawal. In the 1988–2003 data, 10,967 RINs show a traditional final rule or action as the ultimate outcome; 79 RINs show an interim final rule as the ultimate outcome; 4 RINs show a direct final rule as the ultimate outcome; 1316 RINs show deletion or withdrawal as the ultimate outcome; and 2511 RINs with an NPRM show none of these outcomes. In the 1995–2003 data, 5972 RINs show a traditional final rule or action as the ultimate outcome; 64 RINs show an interim final rule as the ultimate outcome; 4 RINs show a direct final rule as the ultimate outcome; 866 RINs show deletion or withdrawal as the ultimate outcome; and 2059 RINs with an NPRM show no outcome. In each subset of the data, the final category of RINs is treated as censored. In the 1995–2003 data, which we focus on, the average duration for final rules/actions (with and without deadlines, significant and nonsignificant) was 511.90 days (standard error = 7.96 days); for interim final rules, the average duration was 696.75 days (standard error = 121.51); for direct final rules, it was 1219.25 days (standard error = 263.05); and for withdrawals, it was 1541.07 days (standard error = 46.63). This analysis looks at ultimate actions for a particular RIN. Earlier analysis on interim and direct final rulemaking considered all reported actions for a RIN.

Many competing risks hazard models stratify the data by outcome types, permitting the baseline hazard function to vary by stratum, but constraining the regression coefficients to be identical across strata. This approach, without the inclusion of explanatory variables dependent on particular strata, is problematic for our data. For example, we want to consider whether a change in party control in Congress or the White House between an NPRM and final outcome explains any of the variation in duration of the regulatory process. Change in party control of Congress or the White House likely has opposing effects on duration, depending on the outcome. Change in party control likely has a negative effect on duration (i.e., makes it shorter) if the NPRM ends in withdrawal; indeed, a significant number of NPRMs were withdrawn after control in Congress shifted in January 1995 and after President George W. Bush took office in January 2001. *See* O'Connell, *supra* note 26, at 45. But change in party control probably has a positive effect on duration if the NPRM ends in a rule. Agencies started off the rulemaking by pleasing one set of members; now, they have to make changes before they finish it to please the current set of members. To deal with this concern, the explanatory variables are included on their own and as interaction variables with the withdrawn or deleted actions stratum.

coefficients predict shorter duration, and negative coefficients predict longer duration. The results are presented in Table 13.[79]

First, and most importantly, the presence of any deadline shortens the duration of the regulatory process.[80] Holding constant the effect of other covariates, deadlines do shorten the time frame in which agencies issue policy. Although deadlines also produce side effects, they do quicken the pace of agency decisions.[81] These coefficients do

---

[79] Table 13 presents estimates for the 1995–2003 data and for the 1988–2003 data. We tested the competing risks model's key assumption that the proportionality of hazards across cases does not vary over time within each stratum. Because the model incorporates competing risks, standard tests of the proportionality assumption in commercial statistical packages (for example, the "stphtest" command in Stata) are not appropriate. Instead, we plotted the observed and predicted survival probabilities for each of the competing risks (rule completions and rule withdrawals); if the observed and predicted probabilities are close, the model's assumption is supported. The probabilities are very close for rule completions over all values of the duration variable, and close for rule withdrawals for shorter durations (but wider for longer durations), confirming that the key assumption holds for at least the first stratum and partially for the second.

Although we think the CPH model is most appropriate in this setting, we have also estimated a series of alternative models. The simplest, and least appropriate, is a simple ordinary least squares regression equation of duration of agency actions (from NPRM to final rule, final action, interim final rule, or direct final rule) on the set of explanatory variables (excluding the interaction terms). A Poisson regression is somewhat more appropriate because of the distribution of the dependent variable. We also estimated other duration models using both the Weibull distribution and the exponential distribution, as well as a CPH model without the competing risks specification. The main directional results (presence of deadline, significance of action, change in Congress, and change in the White House) are robust to all these alternative specifications. Results are available from the authors.

[80] This result also holds when separate variables are included for statutory and judicial deadlines. The existence of a deadline, however, is not significant when that process ends in withdrawal of an NPRM. This result may appear surprising at first, but it also has an intuitive explanation. Deadlines are supposed to force agencies to act—to enact some sort of regulation. To fail to complete a rulemaking, or to withdraw a regulatory action, in the face of a deadline likely is highly unusual. *See, e.g.*, Steven J. Groseclose, *Reinventing the Regulatory Agenda: Conclusions from an Empirical Study of EPA's Clean Air Act Rulemaking Progress Projections*, 53 MD. L. REV. 521, 562 (1994) (finding that the EPA was less likely to withdraw a rulemaking with a deadline). An agency would not undertake withdrawal lightly and thus may take more time before choosing that outcome.

[81] This effect may be biased downward. To the extent that agencies may set internal deadlines for particular rulemakings in the absence of statutory deadlines, nondeadline rulemaking processes will have a shorter duration than otherwise. In addition, to the extent that Congress signals to the agency that important rulemakings should be finished promptly without the imposition of deadlines, nondeadline actions will take less time. *Cf.* Cornelius M. Kerwin & Scott R. Furlong, *Time and Rulemaking: An Empirical Test of Theory*, 2 J. PUB. ADMIN. RES. & THEORY 113, 129, 132 (1992) (find-

not directly map onto measures of the actual change in duration, but keeping all explanatory covariates at their means, in the first model (1995–2003 *Unified Agenda* reports), the odds of a rulemaking with a deadline coming to an end before a rulemaking without a deadline are 1.37 to 1.[82]

Second, significant regulatory actions—in other words, rules with bigger effects—unsurprisingly take longer to complete. Similarly, regulatory actions with more comment periods also had longer durations in the first model. Third, change in party control of the White House or Congress affects regulatory actions ending in withdrawal differently than actions that culminate in a final rule or action. If control of the White House or party control of Congress changes after the Notice of Proposed Rulemaking (NPRM) is issued, the rulemaking process takes longer if the process ends in completion; but the process is shorter if the rule is deleted or withdrawn. (Both effects are compared to rulemakings where control does not shift.) Put differently, when the Republicans took over Congress in 1995 and the White House in 2001, there were two effects on pending rules. First, for rules that were ultimately issued, there was greater delay. Second, other rules were quickly withdrawn, and withdrawn more quickly than rules withdrawn absent a shift in congressional or presidential control. The relationship between the length of the regulatory process and whether that process starts during a period of united government is more complex.[83] In summary, deadlines do produce faster regulatory action, but this effect interacts in important and somewhat surprising ways with other sources of political and institutional variation.[84]

---

ing that actions governed by judicial deadlines take much longer to complete than those not governed by judicial deadlines, in part because of prior agency delay).

[82] This measure is obtained by calculating the expected hazard ratio with the deadline covariate set to one and all other covariates set to their means, and calculating the expected hazard ratio with the deadline covariate set to zero and all other covariates set to their means. These ratios are, respectively, 0.29159 and 0.21221; the odds reported in the text are calculated by taking their ratio.

[83] For both CPH models in Table 13 (1995–2003 data and 1988–2003 data), the regulatory process for actions that ultimately end in withdrawal or deletion appears to take longer if started under united government (though the result is not significant for the first model). For the 1995–2003 data (where the model controls for the significance of the action), the process is also longer if it ends in completion of a rule, whereas, for the 1988–2003 data (where the model does not control for the significance of the action), the process is shorter.

[84] Although agencies make quicker decisions if they confront deadlines, all else being equal, they often miss the deadlines themselves. In the 1988–2003 data, of the 226 unique rulemakings for which specific dates were available for the statutory dead-

III. DEADLINE DOCTRINES

Administrative law is forced to deal with deadlines in a wide range of contexts, and in many, either the deadline distorts the ordinary doctrinal contours or standard doctrines encourage counterproductive agency behavior. These negative results are neither uniform nor inevitable, but they are frequent enough to cause genuine concern about deadlines in administrative law. This Part canvasses how several

---

line for an NPRM to be issued and for the actual issuance of the NPRM, the agency met the deadline in only 26.99% of the cases. In the 1995–2003 data, for the subset of 49 significant rulemakings, the agency satisfied the NPRM statutory deadline in 12.24% of the cases. The mean difference in days between the NPRM deadline and the actual NPRM issuance was 169.67 days (past the deadline) (standard error = 30.36); for significant actions, the mean difference was 261.24 days (standard error = 60.29). Of the 1341 unique rulemakings with specific dates for a statutory deadline for completed regulatory action and for the actual issuance of a final action (final rule, action, interim final rule, or direct final rule), the agency met the deadline in only 18.94% of the cases. For the subset of 261 significant rulemakings, the agency satisfied the completion deadline in 21.46% of the cases. The mean difference in days between the completion deadline and the actual completion was 385.82 days (past the deadline) (standard error = 16.96); for significant actions, the mean difference was 508.26 days (standard error = 48.52).

The EPA's pattern of missing statutory deadlines has been well documented. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-613, CLEAN AIR ACT: EPA HAS COMPLETED MOST OF THE ACTIONS REQUIRED BY THE 1990 AMENDMENTS, BUT MANY WERE COMPLETED LATE 7-12 & tbl.9 (2005) (finding that only 37 of 338 statutory deadlines were met on time); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-669, CLEAN AIR ACT: EPA SHOULD IMPROVE THE MANAGEMENT OF ITS AIR TOXICS PROGRAM 15-20 (2006) (finding that the EPA issued most air toxics requirements late); Groseclose, *supra* note 80, at 560-64 (noting that the EPA was less likely to miss court deadlines than statutory deadlines); Pierce, *supra* note 7, at 81-82 (noting that the EPA met only 20% of the Clean Air Act's statutory deadlines).

In some respects, agencies seem better at meeting judicial deadlines. In the 1988–2003 data, of the 139 unique rulemakings for which specific dates were available for the judicial deadline for an NPRM to be issued and for the actual issuance of the NPRM, the agency met the deadline in only 15.11% of the cases. In the 1995–2003 data, for the subset of 68 significant rulemakings, the agency satisfied the NPRM judicial deadline in 11.76% of the cases. But agencies did not delay as long. The mean difference in days between the NPRM deadline and the actual NPRM issuance was 20.85 days (*before* the deadline) (standard error = 23.01); for significant actions, the mean difference was 11.22 days (past the deadline) (standard error = 20.89). Of the 225 unique rulemakings with specific dates of a judicial deadline for completed regulatory action and for the actual issuance of a final action (i.e., final rule, final action, interim final rule, or direct final rule), the agency met the deadline in only 14.22% of the cases. For the subset of 79 significant rulemakings, the agency satisfied the completion deadline in 11.39% of the cases. The mean difference in days between the completion deadline and the actual completion was 55.54 days (past the deadline) (standard error = 9.41); for significant actions, the mean difference was 54.37 (standard error = 25.38).

standard administrative law doctrines address the presence of a statutory deadline. First, it considers how deadlines provide a rare opportunity for parties to successfully sue for agency inaction under section 706(1) of the APA. Second, it examines procedural and substantive challenges to agency actions enacted in the face of deadlines. If an agency promulgates a rule required by a deadline but fails to use traditional notice and comment procedures, some courts will strike down such action on procedural grounds, rejecting any "good cause" exception to the notice and comment requirements of section 553 of the APA. When an agency's statutory interpretation is challenged under the standard framework of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[85] a deadline will likely make it harder for an agency to emerge victorious. When agency actions are challenged as arbitrary and capricious, deadlines have an ambiguous effect. Little case law exists, and facially plausible arguments suggest both net advantages and disadvantages for agency litigation. Third, this Part explores how deadlines affect the authority of courts to fashion remedies when agencies do not meet their obligations, and considers whether deadlines present any constitutional problems. Although statutory deadlines are generally assumed to be legally uncontroversial, there are several reasons why deadlines might be constitutionally suspect.

A. *Agency Inaction*

Federal courts generally have extremely limited jurisdiction to "compel agency action unlawfully withheld or unreasonably delayed" under section 706(1) of the APA.[86] In *Norton v. Southern Utah Wilderness Alliance*, the Supreme Court ruled that "a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*."[87] The Court refused to allow environmental groups to challenge the Bureau of Land Management's failure to limit off-road vehicle use on public lands under

---

[85] 467 U.S. 837 (1984).

[86] 5 U.S.C. § 706(1) (2000); *see also* 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, 993 (2004) ("[C]ourts should take care to respect agency decisionmaking processes when considering the timing of review, the liability determination . . . and the remedy."); Biber, *supra* note 7, at 4-5 (noting the Supreme Court's chilly reception to attempts by private parties to compel agency action); Bressman, *supra* note 18, at 1658 (discussing the Supreme Court's reluctance to permit judicial review of agency inaction).

[87] 542 U.S. 55, 64 (2004).

the Federal Land Policy and Management Act of 1976.[88] The Court, however, explicitly indicated that statutory deadlines could establish the discrete mandatory action needed to bring a challenge under section 706(1),[89] a view consistent with previous lower court decisions.[90] Deadlines stand out as one of the few areas where courts will compel agencies to act despite multiple demands on their resources.

The *Southern Utah Wilderness Alliance* analysis is part of the Court's general administrative law doctrine, but specific statutes also carve out jurisdiction for courts to review agency inaction. Under the Clean Air Act, citizen suits are expressly permitted, presuming standing and other jurisdictional requirements are met, "against the Administrator [of the EPA] where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary."[91] Many district courts have held that missed statutory deadlines in the Clean Air Act satisfy this citizen suit provision.[92] The Clean Water Act has an identical provision,[93] and, as with the Clean Air Act, many district courts have ruled that an agency's failure to meet a statutory deadline qualifies under this provision.[94]

---

[88] *Id.* at 65-72.

[89] *Id.* at 71-72.

[90] In *Sierra Club v. Thomas*, the D.C. Circuit explained how a deadline is almost always necessary to create a nondiscretionary duty:

> Although a date-certain deadline therefore may or may not be nondiscretionary, it is highly improbable that a deadline will ever be nondiscretionary, i.e. clear-cut, if it exists only by reason of an inference drawn from the overall statutory framework. . . . The inferrable deadline is likely to impose such a discretionary duty because it rests, at bottom, upon a statutory framework that will almost necessarily place competing demands upon the agency's time and resources.

828 F.2d 783, 791 (D.C. Cir. 1987) (footnote omitted). The court continued, "In the absence of a readily-ascertainable deadline, therefore, it will be almost impossible to conclude that Congress accords a particular agency action such high priority as to impose upon the agency a 'categorical[] mandat[e]' that deprives it of all discretion over the timing of its work." *Id.* (alterations in original) (footnote omitted); *cf.* Raymond Proffitt Found. v. U.S. EPA, 930 F. Supp. 1088, 1099-1100 (E.D. Pa. 1996) (holding that a deadline may be sufficient, but is not necessary, to show a nondiscretionary duty).

[91] 42 U.S.C. § 7604(a)(2) (2000).

[92] *See, e.g.*, Envtl. Def. v. Leavitt, 329 F. Supp. 2d 55, 64 (D.D.C. 2004); Natural Res. Def. Council, Inc. v. U.S. EPA, 797 F. Supp. 194, 196 (E.D.N.Y. 1992); Sierra Club v. Ruckelshaus, 602 F. Supp. 892, 903-04 (N.D. Cal. 1984).

[93] 33 U.S.C. § 1365(a)(2) (2000).

[94] *See, e.g.*, Defenders of Wildlife v. Browner, 888 F. Supp. 1005, 1008 (D. Ariz. 1995).

There are, however, substantial limits on the scope of judicial review of agency inaction, even if deadlines generally make it easier for parties to win "unreasonable delay" cases on the margin.[95] Parties must meet applicable statutes of limitations,[96] have standing to sue,[97] and bring a live case.[98] Most critically, in agency inaction suits involving deadlines where "the manner of . . . action is left to the agency's discretion," courts "can compel the agency to act, but [have] no power to specify what the action must be."[99] A statutory deadline,

---

[95] Biber, *supra* note 7, at 29.

[96] In *Center for Biological Diversity v. Hamilton*, the Eleventh Circuit ruled that environmental groups could not bring a lawsuit to mandate that the Secretary of Interior designate a critical habitat for two endangered species of minnows under the Endangered Species Act because the Secretary's failure to act was not a continuing violation that extended beyond the statute of limitations. 453 F.3d 1331, 1335-36 (11th Cir. 2006). Generally, if the statute does not otherwise specify, parties have six years after a deadline has passed to challenge agency inaction. 28 U.S.C. § 2401(a) (2000); *Ctr. for Biological Diversity*, 453 F.3d at 1334.

[97] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (requiring (a) "an injury in fact" that is (b) "fairly traceable" to the challenged action, and (c) that the injury is likely to be redressed by a favorable decision (internal quotation marks and alterations omitted)). *See generally* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992) (criticizing *Lujan*'s narrow view of standing). Proving standing under current precedent can be quite difficult, particularly when the agency's inaction does not concern regulation of the plaintiffs themselves. *Lujan*, 504 U.S. at 561-62; *cf.* Massachusetts v. EPA, 127 S. Ct. 1438, 1452-58 (2007) (holding that the plaintiffs had standing to challenge the EPA's refusal to regulate greenhouse gases).

[98] Challenges to compel agency action will also typically become moot once the agency acts, even if far beyond the deadline, because after the agency acts, the court cannot "grant any relief beyond requiring steps that [the agency] has already taken." Sierra Club v. Browner, 130 F. Supp. 2d 78, 82 (D.D.C. 2001); *see also* Church of Scientology of Calif. v. United States, 506 U.S. 9, 12 (1992) ("[I]f an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effectual relief whatever to a prevailing party, the appeal must be dismissed." (internal quotation marks omitted)).

[99] Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 65 (2004). The Court continued:

> For example, 47 U.S.C. § 251(d)(1), which required the Federal Communications Commission "to establish regulations to implement" interconnection requirements "[w]ithin 6 months" of the date of enactment of the Telecommunications Act of 1996, would have supported a judicial decree under the APA requiring the prompt issuance of regulations, but not a judicial decree setting forth the content of those regulations.

Id. (alteration in original).

therefore, may spur a court to order the agency to act, but will almost never allow the court to specify the content of that action.[100]

B. *Late Agency Action*

If the agency imposes legal obligations once a statutory deadline has passed, does the presence of the deadline nullify the agency's action? The Supreme Court's most recent pronouncement was a clear no—at least unless Congress clearly specifies otherwise—but the Court was sharply split. In *Barnhart v. Peabody Coal Co.*, the Court upheld the Commissioner of Social Security's late assignment of beneficiaries to coal companies for the payment of health insurance premiums under the Coal Industry Retiree Health Benefit Act of 1992.[101] The Court acknowledged that the Commissioner "had no discretion to choose to leave the assignments until after the prescribed date, and [that] the assignments in issue here represent a default on a statutory duty, though it may well be a wholly blameless one."[102] But the Court refused to strike down the Commissioner's dilatory action as lacking legal authority because the Coal Act did not explicitly provide for what would happen in such a case. As the Court concluded, "'[I]f a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction.'"[103] This analysis was consistent with

---

[100] Challenges to agency inaction based on missed deadlines also present interesting jurisdictional questions as to what level of court should first hear such claims. These challenges are typically heard in district court, in contrast to claims involving agency action. *See* STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 752-53 (6th ed. 2006). Many statutes, including the Clean Air Act and Clean Water Act, prescribe that parties must first try to set aside an agency action in the Court of Appeals. *See* 42 U.S.C. § 7607(b)(1) (2000) (prescribing appellate jurisdiction for challenges to particular agency actions under the Clean Air Act); 33 U.S.C. § 1369(b)(1) (2000) (setting similar jurisdictional rules for challenges under the Clean Water Act).

[101] 537 U.S. 149, 155, 171-72 (2003).

[102] *Id.* at 157.

[103] *Id.* at 159 (quoting United States v. James Daniel Good Real Prop., 510 U.S. 43, 63 (1993)). The *Peabody* Court, *id.* at 160-63, relied on another missed statutory deadline case, *Brock v. Pierce County*. In that case, which involved late action by the Secretary of Labor, the Court was extremely hesitant "to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake." 476 U.S. 253, 260 (1986). The Court reasoned that "[w]hen, as here, there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act." *Id.* (footnote omitted). The Supreme Court in *Peabody* and *Pierce County* did not explicitly discuss laggard agency action in terms of the APA. If an

lower court decisions, which have generally upheld binding agency policies enacted after a statutory deadline has passed, so long as the statute does not spell out explicit consequences for late action.[104] What courts then struggle with is determining whether the statute provides such consequences.[105]

Although this doctrinal result is clear enough, it is also subject to criticism. Suppose a statute grants legal authority to a new agency, but also sunsets it at the end of the year. The most plausible inference is that the agency has no power after the source of its legal authority terminates. Why should deadlines be different? After all, deadlines require that an agency take some action by a certain date. Prior to that date, the action is presumptively lawful, but after the date, the agency is acting in contravention of the legal authority for its action. Under this view, late action in the face of a deadline does not seem all that different in kind from late agency action after the sunset of a statute. However, missing a deadline in a broad statutory scheme also seems distinct from the expiration of a narrow grant of statutory authority. Regardless, the deadline doctrine for late action highlights the importance of hammer provisions, which specify regulatory outcomes in the event that an agency fails to meet a statutory deadline.[106]

---

agency misses a mandatory deadline without justification, such late action would arguably qualify as "an abuse of discretion" under section 706(2)(A) of the APA. *Cf.* Int'l Union, United Auto. Workers v. Chao, 361 F.3d 249, 254 (3d Cir. 2004) (finding a missed deadline not to be an abuse of discretion because the deadline was aspirational, not mandatory); Action on Smoking & Health v. Dep't of Labor, 100 F.3d 991, 993 (D.C. Cir. 1996) (same). But if the agency has acted, albeit late, a section 706(2)(A) challenge likely will be moot or provide no considerable remedy.

[104] *See, e.g.*, Newton County Wildlife Ass'n v. U.S. Forest Serv., 113 F.3d 110, 112 (8th Cir. 1997) ("Absent specific statutory direction, an agency's failure to meet a mandatory time limit does not void subsequent agency action."); Linemaster Switch Corp. v. U.S. EPA, 938 F.2d 1299, 1304 (D.C. Cir. 1991) ("We are especially reluctant to so curb EPA's substantive authority [to add sites to the National Priorities List] in light of Supreme Court decisions declining to restrict agencies' powers when Congress has not indicated any intent to do so and has crafted less drastic remedies for the agency's failure to act.").

[105] *See, e.g.*, Dixie Fuel Co. v. Comm'r of Soc. Sec., 171 F.3d 1052, 1063-64 (6th Cir. 1999), *rev'd*, *Peabody*, 537 U.S. at 172. Late agency action may raise additional concerns if the agency wants its action to apply retroactively. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 224-25 (1988) (Scalia, J., concurring) ("If . . . a statute prescribes a deadline by which particular rules must be in effect, and if the agency misses that deadline, the statute may be interpreted to authorize a reasonable retroactive rule despite the limitation of the APA.").

[106] *See generally* JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 15-16 (4th ed. 2006) (discussing the use of hammers as "penalties if an agency fails to take timely action"); Magill, *supra* note 7, at 153-56 (describing hammers as providing a

Hammer provisions can implement "a congressionally specified regulatory result."[107] Or they can implement an agency's proposed rule if the agency does not promulgate the final rule before the deadline.[108] These provisions often impose "harsh[] default prohibitions" to motivate quicker agency action.[109] In sum, the absence of a congressionally specified hammer will generally prevent courts from striking down agency action simply for missing a deadline.

C. *Procedural Challenges*

Deadlines impose significant constraints on agency resources, and, therefore, agencies often forego notice and comment rulemaking (detailed in section 553 of the APA) for deadline-driven actions. And because most deadlines guide significant regulatory actions or legislative rules, notice and comment is the default procedural requirement. Agencies faced with deadlines, however, often contend that deadlines require pressed work, making "notice and public procedure thereon . . . impracticable, unnecessary, or contrary to the public interest," and therefore within the APA's "good cause" exception to notice and comment requirements.[110]

Much of the considerable case law in this area concerns the 1977 amendments to the Clean Air Act.[111] In 1978, the EPA received plans from states designating areas as compliant and noncompliant with national ambient air quality standards for various air pollutants. Subse-

---

strong incentive for agencies to meet deadlines); Richard C. Fortuna, *The Birth of the Hammer*, ENVTL. F., Sept.–Oct. 1990, at 18, 20-21 (recounting the 1982 proposal to add hammer provisions to the Resource Conservation and Recovery Act in response to the Carter EPA's indifferent implementation). Such provisions are more popular in divided government. *Cf. id.* (describing the importance of divided government to motivating the Resource Conservation and Recovery Act hammer provisions).

[107] *See* LUBBERS, *supra* note 106, at 16 (discussing the hammer provision in the 1984 amendments to the Resource Conservation and Recovery Act, 42 U.S.C. § 6924(d)(1)–(2) (2000)).

[108] *See* Magill, *supra* note 7, at 155 (discussing the hammer provisions in the Nutrition Labeling and Education Act of 1990).

[109] Bradley C. Karkkainen, *Information-Forcing Environmental Regulation*, 33 FLA. ST. U. L. REV. 861, 883 (2006); *see also* Mark Seidenfeld, *A Big Picture Approach to Presidential Influence on Agency Policy-Making*, 80 IOWA L. REV. 1, 8 n.40 (1994) ("A hammer provision . . . leaves the agency discretion to generate a regulatory scheme in the first instance, but threatens . . . forfeiture of that discretion should the agency fail to comply with the statutory deadline.").

[110] 5 U.S.C. § 553(b)(3)(B) (2000).

[111] LUBBERS, *supra* note 106, at 111; Ellen R. Jordan, *The Administrative Procedure Act's "Good Cause" Exemption*, 36 ADMIN. L. REV. 113, 125-29 (1984).

quently, the EPA Administrator promulgated a rule without prior comment in the face of a statutory deadline, modifying those plans and imposing various obligations under the Act.[112] Five courts of appeals ruled that the Administrator did not have the requisite "good cause" to eschew the APA's notice and comment provisions;[113] two courts of appeals sustained the Administrator's choice of harried procedure.[114] The first set of courts emphasized that the Administrator had sufficient time to provide notice on the proposals and to take comment before promulgating a final rule.[115] Many of the courts also argued that the agency did not treat the statutory deadline as "sacrosanct," since the agency published the final rule a month after the deadline.[116] They also rejected the agency's argument that by providing an opportunity for comments *after* promulgating the rule, the agency cured any procedural problems.[117] For these courts, the EPA had failed to meet its burden to show that it met the narrow "good cause" exemption to notice and comment rulemaking.

The Sixth and Seventh Circuits accepted the EPA Administrator's reliance on the "good cause" exemption. Both courts concluded that

---

[112] Jordan, *supra* note 111, at 126.

[113] U.S. Steel Corp. v. EPA, 649 F.2d 572, 575 (8th Cir. 1981); W. Oil & Gas Ass'n v. U.S. EPA, 633 F.2d 803, 812 (9th Cir. 1980); New Jersey v. U.S. EPA, 626 F.2d 1038, 1045 (D.C. Cir. 1980); U.S. Steel Corp. v. U.S. EPA, 595 F.2d 207, 214 (5th Cir. 1979); Sharon Steel Corp. v. EPA, 597 F.2d 377, 379 (3d Cir. 1979); *see also* Jordan, *supra* note 111, at 127-28 (summarizing the conflict among the appellate courts).

[114] Republic Steel Corp. v. Costle, 621 F.2d 797, 803 (6th Cir. 1980); U.S. Steel Corp. v. U.S. EPA, 605 F.2d 283, 286-90 (7th Cir. 1979). The Supreme Court refused to resolve the circuit split. *See* U.S. Steel Corp. v. U.S. EPA, 444 U.S. 1035 (1980) (denying certiorari).

[115] *See, e.g.*, *Sharon Steel*, 597 F.2d at 380. These courts emphasized that the EPA gave no reason for "why it could not at least have published the . . . initial list[s] upon receipt and accepted comments during the time it was reviewing the list[s]." U.S. Steel Corp. v. U.S. EPA, 595 F.2d 207, 213 (5th Cir. 1979). Such quick action "would have afforded petitioners some warning of the imminent designations and allowed them opportunity to influence the agency's action." *Id.*; *see also New Jersey*, 626 F.2d at 1047.

[116] U.S. Steel Corp. v. U.S. EPA, 595 F.2d 207, 213 (5th Cir. 1979); *see also New Jersey*, 626 F.2d at 1043 n.3; *Sharon Steel*, 597 F.2d at 379 n.4. The courts also pointed to the agency's own repeated remarks that the designations in the final rule were "preliminary" in the statute's regulatory scheme, suggesting that the agency could have issued the designations as a proposed rule. *See, e.g.*, *New Jersey*, 626 F.2d at 1042 (citing U.S. Steel Corp. v. U.S. EPA, 595 F.2d 207, 214 (5th Cir. 1979)).

[117] *See* U.S. Steel Corp. v. U.S. EPA, 595 F.2d 207, 214-15 (5th Cir. 1979) ("Were we to allow the EPA to prevail on this point we would make the provisions of § 553 virtually unenforceable. An agency that wished to dispense with pre-promulgation notice and comment could simply do so, invite post-promulgation comment, and republish the regulation before a reviewing court could act."); *see also New Jersey*, 626 F.2d at 1049; *Sharon Steel*, 597 F.2d at 381.

the statutory deadline made prior notice and comment impractical. The Sixth Circuit concluded that courts that had held the opposite "appear to us to ignore the sense of urgency which characterized the Congressional debate preceding the passage of the Clean Air Act Amendments of 1977."[118] The Seventh Circuit similarly ruled that "the 'good cause' exception may be utilized to comply with the rigors of a tight statutory schedule."[119] These two courts were therefore not troubled by the agency's provision of post-rule commenting.[120] Finally, the courts emphasized that upholding the agency's harried procedures served the public interest.[121] The Sixth Circuit put it bluntly: "Past experience has taught this court that remand means an additional two-year delay in achieving national air quality standards in Ohio."[122]

In lieu of a bright-line rule on deadlines and good cause, courts typically apply a multifactor analysis in assessing whether an agency can rely on a deadline to forego traditional notice and comment procedures.[123] Courts permit agencies to deviate from standard APA rulemaking procedures where the deadline is "very tight and where the statute is particularly complicated."[124] But the agency cannot generally create its own emergency by waiting to act until quite close to

---

[118] *Republic Steel*, 621 F.2d at 804. The Sixth Circuit did not find the issue close: "If the circumstances of this case do not justify employment of the good cause exception, we will be hard put to find any justification for its use." *Id.*

[119] U.S. Steel Corp. v. U.S. EPA, 605 F.2d 283, 287 (7th Cir. 1979).

[120] *See, e.g.*, *Republic Steel*, 621 F.2d at 804 ("Under these circumstances, we think that the Administrator's solution of promulgating a schedule of nonattainment areas and subsequently receiving objections and comment, and thereafter effecting such changes as were required, was a reasonable approach consistent with the Administrative Procedures Act.").

[121] As the Seventh Circuit explained, "We have already noted the Congressional concern manifest in the Clean Air Act that national attainment be achieved as expeditiously as practicable. This concern was reflected in the desire that the due administration of the statutory scheme not be impeded by endless litigation over technical and procedural irregularities." U.S. Steel Corp. v. U.S. EPA, 605 F.2d 283, 290 (7th Cir. 1979).

[122] *Republic Steel*, 621 F.2d at 804.

[123] Most importantly, the mere existence of a deadline is not sufficient for establishing good cause. *See, e.g.*, Natural Res. Def. Council v. Abraham, 355 F.3d 179, 205-06 (2d Cir. 2004).

[124] Methodist Hosp. of Sacramento v. Shalala, 38 F.3d 1225, 1236 (D.C. Cir. 1994). Courts have viewed forty-nine and sixty days as sufficiently "tight," but not six, twelve, or fourteen months. *See* Nat'l Women, Infants & Children Grocers Ass'n v. Food & Nutrition Serv., 416 F. Supp. 2d 92, 106 (D.D.C. 2006) (citing cases from the courts of appeals).

the deadline.[125] Courts are also more accommodating of missed procedural mandates if the agency action is "of limited scope or duration."[126] Finally, courts "give[] greater weight to congressional deadlines in justifying lack of notice and comment when the deadlines implemented budget-cutting measures."[127] In short, an agency must exercise care in skipping notice and comment procedures, but if the ordinary requirements of notice and comment are truly burdensome given the statute's time constraints, the agency's decision to avoid costly and time-consuming procedures is likely to be upheld.[128]

D. *Substantive Challenges*

Deadlines also significantly affect how courts engage in substantive review of agency decisions. Explicit deadlines often make it easier for the reviewing court to find related language unambiguous and to strike down agency attempts to modify it. But deadlines may make a reviewing court less skeptical of rushed agency action, upholding more agency actions against arbitrary and capricious challenges.

---

[125] *Methodist Hosp.*, 38 F.3d at 1237 (citing Council of S. Mountains, Inc. v. Donovan, 653 F.2d 573, 581 (D.C. Cir. 1981)).

[126] LUBBERS, *supra* note 106, at 111. For example, interim final rulemaking that precedes final rulemaking is more acceptable. Am. Transfer & Storage Co. v. Interstate Commerce Comm'n, 719 F.2d 1283, 1294 (5th Cir. 1983).

[127] LUBBERS, *supra* note 106, at 112.

[128] Congress may, of course, simultaneously set deadlines and explicitly waive APA requirements in a statutory scheme, as it has occasionally done. For example, section 161(d) of Title I of the Federal Agriculture Improvement and Reform Act of 1996 prescribed that the Secretary of Agriculture and the Commodity Credit Corporation promulgate regulations within ninety days "without regard to . . . the notice and comment provisions of section 553 of Title 5." 7 U.S.C. § 7281(d)(1) (2000); *see also* 7 U.S.C. § 1522 note, Act of July 24, 2001, Pub. L. No. 107-20, tit. II, ch. 1, § 2103, 115 Stat. 155, 165 (mandating that "[n]ot later than August 1, 2001, the Federal Crop Insurance Corporation shall promulgate final regulations to carry out section 522(b) of the Federal Crop Insurance Act . . . , without regard to . . . the notice and comment provisions of section 553"); 16 U.S.C. § 3831(k)(3)(I)(ii) (Supp. V 2005) (requiring regulations implementing the Emergency Supplemental Appropriations To Address Hurricanes in the Gulf of Mexico and Pandemic Influenza to be issued within ninety days "without regard to . . . the notice and comment provisions of section 553 of title 5").

1. *Chevron*

In the familiar *Chevron* framework, courts engage in a two-part inquiry in examining an agency interpretation of a statute:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[129]

Recent case law appears to have added a prior *Chevron* "Step Zero" to this analysis.[130] *United States v. Mead Corp.*[131] and its progeny suggest that the degree of deference courts owe to an agency's statutory interpretation is partly a function of the procedures used to generate an agency decision.[132] Judicial deference is appropriate "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[133]

How do statutory deadlines fit into this *Chevron* framework? Consider Step Zero. If the agency failed to use notice and comment procedures because of a deadline, the lack of formal procedures might indicate *Chevron* deference ought not to apply.[134] After *Mead*, informal

---

[129] Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984) (footnotes omitted).

[130] *See* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191 (2006) (defining *Chevron* "Step Zero" as the initial determination of whether the *Chevron* framework applies). The term originally appeared in Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 836 (2001).

[131] 533 U.S. 218 (2001).

[132] *See* Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1486 (2005); Sunstein, *supra* note 130, at 213-16; *see also* Adrian Vermeule, *Introduction:* Mead *in the Trenches*, 71 GEO. WASH. L. REV. 347 (2003) (considering how *Mead* affected the D.C. Circuit's jurisprudence).

[133] *Mead*, 533 U.S. at 226-27.

[134] Recent statements suggest that procedural formality is neither a necessary nor a sufficient condition for deference, but that judicial deference is much more likely when agency views are articulated using formal procedures like notice and comment rulemaking. *Mead*'s language initially appeared to make Step Zero turn entirely on procedural formality. Unfortunately, the precise relationship between the delegation of force-of-law authority and procedural formality remained elusive. The Court clearly

procedures (such as policy statements or guidance documents) are less likely to receive judicial deference. By the same token, if the agency had "good cause" to avoid notice and comment, the rule is a perfectly valid legislative rule. Because most legislative rules will qualify for deference at Step Zero, the deadline could make it easier for the agency to receive deference for substantively important views that were articulated informally.

This latter possibility is tempered by the way deadlines are analyzed at *Chevron* Step One. Explicit statutory deadlines usually prevent agencies from changing or ignoring those timetables for themselves[135] or for regulated entities[136] to avoid conflict with clear congressional intent. Congress's intent about the timing of agency actions in explicit deadline statutes is not ambiguous. By contrast, absent a dead-

---

stated that a lack of procedural formality does not preclude *Chevron* deference. *See Mead*, 533 U.S. at 231 ("The fact that the tariff classification here was not a product of such formal process does not alone, therefore, bar the application of *Chevron*."). And at least Justice Breyer thinks procedural formality is not a sufficient condition for *Chevron* deference either. *See* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1004-05 (2005) (Breyer, J., concurring) ("It is not a sufficient condition because Congress may have intended *not* to leave the matter of a particular interpretation up to the agency, irrespective of the procedure the agency uses to arrive at that interpretation . . . .").

[135] *See, e.g.*, Delaney v. EPA, 898 F.2d 687, 691 (9th Cir. 1990) ("When Congress has explicitly set an absolute deadline, congressional intent is clear. . . . The EPA cannot extract leeway from a statute that Congress explicitly intended to be strict."), *superseded by statute*, Clean Air Act Amendments, Pub. L. No. 101-549, 104 Stat. 2399 (1990), *as recognized in* Ober v. U.S. EPA, 84 F.3d 304, 311-12 (9th Cir. 1996); *infra* note 151 and accompanying text.

[136] *See, e.g.*, Natural Res. Def. Council v. EPA, 489 F.3d 1364, 1374 (D.C. Cir. 2007) ("Congress has spoken on the question and has not provided EPA with authority under [the statute] to extend the compliance date in [its] 2006 rule."); Sierra Club v. EPA, 311 F.3d 853, 862 (7th Cir. 2002) ("In sum, Congress addressed in great detail the circumstances under and extent to which the EPA could grant exceptions to the nonattainment schedule. Extensions where the failure is the result of transported ozone are not among them. . . . [U]nder our system of government, it is not our business or the EPA's business to rewrite a clear statute so that it will better reflect 'common sense and the public weal.'"); Abramowitz v. U.S. EPA, 832 F.2d 1071, 1077-78 (9th Cir. 1987) ("Although it is axiomatic that a reviewing court cannot substitute its judgment for that of the administrative agency, it is equally well established that a court cannot defer to agency discretion when the intent of the Act is clear. . . . We conclude that EPA exceeded its authority by approving [particular regulatory measures] . . . without requiring a demonstration [that the statutory deadline would be met]."), *superseded by statute*, Clean Air Act Amendments, Pub. L. No. 101-549, 104 Stat. 2399 (1990), *as recognized in* Hall v. U.S. EPA, 273 F.3d 1146, 1159 (9th Cir. 2001). *But see* Natural Res. Def. Council, Inc. v. EPA, 22 F.3d 1125, 1135-36 (D.C. Cir. 1994) (per curiam) (permitting the agency to extend statutory deadlines for compliance in particular circumstances).

line, statutory silence generates sufficient ambiguity to provide for agency discretion and judicial deference with respect to timing.[137]

2. Arbitrary and Capricious Review

Section 706(2)(A) of the APA prescribes that the "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[138] In assessing whether the agency has acted in an arbitrary or capricious manner, courts generally engage in a searching inquiry to determine whether an agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made."[139]

Little case law directly addresses deadlines in arbitrary and capricious review, but the inquiry raises several critical implications for agency behavior. On one hand, courts could apply a less searching standard for actions promulgated under deadline,[140] requiring less from the agency in terms of either procedure or substance.[141] This

---

[137] Might a court find a statute's timing provisions ambiguous, thereby satisfying *Chevron* Step One, but nonetheless conclude the agency's interpretation of those provisions is unlawful? This is possible, but not particularly likely. Although there are court decisions in which agencies lose at Step Two, such an outcome is rare. *See generally* Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1260-62 (1997).

[138] 5 U.S.C. § 706, 706(2)(a) (2000).

[139] Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (internal quotation marks omitted).

[140] As Jack Beermann explains in the context of judicial deadlines,

> Courts might . . . be reluctant to cast doubt on the legality of rules in . . . situations in which agencies promulgate rules under external compulsion. . . . Under the influence of a court decree, an agency may issue a rule that deviates from actual administrative preferences. One could argue that the agency did not seriously consider comments that were contrary to the push or pull of the external force such as the judicial order. . . . Courts are unlikely to accept these arguments, which in effect would hamper courts' ability to enforce their judgments regarding proper administrative conduct.

Jack M. Beermann, *Presidential Power in Transitions*, 83 B.U. L. REV. 947, 1002-03 (2003); *cf.* Pierce, *supra* note 7, at 74-75, 88 (discussing Judge Easterbrook's view that courts should relax their review of actions completed by resource-starved agencies).

[141] Some limited case law also supports this argument. In *California Human Development Corp. v. Brock*, the D.C. Circuit upheld an allocation of funds by the Department of Labor (DOL) as rational, given a deadline:

idea of reducing the intensity of arbitrary and capricious review because of statutory deadlines[142] or agency resource constraints[143] has been advocated by a number of prominent scholars—but case law on point is scarce and there are also reasons to resist ad hoc exceptions to standard doctrines of judicial review.

Agencies may act poorly when rushed—for example, they may not consider necessary alternatives, not explain their choices, or not act consistent with standard doctrinal requirements. Standard arbitrary and capricious review requires courts to strike down an agency action as arbitrary and capricious

> if the agency . . . relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or [was] so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[144]

When agencies sacrifice deliberative process to meet deadlines, decisions seem more likely to fail the arbitrary and capricious inquiry.

> The DOL's actions were rational, given the information that the DOL had at the time the agency promulgated the regulations. Complex decisions had to be made in a short time span. The change in allocation pattern was mainly due to the substitution of the 1980 Census data for the 1977 Social Security data. That choice must be laid at the doorstep of the Congress. At least for the DOL's fiscal year 1983 and 1984 allocations, this court cannot find the agency's allocation formula to be arbitrary and capricious.

762 F.2d 1044, 1051 (D.C. Cir. 1985) (internal quotation marks, footnote, and alterations omitted); *cf.* Hercules Inc. v. EPA, 598 F.2d 91, 129 (D.C. Cir. 1978) (explicitly relying on the presence of a statutory deadline to uphold the agency's questionable actions in a challenge under APA section 557(b)).

[142] *Cf.* Cross, *supra* note 41, at 1027-36 (discussing the adverse effects of challenges to agency inaction); R. Shep Melnick, *Administrative Law and Bureaucratic Reality*, 44 ADMIN. L. REV. 245, 249-51 (1992) (suggesting that litigation over deadlines can undermine agencies' abilities to regulate effectively); R. Shep Melnick, *The Political Roots of the Judicial Dilemma*, 49 ADMIN. L. REV. 585, 589-91 (1997) (arguing that courts ignore the disparity between agency resources and the demands imposed on them by deadlines).

[143] *See* Biber, *supra* note 7, at 47 (arguing that courts should "defer to agency decisions about resource allocation" unless an agency is "flouting the will of Congress"); Pierce, *supra* note 7, at 93-94 (suggesting that courts "should excuse agencies from the duty to comply with a statutory deadline" when compliance would require the agency to "violat[e] another statute"); *cf.* Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 670 (1985) (characterizing resource allocation decisions as generally "consistent with congressional will").

[144] *State Farm*, 463 U.S. at 43.

If courts do not relax ordinary requirements, then agencies will lose more often in challenges to deadline actions.[145]

E. *Judicial Remedies*

Statutory schemes that impose deadlines on agency action rarely grant explicit permission to agencies or courts to modify those deadlines, but there are some exceptions.[146] The Freedom of Information Act, for instance, sets strict deadlines for agencies to release nonexempt information. Agencies have only twenty days, with the possibility of a ten-day extension, to determine "whether to comply with [a] request and . . . [to] immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination."[147] However, the statute expressly allows the court to grant the agency additional time if the agency meets certain requirements.[148] Indeed, many agencies almost never meet these statutory deadlines.

Most statutes that impose deadlines are silent about what should happen if the agency misses the deadline. Courts generally "will not blindly enforce a time limit without regard to the reasonableness of an agency's action."[149] Instead, courts can, without express authorization in the statute, give an agency more time to comply with a deadline if it would be impossible for the agency, operating in good faith, to meet it.[150] For example, in *Natural Resources Defense Council, Inc. v. Train*, the D.C. Circuit noted two circumstances where a court could use its equitable powers to provide the agency additional time: when meeting

---

[145] *Cf.* Salameda v. INS, 70 F.3d 447, 452 (7th Cir. 1995) ("[U]nderstaffing is not a defense to a violation of principles of administrative law . . . ."); Pierce, *supra* note 7, at 73-75 (discussing the *Salameda* case).

[146] *See* Abbott, *Cost-Benefit Appraisal*, *supra* note 7, at 177-78 (discussing statutory escape clauses, which excuse agency noncompliance with deadlines).

[147] 5 U.S.C. § 552(a)(6) (2000).

[148] *See id.* § 552(a)(6)(C)(i) ("If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records."). This additional time is termed an *Open America* stay. *See* Open Am. v. Watergate Special Prosecution Force, 547 F.2d 605, 615-16 (D.C. Cir. 1976).

[149] Abbott, *Cost-Benefit Appraisal*, *supra* note 7, at 178.

[150] *Id.*

deadlines would unduly jeopardize the implementation of other essential programs and where compliance is technologically impossible.[151]

When an agency fails to meet a statutory deadline, the reviewing court may sometimes remand the case to the agency with a new judicial deadline, pursuant to specific authority under the APA and general equitable powers to fashion adequate remedies.[152] Courts, how-

---

[151] *See* 510 F.2d 692, 712 (D.C. Cir. 1975) ("First, it is possible that budgetary commitments and manpower demands required to complete the guidelines by [the statutory deadline] are beyond the agency's capacity or would unduly jeopardize the implementation of other essential programs. Second, [the agency] may be unable to conduct sufficient evaluation of available control technology to determine which is the best practicable or may confront problems in determining the components of particular industrial discharges."). This case has generated considerable controversy and led many courts to distinguish it. *See, e.g.*, Envtl. Def. Fund v. Thomas, 627 F. Supp. 566, 569-70 (D.D.C. 1986) (arguing that, under *Train*, an agency can show that it is proceeding in good faith and not trying to "mandate flat guidelines on its own"); Sierra Club v. Thomas, 658 F. Supp. 165, 171 n.5 (N.D. Cal. 1987) (finding that *Environmental Defense Fund v. Thomas* "misconstrue[d] *Train*" by not requiring an agency to show "utmost diligence"); New York v. Gorsuch, 554 F. Supp. 1060, 1065 & n.4 (S.D.N.Y. 1983) (disapproving of the susceptibility of the language in *Train* to expansive interpretation, and arguing that a "good faith" standard for an administrator's compliance with a statutory mandate can only work if applied very strictly). Courts agree, however, that the agency bears the "heavy" burden of "establishing impossibility or infeasibility of issuing regulations within the statutory time frame." *Sierra Club*, 658 F. Supp. at 171. Not surprisingly, courts are typically hesitant to find impossibility or infeasibility in the face of clear congressional desires. *See, e.g.*, Forest Guardians v. Babbitt, 174 F.3d 1178, 1181 (10th Cir. 1999) (rejecting an impossibility argument in the face of "a mandatory, non-discretionary duty unambiguously imposed by the" statute); Natural Res. Def. Council, Inc. v. U.S. EPA, 797 F. Supp. 194, 197 (E.D.N.Y. 1992) (finding that the EPA's claim of impossibility was not "sufficient to justify a departure from a Congressional mandate"); *New York*, 554 F. Supp. at 1065 (arguing that recognizing an impossibility exception would grant the agency "unbridled discretion . . . regardless of specific congressional directions to the contrary").

[152] *See* Biodiversity Legal Found. v. Badgley, 309 F.3d 1166, 1177 (9th Cir. 2002) (finding equitable relief appropriate when "an injunction is necessary to effectuate the congressional purpose behind the statute"); *In re* Int'l Chem. Workers Union, 958 F.2d 1144, 1149 (D.C. Cir. 1992) ("A reviewing court 'shall compel agency action unlawfully withheld or unreasonably delayed.'" (quoting Administrative Procedure Act, 5 U.S.C. § 706(1) (1988))). But when courts do impose judicial deadlines, they essentially create hammer provisions of their own. In *Northwest Environmental Advocates v. U.S. EPA*, the Northern District of California gave the EPA two years to establish regulations for ballast water discharges from vessels at American ports. No. 03-5760, 2006 WL 2669042, at *12 (N.D. Cal. Sept. 18, 2006). The court also ruled that at the end of the two years it would vacate a rule exempting such discharges from the National Pollutant Discharge Elimination System under the Clean Water Act. *See id.* at *15.

ever, appear to exercise this authority rarely.[153] Courts may, of course, utilize other options besides imposing their own deadlines on agencies. Courts often order a dilatory agency to propose a new deadline it then promises to meet.[154] Or courts will simply declare that the agency should act expeditiously, perhaps suggesting a target date for completion.[155] In sum, courts can enforce statutory mandates, even if those deadlines have passed, in a myriad of ways. Whether courts elect to do so and with what frequency naturally affects the desirability of using deadlines in statutes to control agencies.

F. *OIRA Review and Constitutional Law*

The above deadline doctrines rest on a fundamental assumption: that deadlines are constitutionally unproblematic. Although the use

---

[153] In *In re International Chemical Workers Union*, the D.C. Circuit emphasized the gravity of its action:

> There is a point when the court must "let [an] agency know, in no uncertain terms, that enough is enough," and we believe that point has been reached. We are not unmindful of OSHA's need to "juggle competing rulemaking demands on its limited scientific and legal staff," but we think the delay in promulgating a final rule that OSHA believes is necessary to workers' well-being has been too lengthy for us to temporize any longer. We accept OSHA's estimate of the additional time it needs to complete the final stages of the rulemaking, but we insist that there be no postponement beyond the August 31, 1992 target date. Any additional delay would violate this court's order.

958 F.2d at 1150 (citations omitted) (quoting Pub. Citizen Health Research Group v. Brock, 823 F.2d 626, 627, 629 (D.C. Cir. 1987) (per curiam)).

[154] *See, e.g.*, Alaska Ctr. for the Env't v. Browner, 20 F.3d 981, 987 (9th Cir. 1994) (holding that when agencies are derelict in their duties, "it is up to the courts in their traditional, equitable, and interstitial role to fashion the remedy. This the district court [by requiring the agency to set new deadlines for itself] has done in a manner we cannot fault.").

[155] For example, in *Public Citizen Health Research Group v. Auchter*, the D.C. Circuit wrote:

> Although we dictate no fixed date for issuance of a final rule, we do direct OSHA to proceed on a priority, expedited basis and to issue a permanent standard as promptly as possible . . . . Under the circumstances presented here, *i.e.*, the significant risk of grave danger to human life, and the time OSHA has already devoted to [the matter], we expect promulgation of a final rule within a year's time.

702 F.2d 1150, 1159 (D.C. Cir. 1983). To put pressure on the agency, courts can also retain jurisdiction over a challenge to agency inaction. *See, e.g.*, *In re* Ctr. for Auto Safety, 793 F.2d 1346, 1354 (D.C. Cir. 1986) ("[B]ecause of NHTSA's history of chronic delay and its repeated failure to meet its own projections, even in the face of a pending lawsuit and while subject to court scrutiny, the least that this court must do is to retain jurisdiction over this case until agency publication of the final . . . standards.").

of statutory deadlines appears to be readily accepted in law and politics, it is worth pausing to consider whether there is any plausible constitutional problem with deadlines in administrative law.

Agencies face procedural mandates not only from the APA and other statutes, but also from an array of White House requirements. Although statutory deadlines are typically designed to constrain agency action, they can sometimes have the unintended consequence of allowing agencies to subvert other requirements. A major shift in the past twenty-five years has been renewed interest, both in scholarship and in practice, in "Presidential Administration," the assertion of greater centralized control by the President over many aspects of administrative process.[156] The President has always had nominal control over nonindependent agencies, and some influence on independent agencies because of the appointments power.[157] But starting with President Reagan's Executive Order 12,291 in the early 1980s, and continuing with its subsequent revisions by Presidents Clinton and George W. Bush, Presidents have sought greater ex ante control of proposed agency policies.[158] This is not the place to rehash the Presidential Administration debates; it is enough to note that the growing influence of the OMB's Office of Information and Regulatory Affairs (OIRA) on administrative agencies has genuine implications for the law of deadlines.

Under Executive Order 12,866, as amended by Executive Order 13,422, nonindependent agencies must seek OMB review of legally binding rules, typically prior to issuing notice as well as prior to promulgating the final rule; significant guidance documents now must also undergo OMB review.[159] Although Executive Order 12,866 mandates that agencies notify the OMB of any statutory or judicial deadlines and, "to the extent practicable, schedule rulemaking pro-

---

[156] *See, e.g.*, Kagan, *supra* note 3, at 2246, 2290-99 (defending the Clinton administration's exercise of "directive authority" to "serve pro-regulatory objectives"); *cf.* Beermann, *supra* note 140 (discussing the phenomenon of "midnight regulation" during presidential transition periods); Seidenfeld, *supra* note 109 (arguing against presidential micromanagement of agency policies).

[157] The President appoints the leaders of independent agencies, with Senate confirmation, but cannot remove most of them except for cause. *See, e.g.*, Humphrey's Executor v. United States, 295 U.S. 602, 629 (1935).

[158] *See* Kagan, *supra* note 3, at 2282 (arguing that Clinton built on Reagan's legacy to show that "presidential supervision of administration could . . . trigger, not just react to, agency action").

[159] *See* Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993), *amended by* Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 18, 2007).

ceedings so as to permit sufficient time for [the OMB] to conduct its review,"[160] deadlines for agency action may permit the agency to forego that process or to ignore OMB objections.[161] The Executive Orders do not permit judicial review, but courts have occasionally commanded agencies to meet their discrete mandatory obligations even if the OMB has not approved the regulatory action.[162] After all, Executive Order 12,866 states that "[n]othing in this order shall be construed as displacing the agencies' authority or responsibilities, as authorized by law."[163]

Since the Clinton administration, an increasing proportion of agency actions must be "cleared" by OIRA.[164] The most recent Executive Order on this matter also requires that agencies consider formal rulemaking—a notoriously slow method of policymaking—in a wider range of contexts.[165] Agencies are also typically required to engage in some cost-benefit justification of proposed rules and elaborate analyses for significant rules.[166] If OIRA slows the average pace of agency action, and if Congress cares about the duration of agency processes, then Congress might rely on deadlines to control an ever-increasing array of regulation. In the process, statutory deadlines could undermine the prospects for effective OIRA review. The Executive Orders establish a detailed timetable for the presentation and review of proposed agency actions;[167] meeting statutory deadlines may mean failing to meet the President's requirements.

---

[160] Exec. Order No. 12,866, § 6(a)(3)(D), 58 Fed. Reg. at 51,741.

[161] *See* Kagan, *supra* note 3, at 2279 ("[T]he OMB director could cite only six instances in which agencies had issued rules over OMB's objections: in four, the agencies had acted under judicial order, and in two, the agencies successfully had appealed their position to the White House.").

[162] *See* Envtl. Def. Fund v. Thomas, 627 F. Supp. 566, 571 (D.D.C. 1986) ("OMB has no authority to use its regulatory review . . . to delay promulgation . . . beyond the date of a statutory deadline."); *see also In re* United Mine Workers of Am. Int'l Union, 190 F.3d 545, 551 (D.C. Cir. 1999) ("[T]he President is without authority to set aside congressional legislation by executive order, and the 1993 executive order does not purport to do so.").

[163] Exec. Order No. 12,866, § 9, 58 Fed. Reg. at 51,744.

[164] *See* Exec. Order No. 13,422, §§ 1–3, 7, 72 Fed. Reg. at 2763-65 (adding agency guidance documents to the list items for review by OIRA); *see also* Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 826-29 (2003).

[165] Exec. Order No. 13,422, § 5, 72 Fed. Reg. at 2764.

[166] Exec. Order No. 12,866, § 6(a), 58 Fed. Reg. at 51,740.

[167] *Id.* § 6(b), 58 Fed. Reg. at 51,742.

What if statutory timing requirements conflict with executive procedural requirements? Current law suggests that the statutory deadline takes legal priority. The relevant Executive Orders have always contained clauses indicating that they should be applied consistently with other legal requirements. As the relevant deadline is part of a duly enacted statute, the OIRA timetable likely yields. Still, this area of the law is nascent, and strong predictions are difficult. Deadlines arguably interfere with the President's ability to implement the law and manage executive agencies, and therefore could run afoul of separation of powers principles. It is somewhat awkward to conclude that a statutory deadline interferes with the President's duty under the Take Care Clause, because the deadline is part of the law that the President has a duty to faithfully implement. But if stringent statutory duties in issue area *X* reduce the ability of the President to implement policy in issue area *Y*, then perhaps Congress has impermissibly interfered with Article II authority. Even if this argument is weak, if it raises a legitimate constitutional question, the canon of constitutional avoidance could produce odd results.[168] The avoidance canon counsels that as between two interpretations, one of which raises a constitutional question and the other of which does not, a court ought to adopt the interpretation that avoids the constitutional question.

In recent years, the President has issued a growing number of signing statements announcing his interpretation of the statute being signed.[169] Although their legal status remains debated, suppose the President issued a signing statement saying that he interprets a statutory deadline requiring final rules by December 31, 2010, to include

---

[168] *See* Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1948-49 (1997) (reviewing the avoidance doctrine). *See generally* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 599-600 (1992) (analyzing several Burger Court opinions invoking the avoidance doctrine); Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003 (1994) (exploring the justifications and criteria for invoking the avoidance rule); Lawrence C. Marshall, *Divesting the Courts: Breaking the Judicial Monopoly on Constitutional Interpretation*, 66 CHI.-KENT L. REV. 481, 483-92 (1990) (examining "how well the [avoidance] canon reflects actual congressional awareness of constitutional issues and what kind of constitutional culture it helps create within the halls of Congress"); Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 838-41 (1991) (calling the avoidance canon "radically incomplete and perhaps incoherent"); Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71 (1995) (reviewing the impact of Justice Brandeis's concurrence in *Ashwander v. Tennessee Valley Authority* on the avoidance doctrine).

[169] *See* Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 312-34 (2006).

an implicit caveat to mean "if at all possible consistent with the requirements of OIRA review." The interpretation favored by the canon of avoidance might well be the one proffered by the President. The saving construction would require the new agency rule to be issued by the deadline unless other relevant and permissible factors dictate otherwise. As noted, there is an active debate (particularly in immigration law) about whether to relax standards of judicial review under conditions of agency strain.[170] Adherents of the relaxed-review school advocate allowing agencies to ignore statutory deadlines in much the way that the saving interpretation would in the signing statement hypothetical.

The implications might be even more significant were a pro-regulation Democratic Congress to face off against a strongly anti-regulation Republican President. An anti-regulation President could consistently use OIRA review to impede or block entirely new agency regulations. Presidential bias against new regulations, however, is hardly the only value at stake in OIRA review. More centralized presidential control and oversight over intra-agency and inter-agency regulatory agendas may produce more efficient and effective risk regulation.[171] Using deadlines to obviate OIRA review is far from an unqualified good. Nor is congressional interference with the OIRA Executive Orders far-fetched. Various legislators in the current Congress have sought to counter changes to OIRA review. A provision in the House appropriations legislation, adopted by the chamber, contained a clause forbidding the White House from expending any funds to implement the latest Executive Order on regulatory review.[172] As the White House seeks to ratchet up control of administrative agencies, congressional countermoves grow ever more likely.

G. *Summary*

We have surveyed many instances of deadline doctrines in administrative law. First, under the rubric of reviewability, the existence of a statutory deadline often makes judicial review of agency inaction more likely. Second, the presence of a deadline increases the probability that agencies will successfully avoid notice and comment procedural

---

[170] *See* Pierce, *supra* note 7, at 85-89.

[171] *See generally* Bagley & Revesz, *supra* note 3.

[172] *See* H.R. 2829, 110th Cong. § 901 (2007) ("None of the funds made available by this Act may be used to implement Executive Order 13422."). The Senate also considered similar language, but ultimately did not include the defunding provision.

requirements pursuant to the "good cause" exception in the APA. Third, deadlines have two important effects, both of which reduce the odds that an agency will receive judicial deference. At *Chevron* Step Zero, the failure to use formal procedures may lower the probability of judicial deference.[173] But if courts treat deadline actions as legislative rules, agencies could receive deference for informal judgments more often. At Step One, an explicit deadline is less likely to generate statutory ambiguity about timing requirements for agency actions. Fourth, deadlines have ambiguous effects on arbitrary and capricious challenges. When agencies sacrifice deliberative process to meet deadlines, the odds that existing decisions will fail to meet the *State Farm* factors grow. If judges apply relaxed standards of review (as some judges do), agency actions may be more likely (or as likely) to survive arbitrary and capricious challenges. Together, these deadline doctrines likely do more harm than good in administrative law, or so we now suggest.

IV. NORMATIVE IMPLICATIONS

Before continuing, a brief caveat is in order. Sometimes it is more important that a rule exist than that it be right. When a rule serves only as a coordination mechanism, its actual content is arbitrary. For this subset of regulatory action, quicker action is almost always better because there cannot, by construction, be a sacrifice of content, quality, or process. The vast majority of regulations are not of this sort. When there is a right answer (or a better answer), congressional use of deadlines may be suboptimal. As noted, deadlines can increase the probability of judicial review for certain forms of agency inaction, make it easier for agencies to emerge victorious against procedural challenges to the failure to utilize notice and comment, make it more difficult for agencies to defend substantive challenges in the *Chevron* framework, and make it harder to defeat arbitrary and capricious challenges if judges do not relax the ordinary standards of review. How then are agencies likely to respond to deadlines?

First, some portion of the underlying distribution of actions that would likely have been promulgated using notice and comment pro-

---

[173] *See* Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528, 533-34 (2006); *see also* Barnhart v. Walton, 537 U.S. 212, 221-22 (2002) (reviewing prior decisions on the relevance of rulemaking formality to the Step Zero determination).

cedures may be issued using less formal mechanisms. Because deadlines often constitute "good cause" for avoiding notice and comment and because the ordinary costliness of notice and comment is exacerbated under time constraints, agencies can be expected to opt out of these costly procedures more often. Both democratic and technocratic ideals in administrative law suggest that notice and comment is a desirable form of agency action.[174] On this view, deadlines should make administrative behavior worse. Fewer agency decisions will take advantage of the information and expertise produced by notice and comment; fewer decisions will exhibit the democratic legitimacy produced by public participation.

A second, related effect derives from the *Mead* doctrine. Ordinarily, *Mead* provides a counterweight to agencies considering informal decision-making mechanisms.[175] Because procedural formality usually allows an agency to qualify for *Chevron* deference,[176] agencies that want deference in litigation tend toward such formality, notwithstanding the costs.[177] Certain deadline doctrines undermine this incentive. Because statutory deadlines can connote congressional clarity under Step One of *Chevron*, the probability that judicial deference will be given to some agency views is marginally lower. With lower benefits from notice and comment procedures at Step One, deadlines may weaken an agency's motivation to use those procedures for Step Zero.

Some courts treat deadline actions not promulgated using notice and comment as "good cause" actions. If Step Zero allows deference in these scenarios, the temptation to avoid notice and comment and still receive *Chevron* deference will be all the greater. Although we do not want to romanticize informal rulemaking, the dominant trend in the courts and commentary has clearly been toward more notice and

---

[174] *See generally* Cuéllar, *supra* note 69 (arguing that comment by the lay public serves an important function in regulatory democracy).

[175] *See generally* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1431 (2004) ("[*Mead*] structures scope-of-review doctrine systematically by telling all agencies that there is a link between the policymaking form chosen and the standard of review applied.").

[176] *Cf. Barnhart*, 537 U.S. at 221 ("[T]he fact that the Agency previously reached its interpretation through means less formal than 'notice and comment' rulemaking does not automatically deprive that interpretation of the judicial deference otherwise its due." (citation omitted)).

[177] This obviates many underlying complexities. *See* Stephenson, *supra* note 173, at 533 (arguing that the increased latitude that accompanies greater procedural formality will lead to less textually plausible agency interpretations of statutes).

comment rather than less. Deadline doctrines are then a consequential exception to this general rule.

Third, arbitrary and capricious review requires that agencies consider all required factors, not consider any precluded factors, and clearly explain the link between the evidence in the record and the ultimate policy choice.[178] Although the arbitrary and capricious doctrine does not demand procedural formality, some degree of formality is often required implicitly. If courts do not give agencies greater leeway because of the deadline, then agencies will be more likely to lose arbitrary and capricious challenges. If agencies do not have sufficient time to adequately consider and evaluate relevant factors or evidence, all else equal, decisions are more likely to be overturned. If judges do give agencies more leeway when deadlines are present, agencies will not lose in litigation, but greater uncertainty and instability in administrative law will be generated because of exceptions to long-standing doctrine.

Neither of these alternatives is especially desirable. The first results in lower-quality agency actions that are more likely to be struck down, creating more administrative delay rather than less. The second carves out an ad hoc exception to standard administrative law requirements. Although others suggest such an exception would be desirable,[179] we are not quite convinced. If judges are less likely to strike down deadline actions on arbitrary and capricious grounds, it is at least relevant that an important check on agency behavior is weakened. These assorted deadline doctrines can shift agency decisions out of notice and comment, increase delay in the ultimate implementation of rules, and cause greater confusion and uncertainty in administrative law.

It is also the case that deadlines shift internal agency resources away from policy programs without deadlines toward policy programs with deadlines.[180] Many strains of administrative law seek to preserve the agency's ability to allocate internal resources.[181] Agency decisions not to enforce or adjudicate are defended on this ground; the extraordinary deference given to agency decisions not to act and the

---

[178] Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

[179] *See* Pierce, *supra* note 7, at 85-89.

[180] Abbott, *Cost-Benefit Appraisal*, *supra* note 7, at 192-95; Pierce, *supra* note 7, at 80-81. For arguments that judicial review in general leads to resource reallocation, see Biber, *supra* note 7, and Cross, *supra* note 41, at 1036-39.

[181] *See, e.g.*, Abbott, *Cost-Benefit Appraisal*, *supra* note 7, at 192-95.

presumption against reviewability of certain agency inactions generally are as well. Each is founded, in part, on the idea that agencies are better than courts at managing their own internal affairs.

Setting aside concerns about the internal coherence of administrative law, to evaluate the normative status of deadlines, one must know whether the existing allocation of agency resources is desirable; whether relative institutional capacities suggest that Congress, agencies, or courts should make decisions about agency resources; and if the existing allocation is not desirable and if Congress is an appropriate institutional decision maker, whether statutory deadlines are a reasonable mechanism for change.

To explore these issues, consider the use of deadlines in risk regulation. The existing literature provides several reasons to be skeptical. First, there is a general tendency to favor new, high-profile risks for regulation over older, more familiar risks that may be more serious.[182] This new-risk bias produces an inefficient allocation of resources because older, more serious risks are not given their appropriate share of time, money, and attention.[183] If deadlines accompany statutory commands to address newly recognized risks (as they often do), then deadlines will tend to exacerbate the new-risk bias rather than mitigate it. In a world of limited agency resources, a statutory command to formulate regulations in a new policy area will inevitably reduce resources allocated to other areas unless accompanied by a corresponding increase in budget.[184] Absent a deadline, an agency can at least allocate resources according to need and importance across programs over time. The deadline removes one dimension of flexibility, and therefore likely worsens the misallocation problem from new-risk bias.

Still, to know whether deadlines are good or bad for social welfare, political accountability, regulatory policy, or administrative law,

---

[182] *See, e.g.*, Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 715-36 (1999); Roger G. Noll & James E. Krier, *Some Implications of Cognitive Psychology for Risk Regulation*, 19 J. LEGAL STUD. 747, 754-55 (1990); Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 556 (2002); Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 501-02 (2002).

[183] *See* BREYER, *supra* note 17, at 33 (giving the example that "[r]isks associated with toxic waste dumps and nuclear power appear near the bottom of most expert lists; they appear near the top of the public's list of concerns, which more directly influences regulatory agendas").

[184] *See* Pierce, *supra* note 7, at 65-70; *see also* Abbott, *Cost-Benefit Appraisal*, *supra* note 7, at 192-95 (discussing the costs of this forced reallocation of resources).

one cannot only compare the best-case scenario for a lack of deadlines with the worst-case scenario for deadline-driven action. Absent the deadline, one possibility is that the agency would have spent the appropriate amount of time and resources to select the optimal regulatory regime. Another, and the one raised by the theoretical sketch in Part I, is that the agency would have taken too long to do the wrong thing. Yet another possibility is that the agency would have done nothing. If a statutory deadline shifts outcomes from either of these latter two outcomes, then deadlines could easily make the regulatory world better.[185]

Assume, then, that the existing allocation of agency resources is incorrect. Are congressional deadlines a reasonable way to calibrate? Congress regularly makes decisions about agency resources. Congress specifies an agency's budget; Congress creates, removes, or expands agency jurisdiction; and Congress mandates or forbids that agencies address certain policy problems. So long as these other forms of resource allocation are uncontroversial, it is hard to see why comparative institutional competence arguments demand that Congress avoid deadlines.

That said, there is something awkward about a legislature not only making judgments about the internal allocation of agency resources but doing so indirectly using deadlines, rather than directly using budgeting authority or clear statutory commands.[186] A remaining question is whether deadlines are an objectionable mechanism for allocating agency resources even if there are no good grounds for objecting to congressional reallocation of agency resources in general. One such concern might be that the reallocation is transient. Prior to the deadline, resources must be reallocated, but after the deadline, the agency could revert to the old allocation, which (by working assumption) is incorrect.

Alternatively, the use of congressional deadlines to shift resources is troubling if a common byproduct is to lower the quality of regulatory decisions. Tentative theoretical and empirical evidence suggests this may be the case.[187] If deadline outcomes are worse than nondead-

---

[185] One might also want to compare different forms of deadline regimes (e.g., statutory deadlines, judicial deadlines, deadlines with escape clauses, etc.).

[186] *Cf.* Biber, *supra* note 7, at 36 (stating that the legislature, not the agency, should be responsible if the legislature will not provide the funds to implement the duties it prescribes).

[187] *See, e.g.*, Carpenter et al., *supra* note 20, at 21-23 (finding that deadlines may result in the approval of less-safe pharmaceuticals).

line outcomes, deadline actions will be struck down more often by courts, which will produce more delay and arguably a greater displacement of agency resources than Congress originally intended (unless Congress anticipates this effect and incorporates the eventuality into its timing decision). Even if the actual shift in resources is desirable, deadlines may not produce the desired effects or, at least, may also produce undesired effects, a conclusion emphasized both by theory and data.[188]

The simple point is that there are risks as well as benefits from statutory deadlines. This is true for social welfare; it is true for political accountability.[189] Deadlines sometimes ensure that important policy is generated and implemented quickly, effectively, and efficiently. But deadlines can also produce a range of negative side effects, distorting agency procedures and reducing the quality of decisions. If deadlines do reduce the quality of agency actions, then actions will be prompt but not of high quality. If courts strike down the low-quality actions, then ultimate agency policy will be of reasonable quality, but not timely. If Congress generally prefers agency decision-making processes that allow for public input, the development of expertise, and reasoned deliberation, none of these goals is necessarily served well by deadlines. Deadlines are therefore unlikely to be a cure-all for remedying the pathologies of regulatory policy, notwithstanding the sensible reasons for regulating the timing of agency action.

If effective, deadlines may be democratically desirable, reducing agency shirking and increasing congressional monitoring. Deadlines can, however, also serve political interests in a narrower, partisan sense. If deadlines are used as a mechanism for controlling agency problems, then they should be used more often when agencies have preferences further from those of the legislature. More deadlines should be enacted during periods of divided government. Congress should also more frequently impose deadlines on agencies that are perceived to be further from legislative ideal points.

---

[188] On the other hand, it is possible that deadlines, by functioning as credible commitment devices, give agencies more authority (at least relative to the OMB and interest groups) and help agencies make better decisions. *Cf.* Magill, *supra* note 7, at 152, 183-84 (proposing that pressure on agencies to act quickly might diminish the potential of interested parties to influence the agency); *supra* note 41.

[189] *See* Abbott, *Cost-Benefit Appraisal*, *supra* note 7. There are also costs and benefits to various institutions, which often may not align with social welfare or political accountability objectives. For instance, deadlines have tailored consequences for Congress, the White House, agencies, and the courts. These consequences raise interesting positive questions, some of which were discussed in Part I.

In part, these are empirical predictions, but they have normative implications as well. Deadlines imposed in particular political or institutional configurations may result in less effective regulatory policy. If less-centralized regulatory policy in the executive branch causes fewer systematic inter-agency and inter-risk tradeoffs, then deadlines are likely to produce worse net policy. But deadlines may also create more effective policy if they are imposed on agencies that would otherwise do very little to improve social welfare under strong executive control. In other words, there may be less coordination and fewer inter-risk tradeoffs with more deadlines, but there may be more socially beneficial regulatory policy overall because agencies acting on their own are forced to enact beneficial regulations that they would not otherwise implement without deadlines. Again, the proper comparison should not presume coordinated executive control at its best. Given a particular political configuration, the costs to weakened coordination from deadlines must be weighed against the benefits to regulatory outputs that would not occur but for deadlines, or that would occur much more slowly.

Ironically, even if deadlines improve social welfare, they may undermine democratic accountability in another important sense. To the extent that the President is more representative of the national electorate, a deregulatory administration whose agencies do very little may comport better with voter preferences than a congressional committee with preferences different than the congressional median that imposes deadlines to force particular regulatory actions. To the extent, however, that Congress is more representative,[190] deadlines may promote greater political accountability.

CONCLUSION AND FUTURE RESEARCH

Before concluding, a handful of potential future research questions that follow from the findings are worth noting. Deadlines likely force agencies to reallocate resources away from programs without deadlines and toward programs with deadlines. If the resource-allocation hypothesis is correct, then deadlines for one policy should produce an increase in the expected duration of agency actions in

---

[190] *See* Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1221 (2006) ("[O]ne could surmise that . . . the narrow and parochial interests of individual legislators are likely to cancel each other out and produce a potential outcome that is much more representative of the national interest than that of any single political actor.").

other policy areas that the agency implements. Alternatively, if deadlines lower the quality of average agency decisions,[191] then it should be the case that actions with deadlines are more likely to be struck down in postenactment legal challenges than agency actions that are not subject to deadlines. Assuming that the quality of agency decision making is positively correlated with courts sustaining agency action, then agency rules of lower quality should, all else equal, be more likely to be overturned. Nevertheless, deadlines may also signal clear congressional intent, making courts more likely to remand without vacatur in these cases.

We leave these issues for another day. For now, we hope to have shown that deadlines are a central and poorly understood feature of the modern administrative state. If delay is a preferred method of agency shirking, then regulating the timing of agency decisions is a natural response. Indeed, deadlines often do quicken agency action, at least to some degree, but they also produce policy resulting from systematically different decision-making processes that are less intensive than the norm. Deadlines seem to trade timing against process, and possibly even quality. When deadline actions get to court, judges apply doctrines that run counter to many existing strands of administrative law, either undermining desirable incentives for agency behavior or making it more likely that subpar agency decisions will be given legal effect. Deadlines are not uniformly undesirable, of course, but nor are they a panacea for the problem of regulatory delay. The theoretical, empirical, doctrinal, and normative analysis here emphasizes the importance of deadlines not only for administrative law, but also for institutional design and democratic theory more generally.

---

[191] *See supra* note 187 and accompanying text.

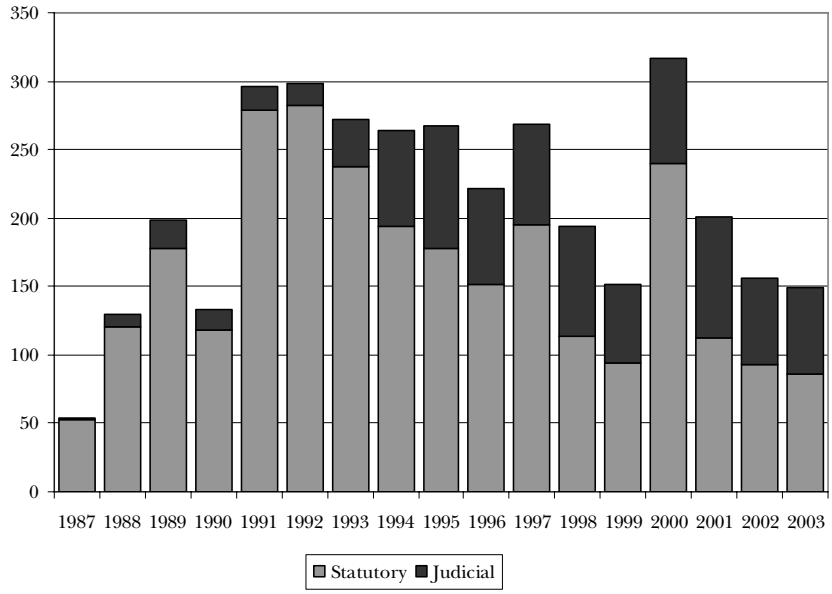
TABLES AND FIGURES

Table 1: Deadlines by Year

Year	Statutory	Judicial	Total	Percent Statutory	Percent Judicial
1987	53	1	54	98.15	1.85
1988	121	9	130	93.08	6.92
1989	178	21	199	89.45	10.55
1990	118	15	133	88.72	11.28
1991	279	17	296	94.26	5.74
1992	282	16	298	94.63	5.37
1993	237	35	272	87.13	12.87
1994	194	70	264	73.48	26.52
1995	178	89	267	66.67	33.33
1996	152	69	221	68.78	31.22
1997	195	74	269	72.49	27.51
1998	114	80	194	58.76	41.24
1999	94	57	151	62.25	37.75
2000	240	77	317	75.71	24.29
2001	113	88	201	56.22	43.78
2002	93	63	156	59.62	40.38
2003	86	63	149	57.72	42.28

Data: Total number of judicial and statutory deadlines reported with actual dates by all agencies, by year of deadline date. Source: *Unified Agenda* reports, Oct. 1988–Oct. 2003. Duplicate RIN entries were handled as follows: if there was no deadline reported, the most recent *Unified Agenda* entry was kept for each RIN; if there was a deadline reported, however, the most recent *Unified Agenda* entry was retained out of all entries with the same RIN and deadline information (deadline type, deadline stage, and deadline date).

Figure 1: Statutory and Judicial Deadlines, 1987–2003



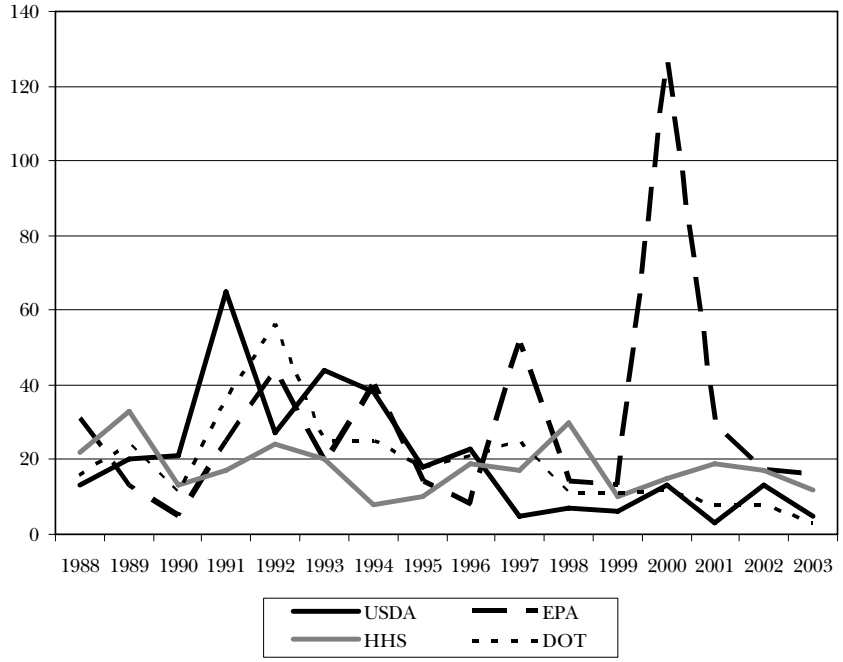
Data: Total number of judicial and statutory deadlines reported with actual dates by all agencies, by year of deadline date. Source: *Unified Agenda* reports, Oct. 1988–Oct. 2003. Duplicate RIN entries were handled as follows: if there was no deadline reported, the most recent *Unified Agenda* entry was retained for each RIN; if there was a deadline reported, however, the most recent *Unified Agenda* entry was retained out of all entries with the same RIN and deadline information (deadline type, deadline stage, and deadline date).

Table 2: Deadlines by Agency

Agency	Statutory	Judicial	Total
Consumer Product Safety Commission	8	0	8
Department of Agriculture	350	3	353
Department of Commerce	940	22	962
Department of Defense	203	0	203
Department of Education	12	0	12
Department of Energy	63	0	63
Department of Health and Human Services	323	12	335
Department of Housing and Urban Development	107	2	109
Department of the Interior	279	209	488
Department of Justice	90	3	93
Department of Labor	75	6	81
Department of State	30	0	30
Department of Transportation	350	9	359
Department of the Treasury	141	3	144
Department of Veterans Affairs	13	1	14
Environmental Protection Agency	611	731	1342
Equal Employment Opportunity Commission	5	0	5
Federal Communications Commission	37	2	39
Federal Deposit Insurance Corporation	37	0	37
Federal Emergency Management Agency	11	0	11
Federal Maritime Commission	11	0	11
Federal Reserve System	29	0	29
Federal Trade Commission	10	1	11
General Services Administration	29	2	31
National Aeronautics and Space Administration	10	0	10
Nuclear Regulatory Commission	3	0	3
Office of Management and Budget	4	0	4
Office of Personnel Management	41	0	41
Securities and Exchange Commission	25	0	25
Small Business Administration	31	0	31

Data: Total number of judicial and statutory deadlines reported by agencies, with and without actual dates. Source: *Unified Agenda* reports, Oct. 1988–Oct. 2003. Duplicate RIN entries were handled as follows: if there was no deadline reported, the most recent *Unified Agenda* entry was retained for each RIN; if there was a deadline reported, however, the most recent *Unified Agenda* entry was retained out of all entries with the same RIN and deadline information (deadline type, deadline stage, and deadline date).

Figure 2: Deadlines over Time for Four Major Agencies



Data: Number of statutory deadlines reported with actual dates by USDA, EPA, HHS, and DOT, by year of deadline date. Source: *Unified Agenda* reports, Oct. 1988–Oct. 2003. Duplicate RIN entries were handled as follows: if there was no deadline reported, the most recent *Unified Agenda* entry was retained for each RIN; if there was a deadline reported, however, the most recent *Unified Agenda* entry was retained out of all entries with the same RIN and deadline information (deadline type, deadline stage, and deadline date).

Table 3: Simple Correlation of Judicial and Statutory Deadlines

	Correlation Coefficient	*p*-value	*n*
Pearson	0.042	< 0.0001	32,712
Kendall's Tau B	0.049	< 0.0001	32,712
Spearman's Rho	0.049	< 0.0001	32,712

Data: Correlation between the number of statutory deadlines and judicial deadlines reported, with and without actual dates, by RIN, using a one-tailed significance test. Source: *Unified Agenda* reports, Apr. 1988–Oct. 2003. The most recent entry for a RIN was retained; earlier entries were deleted.

Table 4: Categorical Association of Statutory and Judicial Deadlines

Type of Deadline	*n*
Statutory Deadlines Only	2493
Judicial Deadlines Only	331
Statutory and Judicial Deadlines	81
No Deadlines	29,807

Data: Number of RINs reporting statutory deadlines only, judicial deadlines only, both statutory and judicial deadlines, and no deadlines, with and without actual dates. Source: *Unified Agenda* reports, Apr. 1988–Oct. 2003. The most recent entry for a RIN was retained; earlier entries were deleted.

Table 5: Significant Rules and Deadlines

	Any Deadline	Statutory Deadline	No Deadline
Significant Rules	620	487	3716
Nonsignificant Rules	1217	1073	14,969
Percent Significant	33.75%	31.22%	19.89%

Data: Number of RINs (stratified by whether the RIN was significant or nonsignificant) reporting any deadline, any statutory deadline, and no deadline, with and without actual dates. Source: *Unified Agenda* reports, Apr. 1995–Oct. 2003. The most recent entry for a RIN was retained; earlier entries were deleted.

Table 6: Simple Correlation of Significant Regulatory Action and Presence of Any Deadline

	Correlation Coefficient	*p*-value	*n*
Pearson	0.097	< 0.0001	20,522
Kendall's Tau B	0.097	< 0.0001	20,522
Spearman's Rho	0.097	< 0.0001	20,522

Data: Correlation between significance of regulatory action and presence of any deadline, reported with or without actual dates, by RIN, using a two-tailed significance test. Source: *Unified Agenda* reports, Apr. 1995–Oct. 2003. The most recent entry for a RIN was retained; earlier entries were deleted.

Table 7: Simple Correlations of Regulation Type and Presence of Any Deadline

Regulatory Characteristic	Correlation Coefficient	*p*-value	*n*
Unfunded Government Mandate	0.042	< 0.0001	20,522
Unfunded Private Mandate	0.088	< 0.0001	20,522
State Government	0.127	< 0.0001	32,712
Local Government	0.089	< 0.0001	32,712
Tribal Government	0.046	< 0.0001	32,712
Federal Government	0.118	< 0.0001	32,712

Data: Correlation between particular regulatory characteristics and any deadlines reported, with and without actual dates, by RIN; identical correlation coefficients are obtained for Pearson, Kendall's Tau B, and Spearman's Rho in a two-tailed significance test. Source: For unfunded mandates, *Unified Agenda* reports, Apr. 1995–Oct. 2003 (reporting on unfunded mandates started in the mid-1990s). For the other characteristics, *Unified Agenda* reports, Apr. 1988–Oct. 2003. For all, the most recent entry for a RIN was retained; earlier entries were deleted.

Table 8: Agency Decision Process and Deadlines

	Any Deadline	Statutory Deadline	No Deadline
Interim Rules	360	356	2283
No Interim Rules	2545	2218	27,524
Percent Interim Rules	12.39%	13.83%	7.66%
Direct Rules	6	5	231
No Direct Rules	2899	2569	29,576
Percent Direct Rules	0.21%	0.19%	0.77%

Data: Number of RINs reporting any deadline, any statutory deadline, and no deadline, with and without actual dates, stratified by whether the RIN had an interim final rule or not (or a direct final rule or not). Source: *Unified Agenda* reports, Apr. 1988–Oct. 2003. The most recent entry for a RIN was retained; earlier entries were deleted.

Table 9: Simple Correlations of Agency Decision Process and Presence of Any Deadline

	Pearson	Kendall's Tau B	Spearman's Rho
Interim Rules	0.042 ($p < 0.0001$) $n = 32{,}712$	0.049 ($p < 0.0001$) $n = 32{,}712$	0.049 ($p < 0.0001$) $n = 32{,}712$
Direct Rules	–0.019 ($p < 0.001$) $n = 32{,}712$	–0.019 ($p < 0.001$) $n = 32{,}712$	–0.019 ($p < 0.001$) $n = 32{,}712$

Data: Correlation between type of rulemaking (direct final rule or interim final rule) and presence of any deadline, with and without an actual date, by RIN, using a two-tailed significance test. Source: *Unified Agenda* reports, Apr. 1988–Oct. 2003. The most recent entry for a RIN was retained; earlier entries were deleted.

Table 10: Simple Correlation of Number of Comment Periods and Presence of Any Deadline

	Correlation Coefficient	*p*-value	*n*
Pearson	0.050	< 0.0001	32,712
Kendall's Tau B	0.043	< 0.0001	32,712
Spearman's Rho	0.043	< 0.0001	32,712

Data: Correlation between the number of comment periods (count goes up by 1 for a new comment period, a reopened comment period, or an extended comment period) and any deadline reported, with and without actual dates, by RIN, using a two-tailed significance test. Source: *Unified Agenda* reports, Apr. 1988–Oct. 2003. The most recent entry for a RIN was retained; earlier entries were deleted.

Table 11: Simple Correlations of Duration with Regulatory Significance and Presence of Any Deadline

	Pearson	Kendall's Tau B	Spearman's Rho
Regulatory Significance	0.060 ($p < 0.0001$) $n = 6040$	0.068 ($p < 0.0001$) $n = 6040$	0.083 ($p < 0.0001$) $n = 6040$
Deadline Present	–0.056 ($p < 0.0001$) $n = 6040$	–0.052 ($p < 0.0001$) $n = 6040$	–0.064 ($p < 0.0001$) $n = 6040$

Data: Correlation between significance of regulatory action and duration (first row) and between the presence of any deadline, with and without an actual date, and duration (second row), by RIN, using a two-tailed significance test. Source: *Unified Agenda* reports, Apr. 1995–Oct. 2003, using only RINs with an NPRM with an actual date and a final action (i.e., rule, action, interim final rule, or direct final rule) with an actual date. The most recent entry for a RIN was retained; earlier entries were deleted.

Table 12: Average Duration of Agency Action

	Nondeadline Actions			Deadline Actions		
	Mean	**95% CI**	***n***	**Mean**	**95% CI**	***n***
USDA	400.63	369.52–431.74	697	375.71	296.26–455.16	113
EPA	685.07	625.55–744.60	462	610.54	542.29–678.78	279
HHS	817.07	761.23–872.91	710	444.68	360.06–529.31	82
DOT	586.12	545.18–627.06	1085	440.29	381.93–498.65	146

Data: Mean duration of completed agency actions for the USDA, EPA, HHS, and DOT. Source: *Unified Agenda* reports, Apr. 1988–Oct. 2003, using only RINs with an NPRM with an actual date and a final action (i.e., rule, action, interim final rule, or direct final rule) with an actual date. The most recent entry for a RIN was retained; earlier entries were deleted.

Table 13: Estimates of Duration of Rulemakings

Covariate	CPH (1995+) Coefficient (SE clustered on RIN)	CPH (1988+) Coefficient (SE clustered on RIN)
Deadline	0.318 (0.047)**	0.301 (0.037)**
Regulatory Significance	–0.277 (0.039)**	
Comment Periods	–0.056 (0.027)*	–0.020 (0.023)
NPRM in United Government	–0.087 (0.035)*	0.279 (0.030)**
Congressional Change	–1.026 (0.039)**	–1.718 (0.029)**
Presidential Change	–2.024 (0.062)**	–1.392 (0.030)**
Carter	–1.322 (0.312)**	–0.778 (0.170)**
Reagan	–0.640 (0.099)**	0.248 (0.032)**
Bush 41	0.033 (0.075)	0.018 (0.029)
Bush 43	–0.077 (0.039)*	0.098 (0.038)**
Deadline*Withdrawal (W)	–0.136 (0.134)	–0.155 (0.106)
Regulatory Significance*W	0.071 (0.078)	
Comment Periods*W	–0.149 (0.061)*	–0.209 (0.051)**
NPRM in United Government*W	–0.175 (0.107)	–0.248 (0.080)**
Congressional Change*W	0.466 (0.121)**	0.800 (0.059)**
Presidential Change*W	1.138 (0.118)**	0.582 (0.065)**
Carter*W	–0.159 (0.325)	0.006 (0.190)
Reagan*W	–0.509 (0.127)**	–0.614 (0.069)**
Bush 41*W	–0.412 (0.110)**	–0.200 (0.068)**
Bush 43*W	0.895 (0.171)**	0.816 (0.150)**
Observations	17,922 (2 per RIN for competing risks)	29,732 (2 per RIN for competing risks)
Wald X^2	6355.07 (97) $p < 0.0001$	10569.25 (100) $p < 0.0001$

** $p < 0.01$, * $p < 0.05$. Covariates included in both CPH models but not significant: State Government, Local Government, Federal Government, Tribal Government, State Government*Withdrawal, Local Government*Withdrawal, Federal Government*Withdrawal, and Tribal Government*Withdrawal. Covariates for all agencies in the database (and their interactions with withdrawal actions) were also included in both models.

The following major agencies had a significantly positive effect on duration (i.e., a negative effect on the hazard rate) in both models: Departments of Agriculture, Energy, Health and Human Services, the Interior, Justice, Labor, the Treasury, and Transportation; Environmental Protection Agency; and Federal Communications Commission. The following major agencies had a significantly negative effect on duration (i.e., a positive effect on the hazard rate) in both models: Department of Commerce, Department of Education, and Small Business Administration. The *Unified Agenda* reports used here (1995 and later for Model 1 and 1988 and later for Model 2) contain some information on much earlier actions, permitting the inclusion of dummy variables for Presidents Carter, Reagan, and George H.W. Bush in both models.